The University of the State of New York

The State Education Department

State Review Officer

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No. 23-275

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer equitable services to respondent's (the parent's) daughter and ordered the district to fund services for the 2023-24 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 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, 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

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

Briefly, the CSE convened on May 12, 2021, to formulate the student's IESP for the 2021-22 school year (see generally Parent Ex. B). The CSE recommended five periods of direct group special education teacher support services (SETSS) in the general education classroom per week; two periods of direct group SETSS in a separate location per week; two 30-minute sessions of

individual speech-language therapy per week, and two 30-minute sessions of individual occupational therapy (OT) per week (id. at p. 8).[1]

Between that time and fall 2023, the CSE did not convene again (Tr. p. 5; see Parent Ex. C at p. 2). On August 28, 2023, the parent sent the district a letter notifying the district that she consents to all services identified in the student's May 2021 IESP, that she had no way of implementing those recommendations as she could not find providers at the district's rates, and that she had no choice but to implement the May 2021 IESP on her own and would seek reimbursement or direct funding from the district (Parent Ex. C at p. 3).

In a due process complaint notice, dated September 7, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year by not convening a CSE meeting since May 2021 and by failing to implement the May 2021 IESP (see Parent Ex. A).[2] The parent asserted that the district had not convened a CSE meeting since May 2021, that she was "unable to locate a provider on [her] own accord and the [d]istrict has failed to implement [its] own recommendations for the 2023-24 school year" (id. at p. 2). The parent then indicated that, without supports, the student's mainstream school was untenable and she located "appropriate service providers independently for the 2023-24 school year" (id.). For relief, the parent requested an order that the district fund the program outlined in the May 2021 IESP for the 2023-24 school year at a "reasonable market rate" and an order that the district "fund a bank of compensatory periods for all services" the student was "entitled to under pendency for the entire 2023-24 school year – or the parts of which were not serviced" (id. at p. 3).

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on October 25, 2023 (Tr. pp. 1-39). In a decision dated October 25, 2023, the IHO rejected the district's contentions that the parent could not rely on the May 2021 IESP due to the district's failure to convene and develop a new IESP for the student and that the parent was required to establish the appropriateness of the unilaterally obtained services before holding that the district bore the burden of production and persuasion, and therefore the parent's "allegations in the [due process complaint notice] [we]re deemed true" (IHO Decision at pp. 5, 16). The IHO found that because the district failed to implement the May 2021 IESP, the student was denied equitable services and entitled to compensatory relief (id. at p. 5). More specifically, the IHO determined that the standard from Burlington/Carter did not apply in this case (id. at p. 7; see Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993].).[3] According to the IHO, this case was not "enforcement of implementation" and allowing the parent to prospectively secure services the district should have been providing was "merely a mechanism that allows the [district] to implement the services it had contracted to provide, or to allow [p]arent to seek out private providers" (IHO Decision at p. 7). The IHO decided this was a matter of equity and that he could rule on it; the IHO also noted that

[1] The recommended language of service for SETSS and speech-language therapy was Yiddish (Parent Ex. B at p. 8).

[2] The parent asserted that the student's pendency placement lay in the May 2021 IESP (Parent Ex. A at p. 2).

[3]

he had "serious concerns" with applying the Burlington/Carter standard to cases involving equitable services rather than a FAPE (id.). The IHO held that the Burlington/Carter standard provided guidance, but was not a required to be applied in cases like this and identified three reasons for differentiating it in matters involving equitable considerations (id.). The IHO found that the student was entitled to services as described in the May 2021 IESP and that it was the district's responsibility to provide these services (id. at p. 12). Therefore, the IHO held that the district must reimburse and/or directly fund those services at the reasonable market rate (id.).[4] The IHO ordered that until the district implements the May 2021 IESP, the district shall "reimburse and/or directly fund" the services obtained by the parent for the entire 10-month 2023-24 school year for seven periods of group SETSS in Yiddish per week, two 30-minute sessions of individual speech-language therapy in Yiddish per week, and two 30-minute sessions of individual OT per week (id. at pp. 15-16).[5]

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The issue on appeal is whether the IHO used the proper standard and if not whether the matter should be remanded.

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]).[6] "Boards of education of all school districts of the state

[4] Regarding pendency, the IHO determined that the May 2021 IESP constituted pendency, noting that there was no dispute on the issue (IHO Decision at p. 14). The IHO ordered pendency pursuant to the May 2021 IESP (id. at p. 15).

[5] The IHO ordered reimbursement and/or direct funding "upon submission of invoices and service provision dates, and a valid contract between the Parent and properly licensed/certified (if applicable) provider of Parent's choosing" (IHO Decision at p. 15).

[6] 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

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.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

Here, the IHO dismissed the district's assertion that the standard set forth in Burlington/Carter was applicable to this proceeding and the district's contention that under that standard the parent had the burden to establish that the unilaterally obtained services were appropriate, calling this position "untenable" (IHO Decision at pp. 5-6). Regarding Burlington/Carter, the IHO held that for dual-enrollment students its application was not a "must" (id. at p. 7). The IHO rationalized that in this instance there was no disagreement with a district program as the parents sought "those services that the school district agreed to provide," that the 3602-c statute was a State law, while Burlington/Carter cases dealt only with a federal statute, and that equitable services cases deal only with a "fee-for-service arrangement" meaning that, unlike with a school contract, parents are not obligated for the whole school year (id. at pp. 7-8).

In the request for review, the district argues that the IHO erred by not applying the Burlington/Carter standard. The district asserts that State Review Officers have continually applied the Burlington/Carter standard to these cases and the IHO was obligated to apply this standard in this case. The district contends that if the proper standard is used, the parent failed to

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[Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[7] 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 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). 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.).

meet her burden she did not introduce any evidence concerning the provision of services obtained for the student. Further, the district contends there is no evidence of a contractual obligation between any provider and the parent. The district argues that the matter should not be remanded as the parent had a full and fair opportunity to present evidence on the issue of appropriateness and to demonstrate a financial obligation between the parent and provider but failed to do so. Regarding FAPE, the district asserted that to the extent the IHO applied a FAPE analysis, that determination should be reversed as the student is not seeking FAPE or entitled to it.

In her answer, the pro-se parent contends that the IHO's decision should be upheld because the district failed to provide the student with services and did not conduct an annual review.[8] The parent asserts that for the 2023-24 school year, the district made no effort to implement any of the student's services. The parent indicates that the district did not file a response to her due process complaint notice or 10-day notice, which the parent asserts are violations of the regulations. The parent contends that the district agreed to the student's pendency placement and that the district should have been providing services via pendency, therefore, any services not delivered under pendency should be awarded as compensatory services. The parent argues that altering the IHO decision would only be rewarding the district for its "negligence and refusal to do what they are charged to do in the first place." The parent also contends that public policy concerns warrant relief asserting that the district has been incentivized to not provide equitable services to students within her community. The parent further alleges that parents are at a disadvantage in having to show that unilaterally obtained services cause students to make progress asserting that such a standard is beyond what is called for. Should the SRO overturn the IHO decision, the parent requests that the matter be remanded because the IHO made it clear that he would not consider additional parent evidence.

In this matter, as of the filing of the due process complaint notice on September 7, 2023, the parent asserted that she "located appropriate services providers independently for the 2023-24 school year (Parent Ex. A at p. 2). However, during the hearing the attorney for the parent asserted that they were requesting services through pendency during the hearing and compensatory services consisting of district funding at a "reasonable market rate until such time [as] the [d]istrict implements services on [its] own" (Tr. pp. 7-8). In considering the parties' arguments, the IHO acknowledged that the parent indicated she had located a provider for the student, but surmised that the parents' claims were actually related to future events posing questions as to "what stops [the parent] from obtaining a different provider tomorrow?" and "what stops the [district]" from implementing [the May 2021 IEP] tomorrow?" (Tr. p. 12). According to the IHO, his intent was to "order[] the [d]istrict to provide these services. And until such time as it does, the parent can find a provider" (Tr. p. 14). The IHO indicated he could issue an order based on "an ongoing harm to get comp[ensatory services] for every day that the District doesn't implement" (Tr. p. 16). Accordingly, in his decision, the IHO awarded the parent reimbursement or direct funding for seven periods per week of group SETSS, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT upon submission of invoices and service dates and a "valid contract" between the parent and the provider, until such time as the district implements the May 2021 IESP (IHO Decision at pp. 15-16).

[8] The parent was represented by counsel during the impartial hearing (see Tr. p. 4; see also Parent Ex. A).

Upon review of the IHO's decision, it appears as though it was the IHO's intent to award compensatory services for harms not yet realized by the parent, i.e. an anticipated failure of the district in implementing the student's educational programming going forward. However, it is worth noting that a claim is ripe once a cause of action accrues and, under the IDEA, a claim for implementation cannot accrue until there is a failure to implement, as a cause of action accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]).[9] To the extent the IHO awarded compensatory relief for future harms, the IHO was in error.

To be fair, the parent was justified in filing the September 7, 2023 due process complaint notice as the district had failed to convene a CSE to review the student's educational programming for over two years and had failed to respond to the parent's August 28, 2023 letter requesting implementation of the May 2021 IESP (see Parent Exs. A-C). However, in remedying that denial of equitable services, that occurred prior to the start of the school year, the IHO should have employed a more cautious approach to relief. The IHO's wholesale acceptance of the student's expired May 2021 IEP as an appropriate program for the student for the 2023-24 school year runs the risk of locking the student into an outdated, inappropriate program for the remainder of the 2023-24 school year.

In this instance, the parent objected to the district's failure to develop an educational program for the student for the 2023-24 school year, the parent then indicated that the May 2021 IESP, developed two years prior to the current school year, constituted an appropriate program for the student. However, there is no information in the hearing record as to the student's current educational needs and no information to determine if the educational program as recommended in the May 2021 IESP is still an appropriate program for the student. This lack of information is the fault of the district; however, in deciding to continue the student's services from the two-year old IESP, the parent attempted to remedy the district's failure by unilaterally obtaining services for the student and took on the burden of establishing that any private programming that she acquired without the consent of school district officials was appropriate. "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 IEP 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], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Carter, 510 U.S. at 14 [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."]).[10] Accordingly, for the situation presented in this matter, the IHO should

[9] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

[10] Although the standard employed is commonly referred to as the Burlington/Carter test and is based on two Supreme Court decisions, and dual enrollment special education services under an IESP are provisions based on State law, the provisions permitting due process proceedings for dual enrollment cases specifically reference State

have determined whether the private special education programming unilaterally identified by the parent was an appropriate program for the student for the 2023-24 school year.

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). 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 (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). In this instance, the IHO was incorrect and should have applied the Burlington/Carter analysis, a factor which weighs in favor of remanding this matter for further

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law, which provides that "a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement" (Educ. Law 4404[c]; see Educ. Law 3602-c[2][b][1]). Accordingly, although there could, at some point, be separate federal and State tests for the appropriateness of unilaterally obtained services, at this point in time, the federal standard is instructive in review of the appropriateness of unilaterally obtained services. Additionally, although the State statute references "reimbursement," (Educ. Law 4404[c]), the original Burlington/Carter framework also initially only addressed reimbursement for the cost of private school tuition but was expanded to include a direct payment remedy (Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4 [S.D.N.Y. Sept. 26, 2023]).

determinations. Specifically, the impartial hearing was held on October 25, 2023 (see Tr. p. 1). After opening statements, the IHO immediately questioned the district regarding its contention that the IHO should apply the Burlington/Carter test (Tr. pp. 6-8). The discussion between the IHO and counsel for the district regarding the standard was extensive and took up the majority of the hearing (Tr. pp. 8-28). During that discussion, the district acknowledged that "there was no IESP for this school year, so there was no services offered to the student" (Tr. p. 23).[11] However, throughout the discussion, the IHO expressed his belief that the Burlington/Carter test did not apply and the parent had no burden in this proceeding (Tr. pp. 19-23). As discussed above, the IHO then went on in the final decision to formalize that holding (IHO Decision).[12]

The IHO's insistence that the parent was not required to present evidence of the appropriateness of the unilateral placement is a factor weighing in favor of a remand. However, the parent's position asserted on the record during the impartial hearing must also be considered. Upon review, counsel for the parent repeatedly took the position that the parent did not have to submit proof of the appropriateness of any unilaterally obtained services (Tr. pp. 7-8, 29). Counsel for the parent explained that the parent intended to accept pendency services as a complete remedy for the period through the end of this proceeding and that the only issue in front of the IHO was a remedy for future services (Tr. pp. 7-8, 29).[13] Counsel for the parent then indicated the parent was seeking the services recommended in the May 2021 IESP and requested that the IHO order "that services be implemented in a compensatory fashion at the reasonable market rate" until the district implements the May 2021 IESP (Tr. p. 29). Counsel for the parent elected not to address the appropriateness of the requested services during the hearing and at no time argued that the recommendations included in the May 2021 IESP were an appropriate educational program for the student for the 2023-24 school year. Accordingly, despite having an opportunity to present evidence of the appropriateness of the requested services, the parent elected not to do so.

Review of the parent's answer to the request for review shows that the parent is asking for a remand as a remand would be appropriate to address the IHO applying the wrong standard. However, the parent asserts that the student has received the same services for the 2021-22 and 2022-23 school years through filing due process proceedings, that the district has made no efforts to provide the student with services for the 2023-24 school year, and that the student should have received "yearly follow up meetings with updated evaluations" and the CSE should have met to "reconsider the recommendations and determine what was best for [the student]" (Answer at p. 1). Considering these assertions, and that the focus of this proceeding should have been on the district's failure to develop an IESP for the student for the current school year and what relief would be appropriate to address such a denial, remand is not an appropriate course of action in the

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[11] The district specifically stated that it was not asserting the June 1 deadline as an affirmative defense (Tr. p. 28).

[12] Additionally, the IHO noted in the decision that prior to the October 25, 2023 hearing, the parties participated in a settlement conference by an "impartial hearing officer not appointed to adjudicate" this matter on October 12, 2023 (IHO Decision at p. 4). There is no information regarding what happened during this "settlement conference."

[13] A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]).

specific circumstances present in this proceeding. In fact, remanding this matter for further proceedings could result in a further delay in evaluating and reviewing the student's educational program. Accordingly, it is appropriate to craft remedial relief at this juncture.

As noted above, the relief the parent requested during the hearing focused on two time periods, the portion of the school year the student was supposed to receive services through pendency and the portion of the school year following the conclusion of this proceeding.

There is scant information available as to what educational program the student received during the 2023-24 school year, up to this point. Pursuant to the IHO's decision, during the pendency of this proceeding which commenced with the filing of the due process complaint notice around the start of the 2023-24 school year, the district is required to reimburse the parent for, or directly fund, seven periods per week of group SETSS, two 30-minute sessions per week of speech-language therapy, and two 30-minute sessions per week of OT, upon the parent's submission of invoices, dates of the provision of services, and a "valid contract" between the parent and a "provider of Parent's choosing" (IHO Decision at p. 15; see Parent Ex. A). On appeal, the parent requests compensatory services for the failure to implement pendency, asserting that "the District should have been providing [the student] with her services under Pendency" and that any services not delivered should be awarded as compensatory education (Answer at p 2). However, this is not a case in which the district was required to provide pendency services to the student and, having failed to have done so, an order of reimbursement for services the parent obtained or for compensatory make-up services from private providers (as opposed to district providers) may have been warranted (see E. Lyme, 790 F.3d at 456). Rather, as described above, the IHO decision directs the district to fund services pursuant to pendency with the expectation being that the parent was authorized to contract for private providers of her choosing and would receive reimbursement or direct funding upon submission of invoices and a "valid contract" for the ordered services (IHO Decision at p. 15).[14] As neither party appeals from the IHO's pendency determination, the district's "only lawful course of action is to implement those Orders, full stop" and, having failed to do so, the parent will likely succeed in her efforts to compel enforcement (LV v. New York City Dep't of Educ., 2021 WL 663718, at *8 [S.D.N.Y. Feb. 18, 2021]); however, the district's responsibility appears limited to funding of services obtained by the parent.

The remainder of the parent's requested relief, as expressed during the hearing, involves prospective relief for the remainder of the 2023-24 school year. As noted above, the hearing record is inadequately developed to determine appropriate programming for the student going forward, as it is imprudent to assume that an IESP that is now approaching three years old is still an appropriate educational program for the student. Additionally, an award of prospective placement or services for a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs

[14] It is unclear who the IHO expected to be the adjudicator of what constitutes a "valid contract"; however, as that question is not before me, I will not address it. Nevertheless, it is worth mentioning that during the hearing, the IHO in discussing relief with the parties, including the parent's request for services to be funded at "reasonable market rates," appeared to believe that including such a vague order would permit the district to decide what was reasonable (Tr. p. 33). It may be telling that the IHO then declined to include any language related to a rate in his order; however, in including language requiring submission of a "valid contract" in order for the parent to receive funding, the IHO created a similar problem as with language directing a "reasonable" rate for services.

(see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). Accordingly, appropriate relief in this matter is to direct the CSE to convene and develop an appropriate educational program for the student. Additionally, as the hearing record does not include any evaluative information regarding the student, the district is reminded of its obligation, consistent with State and federal regulations, to evaluate the student with appropriate assessments based on the student's needs and to identify all of the student's special education needs (Educ. Law 3602-c[2-a]; 34 CFR 300.303-300.305; 8 NYCRR 200.4[b]). If it has not done so already, the district will be directed to expedite the any necessary reevaluation of the student in order to formulate an appropriate program for the student.

VII. Conclusion

Having determined that the IHO erred in his analysis, having considered a remand to the IHO for consideration of the appropriate legal standard, and having determined that remand is not necessary as the matter should come to a conclusion to address the student's current and future educational needs through the process envisioned by the IDEA, the district shall be directed to convene a CSE to develop an educational program for the student.

IT IS ORDERED that the IHO decision dated October 25, 2023 is modified by reversing those portions which found that the parent did not have a burden of proving the appropriateness of unilaterally obtained services in a proceeding involving equitable services and ordered the district to fund prospective services for the student;

IT IS FURTHER ORDERED that the district shall, if it has not already done so, conduct a comprehensive reevaluation of the student within 25 days of the date of this decision; and

IT IS FURTHER ORDERED that the district shall convene a CSE to review the student's educational program within 35 days of the date of this decision and propose a new IESP for the student.

Dated: **Albany, New York**
January 26, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER