



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-205

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') son and ordered it to fund the costs of special education teacher support services (SETSS) 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.

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 17, 2023 to develop an IESP for the student for the 2023-24 school year, with an implementation date of October 31, 2023 (Parent Ex. B at pp. 1, 10-11). Finding the student eligible for special education and related services as a student with a visual impairment, the October 2023 CSE recommended that the student receive 10 periods per week of direct, group, SETSS in a separate location, delivered in Yiddish, two 30-minute sessions per week of individual speech-language therapy in a separate location or flexible location, delivered in Yiddish, one 30-minute session per week of group speech-language therapy in a separate location or flexible location, delivered in Yiddish, three 30-minute sessions per week of individual occupational therapy (OT) in a separate location or flexible location, delivered in English, two 30-minute sessions per week of individual physical therapy (PT) in a separate location or flexible location, delivered in English, two 30-minute sessions per week of individual vision education services in a separate location or flexible location, delivered in English, and daily provision of full-time, individual paraprofessional services for orientation and mobility (*id.* at pp. 1, 10-11).^{1, 2}

A parent service contract with Alpha dated October 31, 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 30, 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 2023 IESP (*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 paraprofessional services mandated by the October 2023 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, along with four other matters, before the Office of Administrative Trials and Hearings (OATH) on March 14, 2024 (Tr. pp 1-31; *see* Feb. 5, 2024 IHO Omnibus Settlement Order at p. 1). During the impartial hearing, the parties submitted documentary evidence, waived opening statements, and gave closing statements (Tr. pp. 7-14; *see* Parent Exs. A-C; Dist. Exs. 1-2). The district conceded that it did not implement the student's October 2023 IESP and then argued that a Burlington/Carter three-pronged analysis should apply to the parents' claims, that the hearing record was insufficient to demonstrate the appropriateness of the parents' unilaterally obtained services, and that the rate charged by Alpha was excessive (Tr. pp. 10-13). As part of the parents' closing argument, the

¹ The student's eligibility for special education as a student with a visual impairment is not in dispute (*see* 34 CFR 300.8[c][13]; 8 NYCRR 200.1[zz][13]).

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.

parents' attorney stated that the parents were not seeking relief for speech-language therapy or OT, that no provider was in place for PT or for the paraprofessional services, and that the parents had only obtained SETSS from Alpha (Tr. pp. 13-14). The parents' attorney further argued that a Burlington/Carter analysis should not apply and requested direct funding for the parents' SETSS obtained from Alpha and for a bank of compensatory education for PT and for the paraprofessional services (id.). At the conclusion of the parties' closing statements, the IHO stated that

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

(Tr. pp. 14-15).³ The IHO then inquired of the parties as to what relief was appropriate and then engaged in a discussion with the parties about the correct analysis and the sufficiency of the evidence (Tr. pp. 15-28).

By decision dated April 14, 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 2023 IESP (IHO Decision at pp. 6, 8). 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 2023 IESP (id. at pp. 5-9). The IHO further found that the only evidence of a market rate came from the parents' evidence and that the district did not refute the evidence (id. at p. 10). 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.). The IHO awarded direct funding of SETSS at the rate of \$195 per hour, and direct funding of PT, vision education services, and paraprofessional services at a "fair market rate" (id. at p. 11). The IHO further awarded

³ The status conference referenced by the IHO was not part of the certified hearing record. There is no indication in the hearing record whether the status conference was transcribed, it was not referenced in the IHO's omnibus settlement order or in her decision (see IHO Decision at p. 3). 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 is expected to be addressed rather than a specified time for each and every proceeding. However, these practices have limits. It is inconsistent with standard legal practice to merge 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 exceptions of failing to record the status conference and in 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. 24-204; 24-206; 24-207.

compensatory education for the period of time beginning with the October 31, 2023 implementation date of the IESP through the date the parents hired a provider for the services or until such time as the district implemented the October 2023 IESP (*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 provided by Alpha, and that the IHO should have denied all of the parents' requested relief. The district further asserts that the IHO erred in awarding relief the parents did not request and should not have awarded direct funding for services that the parents had not obtained. The district also argues that the matter should not be remanded because the parents affirmatively chose not to present evidence from the SETSS provider. The district further contends that the IHO erred in finding the parents' SETSS rate was reasonable.

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]).⁴ "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

⁴ 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]).

with disabilities attending public or nonpublic schools located within the school district (*id.*).⁵ 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 2023 IESP 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 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 30, 2024 due process complaint notice, the parents alleged that the district had not implemented the student's October 2023 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. "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

⁵ 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.

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"]).⁶

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

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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

⁶ 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]).

[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., 459 F.3d at 364; 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). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

Here, the only evidence of the student's needs is the description of the student in the October 2023 IESP (Parent Ex. B). The student's needs as set forth in the IESP are not in dispute (see Parent Ex. A at p. 2).

The October 17, 2023 IESP indicated that at the time it was written the student was five years old and attending kindergarten at the Central United Talmudical Academy (Parent Ex. B at p. 1). The IESP noted the student's history of significant health problems and loss of vision in his right eye (id. at p. 2).

With respect to academic achievement and functional performance, the IESP stated that, in English language arts (ELA), the student was learning to retain information that was taught by responding to "wh" questions related to recent learning experiences (id.). In addition, the student was learning to engage in abstract thinking and would attempt to make predictions/draw inferences when given verbal cues (id.). The IESP indicated that the student could identify letters in isolation and was continuing to work on identifying all letters of the alphabet (id.). The student was also

learning to make appropriate letter-sound correspondences and distinguish vowel sounds (id.). According to the IESP, the student was "not up to decoding any sight words" (id.). In addition, the student was unable to process information read aloud to him in order to answer questions and demonstrate comprehension (id.). The IESP noted that, at times, the student had difficulty grasping a writing utensil (id.). He could trace letters when prompted and, although he understood he needed to copy letters, he was unable to do so (id.).

In terms of mathematics, the IESP indicated that the student was able to rote count past ten and count up to ten objects using 1:1 correspondence (Parent Ex. B at p. 1). In addition, the student could identify and name primary and secondary colors, identify basic shapes, extend a three-step pattern, and complete a two-step task in a small group (id.).

The IESP noted significant improvement in the student's communication, specifically his articulation and reported that the student "was now understood by familiar adults most of the time" (Parent Ex. B at p. 1).⁷ The IESP further indicated that the student "expressed his needs when around familiar adults instead of waiting for adults to notice them" (id. at pp. 1, 2). The student also expressed his ideas and thoughts during unstructured group time and was learning to do so during group time (id. at p. 2). According to the IESP, the student liked to learn and "'read'" books, enjoyed arts and crafts and hands-on activities, and enjoyed playing with magna tiles (id.).

The IESP indicated that the student was continuing to use strategies to help maintain his focus and attention for presented tasks (Parent Ex. B at p. 2). The IESP noted that the student required support to initiate play with his peers (id.). It further indicated that the student would continue to develop grade level academic skills in reading, writing, and math, as well as age-appropriate language skills (id.). According to the IESP, the parent noted that although the student had made progress, he was still "'not where he needed to be'" (id.).

Turning to the student's social development, the October 2023 IESP stated that the student enjoyed replaying familiar scenes or learning experiences but that he required support to plan and execute a novel play scenario (Parent Ex. B at p. 3). The IESP described the student as a happy child who displayed pleasure when engaging in group activities and when asked to come up for a turn (id.). The student responded to peers who initiated a conversation with him but required support to verbalize his actions and converse with peers during play (id.). According to the IESP, the student engaged in parallel play when prompted and, at times, also engaged in associative play (id.). Although the student generally reverted to solitary play, he would allow one or two calm students to join in his play and was beginning to display pleasure when playing next to them (id.). The IESP indicated that the student was familiar with the class routine and was independent during transitions (id.). He thrived on predictability, displayed rigidity in thinking, and required support to accept a change in schedule or routine (id. at pp. 2, 3). The IESP noted that the student was cautious when approaching novel activities, and initially refused to participate (id. at p. 3). The student also had difficulty participating in large group activities but was beginning to engage in choral responding and sang along when motivated (id.). He became easily overwhelmed by

⁷ The October 2023 IESP included a description of the student's articulations skills and what was being worked on with the student "according to his most recent IEP," however, it does not provide the date of that IEP, nor is the IEP in the hearing record; accordingly, it is unclear how current that information was at the time of the October 2023 CSE meeting (Parent Ex. B at p. 2).

difficult academic and social situations (id.). According to the IESP, the student was shy around new people, would shut down when socializing with peers if he became uncomfortable, and would not interact with the teacher when frustrated (id.). The IESP indicated that the student knew right from wrong, knew the rules of the school, and was respectful of school community members (id.). However, the IESP also noted that the student was consistently off-task and needed redirection and benefitted from positive reinforcement (id.).

In terms of physical development, the October 2023 IESP indicated that the student was premature and had retinopathy of prematurity (ROP) with loss of all vision in his right eye (Parent Ex. B at p. 3). As noted in the IESP, documentation from the student's physician indicated that the student needed constant supervision to ensure his safety and support going up and down stairs and navigating the school building (id.). The student was diagnosed with bronchopulmonary dysplasia and required a tracheostomy and gastrostomy tube (id.). Subsequently, the student had surgery to reconstruct his upper airway and the tracheostomy was removed (id.). At the time the October 2023 IESP was developed, the student was able to eat orally and independently (id.).

The October 2023 IESP included descriptions of the student's fine and gross motor needs "according to [the student's] most recent IEP" (Parent Ex. B at p. 4). With respect to the student's fine motor development, the IESP indicated that his motor skills were significantly delayed as they were impacted by physical and visual challenges (id.). The student appeared to have a left-hand preference when manipulating objects but interchanged hands during writing and coloring tasks and demonstrated an inconsistent grasp on writing tools (id.). According to the IESP, the student demonstrated some hand weakness and was unable to trace a 1/4 inch line (id.). The student was, however, able to imitate a circle and zigzag, position scissors with verbal and gestural cues, and open/close the scissors with his left hand while stabilizing paper with his right hand (id.). With respect to gross motor skills, the IESP indicated that the student had significant sensory motor delays, generalized weakness, and joint laxity (id. at p. 3). The student used ambulation as his main means of mobility and was able to ambulate on level surfaces (id.). He demonstrated calcaneal valgus and external hip rotation and wore orthotic inserts throughout the day (id.). The student was able to squat to pick up toys, jump and clear the floor by a few inches, and independently step on and off a 7 inch rise and over a 5.2 inch hurdle (id. at pp. 3-4). The student was also able to walk in a tall kneeling position for approximately 20 feet (id. at p. 4). The IESP indicated that the student was anxious when exposed to new gross motor tasks but would attempt them with support (id.).

The October 2023 IESP also included a description of the student's vision needs taken from his prior IEP (Parent Ex. B at p. 4). According to the IESP, the student had scar tissue in his eye, which led to a retinal detachment, that was surgically removed (id.). The student was light sensitive in his right eye and his left eye was functional; however, laser surgery compromised some of the student's peripheral vision in his left eye (id.). The student had ocular nystagmus and used the null position by positioning his left eye in the inner corner of the socket (id.). He also postured his head by tilting it to the right (id.). In addition to the loss of peripheral vision the student had a loss of depth perception that impacted his mobility (id.). According to the IESP, the student moved his "entire" head to track objects horizontally, did not locate objects in his right or left periphery, had difficulty tracking letters left to right, and visually skipped letters on a line (id.). The student often put his head down on the table when reading or writing, preferred materials placed to his right, and was introduced to a hand-held video magnifier (id.).

According to the October 2023 IESP, the student benefitted from the following resources and strategies to address his management needs: small group instruction, multi-sensory presentation of material, visual cues and manipulatives, large print and bold letters in clear format font, extra spacing to reduce visual clutter, a slant board, visual breaks as necessary to prevent fatigue, directions repeated and simplified, preferential seating, frequent breaks, tangible reinforcement, praise for effort and work completion, prompting, complex tasks broken down into smaller steps, repetition, guided questions, and modeling (Parent Ex. B at p. 5).

Annual goals, included in the October 2023 IESP, targeted the student's use of prepositions, speech intelligibility, ability to answer "wh" questions, ability to retell a short story, fine motor skills and fine motor strength, trunk mobility, core muscle strength and balance, coordination and gait pattern, use of adaptive materials to gather information visually, ability to identify letters and corresponding letter sounds, listening comprehension, ability to copy letters with correct formation and spacing, and ability to count to 20 using 1:1 correspondence (Parent Ex. B at pp. 7-11).

2. Appropriateness of SETSS by Alpha

As described above, the October 2023 IESP identified significant areas of need with respect to the student's vision, motor skills, and physical development (Parent Ex. B at pp. 1-5). As part of the October 2023 IESP, the student was recommended to receive ten periods per week of direct, group, SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual vision education services, and daily full time, individual paraprofessional services for orientation and mobility (*id.* at pp. 11-13).

In his closing statement, the attorney for the parents asserted that "the parents went ahead and implemented what they could from the IESP" (Tr. p. 13). According to the attorney for the parents, the student was receiving SETSS (Tr. p. 13). The attorney further indicated that the student was receiving speech-language therapy and OT but that the parent was not asking for relief for these services as they were being provided through insurance (Tr. p. 13). The parent's attorney then represented that the student was not receiving PT or paraprofessional services and requested a compensatory bank for those services (Tr. pp. 13-14). However, there is little information in the hearing record as to the services the student actually received during the 2023-24 school year.

With regard to the time period at issue in this matter, to wit: the ten-month academic 2023-24 school year beginning with the implementation date of the October 2023 IESP, which was October 31, 2023, the hearing record includes a parent service contract between the student's mother and Alpha, dated October 31, 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 does not secure funding (Parent Ex. C at pp. 1-2). The contract further stated that Alpha "intend[ed] to provide" SETSS, speech-language therapy, OT, PT and paraprofessional services at specified rates (*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 purport that the Alpha SETSS provider was following the IESP, the parent 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, PT, vision education services and paraprofessional services. Accordingly, those aspects of the IHO's decision must be reversed.

B. Compensatory Education

I turn next to the parents' request for compensatory education and the district's appeal of the IHO's decision granting a bank of compensatory services. 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]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [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 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special

education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). 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 would result in the parents successfully circumventing their burden of proof for privately obtained services. SROs 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 the 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 of the proposed private compensatory services that the parents 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.*). Such an order avoids making an appropriateness finding as to whether the not yet obtained services will be appropriate for the student.

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. Nevertheless, pursuant to the October 2023 IESP, the student was entitled to 10-month services consisting of 10 periods per week of direct, group SETSS delivered in Yiddish, two 30-minute sessions per week of individual speech-language therapy delivered in Yiddish, one 30-minute session per week of group speech-language therapy delivered in Yiddish, three 30-minute sessions per week of individual OT delivered in English, two 30-minute sessions per week of individual PT delivered in English, two 30-minute sessions per week of individual vision education services delivered in English, and individual paraprofessional services for the 2023-24 school year.

However, to the extent that the student required paraprofessional services and did not receive them during the 2023-24 school year, there is no information in the hearing record, or even any arguments presented on appeal, to ascertain the extent to which additional services could be provided to make up for missed paraprofessional services. In this instance, although the October 2023 IESP identified the student's present levels of performance in physical development showing significant needs, including that the student continued to need supports to navigate the school building, and the IESP included a recommendation for paraprofessional services for "[o]rientation and [m]obility," there is little other explanation as how the paraprofessional services would have been working with the student (Parent Ex. B at pp. 3-4, 5, 11).⁸ Additionally, to the extent that the student continues to require paraprofessional services for orientation and mobility or to navigate the school environment, they should be considered as part of the student's current educational program rather than as a service to be provided through compensatory education, which is designed to make up for past harms. As there is insufficient information in the hearing record as to how the lack of paraprofessional services during the 2023-24 school year may have prevented the student from making progress, or how another service might be provided to make up for any loss the

⁸ State regulations no longer define the term "paraprofessional," as the term "paraprofessional" was replaced with the term "supplementary school personnel" (*see* NY Reg, June 25, 2014 at 85-86). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]).

student may have suffered, due to the lack of paraprofessional services, the compensatory education awarded will disregard this portion of the student's educational programming.

Further, as the parents' only assertion in the due process complaint notice was that the district failed to implement the October 2023 IESP, compensatory services should be calculated from the implementation date of the October 2023 IESP through the end of the 2023-24 school year, consisting of approximately 30 weeks. In addition, 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.

VII. Conclusion

In summary, the parents failed to demonstrate the appropriateness of the unilaterally obtained SETSS and the IHO erred in awarding the parents direct funding for SETSS at a rate not to exceed \$195 per hour and further erred in awarding direct funding for PT, vision education services, and paraprofessional services at 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 their customary rates. The parent is entitled to 300 hours of SETSS, 30 hours of compensatory individual speech-language therapy, 15 hours of compensatory group speech-language therapy, 45 hours of compensatory individual OT, 30 hours of compensatory individual PT, and 30 hours of compensatory individual vision education services to be provided by the district, less any services provided pursuant to pendency.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 14, 2024 is modified by vacating those portions which ordered the district to directly fund SETSS provided by Alpha and to directly fund unspecified therapists selected by the parents at fair market rates, and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 300 hours of SETSS, 30 hours of individual speech-language therapy, 15 hours of group speech-language therapy, 45 hours of individual OT, 30 hours of individual PT, and 30 hours of individual vision education services for the 2023-24 school year, less any services already provided to the student pursuant to pendency, unless otherwise agreed to by the parties.

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

STEVEN KROLAK
STATE REVIEW OFFICER