The University of the State of New York

The State Education Department
State Review Officer
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No. 23-092

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Regina Skyer & Associates, attorneys for petitioners, by Gregory Cangiano, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal that portion of a decision of an impartial hearing officer (IHO) which denied their request for funding for physical therapy (PT) sessions after ordering respondent (the district) to reimburse the parents for the costs of their son's tuition at the Cooke School and Institute (Cooke) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the hearing record is sparse with regard to the student's educational history. What can be discerned from the hearing record is that the student initially received services through the Early Intervention Program (Parent Ex. D at p. 2). According to the student's mother, the student attended the IDEAL School from 2009 through the 2020-21 school year and the student received PT services outside of school throughout his enrollment in the IDEAL School (Parent Ex. K ¶ 3). Two prior administrative due process proceedings before the same IHO concerning the 2019-20 and 2020-21 school years resulted in two unappealed final decisions, dated March 3, 2021 and September 30, 2021, in which the IHO[1] found that the district had denied the student a free

[1] A different IHO penned the April 20, 2023 IHO Decision that is the subject of this appeal.

appropriate public education (FAPE) and ordered the district to reimburse the parents and/or directly pay for the student's after-school PT services (see Parent Exs. L; M).

For the 2021-22 school year, the student began attending Cooke and continued to receive most of his related services in school while continuing to obtain his PT outside of school (Tr. p. 17; Parent Exs. J ¶¶ 10, 13, 22, 23, 37; K ¶¶ 5, 7, 18).[2] The parent indicated that on December 8, 2021, a CSE convened to develop an IEP for the student; however, the parent stated that the "district did not develop an appropriate IEP for [the student] for the 2022-2023 school year" (Parent Ex. K ¶¶ 24, 25).[3] According to the parents, the CSE recommended a 12:1+1 special class in a district specialized school, occupational therapy (OT), PT, and speech-language therapy (Parent Exs. B at p. 2; K ¶25).

According to psychological and psychosocial evaluations of the student that were conducted in March 2022, the student has received diagnoses of Down syndrome and an intellectually disability (Parent Exs. C at p. 1; D at p. 2). The student was described as presenting with cognitive and learning difficulties, particularly with regard to his expressive language skills (Parent Ex. C at p. 1). The student was depicted as verbal and ambulatory with low tone, and that he demonstrated delays in speech-language, fine motor coordination, and motor planning domains (Parent Ex. D at p. 3). According to the psychosocial evaluation, the student was described as independent in completing most activities of daily living and when the student was in 11th grade, the evaluator noted that his IEP had been reviewed on July 29, 2021 (id. at pp. 2, 3).[4]

According to the March 2022 psychological evaluation, the student received individual and group OT, individual PT, and individual and group speech-language therapy (Parent Ex. C at p. 2). The psychological evaluation recommended that the student continue receiving special education services including individual and group OT, individual PT, and individual and group speech-language therapy (id. at pp. 2, 9).

According to the parents, "[t]he district did not recommend a placement for [the student] for the 2022-2023 school year" (Parent Ex. K ¶ 28). On June 15, 2022, the parent signed a re-enrollment contract for the student to attend Cooke during the 2022-23 school year (Parent Ex. E at pp. 1-2). In July 2022, the student began attending Cooke for his 2022-23 school year (Parent Exs. J ¶ 11; K ¶ 4).

On August 22, 2022, the parents, through their attorney, provided the district with notice of their intent to unilaterally place the student at Cooke for the 2022-23 school year, requested district funding for the student's tuition and district funding for the student's receipt of PT (Parent Ex. B at pp. 1-3). In their letter, the parents noted, among other things, that the December 2021

[2] Cooke has not been approved by the Commissioner of Education as a school that districts may contract with to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The IEP was not entered into evidence and therefore it is not clear what projected implementation dates were listed on the IEP or whether such dates were aligned with the 2022-23 school year that commenced on July 1, 2022.

[4] Furthermore, at a different point, the evaluator noted that the student's IEP "will be reviewed on 08/23/19" (Parent. Ex. D at p. 4).

IEP was not appropriate, that the CSE failed to adequately consider the information regarding the full breadth of the student's needs, and that the district had not evaluated the student in over three years (id. at p. 2). According to the parents, the district did not recommend a program that was appropriate or that could properly implement the student's IEP for the 2022-23 school year (id. at p. 2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated January 12, 2023, the parent alleged that the district denied the student a FAPE for the 2022-23 school year and additionally sought funding for two 30-minute sessions per week of individual PT (Parent Ex. A. at p. 1).[5] The parents alleged that the December 8, 2021 IEP recommending a special class with a "12:1+1 staffing ratio in a specialized school, Occupational Therapy, Physical Therapy, and Speech/Language Therapy" was not appropriate for the student (id. at pp. 1-2). In particular, the parents argued that the CSE was not duly constituted (id. at p. 2). The parents asserted that the district failed to fully evaluate the student and therefore the IEP present levels of performance, annual goals and management needs were deficient (id. at pp. 2-3). The parents contended that the IEP failed to offer the student the proper language, social and emotional support that the student required to be able to succeed academically (id. at p. 3). The parents alleged that the CSE failed to consider "peer reviewed research-based methods" while they were creating the IEP and that the IEP failed to adequately report the basis of the CSE's recommendations (id.). According to the parents, the CSE's recommendation of a 12:1+1 staffing ratio in the IEP was unjustified as the student required a smaller therapeutic setting (id. at p. 2). The parents asserted that the district failed to recommend an appropriate assigned public school site that could properly implement the IEP (id. at p. 3). As relief, the parents requested that the district be ordered to reimburse the parents for the Cooke tuition and to directly fund the student's two 30-minute sessions per week of individual PT for the 2022-23 school year (id. at p. 4).

B. Impartial Hearing Officer Decision

On April 4, 2023, the parties proceeded to an impartial hearing which concluded on the same date (Tr. pp. 1-29). During the impartial hearing, the district declined to present documentary or testimonial evidence and indicated that it would not demonstrate that it offered the student a FAPE (Tr. p. 9). Instead, the district indicated that it might challenge whether Cooke or the relief requested by the parents was appropriate (id.).

In a decision dated April 20, 2023, the IHO found that the district failed to meet its burden that it had offered the student a FAPE for the 2022-23 school year; that Cooke was appropriate to meet the student's needs; and that the equitable considerations favored reimbursing the parents for the Cooke tuition (IHO Decision at p. 2). However, the IHO declined to direct the district to fund two additional sessions of PT per week by a different private provider outside of Cooke (id. at pp. 2, 6).

[5] The original due process complaint notice from September 2022 was not included in the hearing record (see IHO Decision at p. 2; Parent Exs. A-M; Tr. pp. 1-29).

The IHO emphasized that the district conceded that it failed to provide the student with a FAPE for the 2022-23 school year and that the district chose not to present any witnesses or evidence (IHO Decision at p. 3). The IHO determined that he was therefore "constrained to find that the [district] failed to offer the [s]tudent [a] FAPE for the 2022-2023 school year" (id.). The IHO stated that because the district "presented no evidence or rebuttal that [p]arent's unilateral placement was appropriate other than to summarily object to the appropriateness," the parents met their burden of proof that their unilateral placement was appropriate by demonstrating that Cooke provided the student with instruction specifically designed to meet his unique needs (id. at p. 4). The IHO noted that the parents provided the district with an appropriate 10-day notice detailing their specific concerns with the district's proposed assigned public school and that the district failed to offer any evidence of a response to the parents' 10-day notice (id. at p. 5). As such, the IHO held that equitable considerations supported the parents' request for tuition reimbursement (id.).

The IHO stated that although "the IEP is not in evidence, [the] [p]arent's allege that physical therapy was recommended, and this fact is not disputed by the [district]" (IHO Decision at p. 5). The IHO determined that the evidence in the hearing record showed that the tuition charged by Cooke included the provision of PT services (id. at pp. 5-6). The IHO held that the district was not obligated to reimburse the parents for the costs of a private physical therapist as the district was already ordered to pay tuition to a private school that provided PT to its students and the district "should not be obligated to pay a second time" (id. at p. 6). The IHO concluded by noting "assuming arguendo, that the [district] was obligated to provide the other life skills services that [the] Physical Therapist provides, [the] [p]arent would still not be entitled to reimbursement, as the Due Process Complaint seeks only physical therapy, and [Cooke] offers comparable services to those offered by [the] Physical Therapist" (id.).

IV. Appeal for State-Level Review

The parents appeal from the portion of the IHO's decision which denied reimbursement for the PT services from the private PT provider outside of Cooke. The parents argue that the IHO erred in finding that Cooke provides its students with PT and allege that the hearing record establishes that the student's tuition does not include PT. The parents assert that the private physical therapist provides the student with services that are necessary for the student to benefit from his unilateral placement. The parents also argue that pulling the student out of class for PT is detrimental to the student because it would cause the student to miss class and the student has difficulties reorienting himself back to the classroom after PT. The parents assert that two prior IHO decisions ruled in favor of providing the student with private PT and argue that these two decisions support the parents' position that it is appropriate for the district to continue to fund the student's PT outside of school.

In an answer, the district asserts that the IHO provided the parents with a sufficient remedy by granting their request for full funding for Cooke for the 2022-23 school year, and requests that the IHO's decision be affirmed. According to the district, the parents' evidence shows that the tuition charged by Cooke is inclusive of PT services and that it should not be the district's responsibility to pay for additional PT services from the parents' preferred private provider while the parents also forgo the services from Cooke. The district also argues that it is not required to maximize the student's potential by providing additional PT services outside of the school environment. Furthermore, the district alleges that the evidence does not establish that the parents are responsible for the costs of the additional PT because there is no evidence of a contract between

the parents and the private PT provider and there is no evidence regarding the costs of the private provider.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that

provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

In this case, the district acknowledges that it does not challenge the IHO's findings that the district denied the student a FAPE, Cooke was an appropriate unilateral placement for the student, or that equitable considerations favor an award of tuition reimbursement for the student's attendance at Cooke for the 2022-23 school year (IHO Decision at pp. 3-5). These unappealed findings have become has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). The only remaining dispute between the parties is whether the district should also be responsible to pay for PT services outside of Cooke that were also unilaterally obtained by the parents.

A. Unilaterally-Obtained Services

One form of relief available to parents for a district's failure to offer a FAPE is tuition reimbursement, or as specifically sought here, reimbursement for the costs of unilaterally-obtained related services. As set forth above, generally, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Burlington, 471 U.S. at, 369-70; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).

In other words, districts can be made to pay for special education services privately obtained for which parents have either paid or for which they have become legally obligated to pay. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

In this case, the parents argue that Cooke did not provide the student with PT. They allege that the student's private, non-unilateral placement PT services are necessary for the student to obtain benefits, both academically and socially, at Cooke. The district does not disagree that the student needs PT services but argues that Cooke already makes the necessary PT services available.

Based upon the evidence, the district has the better argument in this case. The student's private physical therapist testified that she has provided PT services to the student since he was in the Early Intervention Program (Tr. pp. 11-12, 14).[7] Explaining why the parents have the student receive PT outside of school hours, the physical therapist testified that "in the past, and currently, we don't want to have [the student] leave, whether it be an academic subject, or lunch or even recess, because that impacts his socialization, to come out and do a one-on-one PT" session (Tr. p.

[7] As of the date of the physical therapist's testimony, the student was eighteen years old.

17). The student's mother testified that the student "has been working with the same Physical Therapist since he [wa]s young, and she has been fantastic" and that the student benefits from "[p]hysical [t]herapy outside of school to properly address the gross motor challenges that impact his education" (Parent Ex. K ¶¶ 8, 18).

The evidence shows that Cooke provides PT in accordance with students' individual needs. The Cooke upper school program description section regarding related services states that Cooke "employs a large group of related service providers, ensuring the availability of intensive related services based on student needs. Related services providers provide service both in and out of the classroom . . . " (Parent Ex. G. at p. 4). Regarding PT services specifically, Cooke's upper school program description states "[o]ur physical therapists provide service for the benefit of remediation of impairments and disabilities and the promotion of mobility, functional ability, quality of life and movement potential" (id.). The program description indicated that Cooke's "[p]hysical therapists work with individuals and groups, as well as provide service with our Adaptive Gym program" and that the "[p]rovision of clinical services such as . . . physical therapy is integrated into daily classroom instruction" (id.).

In contrast, the parents argue that Cooke only provided the student with the services listed in the student's progress report for the 2022-23 school year, which does not contain PT as one of the student's subjects. When the assistant head of Cooke (Cooke representative) was cross-examined, she testified that Cooke's tuition is inclusive of related services, that Cooke provides its students with PT, and that Cooke employs its own physical therapist (Tr. pp. 21-22). The Cooke representative's testimony also directly contradicts the testimony given by the student's private physical therapist, who stated that she provided the student with PT services outside of school because "they don't have a physical therapist at Cooke" (Tr. p. 17). The IHO's decision does not directly address this contradictory evidence, nor make a credibility determination between the Cooke representative and the private physical therapist, but it is at least arguable that the IHO implicitly did so, because he held that Cooke "offers physical therapy to its students and has a physical therapist at the school for that purpose" (IHO Decision at p. 5). Regardless of the possibilities regarding the IHO's findings, I accept the testimony of the Cooke representative that PT services were available to the student at Cooke, because she was in a better position to know about what services Cooke made available to students, and her testimony was consistent with the documentary evidence describing Cooke's services. I do not accept as valid the contradictory testimony of an individual who does not work at the school. The student's schedule that is in evidence merely confirms that the parents did not take the PT services that were available at Cooke.

A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014][finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006]).

Here, the parents seek funding for private PT secured for the student in addition to funding for the unilateral placement which includes PT services in its cost of tuition (Tr. pp. 21-22; Parent Ex. G at p. 4). This matter does not present a circumstance that required the parents to make-up for deficiencies in the private school arranged for by the parents. Thus, it amounts to duplicative relief, which the IHO declined to order.

The parents dubiously contend that the student's receipt of PT services outside of school hours is appropriate and "[p]aramount to the analysis is the fact that the appropriateness of this exact program has been established by two previous IHO decisions" (Req. for Review ¶ 23). As set forth above, the hearing record contains two prior IHO decisions, one dated March 3, 2021 and one dated September 30, 2021 (see Parent Exs. L; M).[8] The statements of the parents are only true in part. In both decisions the IHO ruled in favor of the parents and directed the district to fund the student's unilaterally obtained PT services (id.). Those two prior cases are similar to each other insofar as the parents prevailed in obtaining unilaterally selected PT services at public expense as neither case was appealed. Both decisions reported that the district did not present a case and contain the same rationale from the IHO, namely, that due to the lack of evidence from the district and a failure to meet its burden, the district did not provide the student with FAPE for the school years at issue in those matters and therefore was entitled to funding for the PT provided during those school years (see Parent Exs. L at pp. 3, 7-8; M at pp. 3, 8). But contrary to the parents' argument, neither of the IHO decisions actually examined the appropriateness of the student's unilaterally obtained private PT programming at all; rather, both decisions admonished the district for its failure to present evidence and used that as the basis for the parents' requested relief (see Parent Exs. L; M).[9] Those cases differ from this case because the parents asserted claims regarding the student's IEPs and unilateral placements for different school years, namely the 2019-20 and

[8] Exhibit M is an eleven page document that was mistakenly labeled as Exhibit N and therefore the pagination at the bottom of Exhibit M reads as pages "N-1 through N-11" (see Exhibit M).

[9] The prior IHO noted in both proceedings that "[t]he Parent requested tuition reimbursement / direct payment for their unilateral placement of the Student at the Private School during" the 2019-20 and 2020-21 school years, and that "[a]t the time of the hearing, Pendency covered the entire tuition at the Private School and the only issue remaining was the funding of the PT," thus skipping over the task of conducting an appropriateness analyses in accordance with Burlington/Carter (Parent Exs. L at p. 3; M at p. 3). Some courts have taken a dim view of this approach while others have found it an acceptable manner of addressing matters in which the relief has already been realized through pendency (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. Jul. 29, 2011]; but see V.M., 954 F. Supp. 2d at 119-20 [explaining that claims seeking changes to the student's IEP/educational programing for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O., 899 F. Supp. 2d at 254-55; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S., 734 F. Supp. 2d at 280-81 [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]). I understand the IHO's point in those cases because, prior to the decisions in New York City Dep't of Educ. v. V.S. and New York City Dep't of Educ. v. S.A., I was of the viewpoint that for the sake of judicial economy the latter approach was permissible, especially because, in practical terms, a decision in favor of a school district does not typically end its pendency obligations for the same private school in subsequent school years as suggested by the court in V.S.. Instead, parents who have successfully run the Burlington/Carter gauntlet once usually institute new due proceedings and challenges for subsequent school years as a strategy to keep the pendency funding intact for their preferred private placement year in and year out, and even subsequent findings of a FAPE in favor of the school district in outlying years seems to have little effect on the pendency obligation because no court in this circuit has held that the strategy is impermissible. But regardless of which approach to the issue is better, in the context of the now-flooded due process system within the district, it suffices to simply note that no Burlington/Carter appropriateness analyses were conducted in the two prior unappealed IHO decisions that are contained in the hearing record regarding this student.

2020-21 school years (id.). And the parents' argument that the exact same program was at issue is not true at all. The cover pages of the prior IHO decisions both indicate that the student had been unilaterally placed at the IDEAL School during the 2019-20 and 2020-21 school years, not Cooke (Parent Exs. L at pp. 1; M at p. 1), a fact confirmed by the student's mother during these proceedings (Parent Ex. K ¶ 3).

Unlike the prior proceedings, in the case at hand, a district representative ultimately made an opening statement, cross-examined one of the parents' witnesses, and presented a closing argument (see Tr. pp. 6, 9, 21-22, 24-25). As set forth above, during the April 2023 hearing, the district representative's cross examination of the Cooke representative resulted in persuasive evidence that Cooke provides PT to its students and that Cooke tuition is inclusive of related services (Tr. pp. 21-22).

Although the hearing record establishes that the student does not receive PT at the Cooke School, the hearing record also contains no evidence that the Cooke tuition was reduced or discounted because the student was not receiving PT through Cooke. Accordingly, the hearing record does not warrant disturbing the IHO's determination that Cooke provides PT services to students as part of their overall tuition and that it was available to the student in this case. Therefore, the IHO was correct in determining that the parents may, if they wish, choose to pay for their preferred private physical therapist outside of Cooke from their own resources, but that the district was not responsible to pay twice for available services at Cooke as well as the private provider.

VII. Conclusion

The hearing record demonstrates that the tuition for Cooke includes related services, including PT. As the IHO already ordered the district to fund the student's 2022-23 school year tuition at Cooke and that tuition paid by the district includes available PT services, the IHO provided a sufficient equitable remedy. The IHO was correct in finding that the district need not pay twice for the same related service.

I have considered the parents' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 23, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER