The University of the State of New York

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

No. 24-151

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 Frank J. Lamonica, 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 failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund a bank of compensatory education services to the student for the 2023-24 school year. The appeal must be sustained in part.

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

Given the disposition of this matter, a detailed recitation of the facts related to the student is not necessary. Briefly, a CSE convened on May 4, 2023 to develop an IESP with an

implementation date of May 18, 2023 (Dist. Ex. 4 at p. 1). The May 2023 CSE found the student eligible for special education services as a student with a speech or language impairment and recommended 10-month services consisting of two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (OT) (Dist. Exs. 4 at pp. 1, 6; 5 at p. 1).[1]

A CSE reconvened on September 19, 2023 to develop an IESP with an implementation date of October 12, 2023 (Dist. Ex. 9 at p. 1). The September 2023 CSE continued to find the student eligible for related services as a student with a speech or language impairment and continued to recommend 10-month services consisting of two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT (Dist. Exs. 9 at pp. 1, 7; 10 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated November 28, 2023, and received by the district on November 29, 2023, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (IHO Exs. I at pp. 1, 6; II at p. 3).[2] The parent alleged that the student attended a nonpublic religious school, that the last agreed upon IESP was developed on May 26, 2021, and that the district had failed to provide the student with a FAPE and/or equitable services by failing to provide services providers (IHO Ex. I at p. 1). 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 requested pendency services and an award of two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT at enhanced rates for the entire 2023-24 school year (id. at p. 2).[3] In addition, the parent requested "[a]llowance of funding for payment to the student's providers/agencies for the provision of each of the services listed in [the May 2021 IESP] at the enhanced rate each charges for their service for the entire 2023-2024 school year" (id.).

B. Impartial Hearing and Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on February 12, 2024 (Tr. pp. 14-39).[4] During the impartial hearing, the parent did not

[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] The parent's due process complaint notice was dated November 28, 2023, but was not filed until after the close of business on November 28, 2023 (IHO Ex. I at pp. 1, 6; see Tr. p. 3). Accordingly, the IHO referenced the date that the district received the due process complaint notice on November 29, 2023 in his decision (IHO Ex. II at p. 3; IHO Decision at p. 1).

[3] The parent requested a pendency hearing and an impartial hearing (IHO Ex. I at p. 1).

[4] A prehearing conference was held on January 2, 2024 (Tr. pp. 1-13). During the prehearing conference, the IHO stated that he had already issued an interim decision on pendency on December 13, 2023 (Tr. pp. 4-5; see

appear and instead appeared by a representative identified as a law graduate and the IHO confirmed with the parent's representative that according to an email from the parent's attorney, the parent would not be offering any documentary evidence and would not be calling any witnesses at the impartial hearing (Tr. pp. 25, 26). The district presented documentary evidence but did not call any witnesses (Tr. pp. 24-25, 26). In its opening statement the district argued that the IHO should consider the parent's claims in accordance with the three-prong Burlington/Carter analysis and that the district had "implemented three basic minimum controls for IESP cases, which [we]re family engagement, qualified providers, and establishment of a fair market rate for services" (Tr. p. 27). The district further argued that with regard to qualified providers, "before payment for a provider is ordered, the [district] requests identification of the individual proposed to provide the services to the student and confirmation that the individual is a certified special education teacher and qualified to provide the services and meet the student's educational needs" (Tr. p. 28). The district then pointed out that the parent had not offered any documentary evidence or witness testimony to demonstrate that the proposed provider was qualified to meet the student's unique needs and requested that the IHO deny the parent her requested relief (Tr. pp. 28-29). Turning to "the fair market rate," the district requested that if the IHO found the parent had proven the provider was qualified, that the IHO order services at a fair market rate, which the district asserted was $125 per hour (Tr. pp. 29-30).

In the parent's opening statement, the parent's advocate argued that the parent did not dispute the appropriateness of the services recommended in the May 2021 IESP, which was the subject of the due process complaint notice, and also did not dispute the appropriateness of the recommendations in two subsequent IESPs introduced at the hearing by the district (Tr. p. 31; Dist. Exs. 4; 9).[5] The parent's advocate asserted that the only issue in his view was that the student was not receiving services from the district and as such, the student should receive compensatory relief (Tr. p. 31). The parent's advocate requested that the student receive an award of hour-for-hour compensatory education and that utilizing a Burlington/Carter analysis was inappropriate (Tr. pp. 31-32). The parent's advocate further asserted that the parent was entitled to find a provider when the district did not, and he requested an order from the IHO "allowing the [p]arent to utilize an independent provider of [her] choosing to compensate for the same services the student should be receiving… for the rest of the year" (Tr. p. 32). The parent's advocate requested that the parent "be able to use a provider at a market rate," he disputed that the district's $125 per hour represented the market, and further noted that the parent was not requesting special education teacher support services (SETSS), rather the student was entitled to speech-language therapy and OT, which was not a part of the district's opening statement (Tr. pp. 32-33). Both parties rested and waived closing arguments (Tr. pp. 34, 36). With regard to extending the timeline for issuing a decision and when consenting to the parent's request, the district noted that the student "ha[d] pendency so there should be no harm to the student" (Tr. p. 36).

Interim IHO Decision). The IHO's interim order on pendency required the district to "provide the [s]tudent with the program outlined above retroactive to the date of filing of the [d]ue [p]rocess [c]omplaint and continuing until the conclusion of the case (Interim IHO Decision at p. 1).

[5] The subsequent IESPs recommended the same frequency and duration of speech-language therapy and OT as were recommended in the parent's pendency exhibit B, which was the May 2021 IESP (compare Parent Pendency Ex. B at pp. 1, 8, with Dist. Exs. 4 at p. 6; 9 at p. 7).

In a decision dated March 13, 2024, the IHO found that the district "failed to implement an IESP, thereby denying the [s]tudent equitable services pursuant to NY Education Law § 3602-c for the 2023-2024 school year, and that the relief [the p]arent s[ought wa]s appropriate" (IHO Decision at p. 2). In his legal analysis, the IHO determined that the district "ha[d] the entirety of the burden because the [p]arent [wa]s not seeking reimbursement for the [s]tudent's tuition at the Private School" (id. at p. 4). The IHO then determined that the district failed to implement services for the student and had therefore denied the student equitable services (id.). The IHO further found that the Burlington/Carter analysis was not an appropriate standard to apply and that, instead, "a compensatory services analysis" should be applied when a parent alleges that the district failed to implement an IESP (id. at pp. 4-6). The IHO stated that the remedy for a school district's failure to provide appropriate equitable services was "similar to the remedy for a school district's failure to provide appropriate services under the IDEA" and that compensatory education was an appropriate form of relief when the law has been violated (id. at p. 4).

Turning to the appropriate compensatory relief, the IHO determined that the student was entitled to one hour per week of speech-language therapy and one hour per week of OT for a 40-week school year to be delivered by licensed providers of the parent's choosing because "neither party introduced evidence regarding a provider to provide the services" (IHO Decision at pp. 6-7). The IHO further ordered the district to assist the parent in locating providers if she needed assistance (id. at p. 7). With regard to the appropriate rate for services, the IHO determined that the district's purported evidence of market rates did not demonstrate "that there were providers ready, willing, and able to provide the services to the [s]tudent at the rates in the report" (id.). For those reasons, the IHO "le[ft] it to the [p]arent to select appropriately credentialed providers and f[ou]nd it equitable that the providers be paid their standard rate for providing these services" (id.).

As relief, the IHO directed the district to, within 35 days of the date of his decision, assign an individual from its Impartial Hearing Order Implementation Unit to serve as a contact person for the parent regarding the implementation of the order (IHO Decision at p. 9). The IHO further ordered that the contact person was required to provide their name, direct phone number, and email address to the parent and the parent's attorney within 35 days of the date of the order (id.). The IHO also ordered that the contact person was to respond to any inquiry by the parent (or her attorney) concerning the implementation of the order within two business days (id.). Next, the IHO ordered the district to provide the student with a bank of 40 hours of individual speech-language therapy and to provide a bank of 40 hours of individual OT to be provided by licensed providers of the parent's choosing, to be paid the providers' typical rates per hour (id.). The IHO further ordered that "[t]he provider[s] may bill against the bank for any services provided from 9/7/2023 to 12/1/2024" (id.).

The district was also directed to pay the parent's providers within 15 days of receipt of both: "Records indicating the specific provider's name, date of service, session notes for each session, and data regarding the student's performance in each session" and an "invoice for the services provided and accompanying affidavit attesting that the services billed for were provided" (IHO Decision at p. 9). Lastly, the IHO ordered that if the parent requested assistance finding providers to deliver speech-language therapy and OT, the district must locate three providers who were ready, willing, and able to begin providing the services to the student (id.). Further, if the parent presented "a good faith basis for rejecting the [three] providers, the [district] must locate [two] additional providers from which the [p]arent may choose," however, the district was not

required to identify more than five providers in any given six-month period, and that "[n]othing stated" in his decision would prevent the parent from locating and utilizing a provider of her own choosing (id. at pp. 9-10).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in ordering the district to fund private providers of the parent's choosing at current market rates for the 40 hours of speech-language therapy and 40 hours of OT in the amounts listed in the May 4, 2023 IESP. The district further asserts that the IHO erred in calculating the award based on a 40-week school year and in directing the district to assign a contact person and to provide the contact person's information directly to the parent. The district contends that the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims, that even if the IHO had, there was no evidence of any services obtained by the parent and that the IHO erred in finding that Burlington/Carter did not apply because the parent was not seeking tuition. The district also argues that the IHO erred in awarding relief he was not empowered to order, specifically that the parent did not request compensatory education and the parent did not raise any claims related to the district's implementation unit in the due process complaint notice. The district also asserts that the IHO erred in utilizing a 40-week school year in calculating his award.

In an answer, the parent generally denies the district's claims and asserts that the IHO correctly declined to apply a Burlington/Carter analysis to the parent's claims, correctly found that tuition did not include services to nonpublic school students, correctly awarded compensatory education and other equitable relief, and correctly calculated the compensatory education award based on a 40-week school year.

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

[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]).

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.).[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]).

VI. Discussion

A. Legal Standard

In this matter, the student has been parentally placed in a nonpublic religious school and the parent does not seek tuition reimbursement from the district for the cost of the student's nonpublic school. Instead, the student was dually enrolled in the public school and the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year. In the due process complaint notice, the parent "found providers who are willing to provide the student with all required services for the 2023-2024 school year (IHO Ex. I at p. 1). But ultimately, there is no evidence in the hearing record that the private speech language or occupational therapists that the parent's alleged would provide therapy ever materialized or did so, because the parent did not appear at the hearing or offer any evidence of a privately obtained self-help solution. During the

[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.

impartial hearing, the parent did not disclose any documentary evidence or provide testimonial evidence of any unilaterally obtained services and instead requested an hour-for-hour (quantitative) bank of compensatory education services, based on an unimplemented IESP, to be delivered by the parent's chosen providers at their enhanced rates. Accordingly, I do not disagree with the IHO's conclusion that the case should not be analyzed using a Burlington/Carter style of analysis because there is no request for retroactive funding of private services obtained by the parent. If there had been such evidence, then the district would be correct that a Burlington/Carter analysis should be used to analyze the private services obtained without the consent of school district officials. Most of the IHO's reasoning regarding the need for a Burlington/Carter unilateral placement analysis was inapposite as there was no evidence of such a placement by the parent in this case.[8]

The IHO did not grapple with these factual distinctions at all in his decision. Instead, he prospectively awarded private services without any evidence and relied on Appeal No. 23-065 for the proposition that SRO's have been inconsistent in the application of a Burlington/Carter analysis; however that is a misreading of the facts of that case and was error. In Application of a Student with a Disability, Appeal No. 23-065, the parent did not unilaterally obtain private services, and the SRO found that the appropriate equitable relief was compensatory education provided to the student by the district. Here, the district failed to implement the related services recommended in all of the student's IESPs for the 2023-24 school year, which the district does not dispute. There being no evidence of unilaterally obtained services in the hearing record, I will now turn to the parent's request for compensatory education.

B. Compensatory Education and Other Relief

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]). Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). 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] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; 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]). Likewise, SROs have awarded compensatory services to students who remain eligible to

[8] The IHO indicated these matters were distinguishable from the Burlington/Carter scenario because the type of violation by the district was different (i.e., a failure to provide services that the parties agreed to versus a disagreement over the adequacy of an IEP) and the type of privately obtained relief was different (i.e., supportive services versus private school tuition) (IHO Decision at p. 5). But those statements were not relevant to the facts in evidence.

attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). 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 "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, 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]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In treating the requested relief as compensatory education, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

In arguing in their answer to uphold the IHO's decision and the specific relief granted, payment for future therapies that are unilaterally selected by the parents, the parents are effectively engaged in an end run around bearing the burden of proof for privately-obtained services. The undersigned has many times indicated that it may not be appropriate in the administrative due process forum to continue to place the burden of proof regarding compensatory education relief on the district in an administrative due process proceeding, and I note that no Court or other authoritative body in this jurisdiction has addressed the topic to date (Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). Where the parent seeks relief in the form of compensatory education to be provided by parentally-selected private special education services, I find it is appropriate to place the burden of production and persuasion on the parent with regard to the adequacy of the proposed relief. In most cases, the

district, as the party responsible to implement special education services in the first place, should be directed to carry out the remedial relief ordered by an administrative hearing officer.

In this case, the parent did not attend the impartial hearing and presented no evidence at all of the proposed private compensatory services that the parent either selected or intended to select and instead requested a quantitative bank of hours at the cost that the parent eventually obtained them (IHO Ex. I at p. 2), which the IHO essentially awarded—to be provided by licensed providers of the parent's choosing, to be paid the providers' typical rates per hour and ordered that "[t]he provider[s] may bill against the bank for any services provided from 9/7/2023 to 12/1/2024" (IHO Decision at p. 9). Because there was no evidence, the IHO's order in this matter also required that the parent present "[r]ecords indicating the specific provider's name, date of service, session notes for each session, and data regarding the student's performance in each session" and an "invoice for the services provided and accompanying affidavit attesting that the services billed for were provided" to the district prior to payment (id.).

Furthermore, the district appeals the IHO's directives related to the district's implementation unit. Review of the parent's November 29, 2023 due process complaint notice reflects that the parent did not set forth any facts or circumstances relating to the district's implementation unit nor did the parent request any relief related to the district's implementation unit (see generally, IHO Ex. I). The parent's representative briefly mentioned the district's implementation unit in a combined opening and closing statement (Tr. p. 33), but statements made by a legal representative are not evidence.

To the extent the IHO's intent in ordering such relief was to address a perceived systemic problem with implementation of IHO orders in the district, generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Neither the IHO, nor I for that matter, have plenary authority to pass judgment on the district implementation policies and processes that affect all students.

The IHO's directives relating to the implementation of the order tend to intrude on the district's discretion to follow an administrative process to comply with the order (cf. Abrams v. Carranza, 2020 WL 6048785, at *2 [S.D.N.Y. Oct. 13, 2020] [discussing the district's "reasonable documentation requirements" prior to funding pendency and declining to order injunctive relief "mandating immediate payment"], aff'd sub nom., Abrams v. Porter, 2021 WL 5829762 [2d Cir. Dec. 9, 2021]).[9] The IHO also acknowledged class action litigation involving the district in which

[9] In addition, the IHO's additional requirements for the implementation of the order do tend to resemble an attempt to direct enforcement of the primary order for compensatory education funding before the district has lapsed or failed in its implementation. In this regard, the district correctly argues that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). In the event that the district did not implement the

the United States District Court appointed a special master to oversee the procedures for correcting deficiencies in the implementation of orders issued by impartial hearing officers (IHO Decision at p. 8). In the class action lawsuit, the district and the class members entered into a stipulation to target the district's timely implementation of orders and the court appointed a special master to bring the district into compliance with its obligations under the stipulation (see LV v. New York City Dep't of Educ., 2021 WL 663718, at *3 [S.D.N.Y. Feb. 18, 2021]; see Order with Respect to Motion for Appointment of a Special Master, L.V. v. New York City Dep't of Educ., 03-cv-09917 [S.D.N.Y. filed Dec. 12, 2003]). Insofar as the IHO's order places additional requirements directing the actions of staff in the district's implementation of the order, it is unwise to intervene and interfere with the processes being implemented pursuant to the stipulation and under the guidance of the Court and the special master.

Additionally, in this case the parent requested and obtained a pendency order for the OT and speech-language therapy in the same frequencies and durations called for by the student's IESPs (Interim Decision; see Parent Ex. A at p. 7; Dist. Ex. 4 at p. 6; 9 at p. 7) and the district also appeared to agree to do so prior to the pendency order on December 5, 2023 (Pendency Implementation Form). The district also provided evidence in this case showing the student's receipt of OT and speech-language therapy during the 2022-23 school year that immediately the school year at issue, which the IHO did not discuss (Dist. Exs. 3; 6). Furthermore, during this appeal for State-level Review, the parent's attorney filed a request for a specific extension of time to file the parent's answer on April 28, 2024 and indicated at that time that the student was receiving services pursuant to pendency. Accordingly, I am not convinced that this is a student for which the district is incapable of arranging the delivery of compensatory speech language therapy and OT.

In view of the forgoing, I find the IHO lacked an appropriate evidentiary basis to direct that compensatory education for the student be provided by unknown providers privately selected by the parents at unknown costs. The student is entitled to 10-month services consisting of two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of OT for the 2023-24 school year, which should be based on a 36-week school year (see Educ. Law § 3604[7] [a 10-month school year consists of not less than 180 instructional days]). Further, the compensatory education award shall be delivered by the district but must be reduced in light of any pendency services already provided by the district (Tr. p. 36; see Interim IHO Decision at p. 1).

VII. Conclusion

As discussed above, the IHO erred in awarding the parent funding for a bank of compensatory education based on a 40-week school year. The IHO further erred in ordering the district to fund the student's compensatory education to be delivered by the parent's chosen

IHO's order requiring it to fund the student's compensatory education, the parent could seek enforcement, which she could do by filing a State complaint against the district through the State complaint process or by seeking enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]).

providers at their specified rates. The IHO also erred in issuing directives related to that interfere with the district's implementation unit. The parent is entitled to 36 hours of compensatory speech-language therapy and 36 hours of OT to be provided by the district, less any services provided pursuant to pendency.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 13, 2024 is modified by vacating those portions which ordered the district fund therapists selected by the parents and issued directives to the staff of the district's implementation unit, and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 36 hours of individual speech-language therapy and 36 hours of individual OT for the 2023-24 school year, less any services already provided to the student pursuant to pendency.

Dated: **Albany, New York**
June 13, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER