



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-110

Application of a STUDENT WITH A DISABILITY, by her parent, 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:

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of the services delivered to her daughter by Always a Step Ahead, Inc. (Step Ahead) at specified rates for the 2023-24 school year. The district cross-appeals from the IHO's findings related to equitable considerations. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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

A CSE convened on April 27, 2023, to conduct an annual review and to develop an IESP for the student for the 2023-24 school year (Parent Ex. B at pp. 1, 15). The April 2023 CSE found the student eligible for special education and related services as a student with a speech or language impairment (*id.* at p. 1).¹ The April 2023 CSE recommended the following services on a weekly basis to be delivered in English: five periods of direct group special education teacher support services (SETSS) delivered in a general education classroom, five periods of direct group SETSS delivered in a separate location, two 30-minute sessions of individual speech-language therapy delivered in a separate location, two 30-minute sessions of individual occupational therapy (OT) delivered in a separate location, one 30-minute session of group speech-language therapy delivered in a separate location, and three 30-minute sessions of individual physical therapy (PT) delivered in a separate location (*id.* at pp. 11-13).²

According to an August 17, 2023 progress report from Omni Childhood Center—a different company than the one the parent indicates delivered services to the student for the 2023-24 school year—the student was attending a nonpublic school and receiving seven 60-minute sessions per week of special education itinerant teacher (SEIT) services, which began on September 30, 2021 (Parent Ex. F at p. 1).^{3, 4} The student was also receiving two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, one 30-minute session per week of PT in a group of two, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group of two (*id.*).

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

² SETSS is not defined in the State continuum of special education services (*see* 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

³ State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; *see* "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], *available at* <https://www.nysed.gov/sites/default/files/programs/special-education/specialeducationitinerantservicesforpreschoolchildrenwithdisabilities.pdf>. A list of New York State approved special education programs, including SEIS programs, can be accessed at: <https://www.nysed.gov/special-education/approved-preschool-special-education-programs>. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; *see* Educ. Law § 4410[1][k]).

⁴ The August 17, 2023 progress report stated in the narrative background information that the student was receiving individual SEIT services; however, a table listed under the heading "Quarterly Progress Report" indicated that the student was receiving SEIT services in a group of two (Parent Ex. F at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated August 28, 2023, the parent alleged that the district failed to provide adequate special education and related services to the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further asserted that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services by failing to provide special education and related services providers (id.). Next, the parent claimed that she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with all required services for the 2023-24 school year at rates higher than the standard district rates (id.). The parent requested "[a]llowance of funding for payment to the student's special education teacher provider/agency for the provision of ten sessions per week of special education teacher [sic] at an enhanced rate for the 2023-2024 school year" (id. at p. 2). Lastly, the parent requested an award of "all related services and aides on the IESP for the 2023-2024 school year and (a) related services authorizations for such services if accepted by the parent's chosen providers; or (b) direct funding to each of the parent's chosen providers at the rate each charges, even if higher" than the district's standard rates (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 17, 2024 (Tr. pp 1-16). During the impartial hearing, the parent submitted documentary evidence and both parties gave opening statements (Tr. pp. 4-9; see Parent Exs. A-F). The district conceded that it did not implement the student's April 2023 IESP and then rested its case (Tr. p. 9). The parties were then given an opportunity to argue their respective positions on the appropriateness of the parent's unilaterally-obtained services and equitable considerations (Tr. pp. 9-14). Neither party offered witness testimony or a closing statement (Tr. p. 14).

In a decision dated February 20, 2024, the IHO found that the district failed to implement the April 2023 IESP and denied the student a FAPE, but that the parent did not meet her burden of demonstrating that the unilaterally-obtained services were appropriate (IHO Decision at pp. 2, 4, 6-7).⁵ Specifically, the IHO found that the parent's evidence merely stated that services were provided in accordance with what was stated in the IESP as the student's needs, "as adapted as necessary to the student's current progress" (id. at p. 6). The IHO found that the parent "failed to present any additional information regarding the services that were provided, the quality, frequency, goals, updated progress reports[], or even when [the s]tudent began receiving these services from [Step Ahead]" (id.). The IHO found the district's arguments that "there was no 'solid information about the methodologies, the focus of the instruction for the services provided to the child,' 'metrics for this year although we are more than halfway through the school year,' or 'report cards, . . . assessments, [or] progress reports'" to be persuasive (id.). The IHO determined that the weight of the evidence did not establish that the student's individual special education needs were addressed by the unilaterally obtained services and that the instruction provided was reasonably calculated to enable her to receive educational benefits (id.). Turning to equitable considerations, the IHO found that the district failed to provide any evidence of what a reasonable

⁵ The IHO's decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see generally IHO Decision).

market rate would be and that, if the parent's unilateral services were found to be appropriate on appeal, the equities would weigh in favor of the parent (*id.* at p. 7). The IHO denied the parent's requested relief and ordered the district to implement the student's IESP for the remainder of the 2023-24 school year (*id.*).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her requested relief. The parent asserts that a Burlington/Carter analysis should not apply to the circumstances of her appeal and also argues that, even under a Burlington/Carter analysis, she is entitled to her requested relief. The parent argues that she utilized the services of Step Ahead, which used appropriately credentialed/licensed providers for each service for which funding was requested, and each provider followed the detailed discussions, goals, and frequency of services the district itself created and recommended. The parent asserts that the program cannot be deemed inappropriate. The parent further argues that the evidence in the hearing record fully supported an award of direct funding to Step Ahead for SETSS, OT, and speech-language therapy delivered to the student during the 2023-24 school year at the contracted rates. The parent contends that she contracted with Step Ahead, and no evidence was introduced showing the rates charged by the company to be unreasonable. The parent also seeks compensatory education for unimplemented PT as a bank of hours equal to the student's mandate for the 2023-24 school year to be funded by the district at the reasonable market rate of a provider of the parent's choosing. Thus, the parent requests direct funding to Step Ahead for 10 periods per week of SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual OT, and "an allowance of hours made available for [the s]tudent to receive PT equal to" two 30-minute sessions per week "over the school year utilized by [the p]arent at the [district]'s expense by a credentialed/licensed provider at reasonable market rates."

In an answer and cross-appeal, the district argues that the IHO correctly found the parent did not meet her burden of demonstrating the appropriateness of the unilaterally obtained services and does not appeal the IHO's determination that the district denied the student a FAPE. The district further argues that the parent is not entitled to funding for PT services. The district contends that Step Ahead did not provide PT and the request for compensatory relief was not in the due process complaint notice. The district cross-appeals the IHO's findings related to equitable considerations asserting that the IHO should have denied all relief on the ground that the parent failed to provide the district with ten-day written notice of her intention to obtain unilateral services.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (*see* 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under

the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁶ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (IEP) (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).⁷ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

⁶ State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

⁷ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

VI. Discussion

A. Unilaterally Obtained Services

The district does not appeal from the IHO's decision that its failure to implement the April 2023 IESP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at pp. 2, 4). Accordingly, this determination has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the unilateral services obtained by the parent and delivered to the student by Step Ahead during the 2023-24 school year.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. In her August 28, 2023 due process complaint notice, the parent alleged that the district had not implemented the student's April 2023 IESP and the parent was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 1). As a result, the parent unilaterally obtained private services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (id. at pp. 1-2). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS, OT, and speech-language therapy. "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 [IESP] 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 Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [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"]).⁸

The parent's request for privately obtained services must be assessed under this framework. That is, 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; 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses

⁸ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from Step Ahead for the student (Educ. Law § 4404[1][c]).

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).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA,

parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

1. Student's Needs

Here, the only evidence of the student's needs is the description of the student in the April 2023 IESP and the August 2023 progress report (Parent Exs. B; F). The student's needs as set forth in the IESP are not in dispute (see Parent Ex. A at p. 1).

According to the April 2023 IESP, the student was almost five years old and her teacher reported that she had acquired rote skills and could recognize numbers from one to six but could not count to more than 12 (Parent Ex. B at p. 1). The student was "able to sort one attribute but not two," and was able to recognize upper and lower case letters; however, the student got confused with the sounds of the letters (id.). When the student was "provided with cues for the letter sounds" she was better able to identify them (id.). The student knew basic shapes except for diamonds and ovals, and she tended to say "I don't know" in school, which the teacher believed was due to the student's lack of understanding of what was being asked more than the actual question (id.). The student reportedly fixated on one word or thought and would not let go of that (id.). As an example, the teacher described that when the student was asked "what day is today?" she would respond that "tomorrow there is no school" and the student would describe "what happens during the weekend" (id.). The student spoke in phrases without a beginning and an end and spoke "with a closed mouth" (id.). The student's vocabulary was reportedly very limited, and she would use certain words over and over to respond (id.). The student knew routines and was "able to follow multiple directions when they [we]re directions of self-help" (id.). Reportedly when directions required "someone else she w[ould] look around to see what others [we]re doing" (id.). The April 2023 IESP also incorporated information from a February 8, 2023 SEIT report (id.). The SEIT indicated that in "the domain of counting, [the student] c[ould] count by rote until 10 and c[ould] give and count 2 items" (id.). The student could identify the numbers from one to eight, could identify labels, as well as her full name; however, she could not identify her address or phone number (id.). The student could identify a circle, a square, a triangle, and a rectangle, and she could identify the body part ankle, but not jaw or chest (id.). The student could attend to a task for minutes, and she understood the sequence of daily events, "but with adult prompting only" (id.). The student could categorize fruits and vegetables (id.).

The student was described as presenting "with mildly below average comprehension skills" (Parent Ex B at p. 1). It was further reported that during story time, the student looked at the teacher, but did not ask or answer questions (id.). The student could solve a three-to-five piece puzzle (id.). The April 2023 IESP stated that the student only stacked a set of graduated objects from smallest to largest with adult prompting; however, she did understand the concept of big, bigger, and biggest with a prompt (id. at pp. 1-2). The student reportedly demonstrated strength in identifying numbers and "weakness in the areas of attention span to focus on new concepts

learned and comprehension skills" (id. at p. 2). To address the student's weaknesses, the SEIT would teach a lesson using visual and tactile aids including puppets, games, hands-on sequencing activities, verbal prompting, and cues for redirection and refocusing if needed (id.). The student was able to follow two-step related directions, and could understand prepositions such as in, out, on, and under, but did not use them (id.). The student could identify words that had the same initial sound, but not the same middle or end sounds, and could make up same-sounding words when prompted (id.). When the class sang songs and chants, the student did not sing or say classroom songs, but tried to (id.). Expressively, it was noted that the student's clarity of articulation appeared to be less than 80 percent, and she used four words in her sentences (id.). When the student heard stories, she did not ask or answer "wh" questions (id.). The student could receptively and expressively identify red, blue, yellow, orange, green, pink, purple, brown, white, black, and grey, and this was noted as an area of strength for the student (id.). To address the student's weakness in following directions, the SEIT reportedly provided the student cue cards of the schedule of the day or of different activities, such as cleaning up, showing the picture, and describing the action in the picture and what would come next (id.). Using the cue cards helped the student understand what needed to be done and the order in which it needed to be done (id.). The SEIT also used positive reinforcement and encouragement when the task was completed (id.).

The April 2023 IESP also incorporated information from a January 24, 2023 speech-language therapy report (Parent Ex. B at p. 2). At the time of the report, the student was receiving three sessions of speech-language therapy per week (id.). The student was described as eager, sweet, friendly, and cooperative; however, she needed to be redirected frequently to the tasks at hand (id.). The April 2023 IESP also noted that it was difficult for the student to maintain eye contact and sustain attention, as her eyes often wandered around the room (id.). The student presented with receptive and expressive language delays (id.). The student was capable of following multistep directions, but her accuracy varied depending on her level of focus at the time (id.). Consistent with the information provided in the SEIT report, the speech-language therapy report indicated that the student could identify, name, and classify items in categories such as food, animals, and household items; however, she needed prompting to describe items using a variety of features (id.). When asked "wh" questions, it was noted that she could be impulsive and rush to provide information she knew that may not correspond exactly to the question (id.). At times, the student could be difficult to understand due to reduced mouth opening, reduced range of motion of articulators, and misarticulations of sounds which resulted in overall reduced clarity of speech (id.).

The April 2023 IESP indicated that the parent was concerned about the student's ability to focus and attend in the classroom, because the student had great difficulty attaining and retaining any information she was being taught (Parent Ex. B at p. 3). The parent was very concerned that the student was way behind her peers (id.). The parent expressed many concerns that were consistent with the SEIT's report of the student's academic weaknesses (id.). According to the parent, the student did not know what work she brought home from school (id.). The parent reported that the student was unable to repeat a story that was read to her at home (id.). The student was unable to recount her school day at home and would respond, "I don't know," when prompted by the parent, and the student would "perseverate on thinking about it and she w[ould] not respond with a conclusive and clear answer" (id.). The student reportedly enjoyed anything art related (id.).

With regard to the student's social development, the April 2023 IESP reflected that the student had "a very hard time socially" and that she tended "to tally telling and complaining" (Parent B at p. 3). The student's teacher, SEIT, and parent all described the student as crying and tantruming excessively beyond what was age-appropriate in their views (id. at pp. 3-4). The SEIT report incorporated in the April 2023 IESP indicated that the student had difficulty following rules and would shut down when presented with new activities (id. at p. 3). The student understood the difference between good and bad behavior, she was able to make friends but had "difficulty understanding the pain of others" (id.). When interacting with adults, the student enjoyed praise and sought approval (id.). In the area of play, the student would usually play independently and appropriately with toys (id.). She engaged in make-believe and role play and used age-appropriate speech during play (id.). To address the student's weakness in the area of turn-taking, the SEIT reportedly used verbal prompting and modeling (id.).

The April 2023 IESP described the student's physical development by incorporating a teacher report, the SEIT report, and input from the parent (Parent Ex. B at p. 4). According to the teacher the student was able to run and hop at the same time but needed someone to help her climb and needed to walk by the wall (id.). The student reportedly tired very quickly because of her very low muscle tone (id.). The student could "hold a pencil, color, and cut but [wa]s not age-appropriate" (id.). She inverted letters even when writing her name (id.). The student was able to alternate feet when going upstairs but not when going down (id.). The SEIT reported that in the area of gross motor skills, the student walked straight with what appeared to be an age-appropriate gait and could jump forward and backward (id.). The student was able to run and when using the stairs, she could alternate feet going upstairs, but not downstairs, and could not alternate standing or hopping on either feet (id.). The student could kick a ball, pedal and steer a tricycle/bike (id.). In the area of fine motor skills, the student used the correct grip to color, but did not use consistent strokes and did not stay in the lines (id.). The student could also cross midline to form an "x," copy shapes, copy letters, and copy a three-part stick figure (id.). When using scissors, the student could cut straight across a paper, and cut curved lines most of the time (id.). The student could maneuver her whole hand and spread glue or paint with a utensil like a popsicle stick (id.). The student could build a tower of ten blocks with her hands (id.). The SEIT reported that coloring was an area of strength and catching and throwing a ball was an area of weakness (id.). To address her weaknesses, the SEIT would pair the student with a friend to practice catching and throwing activities during recess, monitoring their progress and assisting, if needed (id.). The SEIT also reported that activities of daily living (ADL) skills were an area of particular strength for the student, given her ability to communicate her needs (id.). The student could help set the table for mealtime, could pour with minimal spillage with adult supervision, and would ask for food/drink independently during mealtimes (id.). The student could undress independently (id.). The student could not dress independently and could not use zippers, buttons, or snaps (id.). The student could toilet independently and wash her hands independently (id.). The parent reported that the student could brush her teeth independently (id.). With regard to safety awareness, the student would stay away from fire, and would not walk into the street but would not stay in place, unless prompted (id.). Notably, the IESP indicated that the student could "be relied upon to go to the right place and come back" (id.). The student required additional prompting to clean up toys with peers, despite teacher instruction (id.).

Information from a January 2023 OT report was also incorporated into the April 2023 IESP (Parent Ex. B at p. 5). According to the report, the student received two sessions of OT services

per week (id.). The student reportedly presented with poor grasping and visual motor functioning skills, and she displayed decreased tone and strength in her hands which negatively impacted her fine motor control (id.). The student required increased prompting and assistance to complete simple tasks slowly and due to limited coordination, the student had poor bilateral coordinating and motor planning skills (id.). The student was further described as having poor attention and focusing skills, sensory processing difficulties, disorganized motor planning skills, and low proprioceptive awareness (id.). The student also presented "with a great sensory dysfunction," was unable to use correct pressure when manipulating objects, and exhibited low attention, low visual regard to the task at hand, and low proprioceptive reception, which all affected her "success in school and [at] home" (id.).

The April 2023 IESP also included information taken from a December 15, 2023 PT report (Parent Ex. B at p. 5). The student presented with low muscle tone throughout her extremities and trunk, and exhibited deficits in her balance, postural control, and coordination (id.). The student was delayed in her overall gross motor skills (id.). The student reportedly transitioned from supine to sitting by partially rolling to her side and pushing off with her elbows, she could transition from "sitting to standing via a half-kneeling with one hand pushing down on her knee," and she sometimes transitioned to standing by pushing on the floor with both hands (id.). The student was described as unsteady during single leg standing, standing on tiptoes, and tandem walking on a straight line (id.). She could stand on one foot for three-to-four seconds "with her trunk swaying sideways while trying to maintain her balance," and she could stand on tiptoes with arms raised overhead for five seconds before moving her feet to maintain her balance (id.). The student could walk forward using a normal stride on a line without stepping off for three out of five trials (id.). The student could walk forward on her toes on the line for four to five steps before stepping off (id.). She had difficulty in maintaining her balance when walking backwards on the line (id.). According to the IESP, the PT report indicated that the student had minimal follow through movements when throwing and kicking a ball and required a lot of verbal cues during ball handling activities to improve her focus, timing, and form (id.). The IESP reflected information from the PT report, which indicated that based on the Peabody Developmental Motor Scales, Second Edition (PDMS-2), the student's gross motor skills placed her within the 31-36 months age range of functioning and further stated that she was starting to acquire some skills within the 37-42 months age range of functioning (id.).

The April 2023 IESP indicated that the parent reported an unspecified neurological diagnosis, which resulted in the CSE discussing the possibility of changing the student's classification to other health impairment or multiple disabilities (Parent Ex. B at p. 6). According to the IESP, the CSE agreed that speech or language impairment was the most appropriate classification at the time of the meeting (id.). The parent reported concerns in the area of physical development related to the student's neurological diagnosis, fatigue, and low muscle tone (id.). The parent stated that the student was able to bathe herself and occasionally feed herself; however, she complained of being very tired when eating and asked her mother to feed her (id.). The student was able to dress herself but had difficulty undressing herself and needed help (id.).⁹ The parent reported that the student required assistance with gross motor tasks; when the student was running,

⁹ According to the SEIT report referenced in the April 2023 IESP, the student could not dress independently but could undress independently (compare Parent Ex. B at p. 4, with Parent Ex. B at p. 6).

the parent stated it looked like she was walking very fast, and the student was not able to alternate feet when walking up and down stairs (id.). The parent also reported that the student was able to color, hold a pencil, and cut with scissors with assistance (id.).

The August 2023 quarterly progress report from Omni Childhood Center appears to have been prepared by the student's then-current SEIT (Parent Ex. F at p. 1). According to the report, the student was adorable and fun-loving (id.). The student's areas of interest and strengths were noted to be coloring and outdoor play (id.). The student reportedly demonstrated strengths in the cognitive domain, specifically in her ability to identify colors and to sort items by shape (id.). Progress was noted in the areas of ADLs and safety awareness in public spaces (id.). Identified weaknesses were in the student's receptive language skills, with observed delays in her ability to verbally answer questions about a story (id. at p. 2).

2. Appropriateness of Unilateral Services

As described above, the April 2023 IESP and August 2023 progress report identified significant areas of need with respect to the student's academic abilities, motor skills, social, and physical development (Parent Exs. B at pp. 1-6; F at pp. 1-2). The student was recommended to receive five periods per week of direct group SETSS in the classroom, five periods per week of direct group SETSS in a separate location, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, two 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT (Parent Ex. B at pp. 11-13).

With regard to the time period at issue in this matter, to wit: the ten-month academic 2023-24 school year, the hearing record includes a document on the letterhead of Step Ahead, dated September 1, 2023, which was electronically signed by the parent on October 24, 2023, wherein the parent stated that she was aware that she would be liable for the costs of SETSS and "related services" delivered to the student at specified rates, which were "be[ing] provided . . . consistent with those [services] listed in [the student's] IEP/IESP dated" April 27, 2023 (Parent Ex. D). The hearing record also includes a document on the letterhead of Step Ahead, in which a case manager for Step Ahead stated that, for the 2023-24 school year, the student would receive a total of 400 hours of SETSS by two named providers, 40 hours of OT by a named provider, and 60 hours of speech-language therapy by a named provider (Parent Ex. E). The document further indicated that individual providers "working with the student reviewed the IESP dated 04/27/2023 and provide[d] service in accordance with what [wa]s stated in that IESP, as the student's needs as adapted as necessary to the student's current progress" (id.). The hearing record also includes printouts reflecting the certifications of the providers named in the statement by the Step Ahead case manager (Parent Ex. C at pp. 1-4). The hearing record includes no further information about the services the parent obtained for the 2023-24 school year.

As a result, there is little evidence regarding Step Ahead's provision of the services identified in the documents. Neither the parent, the providers, nor the case manager from Step Ahead testified at the impartial hearing, and the hearing record does not include any progress report, service records, or even invoices. Although the parent purports that the Step Ahead providers were following the IESP, the IHO correctly determined that the parent must still come forward with evidence that describes the services and the delivery thereof (IHO Decision at p. 6).

The hearing record lacks any information about the level of services the student received or where or when the services were delivered and does not explain how any services that may have been provided by Step Ahead addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

In review of the IHO's findings, the IHO correctly found that the evidence in the hearing record did not include sufficient information to support a finding that any services procured for the student were delivered and were appropriate during the 2023-24 school year. Accordingly, the IHO correctly denied the parent's request for direct funding of her unilaterally obtained services for the 2023-24 school year.

B. Compensatory Education

Turning to the parent's request for compensatory PT in the amount of two 30-minute sessions per week for the ten-month 2023-24 school year as recommended in the April 2023 IESP, the district argues that the parent did not request compensatory educational services as relief in the due process complaint notice.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708 [7th Cir. 2007]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

Here, as the district argues, it does not appear that the parent requested compensatory education services in the due process complaint notice, as she instead sought funding for the

services delivered by her preferred private provider (see Parent Ex. A at p. 2). The parent requested relief of pendency, direct funding to the student's "provider/agency" for the provision of SETSS, and related services via RSAs or direct funding to private providers (id.).¹⁰ As the parent's claims related to the district's failure to deliver services and as it appears from the hearing record that the parent did not privately arrange for the delivery of all of the student's related services, "compensatory education would have been an appropriate form of relief for [the parents] to seek at the outset of their case" (M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]; see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [finding that a request for compensatory education damages was not properly before the IHO or the SRO as it was "not raised in their administrative due process complaint"]).

Further, upon an independent review of the hearing record, there is insufficient evidence to support a finding that the scope of the impartial hearing was expanded to include a request for compensatory education. In this case, the impartial hearing convened for a total of 20 minutes (see Tr. pp. 1-16). During the impartial hearing, the district representative confined the opening statement to arguing that the parent did not prove that the services delivered by Step Ahead were appropriate or that the rates charged for the services were reasonable (see Tr. pp. 6-7). In the parent's opening statement, the advocate discussed the district's failure to implement the services recommended in the April 2023 IESP and that the parent "identified an agency and engaged the agency to provide the services" recommended in the IESP with the exception of PT, which the agency was not then "currently providing" (Tr. pp. 7-8). The parent's advocate stated that, for relief, the parent requested that the district "be ordered to fund the student's services at the rate the agency charges" for the services delivered (Tr. pp. 8-9). As a final matter, the parent's advocate stated that, as [a]n alternative relief, if the IHO f[ound] that the evidence and the equities d[id] not support the requested relief," the parent sought "that the [district] still pay for the services at reasonable market rate, and that an explanation of reasonable market rate should take into account prior school years and overall the last 12 months and the conditions of the market" (Tr. pp. 13-14). Even in the alternative relief, the parent did not seek compensatory education services to make up for the PT that the district did not deliver and which the private company also did not provide.

While IHOs and SROs have some latitude in fashioning appropriate relief, to survive a challenge there should be some specific request for the relief in the due process complaint notice or discussion at the impartial hearing so that a record may be developed as to what services the student may have already been receiving and from what source and what services remained undelivered and warranted based on the student's needs so that a compensatory education award could be crafted.¹¹ Therefore, the parent's request for compensatory PT services as substantive

¹⁰ The parent's request in the due process complaint notice for "such other and further relief as is appropriate" was too broad for the IHO to construe as a specific request for compensatory educational services and, as further noted, the parent did not request relief in this form at any point during the impartial hearing.

¹¹ Moreover, under State law in this jurisdiction, the burden of proof has been placed 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]). Accordingly, if compensatory education is a remedy sought, the district must be given notice that it should describe its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory

relief to remedy the claims raised in the due process complaint notice regarding the district's failure to deliver appropriate equitable services for the 2023-24 school year is denied.

VII. Conclusion

In summary, the parent failed to demonstrate the appropriateness of her unilaterally obtained SETSS, OT, and speech-language therapy, and did not seek relief in the form of compensatory PT during the impartial hearing. In light of these determinations, I need not address the parties' remaining contentions, including the district's cross-appeal that equitable considerations do not favor the parent.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
May 16, 2024**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**

education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]).