The University of the State of New York

The State Education Department
State Review Officer
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No. 24-177

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Always a Step Ahead (Step Ahead) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which awarded compensatory education related to the 2023-24 school year. The appeal must be dismissed. The cross-appeal must be sustained.

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

A CSE convened on September 16, 2022, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with a projected implementation date of September 22, 2022 (Parent Ex. B).[1] The CSE recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS), two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of group speech-language therapy, and one 30-minute session per week of group counseling services (id. at p. 8). The IESP reflects that the student was "Parentally Placed in a Non-Public School " (id. at pp. 10-11).

Turning to the school year at issue, in a due process complaint notice, dated August 28, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and/or equitable services under State law for the 2023-24 school year by failing to provide special education and related service providers (Parent Ex. A at p.1).[2] The parent asserted she was unable to locate service providers on her own at the district's standard rates for the 2023-24 school year and the district failed to provide those services in accordance with the IESP (id.). The parent claimed that she found providers willing to provide the student "with all required services" for the 2023-24 school year but at rates higher than the standard district rates (id.). The parent sought an order requiring the district to continue the student's services under pendency, an award of funding for five sessions per week of SETSS delivered by the private company at an enhanced rate, and an award of "all related services and aides on the IESP" via related services authorization (RSAs) or direct funding (id. at p. 2).

On October 26, 2023, the parent electronically signed a document on Step Ahead's letterhead indicating that she was "aware of" the rate charged for SETSS and related services provided to the student and that, if the district did not fund the services, she "w[ould] be liable to pay for them" (Parent Ex. E).[3]

An impartial hearing convened and concluded on December 7, 2023 before an IHO with the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-20).[4] In a decision dated March 25, 2024, the IHO found that there was no dispute that the student was entitled to the services set forth in the September 2022 IESP during the 2023-24 school year and that the district conceded it failed to implement the IESP during the 2023-24 school year; accordingly, the IHO

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

[2] At the time the due process complaint notice was filed in this matter, August 28, 2023, the district was not yet obligated to deliver services to the student for the 2023-24 school year as the 10-month 2023-24 school year had not yet begun.

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

[4] Subsequent to the impartial hearing held in this matter, the IHO issued a "Standing Order," dated February 20, 2024, listing 42 cases to which the order applied, including the present matter, and setting forth the IHO's expectations for the impartial hearings (see IHO Ex. I).

found that the district denied the student a FAPE (IHO Decision at pp. 2-3).[5] However, the IHO found that that the relief sought by the parent was "not appropriate in part" (id. at p. 2). The IHO noted that, with regard to unilaterally-obtained services, the parent "failed to present any credible, persuasive evidence on appropriateness" of the services, such as "information regarding the services that were provided, the quality, frequency, goals, progress, or even when Student began receiving these services from Provider" (id.at p. 3). Accordingly, the IHO denied the parent's request for district funding of SETSS, speech-language therapy, and OT purportedly obtained by the parent (id.). With respect to compensatory education, the IHO indicated that the parent sought "a bank of hours for counseling services not received" at a specified rate (id. at p. 4). The IHO found no evidence as to why the rate sought should apply and instead ordered the district to fund a bank of 36 hours of group counseling services "at reasonable market rates" for the 2023-24 school year with such award available to use up to 24 months after the date of the decision (id. at pp. 4-5).[6] The IHO also ordered the district to implement the student's SETSS for the remainder of the school year (id at p. 4).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her requested relief. The parent asserts that a Burlington/Carter analysis should not apply to the circumstances of her appeal and also argues that, even under a Burlington/Carter analysis, she is entitled to her requested relief. The parent argues that she utilized the services of Step Ahead, which used appropriately credentialed/licensed providers for each service for which funding was requested, and each provider followed the detailed discussions, goals, and frequency of services the district itself created and recommended. The parent asserts that she is simply requesting that the providers be paid for delivering the services recommended in the student's IESP and that such a program cannot be deemed inappropriate. The parent further argues that the evidence in the hearing record fully supported an award of direct funding to Step Ahead for SETSS, OT, and speech-language therapy delivered to the student during the 2023-24 school year at the contracted rates. The parent contends that she contracted with Step Ahead, and no evidence was introduced showing the rates charged by the company to be unreasonable.

In an answer and cross-appeal, the district argues that the IHO correctly found the parent did not meet her burden of demonstrating the appropriateness of the unilaterally obtained services.[7] The district alleges equitable grounds which it argues also support a denial of an award of district funding for the services purportedly delivered by Step Ahead. In particular, the district argues that the parent failed to provide the district with proper notice of her intention to unilaterally obtain

[5] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-8).

[6] The IHO calculated the compensatory award based on 36-weeks for a 10-month school year (IHO Decision at p. 4).

[7] The district does not appeal the IHO's determination that it denied the student a FAPE and, accordingly, the IHO's finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

private services for the student and seek public funding for the costs thereof. The district also argues that the parent did not demonstrate a legal obligation to pay for services from Step Ahead contemporaneous with the initiation of services. Finally, the district cross-appeals from the IHO's award of compensatory education, arguing that the parent did not request relief in this form in the due process complaint notice and because the hearing record did not demonstrate that the student did not receive counseling services during the 2023-24 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]).[8] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (IEP) (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[9]

[8] 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]).

[9] 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

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. Unilaterally-Obtained Services

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, 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 and, as a self-help remedy, she unilaterally obtained private services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. 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 services. "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."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student 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;

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.

T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[10] 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 unilaterally-obtained services, the federal standard for adjudicating these types of disputes 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, 142 F.3d at 129). 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 Rowley, 458 U.S. at 207). 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).

[10] 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 that the parent obtained from Step Ahead (Educ. Law § 4404[1][c]).

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).

Here, the only evidence of the student's needs is the description of the student in the September 2022 IESP (Parent Ex. B). The student's needs as set forth in the IESP are not in dispute (see Parent Ex. A at p. 1).

The student's September 2022 IESP reflected that on the Stanford-Binet Intelligence Scaled-Fifth Edition (SB-5), the student received a full scale intelligence quotient (FSIQ) of 100, which was in the average range, as well as nonverbal (106) and verbal (93) IQ scores that were also in the average range (Parent Ex. B at pp. 1-2). The IESP noted that there was a "significant 13-point domain discrepancy that suggest[ed] that [the student] may express his intellect somewhat better via nonverbal channels than verbal ones, but both seemed adequately developed" (id.). There were also "significant inter-index discrepancies" that ranged from low average to high average, which suggested that the student's FSIQ might not be an accurate reflection of his overall intellect (id.).

With regard to the student's academic skills, the IESP related that, on the Wechsler Individual Achievement Test, Third Edition (WIAT-III), the student obtained a total achievement score of 91, in the average range, with average standard scores of 101 on the oral language composite, 91 on the written expression composite, and 93 on the mathematics composite (Parent Ex. B at p. 2). According to the IESP, the student was distractible and struggled to keep up with his peers in the group setting, and performed better when provided with individualized support and guidance (id.). The IESP further indicated that the student would benefit from individualized academic support or small group instruction focused on reading and writing skills (id.).

Speaking to the student's communication skills, the IESP identified that the student's disability manifested itself in the areas of speech and language skills, specifically his expressive language skills (Parent Ex. B at p. 3). According to the IESP, the student's delays in expressive language caused him to become upset and frustrated (id.).

Socially, the IESP described the student as a pleasant and engaging child who played well with others (Parent Ex. B at p. 2). The IESP indicated that the student's distractibility in the group environment impacted his ability to fully attend and process information and contributed to "frustration and disengagement" (id.).

Regarding the student's physical needs, the IESP noted that the student had deficits in fine motor, visual perceptual, and self-care skills (Parent Ex. B at p. 3). According to the IESP, the student's decreased muscle tone affected his ability to perform fine motor tasks and impacted his performance on classroom activities (id.). The IESP identified that "clinical observation and reference to the Peabody Developmental Motor Scale," indicated "a delay in skills" (id.).

The IESP identified supports and strategies to address the student's management needs including tasks broken down into smaller units, preview and review of material, a spelling chart of high frequency words, specialized vocabulary for upcoming lessons, preferential seating near the teacher, checks for understanding, specialized reading strategies/instruction, frequent refocusing, and additional time to complete assignments (Parent Ex. B at p. 3).

Thus, the student's present levels of performance included in the September 2022 IESP identified areas of need with respect to the student's attention, expressive language, fine motor, visual perceptual, and self-care skills (Parent Ex. B at pp. 1-3). In addition, the recommended annual goals suggested that the student also demonstrated weaknesses in decoding, math, spelling, receptive language, and coping skills (id. at pp. 4-7).

With regard to services from Step Ahead, the hearing record includes a document on the letterhead of Step Ahead, dated September 1, 2023, which was electronically signed by the parent on October 26, 2023, wherein the parent stated that she was aware that she would be liable for the costs of SETSS and "related services" delivered to the student at specified rates (Parent Ex. E). The hearing record also includes printouts reflecting the certifications/licenses of three individuals (Parent Ex. C). The hearing record does not identify if those providers actually provided the student with any services during the 2023-24 school year and includes no further information about the services the parent obtained for the student for the 2023-24 school year.

As a result, there is no evidence in the hearing record regarding Step Ahead's provision of services to the student. Neither the parent, the providers, nor the case manager from Step Ahead testified at the impartial hearing,[11] and the hearing record does not include any progress report, service records, or even invoices. Although counsel for the parent asserts on appeal that the Step Ahead providers were following the IESP, the hearing record does not include any information to support this assertion.[12]

[11] The parent had originally offered one witness's direct testimony by affidavit in lieu of in-hearing testimony; however, that individual was not available for cross-examination, so the affidavit was withdrawn (see Tr. pp. 4, 14-17; see also 8 NYCRR 200.5[j][3][xii][f]). According to the IHO, the parent's advocate requested that the testimony provided by this individual in a different matter involving a different student be entered into the hearing record in the present matter but the IHO denied such request (IHO Decision at p. 2 n.1).

[12] Counsel for the parent cites only to the parent's due process complaint notice and the provider certifications in support of the parent's contention that Step Ahead was delivering services in accordance with the IESP (Req. for

Additionally, the IHO correctly determined that the parent must still come forward with evidence that describes the services and the delivery thereof (IHO Decision at p. 3). As determined by the IHO, the hearing record lacks any information about the level of services the student received or where or when the services were delivered and does not explain how any services that may have been provided by Step Ahead addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

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

B. Compensatory Education

Turning to the IHO's award of compensatory counseling services, the district argues that the parent did not request compensatory educational services as relief in the due process complaint notice.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a

Rev. at ¶16; however, the due process complaint notice does not refer to Step Ahead and does not indicate that any services were delivered to the student pursuant to the IESP (Parent Ex. A). Additionally, as noted above, the 10-month 2023-24 school year had not yet started at the time the due process complaint notice was filed in this matter—so, even if it were evidence, it would not provide any support to an assertion that services were delivered to the student during the 2023-24 school year pursuant to the student's IESP.

Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708 [7th Cir. 2007]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

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

While the parent did not explicitly request compensatory education in the due process complaint notice, during the impartial hearing, the parent's advocate indicated in the opening statement that the parent was "seeking [a] compensatory bank of services" and "authorization to use independent providers, including at an enhanced rate if needed" (Tr. pp. 5-6). The parent's advocate elaborated that the parent had obtained SETSS, OT, and speech-language therapy from Step Ahead and that the parent was seeking funding for the rates charged by the company (Tr. p. 5). The parent's advocate opined about the legal standard that applied, arguing that "if the Parent is simply seeking implementation of the IESP at market rate, that is . . . not under a Burlington/Carter analysis" and that, if the parent established the student's entitlement to the services and that the district did not provide the services, the parent "should receive a compensatory bank of services at market rate" (Tr. p. 6). The parent's advocate contrasted the situation where a parent had identified "a particular provider that [wa]s charging a particular rate," which was more akin to the "Burlington/Carter Prong II territory," where the parent then carried a burden to show the unilaterally-obtained services were appropriate (Tr. p. 6). The parent's advocate then conceded that, if the parent did not demonstrate the appropriateness of services delivered, she would not be entitled to relief in the form of district funding for the services at the rate charged by the company (Tr. p. 6). However, the advocate opined that "under the compensatory services analysis, the student should still be entitled to receive services at market rate based on no less than the market rate was for last year's services" (Tr. p. 6).

While the advocate referred to "compensatory education," the crux of the relief sought was funding for services delivered to the student either at the rate charged by Step Ahead or at a "market rate." The advocate made no separate request for services above and beyond those that the parent

[13] The parent's request in the due process complaint notice for "such other and further relief as is appropriate" was too broad for the IHO to construe as a specific request for compensatory educational services.

had already unilaterally obtained. In other words, the parent engaged in self-help and obtained relief contemporaneous with the violation and then sought redress through a due process proceeding (i.e., the Burlington/Carter scenario). The parent did not seek prospective relief to remedy a past harm (i.e., compensatory education).

While IHOs and SROs have some latitude in fashioning appropriate relief, to survive a challenge there should be some specific request for the relief in the due process complaint notice or discussion at the impartial hearing so that a record may be developed as to what services the student may have already been receiving and from what source and what services remained undelivered and warranted based on the student's needs so that a compensatory education award could be crafted.[14] Therefore, the IHO's award of compensatory counseling as substantive relief to remedy the claims raised in the due process complaint notice regarding the district's failure to deliver appropriate equitable services for the 2023-24 school year is reversed.

Notwithstanding the foregoing, there may be other avenues that the parent may pursue to obtain services that the district was required to deliver. The IHO ordered the district to implement the SETSS in the IESP for the remainder of the 2023-24 school year (IHO Decision at p. 4). This order by the IHO is unappealed and, therefore, is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10). Moreover, the parties agreed that the student was entitled to the services set forth in the September 2022 IESP as the student's stay put placement during the pendency of the proceedings (Pendency Implementation Form). The parent could seek enforcement of the IHO's order and the pendency agreement 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]).

VII. Conclusion

In summary, the parent failed to demonstrate the appropriateness of services unilaterally obtained from Step Ahead, and the parent did not seek relief in the form of compensatory counseling during the impartial hearing. In light of these determinations, I need not address the parties' remaining contentions, including the portion of the district's cross-appeal alleging that equitable considerations do not favor the parent.

[14] Moreover, under State law in this jurisdiction, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]). Accordingly, if compensatory education is a remedy sought, the district must be given notice that it should describe its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 8, 2024, is modified by reversing that portion which ordered the district to fund a bank of 36 hours of group counseling services at reasonable market rates.

Dated: **Albany, New York**
June 7, 2024

STEVEN KROLAK
STATE REVIEW OFFICER