The University of the State of New York

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

No. 24-242

Application of a STUDENT WITH A DISABILITY, by her 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 Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Educational Services of Brooklyn Inc. (Educational Services) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which addressed equitable considerations, and which awarded compensatory education. 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 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 March 25 2020, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with a projected implementation date of September 8, 2020 (Parent Ex. B).[1] The CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS), two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual physical therapy (PT) (id. at p. 11).

There is no evidence in the hearing record regarding the student's educational history after the March 2020 CSE meeting through the 2022-23 school year. Turning to the 2023-24 school year at issue, the hearing record reflects that the student attended a general education nonpublic religious school (Parent Ex. E ¶ 17). On November 20, 2023, the parent electronically signed an agreement with Educational Services, which indicated that the district developed an "IEP/IESP" for the student and that the company would "implement the program to whatever extent possible" for the 2023-24 school year (Parent Ex. F).[2] The agreement identified an hourly rate for "SETSS/SEIT" (id.).

In a due process complaint notice, dated January 18, 2024, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services under State law for the 2023-24 school year (Parent Ex. A at p. 1). The parent asserted that, for the 2023-24 school year, the student required the same special education and related services set forth in the March 2020 IESP (id.). The parent claimed she was unable to locate service providers on her own at the district's standard rates for the 2023-24 school year and the district failed to provide those services in accordance with the March 2020 IESP (id.). The parent indicated that she found providers willing to provide the student "with all required services" for the 2023-24 school year but at rates higher than the standard district rates (id.). The parent sought an order requiring the district to continue the student's services under pendency, an award of funding for SETSS delivered by a private company at an enhanced rate, and an award of "all related services and aides on the IESP" via related services authorizations (RSAs) or direct funding to the parent's chosen providers at the rates charged (id. at p. 2).[3]

After a status conference on February 21, 2024, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on March 13, 2024 (Tr. pp. 1-32). In a decision dated May 3, 2024, the IHO found that the district did not contest the student's entitlement to equitable services but failed to prove that it developed and implemented an IESP for the student for the 2023-2024 school year and, therefore, the IHO found that the district denied the student

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

[2] Educational Services is a corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] In an agreement signed by the district on January 29, 2024, the parties agreed that the student's pendency placement lay in the March 2020 IESP (Pendency Implementation Form).

equitable services under Education Law § 3602-c for the 2023-24 school year (IHO Decision at pp. 3, 5, 7-8, 10-11). However, the IHO determined that the parent did not meet her burden to prove that the unilaterally obtained educational services were appropriate for the student (id. at p. 3). The IHO determined that the testimony provided by the financial director and the session notes did not sufficiently demonstrate individualized instruction to meet the student's unique needs (id. at pp. 5-9, 14). In particular, the IHO found that the session notes completed by the provider did not adequately identify or address the student's needs or reflect individualized instruction and often contained poorly drafted and unmeasurable goals and reflected that the provider frequently addressed goals related to speech and language, PT, or OT, but without evidence of the efficacy or appropriateness of the provider delivering such support (id. at pp. 8, 14). With respect to equitable considerations, the IHO noted that, had he found the unilaterally obtained services to be appropriate, he would nonetheless have reduced the amount of funding awarded "based on the vagueness of Financial Director's testimony and the market report introduced by the [district]" (id. at p. 15).

While denying the parent's request for district funding of unilaterally-obtained SETSS, the IHO ordered compensatory education in the form of district funding of speech-language therapy, OT, and PT services for the 2023-24 school year to be delivered by providers selected by the parent at a rate to be determined by the district (IHO Decision at pp. 3, 15-19).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her requested relief. The parent asserts that a Burlington/Carter analysis should not apply to the circumstances of her appeal and also argues that, even under a Burlington/Carter analysis, she is entitled to her requested relief. The parent argues that she utilized the services of the company, Educational Services, which used an appropriately credentialed/licensed provider for the SETSS for which funding was requested. The parent also asserts that the IHO erred in critiquing the provider's sessions notes, arguing that, the entries detailed the student's needs and the focus of the work being done with the student, and that there was nothing inappropriate about the provider working on OT goals.

As to equitable considerations, the parent argues that the hourly rate for SETSS charged by Educational Services was reasonable and that the IHO erred in relying on the market report offered by the district.

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly determined that the parent did not meet her burden to prove the appropriateness of SETSS delivered by Educational Services for the 2023-24 school year and that equitable considerations did not support a full award of funding for the services. As an additional equitable consideration that the district argues supports denial of the parent's requested relief, the district alleges that the parent failed to provide the district with notice of her intent to unilaterally obtain SETSS from Educational Services and seek public funding for the costs of such services. As for a cross-appeal, the district asserts that the IHO erred in awarding compensatory education because the parent did not request relief in this form in the due process complaint notice.

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 [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.).[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

[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]).

[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.

enrollment services for which a public school district may be held accountable through an impartial hearing.

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

VI. Discussion

A. Unilaterally-Obtained Services

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

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[6] 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

[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 that the parent obtained from Educational Services of Brooklyn Inc. (Educ. Law § 4404[1][c]).

186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; ; 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 [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). 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).

Here, the only evidence of the student's needs is the description of the student in the March 2020 IESP, which was developed when the student was four years old, more than three years prior to the beginning of the 2023-24 school year at issue (Parent Ex. B). In the March 2020 IESP, the present levels of performance reflected a "recent" progress report prepared by the student's special education itinerant teacher (SEIT) that indicated the student's academic skills were "inconsistent" (id. at p. 1).[7] She had difficulty retelling stories, answering questions, counting using 1:1 correspondence, sequencing a picture story, following multistep directions, and completing tasks without multiple repetitions of the steps involved (id.). Additionally, the IESP indicated that the student had difficulty "taking part in classroom routines," as she exhibited a poor attention span, struggled to focus during circle time, and sat too close to peers (id.). According to the IESP, the student knew her shapes and colors, her knowledge of numbers and letters was emerging, and she required "pre/post teaching strategies" to grasp academic concepts, as well as ongoing redirection, refocusing, and modeling throughout the day (id.). The CSE identified strategies to address the management needs of the student including ongoing verbal prompting and redirection to encourage on-task behavior, checks to ensure comprehension, directions and routines broken down, verbal praise, encouragement, and positive reinforcement (id. at p. 3).

At the time of the March 2020 IESP, the student was receiving two 30-minute sessions per week of speech-language therapy that focused on the student's articulation/phonology and receptive/expressive language deficits (Parent Ex. B at p. 1). Specifically, the student's use of several phonological processes negatively affected her speech intelligibility, her lack of focus affected her ability to follow multi-step directions, and she exhibited difficulty using different forms of speech and language to express herself during playtime or to resolve a conflict (id.). Socially, the IESP described the student as friendly and easygoing, and that she enjoyed interacting with peers (id. at p. 2).

In the area of physical development, the student's March 2020 IESP reflected an OT report indicating that the student received "services to address concerns in the areas of motor coordination, fine motor skills, visual motor/perceptual skills, prewriting skills, attention, as well as sensory processing (Parent Ex. B at p. 2). The IESP described the student's difficulties with

[7] At the time of the March 2020 CSE meeting, the student was almost five years old, and it is unclear when the SEIT report was prepared (see Parent Ex. B at p. 1). State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

graphomotor and scissor skills, as well as sensory seeking behavior that contributed to her difficulty attending in the classroom (id. at pp. 2-3). A PT report, as reflected in the IESP, indicated that the student was working on decreasing toe-walking, improving balance and stair climbing skills, increasing her body awareness in space, and overall gross motor skills (id. at p. 3). According to the IESP, the student needed to receive PT to "improve her overall strength, transitional movements, stair climbing skills, jumping, and ball playing skills" (id.).

In written testimony, the Educational Services director stated that her agency provided five hours per week of SETSS to the student during the 10-month 2023-24 school year (Parent Ex. E ¶¶ 2, 13).[8] According to the director, the SETSS provider who worked with the student was certified by New York State to teach students with disabilities, and she was also "trained and experienced to teach literacy and comprehension to school aged students" (id. ¶ 14).[9] The director also testified that the SETSS provider delivered the student's "1:1 direct" services at her "mainstream school," and that the SETSS provider also prepared for sessions, developed goals, wrote progress reports, and met with teachers and parents (id. ¶¶ 16, 17).[10, 11] Further, the director testified that goals were developed for the student to work on during the 2023-24 school year, which were reviewed quarterly, and her "progress [wa]s measured through quarterly assessments, consistent meetings with the provider and support staff, observation of [the student] in the classroom, and daily session notes" (id. ¶¶ 18, 21). Additionally, the director testified that the individualized sessions delivered to the student "include[d] a great deal of specialized instruction," and that the student "ha[d] already shown signs of progress with her SETSS service provider" (id. ¶¶ 19, 22). During the hearing, the director testified that Educational Services was not providing any other service to the student (Tr. p. 16).

The director's testimony does not offer much support to the parent's position that the SETSS delivered by Educational Services were appropriate to meet the student's special education needs during the 2023-24 school year. The director testified that she had not observed any of the student's SETSS sessions, she did not work 1:1 with the provider, she did not know what happened in the student's SETSS sessions, and what she did know about the SETSS provided to the student came from the descriptions in the session notes (Tr. pp. 17, 20-21).[12] Further, the IHO found it was

[8] The director referred to SETSS as services "for math, [English language arts] ELA, reading comprehension, and general studies subjects" (Tr. p. 19).

[9] The name of the person listed in the session notes holds an internship certificate to teach students with disabilities birth to grade 2 (compare Parent Ex. D at p. 2, with Parent Ex. G).

[10] Although the director testified that 1:1 SETSS was mandated in the student's IESP, review of the IESP reflect that it provided for group services (compare Tr. p. 16, with Parent Ex. B at p. 11).

[11] The director's affidavit includes a typographical error in that the director referred to a different student in stating that the provider delivered services (Tr. pp. 15-16; Parent Ex. E ¶ 16).

[12] The director offered inconsistent testimony about her own role in the company, referring to herself as both the "Director in charge of the finances," the "Program Director," and the "Director of Educational Services"; however, when asked whether she would be the person who drafted the student's progress reports or curriculum she replied "[n]o, the director does that" (compare Tr. p. 17, with Parent Ex. E ¶¶ 2, 3, 4). According to the director, Educational Services hired a "supervisor," who was also referred to as a director, who worked 1:1 with the

"difficult to credit" the director's testimony given the director's confusion over the name of the student's SETSS provider (IHO Decision at p. 6; see Tr. pp. 14-15, 18-19; Parent Ex. E ¶ 16).[13]

The parent did not present testimony by the SETSS provider or the progress reports purportedly prepared by the provider (see Parent Ex. E ¶ 16). Other than the director's testimony, the only other evidence offered regarding the SETSS is what appears to be a fillable document, identified as "session notes"; however, the document, itself, does not bear any title or reflect the origin of the document (Parent Ex. G at pp. 1-19).[14] The session notes reflect the student's name; the SETSS provider's name; the date of session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); areas to describe goals; and areas for notes (id.).[15]

Overall, a review of the session notes shows that the student participated in sessions with the SETSS provider from October 16, 2023 through February 27, 2024 (see generally Parent Ex. G). Although the director testified that "[g]oals were created for [the student] to work on during the 2023-2024 school year," review of the session notes shows that the SETSS provider identified the student's March 2020 IESP annual goals in OT, PT, speech-language, and academics as goals she was working on during sessions (Parent Ex. E ¶ 18; compare Parent Ex. G, with Parent Ex. B at pp. 4-10). There is no evidence in the hearing record that annual goals developed three years prior, when the student was four years old, continued to address the student's needs. In addition, after reviewing the student's session notes, I share the concerns raised by the IHO in his decision (see IHO Decision at pp. 5-9, 14). The IHO characterized the session notes as "incoherent," noting that they referred to the student as being aged 20 to 25 year olds, described sessions (30 out of 54) apparently devoted to addressing related service goals even though the provider was not certified as such and the hearing record was not developed regarding whether the teacher was addressing the goals "effectively or appropriately for Student's needs," referenced use of leveled reading books despite that a session was purportedly focused on the student's math skills, only vaguely referred to classroom supports, and repeatedly worked on the same goals without reflecting or explaining the student's progress over time, which is especially troubling as the goals being worked on were already over three years old (id. at pp. 5, 7-9; see Parent Ex. G).

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provider (Tr. pp. 16-17).

[13] Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

[14] The director testified that the provider completed session notes after each session as to what took place during the session (Tr. p. 21; see Parent Ex. G).

[15] The hearing record does not include any evidence describing the student's school day at her religious, nonpublic school, such as the length of her day or a class schedule (see generally Tr. pp. 1-32; Parent Exs. A-G; Dist. Ex. 1).

The parent argues that "[t]ypos and 'poorly drafted,' session notes are not a basis to deny relief if the preponderance of the evidence demonstrates that the burden of appropriateness as articulated by the Second Circuit has been met" (Req. for Rev. ¶ 13). While perhaps, as a practical matter, a provider need not maintain copious session notes, here, where the poorly drafted session notes are the only substantive evidence about the services provided to the student, the preponderance of the evidence does not demonstrate the services delivered by Educational Services were appropriate and the parent has not presented a sufficient basis for departing from the IHO's conclusions.

B. Compensatory Education

I turn next to the district's cross-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"]).

Initially, a review of the parent's due process complaint notice reveals that compensatory education was not explicitly requested as a form of relief at that time (see generally Parent Ex. A). During the impartial hearing, the parent's attorney characterized the relief sought as compensatory education but was specific in referring to the SETSS delivered by Educational Services (see Tr. p. 24), which as discussed above, could only effectively be examined under the Burlington/Carter framework. Thereafter, the parent's attorney stated the parent's request for related services "through independent providers, either through RSAs or reasonable market rates, depending on what's available" (Tr. pp. 29-30).

The IHO's order directing the district to fund a bank of compensatory speech-language therapy, OT, and PT services to be delivered by providers of the parent's choosing (IHO Decision at pp. 17-18). In requesting relief in the form, district funding for future therapies to be delivered by providers to be unilaterally selected by the parent, the IHO effectively permitted the parent to engage in an end run around bearing the burden of proof for privately-obtained services. Decisions from the Office of State Review have 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, and it is worth noting 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, it is appropriate to place the burden of production and persuasion on the parent with regard to the adequacy of the proposed relief. However, in most cases, where a parent is in fact seeking compensatory education as relief, 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.

During the impartial hearing, the parent did not present evidence regarding proposed private compensatory services that the parent either selected or intended to select and instead requested an order that would allow the parent to eventually obtain services, which the IHO essentially awarded (see IHO Decision at pp. 17-18).

Although there is little current information in the hearing record about the student's needs and progress during the 2023-24 school year, such that an award of compensatory related services could be made to place the student in the position the student would have been in if not for the denial of equitable services, in this case, the parent requested a pendency order for SETSS and related services in the same frequencies and durations called for by the student's March 2020 IESP (see Parent Ex. A) and the district agreed to implement the requested pendency program (see Pendency Impl. Form). The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services

where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

Additionally, 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 June 17, 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 related 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. However, as the student was entitled to pendency services from the filing of the due process complaint notice on January 18, 2024 through the issuance of this decision, after the conclusion of the 2023-24 school year, there was sufficient basis to award two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT for at least a portion of the 2023-24 school year . 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).

VII. Conclusion

Regarding unilaterally-obtained services, having determined that the parent failed to establish the appropriateness of the SETSS delivered by Educational Services for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of district funding for the services (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). Regarding compensatory education, the evidence in the hearing record does not support the IHO's award of a bank of compensatory services or district funding for related services by providers of the parent's choosing. Rather, the hearing record supports an award consisting of 18 hours of compensatory speech-language therapy, 18 hours of compensatory OT services, and 18 hours of compensatory PT to be provided by the district, less any services provided pursuant to pendency.

THE APPEAL IS DISMISSED.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision, dated May 3, 2024, is modified by vacating the award directing the district to fund a bank of compensatory educational services to be delivered by providers of the parent's choosing at reasonable market rates; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 18 hours of compensatory speech-language therapy, 18 hours of compensatory OT services, and 18 hours of compensatory PT for

the 2023-24 school year, less any services already provided to the student pursuant to pendency.

Dated: **Albany, New York**
August 1, 2024

STEVEN KROLAK
STATE REVIEW OFFICER