



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-179

**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 the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the cost of the counseling services delivered to her son by Always a Step Ahead, Inc. (Step Ahead) at a specified rate for the 2023-24 school year. The district cross-appeals from the IHO's award of compensatory education. The appeal must be dismissed. The cross-appeal must be sustained.

### **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 programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

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

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

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

### III. Facts and Procedural History

A CSE convened on April 6, 2020 to develop an IESP for the student's kindergarten school year with an implementation date of September 8, 2020 (Parent Ex. B at pp. 1, 11). The April 2020 CSE found the student eligible for special education as a student with an emotional disability (id. at p. 1).<sup>1,2</sup> The April 2020 CSE recommended that the student receive five periods per week of direct individual special education teacher support services (SETSS) in English delivered in a separate location, three 30-minute sessions per week of individual occupational therapy (OT) delivered in a separate location and two 30-minute sessions per week of group counseling services delivered in a separate location (id. at p. 9).<sup>3</sup>

A CSE convened on June 8, 2023 to develop an IESP with an implementation date of September 7, 2023 for the 2023-24 school year (Dist. Ex. 2 at pp. 1, 11). The CSE continued to find the student eligible for special education and related services as a student with an emotional disability and recommended that the student receive one 30-minute session of individual counseling services and one 30-minute session of group counseling services (id. at p. 8).

According to a progress report dated December 25, 2023, the student was receiving two 30-minute sessions per week of counseling services from a provider from Yeshiva of Flatbush (Parent Ex. D at pp. 1-2).

#### A. Due Process Complaint Notice

In a due process complaint notice dated January 17, 2024, the parent 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 special education and related services providers (id.). Next, the parent claimed that she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with all required services for the 2023-24 school year at rates higher than the standard district rates (id.). The parent requested a pendency hearing, an impartial hearing and an order for the student awarding five sessions per week of "special education teacher services" at an enhanced rate for the 2023-24 school year (id. at p. 2). The parent also requested an

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<sup>1</sup> The April 2020 IESP uses the term "emotional disturbance"; however, as the State changed the term "emotional disturbance" to "emotional disability" as of July 27, 2022, the term "emotional disability" is used in this decision (see 8 NYCRR 200.1[zz][4]; see also "Permanent Adoption of the Amendments to Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance," Office of Special Educ. Mem. [July 2022], available at <https://www.nysed.gov/sites/default/files/special-education/memo/emotional-disability-replacement-term-for-emotional-disturbance.pdf>; see Parent Ex. B at p. 1).

<sup>2</sup> The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

<sup>3</sup> SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

"[a]llowance of funding for payment to the student's special education teacher provider/agency" for the provision of five sessions per week at the enhanced rate for the 2023-24 school year (id.). Lastly, the parent requested "[a]warding all related services and aides on the IESP for the 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" (id.).

After the due process complaint notice was filed, on February 22, 2024, the parent electronically signed a document on the letterhead of Step Ahead, which was dated September 1, 2023,<sup>4</sup> and stated that she was "aware that the rate of the SETSS services provided to my child is \$200 an hour, and related services are \$250 an hour, and that if the [district] does not pay for the services, I will be liable to pay for them" (Parent Ex. G).

## **B. Impartial Hearing and Impartial Hearing Officer Decision**

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on March 5, 2024 (Tr. pp. 1-25). The parties submitted documentary evidence, presented witnesses and provided combined opening and closing statements (Tr. pp. 5-6, 10-16, 17-19, 20-23). During the combined opening and closing statement, the parent's advocate stated the parent was not disputing the counseling recommendation in the June 8, 2023 IESP and was "not making any arguments in support of those other services" found in the "2020 IESP" (Tr. p. 22).

In a decision dated March 25, 2024, the IHO found that the June 2023 IESP, as designed, offered the student a FAPE; however, the district failed to implement the IESP, which resulted in a denial of a FAPE to the student (IHO Decision at p. 5). Turning to the parent's unilaterally obtained counseling services, the IHO found that the parent did not meet her burden of demonstrating that the services met the student's needs (id. at pp. 5-6). The IHO found that testimony from the parent was "essential to determine standing, the appropriateness of the unilaterally obtained services, and the relief being requested" (id. at p. 6). Without testimony from the parent "about the services currently being provided to [the s]tudent and whether progress was made" the IHO found the counseling progress report and the testimony from the director of Step Ahead was "insufficient to determine the appropriateness of the program" (id.). The IHO further noted that the December 2023 counseling progress report "generally characterized the [s]tudent but it did not provide specifics on what was being worked on with [the s]tudent and what specific progress had been made" (id.). The IHO also found that the "progress report did not identify how the [s]tudent's needs were being addressed with [c]ounseling [s]ervices, aside from setting general annual goals that seem to be pulled directly from [the s]tudent's 2020 IESP" (id.). The IHO determined that the totality of the evidence in the hearing record was insufficient to establish the appropriateness of the program (id.). For those reasons, the IHO denied the parent's request for direct funding of her unilaterally obtained counseling services (id.).

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<sup>4</sup> An electronic report attached to the document indicates it was created and signed the same day (Parent Ex. G at p.2).

The IHO ordered the district to implement the student's June 2023 IESP within 30 days of her decision, and if the district failed to do so, the IHO ordered the district to "provide the [s]tudent with an hour-by-hour compensatory education consisting of the weekly services recommended in [the s]tudent's June 8, 2023 IESP multiplied by the number of weeks from the date of this decision through the end of the 2023-2024 school year during which the District failed to implement these services" and that the services shall be provided by an appropriately licensed or qualified provider of the parent's choice at a rate not to exceed \$125 per hour (IHO Decision at p. 7). The IHO further ordered that the compensatory education services would expire two years from the date of her decision (*id.*). Lastly, the IHO ordered the district to "directly pay providers" of the compensatory education award "within 30 days of receipt of [the s]tudent's 2023-2024 class schedule, receipts and/or invoices detailing the exact dates of service and number of minutes/hours the services were provided, and session notes" (*id.*).

#### **IV. Appeal for State-Level Review**

The parent appeals and argues that the IHO erred in denying her requested relief. Initially, the parent argues that a Burlington/Carter analysis should not apply to this matter. The parent further asserts that the IHO erred in finding the parent's privately obtained counseling services were inappropriate. As relief, the parent requests direct funding for two 30-minute sessions per week of counseling services provided to her son at a rate of \$250 per hour for the 2023-24 school year.

In an answer and cross-appeal, the district denies the parent's claims and argues that the IHO correctly denied her request for direct funding of unilaterally obtained counseling services. The district cross-appeals the IHO's award of compensatory relief because the parent did not request a compensatory award. The district further argues that to the extent the parent was entitled to compensatory counseling services, the district should provide a related services authorization (RSA) for the services.

#### **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 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]).<sup>5</sup> "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.*).<sup>6</sup> Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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

## **VI. Discussion**

### **A. Unilaterally Obtained Services**

The district does not cross-appeal from the IHO's decision that the failure to implement the June 2023 IESP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at pp. 5). Accordingly, 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

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<sup>5</sup> 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]).

<sup>6</sup> 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 (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.

between the parties relates to the appropriateness of the parent's unilaterally obtained counseling services delivered to the student by Step Ahead during the 2023-24 school year.

Turning to the parent's argument that she has no burden at all regarding the services from Step Ahead, the parent challenges the IHO's reliance on the Burlington/Carter model of analysis for resolving the parties dispute, accordingly, I will first address the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. In her January 17, 2024 due process complaint notice, the parent alleged that the district had not implemented the April 2020 IESP and the parent was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 1). As a result, the parent unilaterally obtained private services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (*id.* at pp. 1-2). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private counseling services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).<sup>7</sup>

The parent's request for privately obtained services must be assessed under this model of analysis. 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).

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.

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<sup>7</sup> 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 parent obtained from Step Ahead for the student (Educ. Law § 4404[1][c]).

Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. Of Educ. Of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. Of Educ. Of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see 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).



## 1. Student's Needs

Although the student's needs are not in dispute, a description thereof provides context to determine whether the unilaterally obtained counseling services were appropriate to address those needs. The June 2023 IESP indicated that the student's full scale IQ was 122 (very high range) as measured by the May 2023 administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) (Dist. Ex. 2 at p. 2).<sup>8</sup> The student received standard scores in the "high average" range on the verbal comprehension index, visual spatial index, and fluid reasoning index, in the "very high" range on the processing speed index, and in the "very low" range on the working memory index (*id.* at pp. 2-3). The June 2023 IESP noted that the student exhibited "high levels of distractibility" and anxiety during the working memory subtest and had significant difficulty recalling and sequencing series of pictures and lists of numbers (*id.* at p. 3). The June 2023 IESP further reported that the student's academic skills were "at his grade level[] or above," and he attained scores in the "high average" range on the reading and brief achievement clusters of the Woodcock-Johnson IV-Tests of Achievement (W-J IV) (*id.* at pp. 1-2).

With regard to the student's speech-language and social/emotional skills, the June 2023 IESP reported that on the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5), the student's receptive and expressive language skills were within normal limits (Dist. Ex. 2 at p. 3). The June 2023 IESP stated that the student had pragmatic language deficits that could be supported through classroom accommodations (*id.* at p. 4). The June 2023 IESP further stated that according to the May 2023 psychoeducational evaluation report, the student was pleasant but sensitive; he wanted to do his best but was disappointed when he did not do well and became emotional (*id.*). During the May 2023 psychoeducational evaluation, the student "was so upset with his performance that he started crying," however, the evaluator "spoke with him" and he calmed down and completed the other tests (*id.*). The June 2023 IESP related that the student liked school and had friends there (*id.*).

To meet the student's special education needs, the June 2023 CSE recommended one 30-minute session of individual counseling per week and one 30-minute session of group counseling per week (Dist. Ex. 2 at p. 8). The June 2023 IESP identified strategies to address the student's management needs that included preferential seating, direct instruction, auditory presentation of lessons, repetition, rote memorization, use of mnemonics, positive reinforcement, and counseling (*id.* at p. 5). The June 2023 IESP further identified four annual goals that focused on the student's ability to express emotions, communicate wants and needs when upset, cope with frustration and anxiety, and use of conflict resolution strategies (*id.* at pp. 6-7).

## 2. Appropriateness of Counseling

The director of Step Ahead (director) testified that a clinical social worker employed by the agency provided the student with "counseling, 2x30 mandate" per week (Tr. pp. 17-18). The

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<sup>8</sup> The parent's due process complaint notice indicated that the "last program the [district] developed for the child that the parent agreed with was" an IESP dated April 6, 2020 (Parent Ex. A at p. 1). According to the parent, the April 2020 CSE recommended that the student receive five sessions per week of SETSS and "certain related services" (*id.*). At the hearing, the parent's advocate stated he was not disputing the counseling recommendation in the June 8, 2023 IESP and was "not making any arguments in support of those other services" (Tr. p. 22).

December 2023 progress report was on the letterhead of Yeshiva of Flatbush, however the director testified that the provider named in the progress report was working for Step Ahead (Tr. pp. 17-18; see Parent Ex. D at p. 1). The December 2023 progress report identified a "mandate" of "2x30" and reflected that the social worker was "following the recommendations on the IESP dated [April 6, 2020]," which according to the IESP was two 30-minute sessions of individual counseling per week (Parent Exs. B at p. 9; D at p. 1). While the director testified that Step Ahead provided two sessions of counseling per week, she also testified that she, herself, did not provide services to the student or draft progress reports (Tr. pp. 18-19). The hearing record did not include testimony from the student's counseling provider, attendance records or session notes to support that counseling services were in fact provided or to clarify whether these were individual or group sessions. The December 2023 progress note indicated that the social worker who was providing counseling services to the student was following the goals outlined in the student's April 2020 IESP (compare Dist. Ex. B at p. 8, with Dist. Ex. D at p. 1). The social worker may have drafted new counseling goals for the student, but there is no evidence that she was using any of them or any of the updated goals from the June 2023 IESP (compare Parent Ex. D at p. 2, with Dist. Ex. 2 at pp. 6-7).

Thus, neither the counseling progress report nor the Step Ahead director provided any information regarding any specially designed instruction used during counseling sessions to address the student's needs or spoke to his progress toward the goals identified in the June 2023 IESP (see Parent Ex. D; Dist. Ex. 2). The director testified that she did not provide services for the student, draft progress reports or determine curriculum (Tr. p. 19). The student's counseling progress report stated that he had "made some progress with [s]upport ...[h]owever [the student] need[ed] to continue to work on his emotions and how to react to them" (Parent Ex. D at p. 2). Here, consistent with the IHO's finding, the hearing record provided insufficient evidence to find that the counseling services obtained by the parent from Step Ahead were appropriately designed to address the student's needs (IHO Dec. at p. 6).

Although the parent argues that she attempted to implement the program recommended for the student in the June 2023 IESP, the parent must still come forward with evidence that describes the services and the delivery thereof. The hearing record does not explain how any services that may have been provided by Step Ahead addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

In review of the IHO's findings, the IHO correctly applied a Burlington/Carter analysis to the parent's claims and correctly determined that the hearing record did not include sufficient

information to find that the counseling services procured for the student were appropriate for the student during the 2023-24 school year. Accordingly, the IHO correctly denied the parent's request for direct funding of her unilaterally obtained counseling services for the 2023-24 school year.

## **B. Compensatory Education**

The district cross-appeals the IHO's award of compensatory counseling services, as the parent did not request compensatory education in her due process complaint notice (see IHO Decision at p.7).

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 parent requested compensatory education services in the due process complaint notice, as she instead sought funding retrospectively for the services already delivered by her preferred private provider (see Parent Ex. A at p. 2). The parent requested relief of pendency, direct funding to the student's special education teacher "provider/agency" for the provision of five sessions per week of "special education teacher" at an enhanced rate (id.).<sup>9</sup> As the parent's claims related to the district's failure to deliver 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 appropriately expanded to include a request for compensatory education (see Tr. pp. 1-25). In this case, the impartial hearing

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<sup>9</sup> The parent's request in the 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 educational services and, as further noted, the parent did not request relief in this form at any point during the impartial hearing.

convened for a total of 30 minutes (see id.). During the impartial hearing, the district's representative presented one witness to testify to the CSE's recommendations in the June 2023 IESP (Tr. pp. 10-15). On cross-examination, the parent's advocate asked the witness which CSE she represented, and then stated he did not have any other questions (Tr. pp. 15-16). The parent's advocate presented the director of Step Ahead as a witness (Tr. pp. 17-19). On cross-examination, the district's representative asked the director if she provided any services to the student, developed any curriculum or progress reports, to which the director responded in the negative (Tr. p. 19). In her combined opening and closing statement, the district's representative argued that the parent did not prove that the services delivered by Step Ahead were appropriate or that the rates charged for the services were reasonable (Tr. pp. 20-22). In the parent's combined opening and closing statement, the advocate stated that despite the content of the due process complaint notice, the parent was providing counseling from Step Ahead, that the district's evidence had established the student's need for counseling and that the services obtained by the parent were appropriate (Tr. pp. 22-23). The parent's advocate then argued that the rate charged by Step Ahead was reasonable (Tr. p. 23). The parent's advocate concluded by asking that the relief requested in the due process complaint notice be granted "as it relates to counseling" (id.). The due process complaint notice does not mention counseling services at all and, notably, at no point during the impartial hearing did the parent seek compensatory education services to make up for the failure to implement the June 2023 IESP.

While IHOs and SROs have some latitude in fashioning appropriate relief, to survive a challenge there should be some specific request for the relief either in the due process complaint notice or at a timely point during the impartial hearing so that a record may be appropriately and adequately developed as to what services the student may have already been receiving and from what source and what services remained undelivered and warranted based on the student's needs so that a compensatory education award could be crafted. Even at the closing statement stage of the impartial hearing—which is the eleventh hour of that process—it would become deeply problematic to raise the issue for the first time because the evidentiary phase of the hearing has concluded and the participants and IHO would not have not engaged in the fact specific inquiry and record development needed to support an appropriate compensatory education remedy (see 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"]). At no time did the parent seek compensatory education during the impartial hearing and affirmatively took no position regarding other services (Tr. p. 22). Therefore, the IHO erred in awarding compensatory counseling services as substantive relief to remedy the claims raised in the due process complaint notice regarding the district's failure to implement the student's June 2023 IEP. However, the IHO's directive to implement the services in the student's June 2023 IESP going forward remains intact.

## **VII. Conclusion**

In summary, the parent failed to demonstrate the appropriateness of her unilaterally obtained counseling services and did not seek relief in the form of compensatory education during the impartial hearing. In light of these determinations, I decline to overturn the IHO's denial of relief in the form of district funding for privately obtained services delivered by Step Ahead during

the 2023-24 school year; however, for the reasons described above, the IHO's order for compensatory education services must be vacated.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated March 25, 2024 is modified by vacating those portions which ordered the district to provide compensatory education as relief for failing to implement the June 2023 IESP.

**Dated:**            **Albany, New York**  
                         **June 7, 2024**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**