The University of the State of New York

The State Education Department
State Review Officer
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No. 24-298

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 Cynthia Sheps, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications

of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, 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 NY CRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail.

A CPSE convened on October 6, 2022, and, finding the student was eligible for special education as a preschool student with a disability, developed an IEP for the student with a projected implementation date of October 2022 and an anticipated annual review date of October 6, 2023 (Parent Ex. B at pp. 1, 3). The CPSE recommended that the student receive five hours per week of individual special education itinerant teacher (SEIT) services, 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) at a childcare location selected by the parent (id. at pp. 3, 15).[1]

Based on the limited evidence in the hearing record, it appears that the student was parentally placed at an early childhood program in a nonpublic school for the 2023-24 school year (see Parent Exs. A at p. 1; E at p. 1).

In a due process complaint notice, dated January 18, 2024, the parent alleged that the district failed to provide adequate special education and related services for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further asserted that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services by failing to provide services providers (id.). The parent also claimed that she was unable to find providers willing to accept the district's standard rates but found providers willing to deliver all of the student's required services for the 2023-24 school year at rates higher than the standard district rates (id.). The parent requested an "[a]llowance of funding for payment to the student's providers/agencies" for the provision of speech-language therapy, PT, and OT at "the enhanced rate each charge[d] for their services" for the 2023-24 school year (id. at p. 2).[2]

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH) and a prehearing conference was held on February 20, 2024 (Tr. pp. 1-5). Two status conferences were held on March 15, 2024 and April 17, 2024; neither the parent nor her attorney appeared for the status conference held on April 17, 2024 (Tr. pp. 5-17).

On May 2, 2024, the parent electronically signed a document on the letterhead of Step Ahead indicating she was "aware that the rate of the related services provided to [her] child [we]re $250 an hour" and that she would be responsible to pay for services delivered to the student if they

[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). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs. 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]).

[2] The parent also requested and obtained a pendency via an agreement between the parties in the same frequencies and durations called for by the student's October 2022 IEP (Jan. 29, 2024 Pendency Implementation Form). The pendency implementation form did not include SEIT services (see id.).

were not paid for by the district (Parent Ex. G).[3] As part of the letter, the parent further stated she was "aware that the services being provided to [her] child [we]re consistent with those listed in [her] child's IEP/IESP dated: 10/06/2022" (id.).

The parties reconvened on May 9, 2024 for an impartial hearing (Tr. pp. 18-36). The parent introduced seven exhibits into the hearing record and the district did not raise any objections (Tr. pp. 21-22, 24). The district did not disclose or introduced any documentary evidence (Tr. p. 20). Neither party introduced witness testimony (Tr. pp. 20-21). During the impartial hearing, the district indicated that it was not waiving its June 1 defense and that it questioned whether the unilaterally obtained services were appropriate (Tr. pp. 22-23). Further, the parent through her attorney clarified that she was unable to secure PT services for the student and, thus, she was only requesting direct funding for the OT and speech-language therapy services and "a bank of hours at a reasonable market rate" for the missed PT services (Tr. pp. 23-24). Both parties presented combined opening and closing statements (Tr. pp. 25-31).

In a decision, dated May 28, 2024, the IHO determined that the parent's due process complaint notice properly raised implementation of the October 2022 IEP for the 2023-24 school year and dismissed the district's June 1 defense as being inapplicable because the student was a preschool student with an IEP in place (IHO Decision at pp. 4-5). The IHO then determined that the district did not offer any evidence to show that it provided the student with the services recommended in the October 2022 IEP during the 2023-24 school year and accordingly it failed to show that it provided the student a FAPE for the 2023-24 school year (id. at p. 11). 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 unilaterally obtained speech-language therapy and OT services were appropriate to meet the student's needs (id. at pp. 11-12). In the alternative, the IHO determined that equitable considerations favored the parent (id. at p. 12). Therefore, the IHO denied the parent's request for direct funding at an enhanced rate for the related services provided to the student by Step Ahead during the 2023-24 school year (id. at pp. 12-13). Additionally, the IHO determined that the district did not dispute the student's need for PT services, nor did it put forth an argument as to why a bank of compensatory PT hours would not be appropriate; accordingly, the IHO awarded 32 hours of compensatory PT services to be provided by a "qualified provider" of the parent's choosing at a reasonable market rate that would expire one year from the date of the decision (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in denying her request for funding of unilaterally-obtained OT and speech-language therapy services. The parent asserts that the burden of proof should have lain entirely with the district as the parent was only seeking implementation of the district's recommended program, but also asserts that the IHO erred in finding the parent's privately obtained OT and speech-language therapy services were inappropriate. As relief, the parent requests direct funding for the two 30-minute sessions per week of OT services and two 30-

[3] Step Ahead is a private corporation that has not been approved by the Commissioner of Education as a preschool program or provider with which districts may contract to provide special education services to preschool students with disabilities (see Educ. Law § 4410[9]; 8 NYCRR 200.1[nn]).

minute sessions per week of speech-language therapy services provided to her son by Step Ahead at a rate of $250 per hour for the 2023-24 school year.

In an answer with cross-appeal, the district argues that although the IHO properly denied the parent's request for direct funding for the privately obtained OT and speech-language therapy services, the IHO erred by failing to dismiss the parent's entire due process complaint notice on the basis that the student was a preschool student and not eligible to receive equitable services pursuant to Education Law § 3602-c. Additionally, the district argues that the IHO erred by awarding compensatory PT services as relief arguing that such relief was outside the scope of the parent's due process complaint notice. The district also appeals from the IHO's determination that equitable considerations favored the parent, arguing that there was inadequate proof of the parent's obligations to pay for the private OT and speech-language therapy services and that the parent failed to provide a 10-day notice to the district of her intent to engage in self-help by unilaterally obtaining private related services and seeking district funding for the costs of those services.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents'

opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

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

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; 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., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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 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., 694 F.3d at 184-85).

VI. Discussion

Initially, I turn to the district's cross-appeal asserting that the IHO erred in declining to dismiss the parent's due process complaint notice because the parent was seeking equitable services for which the student was not eligible as the student was a preschool student with a disability during the school year at issue.

Although the parent correctly states that this case involves a preschool student with a disability under Education Law § 4410, as noted by the district, the parent's attorney, who drafted the due process complaint notice, repeatedly referred to the October 2022 IEP as an individualized education services program (IESP) in the due process complaint notice (Parent Ex. A at p. 1). References by the parent to the elements found in Education Law § 3602-c, equitable services, and an IESP were in error as the student was a preschool student with a disability for the entire 2023-24 school year. 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 http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The district's argument, as presented to the IHO as defense under Education Law § 3602-c issue, was not actually about the dual enrollment statute at all; at no time has the district asserted that the student would have been eligible for dual enrollment services had the parent filed a request for services by June 1, 2023. Instead, the real nature of the district's assertion was that the parent inadequately and inaccurately described the nature of the problem, which is just a disguised sufficiency challenge to the parent's due process complaint notice (see 20 U.S.C. § 1415[b][7], [c][2]; 34 CFR

300.508[a][5], [d][2]).[5] However, regardless of mislabeling the October 2022 IEP as an IESP, the district did not timely file a challenge to the sufficiency of the due process complaint notice with the IHO,[6] and it was otherwise apparent to the IHO that the due process complaint notice that the parent was seeking implementation of the related services identified on the October 2022 IEP (see Parent Ex. A).[7] Thus, the district's argument that the IHO erred by not dismissing the parent's due process complaint notice because the student was ineligible for equitable services pursuant to Education Law § 3602-c is unfounded and, as the IHO's determination that the district denied the student a FAPE is not otherwise appealed, this determination has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained speech-language therapy and OT services delivered to the student by Step Ahead during the 2023-24 school year.

A. Unilateral Placement

Prior to reaching the merits of the dispute, it is worth addressing the parent's argument that the burden of proof should be entirely on the district, asserting that a Burlington/Carter analysis should only apply when a parent is challenging and rejecting an IEP developed by a school district and that if the parent wants to implement the recommended district program, the parent should only have to show that the providers are credentialed. In review of this argument, the parent suggests that she is permitted to substitute her own private providers anytime the district fails to implement some or all of an IEP, and that she does not have to show that the services were appropriate for the student. However, the IDEA does not permit parents who have opted to parentally place their child in a nonpublic school to substitute their own providers for special education services and states that:

> The provision of [equitable] services pursuant to this subparagraph shall be provided—

[5] State regulations provide that a parent or district may file a due process complaint notice "with respect to any matter relating to the identification, evaluation or educational placement of a student with 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][7][A][ii]; 34 CFR 300.508[b]). A due process complaint notice must contain, at a minimum, (i) the name of the student; (ii) the address of the residence of the student; (iii) the name of the school the student is attending; (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and (v) a proposed resolution of the problem to the extent known and available to the party at the time (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). The other party may challenge the sufficiency of the due process complaint notice it if does not meet these requirement (8 NYCRR 200.5[i][3]).

[6] Had the district followed the procedure and filed a sufficiency challenge, the IHO may well have had grounds to find it insufficient.

[7] Counsel for the parent represented that the student was receiving SEIT services through the district for the 2023-24 school year and that is why the parent was not seeking the SEIT services recommended in the October 2022 IEP in this proceeding (Tr. p. 31).

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(20 U.S.C. § 1412[a][10][A][vi] [emphasis added]). In this case it is the parent, not the district, who contracted with Step Ahead as a self-help remedy. While the parent may have an avenue to pursue the relief she seeks, that avenue is assessed under the Burlington/Carter framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at, 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at192). "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).

In this instance, the IHO appropriately applied the Burlington/Carter standard and determined that parent did not meet her burden that the OT and speech-language therapy services provided by Step Ahead during the 2023-24 school year were appropriate to meet the student's unique needs (IHO Decision at pp. 7-12).[8]

1. Student's Needs

Although the student's needs, related to areas addressed by OT and speech-language therapy, are not in dispute, a description thereof provides some context to determine whether the parent's unilaterally obtained OT and speech-language therapy services were appropriate to address those needs.

The October 2022 CPSE IEP, prepared when the student was approximately three years of age, reflected that administration of the Stanford Binet Intelligence Scales, Fifth Edition to the student yielded a full scale IQ of 87, a verbal IQ of 88, and a nonverbal IQ of 87-all scores in the

[8] The parent, in her request for review, alleges that the "IHO, who is not an [sic] a licensed provider of any of the services, replace[d] the credentialed providers' decision-making process as to what work should have been done to [s]tudent for the program to be implemented appropriately" (Req. for Rev. ¶17). However, the parent cites no authority for this argument, and the unreasonable criticism of the IHO is merely a dubious attempt to excuse the parent's failure to present evidence to prove that the services delivered to the student by Step Ahead were appropriate to meet the student's special education needs. If the parent wanted to present an expert witness to provide evidence of the student's needs and the services being delivered to the student, the parent could have introduced such evidence during the hearing; however, the parent cannot wait until an appeal to attempt to qualify progress reports as expert testimony without having the providers testify.

low average range (Parent Ex. B at p. 3). Administration of the Temperament and Atypical Behavior Scale yielded a score that indicated the student exhibited "significant difficulties in temperament and self-regulation" and the Vineland Adaptive Behavior Scales, Third Edition yielded scores in the moderately low range in communication, socialization, and motor skills domains, with a score in the adequate range on the daily living skill domain (id.). On the Developmental Assessment of Young Children, Second Edition, the student's scores were in the poor range for cognition, communication, receptive language, physical development, and fine motor skills, with scores in the below average range for expressive language, social/emotional development, gross motor, and adaptive skills (id.). Speech-language assessments, including the Preschool Language Scales, Fifth Edition, yielded standard scores of 80 (auditory comprehension), 91 (expressive communication), and 84 (total language), and while a standard score was not obtained on a measure of articulation skills, the IEP indicated that it was "hard to decipher" the student's "running speech" due to "many speech errors" coupled with his "weak oral musculature" (id.). Administration of the Peabody Developmental Motor Scales, Second Edition to the student yielded a gross motor quotient of 76 (fifth percentile), a fine motor "[r]aw [s]core" of 76, and according to results of the sensory profile, the student demonstrated "a definite difference" in the under responsive/seeks sensation area (id. at pp. 3-4).

In the area of social/emotional development, the October 2022 IEP reflected that the student "present[ed] with significant difficulties in temperament and self-regulation," including exhibiting mood swings, frequent anger and frustration, tantrums, irritability, impulsivity, aggression, and limited social play skills (Parent Ex. B at p. 5). The student was not able to verbalize his emotions and became excessively frustrated when limits were set (id.). Additionally, the student grabbed toys from peers, did not share or wait his turn in a group setting, preferred to play alone, and thrived with 1:1 interaction (id.). With respect to physical development, the IEP indicated concerns about the student's strength, balance, and coordination; in that he demonstrated poorly graded motor movement control, walked on his toes, tripped easily, and used "quick" movements that made him susceptible to losing his balance and falling (id. at pp. 5-6). In the area of fine motor and visual motor skills, the student presented with delays completing grasping, bilateral hand, and pre-writing activities (id. at app. 5-6). Regarding sensory processing, the student displayed sensory seeking behaviors such as enjoying rough and tumble play, swings, tight hugs, and constant movement, sensory avoidant behaviors such as a dislike for grooming activities and getting wet, and limited safety awareness (id.). Identified supports to address the student's management needs included verbal and visual cuing, positive reinforcement, repetition, chunking and simplification of directions, small group instruction, verbal preparation, and modeling (id. at p. 6). Additionally, the student needed positive behavioral interventions, supports and strategies to address behaviors that impeded his learning (id.).

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 OT 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 October 2022 IEP, which included "detailed discussions, goals and frequency of services" (Req. for Rev. ¶ 15).

Initially, I note that the parent contends that she was implementing the services recommended in the student's October 2022 IEP, such an allegation is not entirely accurate. As described above, the October 2022 IEP recommended that the student receive five hours per week of SEIT services, 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 (Parent Ex. B at pp. 1, 15). However, the only services the parent privately obtained for the student for the 2023-24 school year were OT and speech-language therapy, and although December 2023 progress reports indicate that two 30-minute sessions of each service were being provided in accordance with the October 2022 IEP, there is no indication in the hearing record identifying a start date for those services (see Parent Exs. E; F). Additionally, as noted above, the parent's attorney in his combined opening and closing statement indicated that the district was providing SEIT services to the student during the 2023-24 school year (Tr. p. 31);[9] however, there is no evidence in the hearing record to support this assertion and it is unclear from the evidence provided how the student's needs that the October 2022 IEP intended to address through SEIT services and PT may have been addressed during the 2023-24 school year. Nevertheless, in this instance, I have reviewed the information in the hearing record solely as it pertains to the student's needs related to and the delivery of speech-language therapy and OT services.

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 IHO's decision, she found that the parent failed to sustain her burden to establish that the unilaterally-obtained OT and speech-language therapy services allegedly delivered to the student were appropriate (IHO Decision at pp. 11-12). The IHO determined that although the parent provided evidence of the providers' qualifications, that was not sufficient to satisfy the parent's burden and the IHO further indicated she was unaware of any case law holding that a parent's burden was met solely through evidence of the providers' qualifications (id. at p. 11). The IHO then noted that the parent presented no witnesses and introduced "barebones" progress reports that were created "nearly five months prior to the hearing" (id.). The IHO determined that the progress reports contained "absolutely no information about the services provided for the bulk of the [2023-24] school year" nor did the reports establish the provision of specially designed instruction by either provider (id.). The IHO also noted that the OT and speech-language progress reports contained no indication of how instruction was adapted to the unique needs of this student, or any specific details about the delivery of instruction, specific methodologies used, when the sessions were provided, the location of instruction, or whether sessions were push-in or pull-out (id.). Further, the IHO determined that there was no objective or non-conclusory evidence of progress in the hearing record, that the hearing record lacked any assessment results, updated

[9] This position also conflicted with the parent's allegation that the parent's attorney drafted into the January 2024 due process complaint notice stating that the district did not provide any services to the student during the 2023-24 school year (Parent Ex. A at p. 1).

progress reports, teacher reports, report cards to establish that the student made any meaningful progress, and that there were no session notes or attendance records entered into the hearing record (id.).[10] Accordingly, the IHO determined that the hearing record was "too sparse" to meet the parent's burden (id.).

The district contends that the IHO properly concluded that the parent failed to sustain her burden of proof, noting that the hearing record lacked testimony from the student's providers at Step Ahead to show that such services were actually provided to the student. Additionally, the district notes that although the affidavit from the secretary of Step Ahead indicated that attendance records were provided, there were no attendance records in the hearing record to support that the speech-language therapy and OT services were provided to the student. The district also contends that even though the speech-language therapy and OT progress reports set forth goals for the student, such progress reports contain no information about whether the student achieved any of the stated goals, in whole or in part, or what assessments, if any, were used to create and measure the progress the student made towards the goals or how the goals were individually tailored to meet the student's needs. The district also notes the lack of testimony from the student's private classroom teacher or the parent as to how speech-language therapy and OT services were appropriate for the student. Further, the district contends that the hearing record lacked information as to how the speech-language therapy and OT services addressed the student's special education needs. As a result, the district asserts that the hearing record supports the IHO's determination that the unilaterally obtained services were not appropriate.

Turning to the services Step Ahead provided to the student, regarding speech-language therapy, the December 20, 2023 progress report indicated that the speech-language pathologist delivered two 30-minute sessions per week of speech-language therapy to the student and "follow[ed] the goals and recommendations" from the October 2022 IEP (Parent Exs. B at p. 15; D at p. 1; E at p. 1). The speech-language pathologist reported that the student exhibited expressive and receptive language delays, articulation delays and poor speech intelligibility, limited vocabulary, and decreased oral motor skills (Parent Ex. E at p. 1). The progress report reflected the student's then-current annual goals and short-term objectives, which were consistent with the October 2022 IEP annual goals and were directed at improving his language and articulation/oral

[10] The parent also argues on appeal that the IHO erred in finding that a lack of progress was a defining factor in determining the appropriateness of the related services delivered by Step Ahead. Though it is well settled that a finding of progress is not required for a determination that a student's unilateral placement, or in this case unilaterally-obtained related services, are adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364), a finding of progress is nonetheless a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). Moreover, the IHO made her determination that the unilaterally-obtained OT and speech-language therapy services were not appropriate based on factual determinations other than the lack of evidence of progress, such as, a lack of evidence on how instruction was adapted to the unique needs of this student (see IHO Decision at p. 11). Thus, the parent's argument on appeal regarding the IHO's determination on progress is unfounded.

motor skills (compare Parent Ex. B at p. 12, with Parent Ex. E at p. 1-2). According to the progress report, the student was "performing all goals with 60-70 [percent] accuracy given cueing and support by the clinician" (Parent Ex. E at p. 2). The speech-language pathologist also reported that the student demonstrated "extreme difficulty in completing all speech related tasks as he [wa]s highly distractible" and the "[g]oals [we]re addressed through a variety of speech exercises which incorporate[d] worksheets and educational games" (id.). New annual goals were developed, and the speech-language pathologist recommended that the student continue to receive twice weekly 30-minute sessions of speech-language services (id. at pp. 2-3). The IHO noted in her decision that it was unclear from the hearing record whether the speech-language pathologist continued working on the October 2022 IEP goals after December 2023 or switched to the recommended new goals (IHO Decision at p. 11).

For OT, in the progress note dated December 18, 2023, the occupational therapist indicated that she delivered two 30-minute sessions per week of OT to the student and "follow[ed] the recommendations" in the student's October 2022 IEP (Parent Exs. B at p. 15; D at p. 2; F at p. 1). The occupational therapist reported that the student presented with poor grasping and visual motor functioning skills, decreased tone and strength in his hands, and poor bilateral coordination and motor planning, focusing, and attention skills (Parent Ex. F at p. 1). Additionally, the occupational therapist noted that the student exhibited sensory processing difficulties and low proprioceptive awareness (id.). Review of the OT progress report shows that the student's then-current annual goals were not identified; however, the occupational therapist reported that the student "show[ed] slow and steady progress in all targeted areas of development" (id.). Nevertheless, the student's overall challenges in low tone, diminished processing, weakness and diminished endurance, decreased motor planning, and processing interfered with the student's ability to engage and participate in the educational process (id.). The OT progress report identified new annual goals designed to improve the student's fine and graphomotor, visual and perceptual motor, sensory processing, and attention skills, and the occupational therapist recommended that he continue to receive two 30-minute sessions per week of OT (id. at pp. 1-2). The IHO noted that the OT progress report contained no information about the goals the student was working on at the time of the report and, although it suggested new goals, the hearing record did not establish that those goals were the ones worked on thereafter (IHO Decision at p. 11).

In fact, as noted by the IHO, there is no evidence in the hearing record describing any services delivered to the student after December 2023, even though the evidence was submitted into the hearing record in May 2024 (id.; see Tr. pp. 18-22; Parent Exs. E; F).

Consequently, consistent with the IHO's determination, I find that under the totality of the circumstances the evidence in the hearing record, as described above, lacks sufficient information to show that the OT and speech-language therapy services Step Ahead allegedly delivered to the student constituted specially designed instruction that was reasonably calculated to enable the student to receive educational benefits. Accordingly, the parent failed to meet her burden to prove that the OT 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. As such, there is no reason for the undersigned to address the parties' contentions regarding equitable considerations.

B. Compensatory Education

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 PT 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.

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 compensatory education was not requested as a form of relief at that time (see generally Parent Ex. A). However, at the May 9, 2024 impartial hearing, some seven months later, the parent's attorney requested

compensatory education for the PT services because the parent was unable secure a provider for such services (see Tr. pp. 23-24). The parent's attorney argued that the due process complaint notice properly encompassed such relief because the parent requested "other and further relief as [wa]s appropriate" (see Tr. p. 24; Parent Ex. A at p. 2).

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 OT and speech language services, the IHO's order directing the district to fund a bank of compensatory PT services does not specify who is to provide the compensatory education services (IHO Decision at pp. 12-13). 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. 24-213; 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 conclusion of 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. 1-36; Parent Exs. A-G), which the IHO essentially awarded

with the only limitation on the IHO's order being that the awarded bank of services would not expire until one year from the date of the IHO's decision (IHO Decision at pp. 12-13).

Additionally, in this case the parent requested and obtained a pendency order for the PT services in the same frequencies and durations called for by the student's October 2022 IEP (see Pendency Impl. Form at pp. 1-2; Parent Ex. B at pp. 1, 15) and the district also appeared to agree to so implement the requested pendency program (see Pendency Impl. Form). Accordingly, I am not convinced that this is a student for which the district is incapable of arranging the delivery of compensatory PT 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 PT 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 hearing record supports the IHO's decision to deny the parent's request for funding of the speech-language therapy services and OT services Step Ahead delivered to the student during the 2023-24 school year because the parent failed to meet her burden of proving their appropriateness; however, 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 PT services to be provided by the district to the student, less any services already 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 May 28, 2024, is modified by vacating the award directing the district to fund a bank of compensatory educational services consisting of 32 hours of PT 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 PT services for the 2023-24 school year, less any services already provided to the student pursuant to pendency.

Dated: **Albany, New York**
August 9, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER