The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-143

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

Gulkowitz Berger, LLP, attorneys for respondent, by Shaya M. Berger, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it waived an affirmative defense, failed to provide equitable services to respondent's (the parent's) daughter, and ordered it to fund the costs of the student's privately-obtained special education services delivered by LAR Learning (agency) during the 2023-24 school year and provide compensatory education services. The 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 programing 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

The evidence in the hearing record concerning the student's educational history is sparse. The evidence reflects that a CSE convened on March 8, 2023 to develop an IESP with an implementation date of March 23, 2023 (Parent Ex. B at p. 1). The March 2023 CSE found that the student remained eligible for special education as a student with an other health impairment (id.).[1] The March 2023 CSE recommended that the student receive two 30-minute sessions per week of individual occupational therapy (OT) and one 30-minute session per week of individual physical therapy (PT) (id. at p. 7).

On October 15, 2023, the parent signed an agreement with LAR Learning for special education and related services for the student for the 2023-24 school year (Parent Ex. G).[2] As background information in the agreement, the parent indicated that the district developed an IESP for the student and failed to implement the recommended program (id.). According to the agreement, the parent would be filing a due process complaint notice to seek funding for the delivery of services by the agency and would be liable to pay LAR Learning for the full amount of the services delivered by the agency if the parent was unable to secure funding from the district (id.). Evidence in the hearing record further reflected that the agency began providing the student services on October 20, 2023 consisting of one thirty-minute session of PT per week (Parent Ex. E at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated December 25, 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.). As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency and an order awarding the student OT and PT services at an enhanced rate for the 2023-24 school year (id. at p. 2). The parent also requested an "[a]llowance of funding for payment to the student's special education teacher provider/agency" for the provision of OT and PT services at the enhanced rate for the 2023-24 school year and "[s]uch other and further relief" that is deemed appropriate (id.).

B. Impartial Hearing and Impartial Hearing Officer Decision

An IHO with the Office of Administrative Trials and Hearings (OATH) conducted a prehearing conference on February 15, 2024, at which the district failed to appear (Tr. pp. 1-2).

[1] The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

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

Also on February 15, 2024, the IHO issued a "Hearing Guidelines and Order" to the parties that summarized the prehearing conference, notified the parties of the next scheduled hearing date on March 5, 2024, and set forth the IHO's rules governing the hearing, including the IHO's directives related to motions, adjournments, affirmative defenses, disclosures of exhibits and witness lists, and subpoenas (IHO Ex. I; see IHO Ex. Ia).

On February 27, 2024, the parent's attorney disclosed to the district and the IHO the exhibits the parent intended to introduce at the impartial hearing (IHO Ex. IV). The district did not disclose any evidence prior to the March 5, 2024 hearing date (see Tr. pp. 16, 18, 21-22). Instead, by email dated March 4, 2024 at 6:04 p.m., the district's attorney requested that the IHO issue a subpoena requiring the parent to appear and testify at the March 5, 2024 hearing as the district noticed the parent was not included as a witness on the parent's evidentiary disclosure list (IHO Ex. III; see Tr. p. 26). The IHO denied the district's subpoena request because it did not comply with the IHO's Hearing Guidelines and Order (see IHO Ex. II at pp. 1-2).

The parent's attorney appeared late to the March 5, 2024 impartial hearing (see Tr. pp. 14-15; IHO Ex. II at p. 1). Prior to the parent's attorney's appearance, the district's attorney requested that the hearing proceed in the parent's attorney's absence; specifically, that the IHO enter into the hearing record the parent's timely submission of evidence and allow the district to present a rebuttal case (Tr. pp. 15-16). The district's attorney also advised the IHO that the district would not be presenting a direct case (Tr. p. 18). The IHO granted the district's request and entered the parent's exhibits into evidence (id.). The parent's attorney then appeared at the impartial hearing and the IHO summarized the hearing up to that point and requested that the parent's attorney confirm the relief sought by the parent (Tr. pp. 19-22). The parent's attorney indicated that the parent was seeking funding for the individual PT the parent privately-obtained for the student from LAR Learning, and a compensatory bank of hours for OT services that were mandated in the student's March 2023 IESP, but never provided by the district, by a provider selected by the parent at a reasonable market rate (Tr. pp. 22-24).[3]

Next, the district's attorney renewed the district's request that the parent be required to appear and testify (Tr. pp. 25-27). The district's attorney acknowledged that its subpoena was not timely requested pursuant to the IHO's Hearing Guidelines and Order, which the attorney admitted she received and reviewed (Tr. pp. 26, 33). The district's attorney further stated that she was unable to assert prior to the March 5, 2024 hearing date an affirmative defense that the parent did not comply with the June 1 deadline set forth in New York Education Law § 3602-c (Tr. p. 33).[4] The district's attorney acknowledged that the IHO's Hearing Guidelines and Order set forth timeframes for raising affirmative defenses; however, she also argued that the statute permitted the June 1 affirmative defense to be raised at the time of the hearing (Tr. pp. 33-34). According to the district, the parent did not provide timely notice of her intent to seek services from the district as required by Education Law § 3602-c, and therefore, the district was absolved of any obligation to implement

[3] It is undisputed by the parties that the district did not implement the March 2023 IESP (Tr. p. 25).

[4] The district's attorney had earlier represented at the March 5, 2024 hearing that the district had provided notice of its intent to assert a June 1 affirmative defense prior to the hearing, which the IHO later sought clarification as the IHO had no record of receiving any notice of such an affirmative defense (see Tr. pp. 18, 22, 32, 54).

the services the CSE recommended at the student's annual review for the 2023-24 school year (Tr. pp. 36-38).

After hearing the parties' arguments, the IHO again denied the district's request to subpoena the parent's appearance and testimony because the IHO determined it was not a timely request pursuant to the IHO's Hearing Guidelines and Order (Tr. p. 41). With respect to the district's June 1 affirmative defense, the IHO explained that affirmative defenses must be timely asserted to allow the opposing party an opportunity to respond and refute such defense (Tr. p. 42). The IHO further noted that the parent submitted exhibit H into evidence, which on its face was a district form, electronically signed by the parent on May 31, 2023, advising the district that the student would be parentally placed at the parent's own expense for the 2023-24 school year and requesting that the district deliver special education services to the student in the nonpublic school she would be attending (id.; see Parent Ex. H).

After both parties' rested their cases, the IHO granted the district's request to proffer evidence to rebut the parent's case, specifically with respect to parent's exhibit H and whether the parent provided notice to the district before the June 1 statutory deadline (Tr. pp. 44-45).[5] The district introduced an unsigned district form dated April 3, 2023 addressed to the parent, that the attorney described as the district's standard business form and said it was mailed to the parent after the March 2023 CSE meeting to notify the parent of the process that she needed to follow to request special education services from the district prior to June 1 (Tr. pp. 48-50; see Dist. Ex. 1). The district also introduced a second district form, which appeared to be completed by the student's father and contained his handwritten signature dated June 18, 2023, requesting that the district deliver special education services to the student in the nonpublic school (Tr. p. 50; see Dist. Ex. 2). The district's attorney then described differences among the district's exhibits and parent exhibit H, including an allegation that parent exhibit H was not the district's standard business form and differed from district exhibit 2, and that parent exhibit H contained an electronic audit trail that showed the document was viewed and electronically signed by the student's mother on February 22, 2024, but the typewritten date next to her electronic signature on parent exhibit H was May 31, 2023 (Tr. pp. 50-51, 60-62; compare Parent Ex. H, with Dist. Ex. 2). The IHO admitted the district's exhibits into evidence over the parent's objections, both parties presented closing statements, and the impartial hearing concluded (Tr. pp. 58-65).

In a decision dated March 10, 2024, the IHO initially recounted the procedural history and then briefly described the legal standards and framework under Burlington/Carter that apply to examining relief in the form of unilaterally-obtained private services in instances where a student is dually enrolled in a nonpublic school and also sought special education services from a district under Education Law § 3602-c (IHO Decision at pp. 3-5).[6] Turning to the findings of fact, the IHO first determined that the district waived its June 1 affirmative defense because the district

[5] The district did not put on a direct case-in-chief; it did not submit any direct evidence or testimony (see Tr. pp. 16, 18, 21-22, 43-44).

[6] The IHO issued a corrected decision dated March 10, 2024 to correct a typographical error as the original decision dated March 10, 2024 referenced an incomplete date, "202" instead of "2024", for the date of the hearing (IHO Decision at p. 1). For purposes of this decision, references to the IHO decision will be to the corrected decision.

failed to adhere to the timeframes set forth in the IHO's Guidelines and Order for asserting affirmative defenses and also failed to follow disclosure timeframes and made an untimely request for a subpoena (id. at pp. 5-6). The IHO further found that the district could not correct its failure to timely assert its June 1 affirmative defense by instead presenting a rebuttal case because such a strategy would amount to "litigation by ambush" and would allow the district to ignore "the [IHO's] clear and reasonable directives, [and] disclosure rules set in place to avoid surprise and undue prejudice to the opposing party" (id. at p. 6). With respect to the district's exhibits, the IHO afforded them "no probative value" because the IHO determined that the "record [was] devoid of any credible corroborating evidence to prove that such documents [were] what they purport[ed] to be," that the district's records were not authenticated, that the parent's attorney lacked advance notice that the district would be proffering such exhibits, and that the district attorney's arguments with respect to the exhibits were "speculative and conclusory at best" (id.).

The IHO next determined that it was undisputed that the district failed to implement the OT and PT services that were mandated on the student's March 2023 IESP (IHO Decision at p. 7). The IHO cited evidence in the hearing record showing that the parent entered into an agreement with the agency for PT services for the 2023-24 school year at a rate higher than the district's standard rate (id.). The IHO noted that the parent was unable to unilaterally secure OT services for the student for the 2023-24 school year (id.). The IHO also noted evidence in the record reflecting that the physical therapist providing services to the student was certified by the State of New York and that the agency "create[d] goals and track[ed] progress for the [s]tudent" (id.). According to the IHO, the "[p]arent was essentially presented with no other option but to unilaterally select a private provider at an enhanced rate" and the IHO determined, "in the absence of any credible contradictory evidence from the [district]" the rate was reasonable (id. at pp. 7-8).

As relief for the district's failure to provide the student with a FAPE on an equitable basis for the 2023-24 school year, the IHO ordered the district to fund the student's PT services recommended in the March 2023 IESP which were delivered by LAR Learning during the 2023-24 school year at a specified rate, upon receipt of invoices and to the extent they were not already provided by related service agreements (RSA) or pendency (IHO Decision at pp. 8-9). The IHO further ordered the district to fund a bank of compensatory OT services (40 hours) to be administered by a provider chosen by the parent at the provider's "customary and regular rate" (id. at p. 9).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in awarding compensatory relief because such relief was not requested in the parent's due process complaint notice. The district further appeals the IHO's award of funding for the student's privately-obtained PT services, arguing that the parent failed to satisfy her burden to show that such services were appropriate to meet the student's needs and that the IHO improperly shifted the burden to the district. According to the district, the agency's affidavit from the billing administrator regarding the student's services was "conclusory and lacked any basis of knowledge." The district also contends that the sole November 2023 PT progress report submitted by the parent into evidence was conclusory, that the student had only a few PT sessions at the time of the November 2023 report, and therefore the hearing record lacked a "more detailed and up-to-date" report of the services provided and progress made at the time of the March 2024 hearing. Overall, the district argues that the hearing record

lacked sufficient evidence, such as progress reports or assessments of the student, which could describe the PT services delivered to the student by the agency and whether those services benefitted the student.

Next, the district argues that equitable considerations did not support the parent's requested relief. The district contends that the parent failed to provide the district with a 10-day notice of unilateral placement, which, in this case, should act as a complete bar to relief.

Lastly, the district asserts that the IHO improperly rejected the district's June 1 affirmative defense, or in the alternative, erred in finding that equitable considerations favored the parent. The district argues that the June 1 affirmative defense can be raised at any time during the impartial hearing and that the IHO erred in relying on Application of a Student with a Disability, Appeal No. 23-225 to hold that the district's failure to comply with the IHO's prehearing rules rendered the affirmative defense waived. The district also argues that the IHO erred in affording no probative value to the district's exhibits and determining to disregard them. According to the district, the IHO erred in determining that further corroborating evidence or authentication was required because it was obvious from the documents themselves that parent exhibit H was electronically signed by the student's mother and district exhibit 2 was signed by the father. The district further asserts that it was not speculative for it to assert that parent exhibit H was "fraudulently created after-the-fact" when the audit trail on the document the parent herself submitted into evidence showed that it was reviewed and electronically signed by the parent in February 2024. The district further notes that it requested the parent's appearance at the impartial hearing in its notice of appearance, and the parent chose not to appear or testify.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety. In seeking to uphold the IHO's decision, the parent primarily argues that, as an equitable services matter, the district entirely bore the burden of proof and persuasion. Additionally, while acknowledging that a Burlington/Carter analysis has typically been used in these cases but without acknowledging that it is the correct legal standard to apply, the parent contends that the IHO's decision should be upheld. The parent also contends that the district's argument that the parent failed to file a 10-day notice of unilateral placement is misplaced.

With respect to the district's June 1 affirmative defense, the parent argues that the IHO correctly determined that such an affirmative defense was waived based on the IHO's prehearing rules and order. The parent also contends that the district had the burden to prove its affirmative defense, and that it was improper for the district's attorney to enter documents on the date of the hearing instead of presenting witness testimony. The parent contends that the district developed an IESP for the student in March 2023, which demonstrates that the district was on notice prior to June 1 that the parent was requesting services. According to the parent, it is "pure conjecture and unwarranted" for the district to "accus[e] the [p]arent of fraud" and the district "wholly misrepresent[ed]" the parent's "unwillingness to appear." As a final point, the parent asserts that she is entitled to direct funding for PT under pendency, which is an automatic right, in the event that an SRO reverses the IHO's decision.

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]).[7] "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 [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.).[8] 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

[7] 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]).

[8] 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 at p. 11, VESID Mem. [Sept. 2007], available at hhttps://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.

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]).

VI. Discussion

A. Education Law § 3602-c and June 1 Deadline

Initially, it must be determined whether the IHO properly found that the district waived its June 1 affirmative defense by first raising the defense at the March 5, 2024 impartial hearing, which did not comply with the timeframes prescribed in the IHO's Guidelines and Order.

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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]).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

Moreover, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should

be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]).

In the instant matter, the hearing record includes the IHO's Guidelines and Order sent to the parties on February 15, 2024 that required the parties to articulate any known or knowable affirmative defense within five calendar days of the date of the order or within five calendar days of the earliest date the affirmative defense was known to the moving party (IHO Ex. I at p. 1). The Guidelines and Order further provided that any affirmative defense not articulated within the timelines prescribed shall be considered waived and deemed evidentiarily irrelevant (id.). It is uncontested that the district first raised the June 1 affirmative defense at the time of the March 5, 2024 impartial hearing (Tr. p. 33). The district's attorney acknowledged that she received and reviewed the IHO's Guidelines and Order (Tr. p. 33). However, the district argues that the June 1 affirmative defense can be raised at any time during the impartial hearing and it was improper for the IHO to procedurally limit the timeframes for when the district could assert such an affirmative defense.

Notably, the district did not explain its failure to appear at the prehearing conference (see Tr. pp. 1, 2, 33). Although the district suggests that it did not know that the June 1 deadline would be an issue until the time it received the parent's exhibits and noticed the parent would not be testifying (see Tr. pp. 33-34), it's unclear from the hearing record why the parent's disclosure of evidence would trigger the availability of such an affirmative defense for the district when it had in its possession a document that showed the student's father provided notice after the statutory June 1 deadline. According to the district's own document, it should have been aware of the potential of such a June 1 affirmative defense (see Dist. Ex. 2). Regardless, as the IHO determined and the district's attorney herself acknowledged, the district did not timely disclose any evidence, requested a subpoena on the eve of the impartial hearing, and did not raise an affirmative defense until the date of the March 2024 hearing—all in contravention of the IHO's Guidelines and Order (see IHO Decision at p. 6; Tr. pp. 26, 33-34; IHO Ex. I). It is well-settled that an IHO is authorized to conduct a prehearing conference for the purpose of managing the proceeding to set forth guidelines and directives with respect to clarifying the issues, identifying evidence and anticipated witnesses, and addressing other administrative matters deemed necessary for a timely impartial hearing such as subpoenas or the timing of affirmative defenses (see Application of a Student with a Disability, Appeal No. 23-225; Application of a Student with a Disability, Appeal No. 23-217; see also 8 NYCRR 200.5[j][3][xi]).

Moreover, contrary to the district's arguments on appeal, the general proposition that affirmative defenses can be raised at any time during the impartial hearing does not invalidate an IHO's reasonable directives and deadlines for the presentation of such defenses, which permit for sufficient notice to the nonmoving party (cf. R.B., 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011] [finding the district did not waive its defense where it raised it "well in advance of the due process hearing" and the parent "was plainly on notice of the arguments that Defendants intended to advance"]). As the IHO pointed out during the impartial hearing, she established timeframes for raising affirmative defenses for the purpose of allowing the opposing party an opportunity to respond and refute such defense and not be caught by surprise (see Tr. p. 42). The district's approach of ignoring the IHO's Guidelines and Order, which the district acknowledged it received

and reviewed, and then attempting to spring its defenses on the IHO and the opposing side at the time of the March 2024 hearing on the merits was manifestly unreasonable behavior for an impartial hearing process. As the IHO noted in her decision, such a strategy is essentially "nothing more than litigation by ambush, as the [district] avoided, not simply the [IHO's] clear and reasonable directives, but disclosure rules set in place to avoid surprise and undue prejudice to the opposing party" (IHO Decision at p. 6).

As the district did not abide by the IHO's reasonable directives with regard to requesting a subpoena and raising affirmative defenses, the IHO did not abuse her discretion in deeming the district's June 1 affirmative defense waived. Accordingly, the IHO's decision that the district waived its June 1 affirmative defense will not be disturbed. I will now turn to the district's arguments regarding the IHO's awarded relief.

B. Privately-Obtained Services

On appeal, the district argues that the IHO erred in determining that the parent met her burden to demonstrate that the privately-obtained PT delivered to the student by LAR Learning was appropriate for the student.

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 December 25, 2023 due process complaint notice, the parent alleged that the district had not implemented the March 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 self-help remedy, the parent unilaterally obtained private services from LAR Learning 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). Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private PT. "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"]).[9]

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

[9] 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 LAR Learning for the student (Educ. Law § 4404[1][c]).

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 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 privately-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).

In this case, although the student's needs are not in dispute and there is little information in the hearing record about the student's needs, a brief description thereof provides some context to determine whether the privately-obtained PT services were appropriate to address those needs. The March 2023 IESP reflects that the student "display[ed] upper body weakness, which imped[ed] her ability to perform lengthy writing tasks" (Parent Ex. B. at p. 3). According to the IESP, the student's teachers had informed the parent of the student's graphomotor concerns and that the student held a pencil with a thumb-wrap grasp as a compensatory strategy (id. at pp. 3-4). The student was reported to have low muscle tone and the IESP reported the parent's concern that the student "fatigues after walking long distances and has diminished endurance" (id.).

To address the student's identified needs, the March 2023 CSE recommended the student receive two 30-minute sessions per week of individual OT and one 30-minute session per week of individual PT (Parent Ex. B at p. 7).

In affidavit testimony, the administrator from LAR Learning indicated that the company agreed to provide the student with one 30-minute session per week of PT services and that that the "[s]tart date of service" was October 20, 2023 (Parent Ex. E at p. 1). The administrator named the physical therapist who was delivering the student's services and indicated the provider held State certifications to practice physical therapy (id. at p. 2). Consistent with this testimony, the hearing record includes a copy of the provider's State license and certification of registration to practice as a physical therapist (Parent Ex. C). The administrator indicated that the PT services were "typically provided at school" (Parent Ex. E at p. 2).

The parent also submitted a "November 2023 Progress Report" dated December 5, 2023, which set forth the student's mandate of one 30-minute session per week of PT (Parent Ex. D). The PT progress report indicated that, at that time, the student had attended a few of her weekly sessions that reportedly began on October 20, 2023 (Parent Ex. D; see Parent Ex. E). The PT progress report listed two annual goals for the student that mirrored those included in the student's March 2023 IESP (compare Parent Ex. D at p. 1, with Parent Ex B at p. 6). In particular, the goals indicated that, through her PT sessions, the student would work on bilateral coordination and

improve strength, proprioception, and balancing skills (Parent Ex. D at p. 1). The progress report also stated that the student was "working to improve her strength, coordination and endurance through the use of therapeutic exercises, repetitions, verbal direction and demonstrations" (id.).

Based on the foregoing, I find that, while the evidence admitted at the hearing cannot be described as robust concerning the implementation of the privately-obtained services, there is sufficient evidence to show that the student received PT and it further shows that the physical therapist identified the student's specific needs related to strength and endurance and delivered services specially designed to meet those needs during the 2023-24 school year.

In light of the foregoing, I find insufficient grounds to disturb the IHO's finding that the parent's privately-obtained PT services were appropriate to meet the student's needs.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir.

2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the district argues that equitable considerations, including the lack of a notice from the parent of her intent to privately obtain PT from LAR Learning, as well as the lack of a June 1 notice, weigh against an award of funding for the privately-obtained services. However, the IHO had this information before her when making the discretionary determination that equitable considerations weighed in the parent's favor (IHO Decision at p. 8). The IHO further found that the district did not present the parent with an option other than to privately locate a provider to deliver the student services (id.). With regard to the June 1 notice, given the manner in which the district presented its evidence and taking into account the IHO's "broad equitable powers," the IHO afforded "no probative value" to the district's exhibits (id. at p. 6). The IHO found the district's equitable arguments "improperly raised, unsupported and speculative" (id. at p. 8).[10]

Given the IHO's specific findings and reasoning, I decline to disturb the IHO's discretionary determination that equitable considerations weigh in favor of awarding the parent funding for PT services from LAR Learning.

D. Compensatory Education

The district also appeals the IHO's award of compensatory OT services, primarily arguing that the parent did not request compensatory education in her 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

[10] The conflicting information about the date of the parent's signature on the "June 1 notice" entered by the parent does raise concerns about the veracity of the document (see Parent Ex. H); however, as the June 1 defense was not timely presented by the district, the parent did not have incentive to testify to explain the document. Further, as noted, the district failed to present its subpoena for the parent's testimony in a timely manner. Thus, I agree with the IHO that there is insufficient information upon which to base a finding that the document was presented to mislead or obfuscate.

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, the parent did not expressly request compensatory education services in the due process complaint notice, as she instead sought funding for the services delivered by her preferred private provider for the 2023-24 school year (see Parent Ex. A). As previously stated, the district failed to appear at the prehearing conference, which would have provided an opportunity for the IHO to clarify with the parties the issues to be resolved at the hearing (see Tr. pp. 1, 2, 33; see also 8 NYCRR 200.5[j][3][xi]). However, at the time of the March 5, 2024 impartial hearing on the merits, the district did not respond nor object to the parent's attorney's statements that the parent sought a compensatory bank of hours for OT services that were mandated in the student's March 2023 IESP, but never provided by the district, by a provider selected by the parent at a reasonable market rate (see Tr. pp. 22-24). At no time during the March 5, 2024 impartial hearing did the district argue that such a request for compensatory services was improperly raised nor did the district propose what remedy might serve to place the student in the position she would have been had the district not denied the student a FAPE or equitable services. Moreover, there is no dispute that the district has not delivered or facilitated the delivery of related services during the 2023-24 school year (Tr. p. 33).[11] Under the circumstances, I do not find that the IHO erred in awarding compensatory education for OT services not delivered and not privately-obtained by the parent during the 2023-24 school year.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards

[11] There is no information in the hearing record regarding any pendency services the student received.

"should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In its appeal, the district does not challenge the type and amount of compensatory education ordered by the IHO on the grounds that the award was not aligned with the student's needs or would not serve to place the student in the position she would have occupied but for the district's violations of Education Law § 3602-c.[12] The district argues that the limitations placed on the award should be affirmed. Further, as noted above, the district made no argument during the impartial hearing regarding an appropriate compensatory award. Thus, there is insufficient basis to disturb the IHO's award of compensatory OT services.

VII. Conclusion

In summary, an independent review of the hearing record demonstrates that there is an insufficient basis to disturb the IHO's determinations that the district waived its affirmative defense. Further, the evidence in the hearing record supports the IHO's determinations that the parent sustained her burden to demonstrate that the privately-obtained PT services delivered to the student by LAR Learning were appropriate to meet the student's special education needs, that equitable considerations weighed in favor of the parent's request for district funding of PT services delivered by LAR Learning, and that an award of compensatory OT services was appropriate.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 12, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[12] The district does request that the award be limited to cover the period of time during which the matter was pendency. While such limitation may be warranted in instances where the request for compensatory education was not raised by the parent, but the district would nevertheless be required to provide compensatory education to make-up for a lapse in pendency services, that is not circumstance presented here.