The University of the State of New York

The State Education Department
State Review Officer
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No. 24-051

Application of a STUDENT WITH A DISABILITY, by her parents, 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 petitioners, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied, in part, their request that respondent (the district) fund the costs of services delivered to their daughter by Kids Domain Childcare Center (Kids Domain) at a specified rate for the 2023-24 school year. The district cross-appeals from the IHO's determination that the parents were entitled to an award of compensatory education. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

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 here in detail.

Briefly, a committee for preschool special education (CPSE) convened on January 24, 2023, to formulate an individualized education program (IEP) for the student (see generally Parent Ex. B). The January 2023 CPSE recommended five periods of direct group special education itinerant teacher (SEIT) services per week, two 30-minute sessions of direct individual occupational therapy (OT) per week, and two 30-minute sessions of direct individual physical therapy (PT) per week (id. at p. 14). A CSE convened on May 9, 2023, and, because the parents informed the district that they intended to place the student in a nonpublic school at their own expense and seek equitable services, the CSE formulated an IESP for the student (see generally District Exs. 1; 2). The May 2023 CSE recommended that the student receive three periods of direct group special education teacher support services (SETSS) per week, one 30-minute session of individual OT per week, two 30-minute sessions of individual PT per week, one 30-minute session of group counseling per week, and one 30-minute sessions of group OT per week (Dist. Ex. 2 at pp. 9-10).

An agreement between the parents and Kids Domain indicated that Kids Domain would provide the student with SETSS for the 2023-24 school year (Parent Ex. E). The agreement indicated that the student would receive five periods of SETSS per week for a period of ten months at a rate of $200 per hour (id.). The agreement stated that it was "effective as of September 1, 2023" and the document was signed by the director of Kids Domain and "DocuSigned" by the parent; however, there was no indication of the date that the agreement was executed by the parties (id.).

In a due process complaint notice, dated August 31, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (see Parent Ex. A). The parent asserted that the last program the CSE developed that the parents agreed with was the January 2023 IEP and that for the full 2023-24 school year, the student required "the same special education services and the same related services each week as set forth on the IEP" (id. at p. 1). The parents further indicated that they were unable to locate service providers at the district's standard rates for the 2023-24 school year but were able to find service providers who could deliver the student's required services at higher rates than the standard district rates (id.). For relief, the parent requested that an IHO:

> 1. Schedule a pendency hearing and issue an order requiring the [district] to continue the student's special education and related services under the student's automatic pendency entitlement.
>
> 2. Schedule an impartial hearing and issue an order for the student awarding 5 sessions per week of special education teacher services at an enhanced rate for the entire 2023-2024 school year.
>
> 3. Allow funding for payment to the student's special education teacher provider/agency for the provision of 5 sessions per week of

special education teacher at an enhanced rate for the entire 2023-2024 school year.

4. Award all related services and aides on the IEP for the entire 2023-2024 school year and (a) related services authorizations for such services if accepted by the parent's chosen providers; or (b) direct funding to each of the parent's chosen providers at the rate each charges, even if higher than the standard [district] rate for such service.

5. Such other and further relief as is appropriate.

(id. at p. 2).

On October 31, 2023, the IHO, appointed by the Office of Administrative Trials and Hearings (OATH), held "Omnibus Status Conferences" for 56 or 57 cases filed by the same attorney that included the student in this matter, at which procedural standards for the conduct of the impartial hearings were discussed (Pre-Hr'g Conf. Summ. at p. 1; Req. for Rev. ¶ 3). The written summary of the prehearing conference indicated that the "Burlington-Carter" standard would be applied in the cases, that cases would be called based upon "Provider and whether the [district] puts on a prong 1 case," that disclosures would not be read into evidence if the parties had no objections, that the district's counsel would indicate if cross-examination of witnesses was anticipated, that opening statements would not be permitted, that pendency agreements were being reviewed by district counsel and would be signed if "certain criteria [we]re met," that any "missing" "Provider and Resolution" information would be "followed-up by Parent's Counsel," and that the parties had consented to allowing an "OATH observer" to attend the hearings for training purposes (id.).

According to the IHO, the parties appeared at a settlement conference and two status conferences for this matter (IHO Decision at p. 3). The hearing record contains an interim order on pendency, dated November 14, 2023, finding that the student's pendency placement lay in the IEP dated January 24, 2023 and consisted of five sessions per week of SEIT services, two 30-minute sessions of OT per week, and two 30-minute sessions of PT per week (Interim IHO Decision).

An impartial hearing convened on December 11, 2023 (Tr. pp. 1-11).[1] During the impartial hearing, the parties entered documentary evidence into the hearing record, agreed that neither party wished to present witness testimony, rested their cases, and made closing arguments (id.).

In a decision dated January 5, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year by failing to implement the May 2023 IESP (IHO Decision at pp. 4-6).[2] Next, the IHO held that the parents did not meet their burden to prove that

[1] According to the parents, the matter was initially grouped with 57 cases as part of an "omnibus" proceeding, "approximately 25" of which were heard on December 11, 2023 (Req. for Rev. ¶ 3).

[2] The IHO found that the May 2023 IESP as drafted offered the student a FAPE because there was sufficient

the unilaterally obtained services were appropriate because there was insufficient evidence to support a finding that the SETSS provider had "identified [the student's] needs and then provided services specially designed to address the [s]tudent's unique needs" (id. at p. 7). As relief, the IHO ordered the district to "identify and provide" qualified providers for the services set forth in the May 2023 IESP and implement those services for the remainder of the 2023-24 school year (id. at p. 9). However, as conditional relief, in the event that the district failed to comply with the order to implement the May 2023 IESP, the IHO ordered that the student should be provided with compensatory education services for the district's failure to provide services and awarded OT, PT and counseling compensatory education services at the rate of $125 per hour (id.).[3]

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in finding they were not entitled to funding for SETSS provided by Kids Domain. Initially, the parents contend that the IHO erred by forcing the parents to have their case heard "in an omnibus fashion" with so many cases heard in one day, which led to errors, and in disregarding the rule that a party at an impartial hearing would have "up to one day" to present its case. The parents contend that the IHO erred in finding that the student did not require five hours of SETSS per week and argue that they could have called witnesses to support the need for five hours of SETSS but were not on notice that the question was at issue because the district had only argued about the rate of reimbursement at the hearing. In the alternative to finding in favor of the parents' claims on appeal, the parents request a remand to the IHO so they can present additional evidence.

In an answer and cross-appeal, the district asserts that the IHO correctly determined that the parents had failed to prove that their unilaterally-obtained SETSS services were appropriate to meet the special education needs of the student but erred in granting an award of compensatory education services. The district contends that the parents did not request compensatory relief in the due process complaint notice and the issue was outside of the scope of the hearing. The district further contends that the IHO erred in failing to deny all relief based upon equitable considerations.

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

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evidence submitted by the district to support the reduction in SETSS from the student's SEIT services among other changes; however, the IHO found that the district's failure to implement the May 2023 IESP denied the student a FAPE (IHO Decision at p. 6).

[3] The IHO determined that the student was not entitled to compensatory education services for SETSS because the student was receiving pendency services for SETSS (IHO Decision at pp. 8-9).

the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

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

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

VI. Discussion

Initially I note that neither party appeals the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year or to provide the student with equitable services for that school year (IHO Decision at pp. 4-6). As such, that finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Given the IHO's final determination in this regard, I do not find it necessary to reach that aspect of the parents' appeal alleging the IHO erred in finding that the May 2023 CSE's recommendation for three periods of SETSS per week was appropriate.

A. Unilaterally-Obtained Services

Prior to reaching the substance of the parties' arguments regarding the parents' unilaterally-obtained SETTS services, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement for the cost of the student's attendance there. Rather, the parents seek public funding of the costs of the private SETSS. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).[6]

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

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

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

Here, the IHO correctly used the Burlington/Carter standard when determining whether the parents' unilaterally-obtained services of SETSS were appropriate.

Initially, the parents do not meaningfully challenge the IHO's finding that they did not present sufficient evidence that the private-obtained SETSS were appropriate, instead arguing that they did not have sufficient opportunity to present their evidence. However, I am not persuaded by the parents' claim on appeal that the appropriateness of the unilaterally-obtained services was somehow not at issue during the impartial hearing, or that the IHO's inclusion of this matter as part of an "omnibus" proceeding unjustly interfered with the parents' ability to meet their burden of proof.

The parents' counsel asserts that prior to the impartial hearing it "appeared that [the district] would not contest the student's right to receive the same frequency of special education teacher services in the form of SETSS as the prior school year" and that the district "confirmed" this anticipation that it had "no contention with the parents' request for 5 periods per week of SETSS" at the impartial hearing by asking only that the IHO apply a reasonable market rate rather than the parents' requested amount (Req. for Rev. ¶¶ 9-10).[7] However, the parents burden to present evidence regarding the appropriateness of services privately obtained was triggered by the parents' request for public funding of the services, and the district was not required to specifically contest the appropriateness of the private services at the impartial hearing. To be sure, the parties could stipulate or agree to take certain issues off the table at the impartial hearing. However, upon my independent review of the hearing record, there is no statement by the district affirmatively relieving the parents of their burden to show the appropriateness of the unilaterally-obtained services under the standard set forth above (see Tr. pp. 1-11). Nor did the parents' counsel request that the district stipulate to the appropriateness of the private services or state on the record its concession to the same.

Moreover, the hearing record indicates that the IHO accepted all of the documentary evidence offered by the parties and entered it into the hearing record (see Tr. pp. 5-6; Parent Exs. A-E; Dist. Exs. 1-5). The IHO offered the parties an opportunity to present witness testimony, although neither party expressed an interest in doing so (Tr. pp. 6-7). On appeal, the parents' counsel asserts that he could have made certain witnesses available but chose not to do so based on his view of the district's case (Req. for Rev. ¶ 9); however, as noted, this view was misguided. Counsel for the parents was also aware that written testimony in the form of affidavits could have been entered into the hearing record to support the appropriateness of the unilateral services, and in fact the parents did enter a witness affidavit to show that there was a contract for the private SETSS (see Parent Exs. D-E). However, the parents did not submit affidavit testimony regarding the appropriateness of the unilateral services at the impartial hearing.

Likewise, although the challenges and drawbacks of using an "omnibus" approach have been discussed in several prior SRO decisions (see, e.g., Application of a Student with a Disability, Appeal No. 24-014, Application of a Student with a Disability, Appeal No. 23-280), I decline to

[7] The parents' counsel focuses on the proof he could have submitted to substantiate the student's need for five hours per week of SETSS; however, to the extent the parent obtained private services for the student in that frequency, the parents only had to prove that the services delivered were specially designed to meet the unique needs of the student.

find under the circumstances of this case that the parents were denied a meaningful opportunity to exercise their rights during the impartial hearing, when as detailed in the prior paragraph, the hearing record indicates the parents had ample opportunities to present evidence and testimony. Also, there is no indication in the hearing record that the parents objected to an omnibus approach or sought an adjournment. The parties were provided a written summary of the October 31, 2023 omnibus status conference that detailed the procedural standards for the conduct of the impartial hearing and there is a transcript of the December 11, 2023 proceeding that only pertained to the student in the instant matter (see 8 NYCRR 200.5[j][3][v]). In light of the above, I decline to find that the parents were relieved of their burden to show the appropriateness of their unilateral placement or that the conduct of the impartial hearing unduly prejudiced the parents' opportunity to pursue their due process rights.

Having found that the parents had sufficient opportunity to present evidence, I turn to the IHO's weighing of the evidence that was presented. The IHO correctly identified that the issue in this matter was whether the private special education programming unilaterally identified by the parents was an appropriate program for the student for the 2023-24 school year. The IHO noted that the provider's affidavit did not discuss the specific goals that were created for the student or what areas of need were being addressed (IHO Decision at p.7; see Parent Ex. D). Rather, the IHO noted that the affidavit merely listed the service provided as "SETSS" and the frequency of services but did not provide substantive data to support whether the services met the student's unique needs (id.). The IHO noted that there were no current progress reports, schedules or details about the SETSS curriculum for the student (id.). The IHO further noted that there was no testimony from the parents or the provider discussing how the SETSS were being provided to the student or whether the student progressed because of the SETSS (id.).

Thus, as the IHO found, there is insufficient evidence regarding what services the parent unilaterally obtained for the student beyond that they are called SETSS.[8] Without more information, the IHO correctly determined that the parents failed to meet their burden of demonstrating that the unilaterally-obtained services were appropriate for the student as there is insufficient evidence that these services were specially designed to meet the student's unique special education needs.

B. Compensatory Education

The IHO's award of compensatory educational services may have arisen applying two different rationales: first, as relief for the district's failure to deliver the student's IESP services; or second, as a remedy for missed pendency services.

With respect to an award of compensatory education to remedy the district's denial of a FAPE or equitable services, the district argues in its cross-appeal that the parents did not request

[8] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and it went largely undefined in the hearing record in this case. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125).

compensatory education in the due process complaint notice and that, therefore, the IHO exceeded her jurisdiction by awarding such relief. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708 [7th Cir. 2007]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

Here, as the district argues, it does not appear that the parents requested compensatory education services in their due process complaint notice, as they instead sought funding for the unilaterally-obtained services delivered by their preferred private provider. The parents requested relief of pendency, SETSS funding, and related services via RSAs or direct funding to private providers (Parent Ex. A at p. 2).[9] As the parents' claims related to the district's failure to deliver services and, it appears from the hearing record that the parents did not privately arrange for the delivery of all of the student's related services, "compensatory education would have been an appropriate form of relief for [the parents] to seek at the outset of their case" (M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]; see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [finding that a request for compensatory education damages was not properly before the IHO or the SRO as it was "not raised in their administrative due process complaint"]).

Further, upon an independent review of the hearing record, there is insufficient evidence to support a finding that the scope of the impartial hearing was expanded to include a request for compensatory relief. In this case, there was only one impartial hearing date (see Tr. pp. 1-11). During the impartial hearing, the district discussed the rate to be applied for funding unilateral SETSS in its closing statement, while the parents' counsel argued that the contract rate or the market rate should be applied to the SETSS funding and discussed the change in the frequency of SETSS between the January 2023 IEP and May 2023 IESP (id.). Neither party submitted a written closing brief. While IHOs have some latitude in fashioning appropriate relief, to survive a challenge there should be some specific request for the relief in the due process complaint notice or discussion at the impartial hearing so that a record may be developed as to what services the student may have already been receiving and from what source and what services remained

[9] The parents' request in their due process complaint notice for "such other and further relief as is appropriate" was too broad for the IHO to construe as a specific request for compensatory education and, as further noted, the parents did not raise it during or even at the conclusion of the impartial hearing.

undelivered and warranted based on the student's needs so that a compensatory education award could be crafted.[10] Therefore, to the extent the IHO granted compensatory education as substantive relief to remedy the claims raised in the due process complaint notice regarding the district's failure to offer and deliver appropriate equitable services for the 2023-24 school year, this was error.

However, this case presents an alternative basis for the IHO's compensatory award, insofar as the district was obligated to deliver the services at issue pursuant to its pendency obligation through the date of this decision but apparently has not done so. While the hearing record is not developed regarding what services, if any, were delivered, the district does not contest the IHO's finding that, although the student received "pendency for SETSS," the student had not received the other services (IHO Decision at pp. 8-9).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

Generally, if a district was required to provide pendency services to the student and failed to do so, an order for compensatory make-up services from private providers (as opposed to district providers) may be warranted (see E. Lyme, 790 F.3d at 456-57). While the IHO did not specifically articulate that the compensatory education was intended to address the district's failure to deliver pendency services, the award is sufficiently targeted to remedy that violation and I find insufficient basis to disturb the IHO's order except that I will limit the award to cover the period of time during which this matter has been pending, beginning from the date of the due process complaint notice through the date of this decision. I will not disturb the IHO's orders that the compensatory education "be provided by an appropriately licensed or qualified provider of the Parent's choice at a rate not to exceed $125 per hour" and that the "services are to be used at any time over the next two years beginning on the date of this order but shall expire thereafter" (IHO

[10] Moreover, 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]). Accordingly, if compensatory education is a remedy sought, the district must be given notice that it should describe its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]).

Decision at p. 9). In addition, the IHO's order for the district to identify and provide qualified providers to deliver the student's services going forward stands and should be implemented (id.).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the parents failed to demonstrate that the unilaterally-obtained services were appropriate, the parents' requested relief is denied. The IHO's compensatory award is modified to relate to the district's failure to implement pendency services.

I have considered the remaining contentions, including the district's argument that the IHO should have denied the parents' relief on equitable grounds, and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 5, 2024, is modified to reverse that portion which ordered the district to provide compensatory education based on the student's IESP through the end of the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall provide the student with hour-for-hour compensatory education consisting of the weekly services to which the student was entitled pursuant to pendency but did not receive beginning as of the date of the parents' August 31, 2023 due process complaint notice through the date of this decision to be provided to the student in the manner and at the rate contemplated by the IHO's decision.

Dated: **Albany, New York**
April 5, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER