



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-204

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 Lindsay VanFleet, Esq.

Shehebar Law, PC, attorneys for respondents, by Y. Allan Shehebar, 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 respondents' (the parents') daughter and ordered it to fund the costs of special education teacher support services (SETSS) and speech-language therapy delivered by Alpha Student Support (Alpha) at a specified rate for the 2023-24 school year as well as additional services at market rates, and further ordered it to fund a bank of compensatory education for unimplemented services at market rates. 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 programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

A CSE convened on October 28, 2022 to develop an IESP for the student for the 2022-23 school year, with an implementation date of November 3, 2022 (Parent Ex. B at pp. 1, 10-11). Finding the student eligible for special education and related services as a student with a learning disability, the October 2022 CSE recommended that the student receive seven periods per week of direct, individual SETSS in a separate location, one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per week of group OT, one 60-minute session per week of individual physical therapy (PT), two 45-minute sessions per week of individual speech-language therapy, and one 45-minute session per week of group speech-language therapy (id.).^{1, 2} The counseling, OT, PT, and speech-language therapy services were designated to be provided in a "[s]eparate [l]ocation . . . provider option" (id.).

A CSE convened on June 7, 2023 to develop an IESP for the student for the 2023-24 school year, with an implementation date of September 7, 2023 (Dist. Ex. 2 at pp. 1, 10-11). Continuing to find the student eligible for special education and related services as a student with a learning disability, the June 2023 CSE recommended seven periods per week of direct, group SETSS in a separate location, one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per week of group OT, one 60-minute session per week of individual physical therapy (PT), two 45-minute sessions per week of individual speech-language therapy, and one 45-minute session per week of group speech-language therapy (id.).³

A parent service contract with Alpha dated September 1, 2023, was electronically signed by the parent and by a representative from Alpha (Parent Ex. C at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated January 31, 2024, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parents argued that the district failed to implement the October 2022 IESP and failed to locate a SETSS provider, a speech-language therapy provider, and related

¹ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

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

³ During the impartial hearing, the parties agreed that the June 2023 IESP was the basis for pendency and that it recommended the same services as those set forth in the October 2022 IESP (Tr. pp. 6-7, 12-13). Nevertheless, review of the IESPs indicates that the October 2022 IESP recommended seven periods of individual SETSS, and the June 2023 IESP recommended seven periods of group SETSS (compare Parent Ex. B at p. 10, with Dist. Ex. 2 at p. 10).

services providers (id. at p. 2). The parents invoked their right to pendency and further requested that the district directly fund or reimburse the parents for the SETSS and speech-language therapy services mandated by the October 2022 IESP (id. at p. 3). The parents also reserved the right to seek compensatory educational services for any services that were mandated but not provided by the district (id.).

B. Impartial Hearing Officer Decision

The parties convened for an omnibus impartial hearing for this matter and for four other matters before the Office of Administrative Trials and Hearings (OATH) on March 14, 2024 (Tr. pp 1-18; see Feb. 5, 2024 IHO Omnibus Settlement Order at p. 1). During the impartial hearing, the parties submitted documentary evidence (Tr. pp. 8-10; see Parent Exs. A-D; Dist. Exs. 1-2). The parties did not present opening or closing statements in this proceeding. The parents' attorney relied on his closing argument from a previous case which was part of the omnibus proceedings (Tr. pp. 14-17; IHO Exs. I; II).⁴ The district submitted a written closing brief asserting that the parents did not meet their burden of proving the appropriateness of the unilaterally-obtained services (Dist. Closing Br.; see IHO Decision n. 9 at p. 4).

⁴ When faced with a large number of proceedings involving the same attorneys for both sides, it is a prudent exercise of the IHO's discretion in managing proceedings to schedule each matter in succession on the same day(s) for the sake of judicial economy. It may even be permissible to provide a window of time within which a certain number of proceedings are expected to be addressed rather than a specified time for each and every proceeding. However, such practices necessarily have limits. It is inconsistent with standard legal practice to merge all multiple cases together into a blended hearing record (see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [referencing IHOs discretion in conducting hearings so long as they are conducted in accordance with standard legal practice]). Each parent is entitled to an unredacted, verbatim hearing record that applies to their own child (8 NYCRR 200.5[j][3][v]), and the parents, SROs, and reviewing courts must be provided with a clear record of each proceeding. Moreover, each parent is entitled to a confidential proceeding that is closed, unless the parent seeks an open proceeding (8 NYCRR 200.5[j][3][x]). Accordingly, if the IHO chooses to address multiple proceedings with the same attorneys on the same day, the IHO should open the record separately in each proceeding, place all motion papers, prehearing orders, scheduling information, e-mail communications from the parties to the IHO, and documentary evidence, if any, into each hearing record all bearing in mind that the parents in each proceeding are entitled to an unredacted verbatim record. Here, the IHO maintained a separate hearing record with the exception of suggesting that the parties have their closing arguments in this matter be redacted and included in the hearing records of Application of the New York City Dep't of Educ., Appeal Nos. 24-205; 24-206; 24-207. However, the redacted transcript is incomplete with pages omitted that included the district's legal argument, which the IHO stated was to be applied to all of the omnibus hearing cases (see IHO Ex. I). The redacted transcript does include the IHO's references to a status conference that was not recorded, about which she stated,

there was a status conference that was held for this omnibus, and I did ask the parties how they wanted me to proceed, whether they wanted me to proceed under Burlington/Carter analysis or under Reid. And I did state that ...I would defer to [the p]arent as this is [the p]arent's case, and the [p]arent actually had requested a comp ed analysis under Reid

(IHO Ex. II at pp. 14-15; see also IHO Ex. II at p. 20). The parents' attorney argued that a Burlington/Carter analysis should not apply (id. at p. 14).

By decision dated April 15, 2024, the IHO found that the burden of proof on all issues was on the district and that it had failed to provide the student with the services recommended in the October 2022 and June 2023 IESPs (IHO Decision at p. 5). The IHO refused to apply a Burlington/Carter analysis to the parents' claims and found that the parents were entitled to the services recommended in the October 2022 and June 2023 IESPs (id. at pp. 5-9). The IHO also found that the district must reimburse the parents or fund properly licensed providers of the parents' choosing at their customary rates (id. at p. 10). The IHO awarded direct funding of SETSS at a rate not to exceed \$195 per hour and direct funding of speech-language therapy at a rate not to exceed \$225 per hour (id. at p. 11). The IHO further awarded direct funding of OT, PT, and counseling services at fair market rates (id.). The IHO further awarded compensatory education for all missed services for the period of time beginning with "the start of the 10-month, 36-week, 2023-2024 school year" through the date the parents hired a provider for the services that were "not otherwise covered through pendency" (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in deciding not to apply a Burlington/Carter analysis to the parents' claims, that the parents failed to demonstrate the appropriateness of the unilaterally-obtained SETSS and speech-language therapy services delivered by Alpha, that the IHO failed to consider the appropriateness of the PT, OT, and counseling services when no provider had been obtained, and further that the IHO should have denied all of the parents' requested relief. The district also asserts in the alternative that the IHO erred in failing to find the providers' rates excessive. The district argues that the matter should not be remanded because the parents affirmatively chose not to present evidence of the appropriateness of their unilaterally-obtained services.

In an answer, the parents generally deny the district's claims and argue that the IHO's decision should be affirmed in its entirety.

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]).⁵ "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.*).⁶ 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

The district does not appeal from the IHO's decision that its failure to implement the October 2022 and July 2023 IESPs resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at pp. 6, 8). Accordingly, this determination has become final and

⁵ 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]).

⁶ 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.

binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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 parents do not seek tuition reimbursement for the cost of the student's attendance there. In their January 31, 2024 due process complaint notice, the parents alleged that the district had not implemented the student's October 2022 IESP and the parents were unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 2). As a result, the parents unilaterally obtained private services from Alpha 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. 2-3). Accordingly, the issue in this matter is whether the parents are entitled to public funding of the costs of the private SETSS and speech-language therapy 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"]).⁷

The parents' request for unilaterally-obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v.

⁷ 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 Alpha for the student (Educ. Law § 4404[1][c]).

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

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student's Needs

Although the student's needs are not in dispute, a brief description provides context to resolve the issues in dispute on appeal. The hearing record contains IESPs dated October 28, 2022 and June 7, 2023 (Parent Ex. B; Dist. Ex. 2).⁸ According to the June 2023 IESP, the student was in second grade at the nonpublic school and exhibited "deficits in foundational skills in most domains," specifically, the IESP noted the student had delays in basic reading skills, writing, and math due to poor focusing ability, retention issues, executive functioning difficulties, and a need for visuals, manipulatives, and hands-on multisensory activities (Dist. Ex. 2 at p. 1).

Academically in the area of reading, the June 2023 IESP indicated that the student was "significantly behind her peers" and needed to work on decoding, phonemic awareness, and reading comprehension skills (Dist. Ex. 2 at p. 1). In math, the student "lag[ged] behind her peers and d[id] not always understand grade level mathematical concepts" including addition, subtraction, time, money, odd/even, or number patterns (id. at p. 2). The student's writing had "seen some improvement," but she needed to progress "to be on the same level as her peers" (id.). The student was learning to spell with "much difficulty," she struggled with parts of speech other than nouns and verbs, she lacked "descriptive writing skills," did not punctuate sentences, and writing a paragraph, even only three sentences, was "beyond her abilities" (id.). The IESP indicated that the student required review, time spent on mastered skills so they became "cemented," redirection, prompting, simplification, and repetition (id.). Further, the IESP reflected reports that the student struggled in all areas of classroom functioning, including solving problems independently, asking for clarification, following multistep instructions, multitasking, managing her time, changing focus, and thinking ahead (id. at p. 3). Annual goals included improving the student's ability to read words with various sound blends, draw inferences based on a story, demonstrated understanding of specified math concepts, and spell words containing specific sound blends (id. at pp. 5-7).

Socially, the June 2023 IESP indicated that the student was "struggling," in that she was "reserved" and did not join in play or conversation (Dist. Ex. 2 at p. 2). Additionally, the IESP noted that the student struggled to communicate effectively, did not communicate wants and needs with peers, and, at times, it was difficult to understand her (id.). The IESP reflected parent report that the student had not received counseling "for over a year," but she was looking for a provider (id.). Counseling annual goals included increasing appropriate interactions with peers and demonstrating problem solving skills in social conflicts (id. at p. 8).

With respect to the student's physical development, the IESP indicated that the student "appear[ed] to be in good health," and, per a parent report, the student had not received "OT or PT for over a year" (Dist. Ex. 2 at p. 3). An annual goal for the student was to improve graphomotor and visual motor skills (id. at p. 5).

⁸ Review of the October 2022 and June 2023 IESPs shows that the present levels of performance contained the same description of the student (compare Parent Ex. B at pp. 1-4, with Dist. Ex. 2 at pp. 1-4).

The June 2023 IESP identified management needs of the student, including a multisensory approach to literacy, math manipulatives, repetition, visual aids, verbal cues, prompts to complete activities, modified assignments, consistent positive reinforcement, direct teacher modeling, teacher check-in and assistance, scaffolding/differentiated instruction and assignments, frequent review of previously taught concepts in small groups, on task focusing prompts, checks for understanding, preferential seating, and additional response time (Dist. Ex. 2 at p. 3). Classroom annual goals for the student included improving self-monitoring skills, initiating/attempting all tasks, asking for help when needed, answering questions about a video, and demonstrating classroom discussion rules (id. at pp. 5, 8-9).

As described above, the June 2023 IESP identified areas of need with respect to the student's academics, physical development, and social-emotional development (Dist. Ex. 2 at pp. 1-9). The June 2023 IESP included recommendations for the student, including, seven periods per week of direct, group SETSS as well as counseling services, OT, PT, and speech-language therapy (id. at pp. 10-11).

2. Appropriateness of SETSS and Speech-Language Therapy by Alpha

With regard to the time period at issue in this matter, to wit: the 10-month academic 2023-24 school year, the hearing record includes a parent service contract between the student's mother and Alpha, dated September 1, 2023, which was electronically signed by the parent and a representative of Alpha, wherein the parent "confirmed [her] understanding that [the student wa]s entitled to receive funding or reimbursement from the [district]" for the recommended services, that Alpha would "make every effort to implement the recommended services ...with suitable qualified providers for the 2023-24 school year," and that the student's mother was "liable to pay Alpha" the full amount for all services delivered by Alpha in the event she did not secure funding (Parent Ex. C at pp. 1-2). Additionally, although the contract identified the services recommended for the student by the district as including SETSS, speech-language therapy, PT, OT, and counseling, and the contract indicated Alpha would "make every effort" to implement the recommended services, the contract further stated that Alpha "intend[ed] to provide" only SETSS and speech-language therapy for the 2023-24 school year, and specified rates for those services (id. at p. 2). The hearing record includes no further information about the services the parent obtained for the student for the 2023-24 school year.

As a result, there was no evidence regarding Alpha's provision of the services identified in the contract. Neither the parents, the providers, nor any representatives from Alpha appeared or provided written testimony at the impartial hearing, and the hearing record does not include any progress reports, service records, or even invoices. Although the parents assert that the Alpha SETSS provider and speech-language therapy provider were following the IESP, they must still come forward with evidence that describes the services and the delivery thereof. 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 Alpha 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]).

Based on the foregoing, the IHO erred in failing to apply a Burlington/Carter analysis to the parents' claims and erred in awarding the parents direct funding for SETSS and speech-language therapy services. Accordingly, those aspects of the IHO's decision must be reversed.

B. Compensatory Education

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 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 their answer, the parents assert that the IHO's decision and her specific relief should be upheld. However, the IHO's award of a bank of compensatory education in the form of payment for future therapies that are unilaterally selected by the parents results in the parents successfully circumventing their burden of proof for privately-obtained services. SRO's have frequently 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 parents seek 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 parents 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 parents 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, which the IHO awarded to be funded at each providers' market rate (IHO Decision at p. 11). Because there was no evidence, the IHO's order in this matter also required that the parents present "a valid contract between [the p]arent and the chosen provider(s), and an affidavit indicating the date(s) of the service and the provider's name, license and/or certification" and directed the district to "directly fund and/or reimburse the [p]arent at the customary rate(s) charged by the properly licensed provider(s) of [the p]arent's choosing" (id.).

Additionally, in this case the parents requested and obtained pendency via agreement between the parties in the same frequencies and durations called for by the student's IESP (Mar. 6, 2024 Pendency Implementation Form). Furthermore, during this appeal for State-level Review, the parents' attorney filed a request for a specific extension of time to file the parents' answer on May 30, 2024 and indicated, at that time, that the student was receiving services. While it is not entirely clear whether or not the services are being provided under pendency, the overall circumstances of the instant matter have not convinced me that this is a student for which the district is incapable of arranging the delivery of compensatory education.

In view of the foregoing, 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. As neither party has presented an argument or evidence to support a qualitative award of compensatory education for the 2023-24 school year, and considering the student is entitled to the same services pursuant to pendency as were recommended in the June 2023 IESP, the student is entitled to a bank of services to be delivered by the district equivalent to what the student would have received if the district had implemented the June 2023 IESP, specifically, seven periods per week of direct, group, SETSS in a separate location, one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, one 30-minute session per week of individual OT, one 30-minute session per week of group OT, one 60-minute session per week of individual PT, two 45-minute sessions per week of individual speech-language therapy, one 45-minute session per week of group speech-language therapy, 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 and reduced by the amount of pendency services provided to the student by the district, if any.

VII. Conclusion

In summary, the parents failed to demonstrate the appropriateness of their unilaterally-obtained SETSS and speech-language therapy services, and the IHO erred in awarding the parents direct funding for SETSS at a rate not to exceed \$195 per hour, direct funding for speech-language therapy at a rate not to exceed \$225, and further erred in awarding direct funding for OT, PT, and counseling services at fair market rates. Further, the IHO erred in awarding the parents funding for a bank of compensatory education for unimplemented services to be provided by the parents' yet to be chosen providers at yet to be identified rates. However, as a compensatory education award, the student is entitled to receive 252 hours of SETSS, 54 hours of compensatory individual speech-language therapy, 27 hours of compensatory group speech-language therapy, 18 hours of compensatory individual OT, 18 hours of compensatory group OT, 36 hours of compensatory individual PT, 18 hours of compensatory individual counseling services and 18 hours of compensatory group counseling services 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 April 15, 2024 is modified by vacating those portions which ordered the district to directly fund SETSS and speech-language therapy

services provided by Alpha and to directly fund any services delivered by providers to be selected by the parents, at their customary rates, and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 252 hours of SETSS, 54 hours of individual speech-language therapy, 27 hours of group speech-language therapy, 18 hours of individual OT, 18 hours of group OT, 36 hours of individual PT, 18 hours of individual counseling services and 18 hours of group counseling for the 2023-24 school year, less any services already provided to the student during the 2023-24 school year pursuant to pendency.

Dated: **Albany, New York**
 July 18, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER