The University of the State of New York

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

No. 24-213

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Hanna Giuntini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for, or to directly fund, the costs of her son's unilaterally-obtained special education teacher support services (SETSS) and speech-language therapy services delivered by Always A Step Ahead (Step Ahead or agency) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's decision awarding compensatory educational services. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (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 §§ 3602-c; 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 related to IESPs, 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 of the IDEA and the analogous State law provisions 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[a]). 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

In this case, the evidence in the hearing record concerning the student's educational history is sparse. Briefly, a CSE convened on March 16, 2023, and developed an IESP with an anticipated implementation date of September 7, 2023 and an anticipated annual review date of March 16, 2024 (see Parent Ex. B at p. 1). Finding that the student was eligible to receive special education as a student with a speech or language impairment, the March 2023 CSE recommended that the student receive five periods per week of SETSS in a group, together with the following related services: two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of counseling in a group (id. at pp. 1, 9-10).[1, 2] In addition, the March 2023 CSE developed annual goals targeting the student's needs in the areas of attention; expressive, receptive, and pragmatic language skills; cognitive skills; social skills; and fine motor skills (id. at pp. 4-8). The March 2023 CSE also recommended strategies to address the student's management needs, including preferential seating, praise and encouragement, small group instruction when possible, graphic organizers, editing checklists, prompting to remain on task, task analysis, step by step organization of tasks, a program with consistency in routines and schedule and structure, and visual and verbal prompting (id. at p. 3).[3]

Based on the limited evidence, it appears that the student was parentally placed at a religious, nonpublic school for the 2023-24 school year at issue (see Parent Ex. A at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated August 26, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the student's March 2023 IESP represented the last-agreed upon IESP, which included a recommendation for five sessions per week of SETSS,

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

[2] 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] Given the student's age, it appears that he would have been considered, chronologically, as a kindergarten student during the 2023-24 school year (see Parent Exs. A at p. 1; B at p. 1). Accordingly, it appears that the 2023-24 school year was the first school year in which the student was eligible for equitable services through an IESP. State guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 13, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students).

as well as "certain related services" (id.). The parent further indicated that she "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers to work at the district's "standard rates," and the district had not provided any for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency, to directly fund the costs of five sessions per week of SETSS at "an enhanced rate" for the 2023-24 school year, and to issue related services authorizations (RSAs) for the parent to obtain the student's related services through parent-selected providers or to directly fund the costs of the student's related services delivered by parent-selected providers at the providers' rates "even if higher than the standard [district] rate" (Parent Ex. A at p. 2).

B. Events Post-Dating the Due Process Complaint Notice

On November 30, 2023, the parent signed a document, dated September 1, 2023, on Step Ahead's letterhead indicating that she was "aware that the services being provided to [the student] [we]re consistent with those listed" in the student's March 2023 IESP, and that she was aware SETSS were provided to the student at a rate of $200.00 per hour and related services were provided to the student at a rate of $250.00 per hour (Parent Ex. D). In a separate document on Step Ahead's letterhead, a "Case Manager" with the agency (case manager) signed a statement on November 30, 2023, which identified the student's SETSS provider, the hourly rate Step Ahead paid the SETSS provider ($85.00), and that the agency charged $200.00 per hour for SETSS (Parent Ex. E).[4] In addition, the case manager's statement noted that the SETSS provider would deliver a "total of 200 hours" of services to the student for the 2023-24 school year (id.). The case manager's statement further identified the student's speech-language provider, the hourly rate Step Ahead paid the speech-language provider ($130.00), and that the agency charged $250.00 per hour for speech-language therapy services (id.). According to the statement, the speech-language provider would deliver a "total of 60 hours" of services to the student for the 2023-24 school year (id.). Next, the case manager's statement indicated that the parent was "requesting [an] enhanced rate for "Direct COUNSELING [AND] OT services at the rate of $250 an hour"; however, at that time, a provider had "not yet been located" (id. [emphasis in original]). The case manager's statement reflected that the "amounts above, including funding for any compensatory services requested, [we]re being requested by [the] parent to be directly funded to the [p]rovider so that the

[4] The statement on letterhead was not directed at any recipient in particular and was notarized by the parent's attorney (Parent Ex. E).

parent should not be liable to the provider for services the [district] agree[d] the student [wa]s entitled to receive" (id.).

On December 14, 2023, the district executed a pendency implementation form, which documented the parties' agreement that the March 2023 IESP formed the basis of the student's pendency services, consisting of five periods per week of SETSS in a group, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of OT, and one 30-minute session per week of counseling in a group (see Pendency Imp. Form at pp. 1-2).

C. Impartial Hearing Officer Decision

On March 13, 2024, the parties proceeded to, and completed, an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-32). At the impartial hearing, the IHO informed the parties that she could be "taking a Burlington/Carter approach to analyzing this matter" (Tr. p. 3). Notwithstanding the IHO's statement, the parent's attorney preserved his right to argue that the Burlington/Carter analysis should not apply to equitable services cases, such as this, but nevertheless argued that the parent met her burden to establish that the SETSS and speech-language therapy being delivered to the student were appropriate because the parent provided copies of each provider's respective credentials as evidence in the hearing record, as well as an affidavit attesting that the "providers for speech and SETSS w[ould] follow the IESP" (see Tr. pp. 6-8, 10-11). The parent's attorney noted, however, that the parent had not located providers to deliver the student's OT and counseling services (see Tr. p. 8). Therefore, the parent's attorney requested a bank of compensatory educational services, consisting of 36 hours of OT services and 18 hours of counseling services that would allow the parent to obtain such services at reasonable market rates (see Tr. pp. 8-9). In addition, the parent's attorney noted that the parent had contracted with Step Ahead to deliver SETSS to the student at a rate of $200.00 per hour and had similarly contracted with Step Ahead to deliver speech-language therapy to the student at a rate of $250.00 per hour, and the hearing record did not include any evidence that these rates were unreasonable (see Tr. p. 9). However, the parent's attorney further noted that the parent "would accept and [agreed that] it would be fair to cap those at reasonable market rates paid by the [district] itself to some for similar services in the past year or so" (id.).

At the impartial hearing, the Step Ahead case manager who signed the statement, dated November 30, 2023, testified on the parent's behalf (see Tr. pp. 12-23; Parent Ex. E). She explained that one of her responsibilities as a case manager included ensuring that the providers entered their "session dates, and times" into the database on a "regular basis" and making sure that providers completed "all categories" in their progress reports (Tr. p. 13). According to the case manager, progress reports were completed at least two times per year "at a bare minimum"; however, she further testified that progress reports were "usually [completed] up to four times per school year" (Tr. pp. 18-19). She noted that the progress reports were made available to the parents (see Tr. p. 19).

The case manager also prepared the "written agreement between the agency and the parent memorializing the initial agreement," which in this matter, was signed by the parent on November 30, 2023 (Tr. p. 14; see Parent Exs. D-E). She explained that the "going rate" for related services providers ranged from $90.00 to $160.00 per hour, therefore, the agency charged $250.00 per hour

for related services to incorporate the "typical range that providers" sought, with the remainder going towards the agency's expenses (Tr. pp. 14-16; see Parent Exs. D-E). The case manager explained that the SETSS provider was paid $85.00 per hour and the speech-language provider was paid $130.00 per hour in this matter (see Tr. pp. 15-16; Parent Ex. E). Thus, the agency received $115.00 of the $200.00 per hourly rate the agency charged for SETSS, and received $120.00 of the $250.00 per hourly rate the agency charged for speech-language therapy services, which was applied to the agency's expenses (see Tr. p. 16). According to the case manager, the agency and parent "agreed that while the [impartial] hearing [wa]s ongoing [the agency was] currently actually paying the providers through loans" (Tr. p. 21). If the parent did not prevail at the impartial hearing, the case manager clarified that the parent would be "ultimately responsible for all of the related services" (Tr. pp. 21-22).

With regard to SETSS, the case manager testified during the impartial hearing that the services were delivered to the student individually at his school and on a pull-out basis (see Tr. p. 20). She could not provide any information concerning the student's progress as a result of his SETSS (see Tr. pp. 19-20). The case manager also could not provide any information regarding what methodologies were used with the student, but explained that a SETSS supervisor oversaw the methodologies used by the providers to ensure they were "consistent with the student's IESP" (Tr. p. 20).

Following the conclusion of the case manager's testimony, the parent's attorney sought to supplement the evidence in the hearing record with the progress reports referenced in testimony (see Tr. pp. 23-24). The district's attorney objected (see Tr. p. 24). The IHO ruled that the parent could not supplement the hearing record, noting that the parent's attorney had "up until five days prior to this hearing to supplement the record" or to "add any additional documents [he] wanted to be considered for the hearing" (Tr. p. 24).[5]

The IHO then turned her attention to the district's attorney, asking if she had any further arguments concerning the appropriateness of the parent's unilaterally-obtained services (see Tr. p. 25). The district's attorney noted, in part, that neither the SETSS provider nor the speech-language provider testified at the impartial hearing to describe the services being delivered to the student, to attest to whether the instruction was proper, or to testify about their respective certifications (see Tr. p. 25). As a result, the district's attorney requested that the IHO deny the parent's request for direct funding for the 2023-24 school year (see Tr. pp. 25-26). The district's attorney also requested that the IHO deny the parent's request for compensatory educational services in this matter, especially where, as here, the parent had already chosen to unilaterally obtain providers to deliver services without having to establish the appropriateness of those providers and services (see Tr. p. 26). The district's attorney also asserted that equitable considerations weighed in the district's favor (see Tr. pp. 26-27).

[5] The hearing record includes a scheduling order, dated September 18, 2023, related to this matter, as well as others, which detailed, among other things, the timeframes assigned to the parties for disclosure of exhibits and witnesses prior to the impartial hearing (see generally IHO Ex. I).

With regard to the parent's position on equitable considerations, the parent's attorney argued that they favored the parent because the district did nothing to implement the student's special education services in the March 2023 IESP (see Tr. pp. 27-29).

In a decision dated April 17, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 2-3).[6] Turning to the appropriateness of the unilaterally-obtained services from Step Ahead, the IHO applied the Burlington/Carter analysis and concluded that the parent failed to sustain her burden to establish that the SETSS and speech-language therapy services were reasonably calculated to enable the student to receive an educational benefit (id at pp. 3-6). The IHO found that the hearing record lacked evidence of the services provided to the student, the methodologies used with the student, whether the student made progress, or whether goals had been developed for the student (id. at p. 6). The IHO further found that the office manager did not "provide credible evidence as to the [s]tudent's program or progress, since she did not work directly with [the s]tudent and did not work directly with [the p]rovider to develop or implement a program for [the s]tudent" (id.). In addition, the IHO referenced that the parent's attorney requested to "submit progress reports, as supplemental evidence," during the impartial hearing, but that the request had been denied (id.). The IHO noted that the parent had "several months to gather and submit evidence to establish that the services were appropriate" and furthermore, even if the parent had submitted a progress report, the IHO would have given it "very little weight" because, pursuant to the case manager's testimony, she "could not testify as to the clinical information found in a student's progress report" (id.).

Having determined that the parent failed to sustain her burden with regard to the appropriateness of the SETSS and speech-language therapy delivered to the student by Step Ahead, the IHO indicated that the necessary inquiry was at an end (see IHO Decision at p. 6).

Next, the IHO turned to the additional relief sought by the parent, namely, a bank of hours at a rate of $250.00 per hour for the counseling and OT services not delivered to the student during the 2023-24 school year (see IHO Decision at p. 6). Initially, the IHO found that the hearing record lacked any evidence to support the parent's request for an "enhanced rate without securing a provider for the services" and that the hearing record was equally "void as to how 'those working on the finances at the agency determined this rate'" (id.). The IHO also referred to the case manager's testimony, which indicated that although she did not "know the market rate" for such services, she understood that "there seem[ed] to be a typical range that the providers that work[ed] with the agency s[ought]" (id.). As a result, the IHO concluded that the district would be required to "fund a bank of hours for these services not received at a reasonable market rate for the 2023-2024 school year" (id. at pp. 6-7).

As relief, the IHO ordered the district to implement the student's SETSS and speech-language therapy services as recommended in the March 2023 IESP from the date of the decision through the conclusion of the 2023-24 school year (see IHO Decision at p. 7). In addition, the IHO ordered the district to fund 18 hours of counseling services and 36 hours of OT services, less

[6] The IHO's decision was not paginated; for the purposes of this decision, the IHO's decision will be cited by reference to its consecutive pagination with the cover page as page one (see generally IHO Decision).

any amounts already funded, at a reasonable market rate (10-month school year or 36 weeks and not to expire until two years from the date of the decision) (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by denying her request for direct funding of the unilaterally-obtained SETSS and speech-language therapy services delivered by Step Ahead for the 2023-24 school year.[7] Initially, the parent argues that equitable services cases, such as the instant matter, should not be subjected to a Burlington/Carter analysis; however, even if assessed under this standard, the parent contends that the IHO erred by finding that the SETSS was not appropriate. With respect to the SETSS and speech-language therapy allegedly delivered to the student by Step Ahead, the parent contends that she used appropriately credentialed and licensed providers and that the evidence fully supports an award of direct funding at the rates set forth in the contract (i.e., $200.00 per hour for SETSS and $250.00 per hour for speech-language therapy). Notably, the parent contends that the hearing record is devoid of evidence that said rates were unreasonable. As relief, the parent seeks an order directing the district to directly fund the costs of the SETSS and speech-language therapy delivered by Step Ahead during the 2023-24 school year at the contracted rates.

In an answer, the district responds to the parent's allegations and argues that the IHO properly denied the parent's request for direct funding of the student's SETSS and speech-language therapy services. As a cross-appeal, the district contends that the IHO improperly awarded compensatory educational services for counseling and OT because the parent did not request such relief in the due process complaint notice. Alternatively, the district asserts that if the compensatory educational services award is left intact, then it should be funded at a reasonable market rate, as ordered by the IHO.

The parent did not file an answer to the district's cross-appeal or respond to the arguments in the district's answer.

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]).

[7] The parent affirmatively expresses her agreement, however, with the IHO's order awarding 18 hour of counseling services and 36 hours of OT as outlined in the decision (see Req. for Rev. ¶ 1). The parent further clarifies that this relief was properly requested in the due process complaint notice (id. ¶ 20, citing Parent Ex. A at p. 2).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[8] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[9] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Legal Standard

The parent challenges the IHO's reliance on the Burlington/Carter model of analysis for resolving the parties' dispute. Accordingly, the first issue to be addressed is the appropriate legal

[8] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[9] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement 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.

standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year, as a self-help remedy, she unilaterally obtained private services from Step Ahead for the student without the consent of the school district officials, and then she commenced due process to obtain remuneration for the costs thereof. Generally, districts, which fail to comply with their statutory mandates to provide special education, can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services 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]).[10] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The parent's claims involve a self-help remedy seeking public funding of the special education services that she privately obtained from Step Ahead. That is the hallmark of a Burlington/Carter style of claim and analysis, and such relief is permissible if the parent meets the evidentiary burden of showing that the private services she obtained were appropriate under the totality of the circumstances. Based on the foregoing, the IHO in this case correctly relied on the Burlington/Carter analysis.

[10] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services the parent obtained from Step Ahead (Educ. Law § 4404[1][c]).

B. Unilaterally-Obtained SETSS and Speech-Language Therapy

The parent also argues that she sustained her burden to establish the appropriateness of the unilaterally-obtained services because she engaged an agency that provided credential and licensed providers to deliver SETSS and speech-language therapy services to the student, in conformity with the March 2023 IESP. In addition, the parent contends that the evidence in the hearing record supports an award of direct funding at the contracted rates for both services.

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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. The Student's Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to resolved on appeal, namely, whether the parent's unilaterally-obtained SETSS and speech-language therapy were appropriate to meet the student's needs.

Based on a review of the case manager's testimony, together with the remaining documentary evidence entered into the hearing record as evidence, there is little, if any, information regarding the student's needs, other than the March 2023 IESP. According to the March 2023 IESP, the student needed "limited prompting" to complete the morning classroom routine, adult facilitation and modeling to appropriately play and interact with peers, and redirection to assist him in focusing on a lesson (see Parent Ex. B at p. 1). At that time, the student could rote count from 1 to 10, "ha[d] a harder time counting with 1:1 correspondence without prompting," but understood "concepts of one, one more, and all" (id. at pp. 1-2). The student could "answer simple questions with repetition and wait time" and he understood "simple prepositions with prompting,"; however, the student did not know the names of all animals and inconsistently stated animal sounds (id. at p. 1). The student also inconsistently demonstrated his knowledge of basic shapes, and he could not identify or label letters of the alphabet (id.). He could, however, identify the letters in his name, spell his name, and recognize his name in print (id.). With respect to phonemic awareness, the March 2023 IESP indicated that the student required "prompting and wait time" to identify the letters learned (id.).

With respect to listening comprehension, the March 2023 IESP noted that, after hearing a story, the student needed "prompting to answer simple questions" (Parent Ex. B at p. 1). In addition, the student had "difficulty recalling events that happened at home," and needed "support, but [wa]s beginning to answer more complex 'wh' questions about stories" (id.). The student could "follow directions within context and with visual cues" (id.). At that time, the March 2023 IESP noted that the student could not "yet sequence," but that his "concept acquisition and retention [wa]s emerging" (id.).

As to his communication skills, the March 2023 IESP indicated that the student's "vocabulary [wa]s growing and he w[ould] verbally interact with teachers and peers" (Parent Ex. B at p. 1). The student spoke in "three to four word utterances," exhibited "poor" articulation, and was "sometimes difficult to understand" (id.). The student would, however, "sometimes repeat what he said upon request" (id.). In addition, the student could follow "simple two step directions," "answer some simple yes[or]no questions," and "with prompting," he could "verbally state his wants and needs" (id. at pp. 1-2). The March 2023 IESP also noted that the student could

participate in a conversation, but presented with "inconsistent vocal affect and low vocal volume, often mumbling his responses" (id. at p. 2). It was also noted, however, that the student's expressive and receptive language "repertoire [wa]s increasing" (id.).

Next, the March 2023 IESP reflected that the student could "sort objects according to color, shape, and size" and "demonstrate[d] understanding of the quantitative concepts of one, one more, [and] all" (Parent Ex. B at p. 2). The student also demonstrated an understanding of the "directional[or]positional concepts of in, on, in front, behind, and next to" (id.). The student required modeling to "help him classify objects into categories" (id.). According to the IESP, the student had difficulty "remaining focused for an adequate amount of time and answering question in a targeted manner" (id.). However, with "some redirection, [the student] c[ould] attend during circle time for [10] minutes" and he could "attend to teacher directed activities until completion" (id.). The student had no difficulty attending to a "self-chosen task until completion," but needed "[l]ots of prompting . . . to help him persevere on a take that he perceive[d] as difficult" (id.).

With regard to the student's social development, the March 2023 IESP reflected the student's difficulties in greeting peers and participating in a "three-part conversational volley" (Parent Ex. B at p. 2). The student could not "express how he [wa]s feeling in various social situations," and would often "sulk when upset or talk at an increase[d] volume when excited" (id.). With supports, the student's ability to "communicate this to an adult in a one on one setting [was] emerging" (id.).

As for the student's physical development, the March 2023 IESP indicated that he "happily participate[d]" in some activities after learning expectations and after gaining some confidence (Parent Ex. B at p. 2). In addition, it was noted that the student might require "encouragement to complete a task" because he demonstrated "poor attention and poor frustration tolerance" (id. at pp. 2-3). As reported in the IESP, the student was "easily distracted by visual stimuli in the room," and had shown "some reluctance with sensory experiences on therapeutic equipment with imposed movement or tactile sensory input" (id. at p. 3). Additionally, while the student could "fairly balance in standing on a soft dome during visual motor activity," he had difficulty with the "bilateral task of pushing together a 'pop tube'" and "mild difficulty with resistive manual tasks that require[d] coordination while using strength, such as opening and placing a clothespin" (id.). At that time, the student could not "effectively use clothing fasteners nor d[id] he dress himself" (id.). He could, however, "draw a closed circle," "build a block tower," and "copy small block designs" (id.). The student was "beginning to use simple interlocking puzzles," but needed "verbal prompts to notice straight sides and corners" (id.). The March 2023 IESP noted that the student could "identify colors" and "some basic shapes," and he could "throw and catch a ball from a very close distance" (id.).

Overall, it was noted in the March 2023 IESP that the student's "expressive and receptive language skills," together with his "learning and social difficulties," "negatively" affected his "access to the general education curriculum without supports" (Parent Ex. B at p. 3).

To address the student's needs, and as noted previously, the March 2023 CSE recommended that the student receive five periods per week of SETSS in a group, together with the following related services: two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute

sessions per week of individual OT, and one 30-minute session per week of counseling in a group (see Parent Ex. B at pp. 1, 9-10). The March 2023 IEP included annual goals targeting the student's needs in the areas of attention; expressive, receptive, and pragmatic language skills; cognitive skills; social skills; and fine motor skills (id. at pp. 4-8). Additionally, the March 2023 IESP included strategies to address the student's management needs, including preferential seating, praise and encouragement, small group instruction when possible, graphic organizers, editing checklists, prompting to remain on task, task analysis, step by step organization of tasks, a program with consistency in routines and schedule and structure, and visual and verbal prompting (id. at p. 3).

2. Services From Step Ahead

The parent argues on appeal that, contrary to the IHO's finding, she sustained her burden to establish the appropriateness of the unilaterally-obtained SETSS and speech-language therapy services from Step Ahead because she submitted evidence of the providers' respective credentials, as well as evidence demonstrating that the agency providers were following the student's March 2023 IESP, which included "detailed discussions, goals and frequency of services."

The district contends that the IHO properly concluded that the parent failed to sustain her burden of proof, noting that the case manager's affidavit testimony failed to include any information explaining how the SETSS and speech-language therapy services were delivered to the student, other than noting that the providers had reviewed the student's IESP and provided services accordingly. The district also contends that, notwithstanding the case manager's testimony about the preparation of progress reports, the hearing record was devoid of such evidence and the case manager could not testify about the student's progress. Similarly, the district argues that the case manager could not testify about the instructional methods used with the student. As a result, the district asserts that the hearing record supports the IHO's determination that the unilaterally-obtained services were not appropriate.

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

In the decision, the IHO found that the parent failed to sustain her burden to establish that the unilaterally-obtained SETSS and speech-language therapy services allegedly delivered to the student constituted a "program that was reasonably calculated to enable [the s]tudent to receive educational benefits" (IHO Decision at p. 6). In support of this determination, the IHO pointed to a dearth of evidence concerning how the SETSS or speech-language therapy services were provided to the student, what methodologies were used, the frequencies of the services delivered to the student, whether goals had been developed, and what, if any, progress had been made by the student (id.). After reviewing the evidence in the hearing record, as described above, and considering the parent's arguments on appeal, there is no basis to disturb the IHO's determination. For example, consistent with the IHO's findings, the hearing record is devoid of any progress

reports describing either the SETSS or the speech-language therapy services delivered to the student by Step Ahead, which could shed light specific strategies used for the student and, how the SETSS and speech-language therapy services provided were tailored to the student and met his unique needs.[11] Additionally, the hearing record fails to identify where Step Ahead delivered the SETSS and speech-language therapy services to the student, and neither the SETSS provider, the speech-language provider, nor the parent testified at the impartial hearing to describe those services or how, if at all, the SETSS or speech-language providers worked on the student's annual goals related to his academic or speech-language needs or what the respective providers otherwise did with the student.[12]

Consequently, consistent with the IHO's determination, the evidence in the hearing record, as described above, lacks sufficient information to show that the SETSS and speech-language therapy services Step Ahead allegedly delivered to the student constituted specially designed instruction sufficient to meet the student's identified needs. Accordingly, the parent failed to meet her burden to prove that the SETSS and speech-language therapy services were specially designed to meet the student's needs, and there is no basis to disturb the IHO's determination.

C. Compensatory Educational Services and Other Relief

Turning to the district's cross-appeal, the district asserts that the IHO erred by ordering the district to fund a bank of services for OT and counseling services at reasonable market rates as relief. The district argues that the parent failed to request this type of relief in the due process complaint notice, and therefore, the IHO erred by awarding it as relief.

The parent, in the request for review, argues that the IHO properly awarded this relief and points to the due process complaint notice in support of her assertion that it was appropriately requested therein. More specifically, the parent notes that she requested an order "[a]warding all related service and aides on the IESP for the 2023-2024 school year and (a) [RSAs] for such services if accepted by the parent's chosen providers; or (b) direct funding to each of the parent's

[11] The case manager testified that part of her job was making sure providers completed progress reports, that Step Ahead was paying a programmer to develop a database which included inputting students' progress reports, that progress reports were required at a minimum of two times per year and usually up to four times per year, and that the student's last progress report was December 2023 (Tr. pp. 13, 17-19). At the conclusion of the case manager's testimony, counsel for the parent requested that he be permitted to supplement the hearing record with the progress reports referred to in the case manager's testimony; however, the district objected and the IHO sustained the district's objection as the parent "had up until five days prior to this hearing to supplement the record" (Tr. p. 24). In the request for review, the parent acknowledges the IHO's denial of her request to supplement the hearing record with the referenced progress reports; however, the parent does not appeal from that finding and does not attempt to submit any progress reports as additional evidence at this stage of the proceeding.

[12] The case manager testified that SETSS were delivered to the student on an individual basis, "[a]t his school," and on a pullout basis in a separate location (Tr. p. 20). It is worth noting, this is not consistent with the March 2023 IESP, which recommended five periods per week of SETSS in a group (Parent Ex. B at p. 9). Although the parent asserts that she is "simply request[ing] that the providers be paid for delivering the services based on the IESP," there is no explanation provided regarding the divergences between the recommended program and the services that were purportedly being provided by Step Ahead. Additionally, the hearing record contains no information as to the delivery of speech-language therapy services.

chosen providers at the rate each charges, even if higher than the standard [district] rate for such service."

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"]).

Initially, a review of the parent's due process complaint notice reveals that, contrary to the parent's assertion, compensatory education was not requested as a form of relief at that time (see generally Parent Ex. A). However, by the time the impartial hearing took place, some seven months later, the parent's attorney requested compensatory education for the OT and counseling services the parent was unable to deliver to the student through Step Ahead and had not yet identified a proposed provider for those services (see Tr. pp. 8-9).

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.

Unlike the SETSS and speech language services, the IHO's order directing the district to fund a bank of compensatory counseling and OT services does not specify who is to provide the compensatory education services (IHO Decision at pp. 6-7). In arguing in the request for review to uphold this portion of the IHO's decision and the specific relief granted, payment for future therapies to be delivered by providers that may have been intended to be unilaterally-selected by the parent, the parent is effectively engaged in an end run around bearing the burden of proof for privately-obtained services. The undersigned has many times indicated that it may not be appropriate in the administrative due process forum to continue to place the burden of proof regarding compensatory education relief on the district in an administrative due process proceeding, and I note that no Court or other authoritative body in this jurisdiction has addressed the topic to date (Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). Where the parent seeks relief in the form of compensatory education to be provided by parentally-selected private special education companies, I find it is appropriate to place the burden of production and persuasion on the parent with regard to the adequacy of the proposed relief. In most cases, the district, as the party responsible to implement special education services in the first place, should be directed to carry out the remedial relief ordered by an administrative hearing officer. And here, the district did not have a reasonable opportunity to present any evidence on this matter, as the parent only requested this form of relief for the first time at the one-day impartial hearing.

In this case, the parent did not attend the impartial hearing and presented no evidence at all of the proposed private compensatory services that the parent either selected or intended to select and instead requested a quantitative bank of hours at a cost that would allow the parent to eventually obtain them (see Tr. pp. 1-32; Parent Exs. A-E), which the IHO essentially awarded less any funds already expended by the district (see IHO Decision at p. 7). The only other limitation on the IHO's order was that the awarded bank of services would not expire until two years from the date of the decision (id.).

Additionally, in this case the parent requested and obtained a pendency order for the OT and counseling services in the same frequencies and durations called for by the student's March 2023 IESP (see Pendency Impl. Form at pp. 1-2; Parent Ex. B at p. 10) and the district also appeared to agree to so implement the requested pendency program (see Pendency Impl. Form). Furthermore, during this appeal for State-level review, the district's attorney filed a request for a

specific extension of time to file the district's answer and cross-appeal on May 30, 2024, on notice to the parent's attorney, and indicated at that time that the student was receiving services pursuant to pendency. The parent's attorney did not respond to this statement, but consented to the district's request for an extension of time. Accordingly, I am not convinced that this is a student for which the district is incapable of arranging the delivery of compensatory OT and counseling services, and it is not necessary to establish a rate for the district to provide the compensatory education services.

In view of the forgoing, I find the IHO lacked an appropriate evidentiary basis to direct the district to fund a bank of compensatory educational services for the student to be provided by unknown providers at unknown costs. The student is entitled to 10-month services consisting of two 30-minute sessions per week of individual OT and one 30-minute session per week of counseling in a group for the 2023-24 school year, which should be based on a 36-week school year (see Educ. Law § 3604[7] [a 10-month school year consists of not less than 180 instructional days]). Further, the compensatory education award shall be delivered by the district, but must be reduced in light of any pendency services already provided to the student by the district (see Pendency Impl. Form at pp. 1-2).

VII. Conclusion

As discussed above, the IHO erred in awarding the parent funding for a bank of compensatory education "at a reasonable market rate." Consequently, the parent is entitled to an award consisting of 36 hours of compensatory OT services and 18 hours of compensatory counseling services to be provided by the district, less any services provided pursuant to pendency.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 17, 2024, is modified by vacating the award directing the district to fund a bank of compensatory educational services consisting of 36 hours of OT and 18 hours of counseling services; and,

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 36 hours of OT and 18 hours of counseling services for the 2023-24 school year, less any services already provided to the student pursuant to pendency.

Dated: **Albany, New York**
July 17 , 2024

JUSTYN P. BATES
STATE REVIEW OFFICER