



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-126

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 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. 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 occupational therapy (OT) 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 findings related to equitable considerations and from the IHO's award of compensatory education. The appeal must be sustained. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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

A Committee on Preschool Special Education (CPSE) convened on September 11, 2023 to conduct the student's annual review and to develop an IEP for the student for the 2023-24 school year (Parent Ex. B at pp. 1, 3; Dist. Ex. 6 at p. 1).¹ The CPSE found the student continued to be

¹ The hearing record contains duplicate copies of the September 2023 IEP. For purposes of this decision, only the parent's exhibit will be cited. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

eligible for special education as a preschool student with a disability and recommended that the student receive four hours per week of special education itinerant teacher (SEIT) services in a group of three and two 30-minute sessions per week of OT in a group of three to be implemented starting on September 18, 2023 (Parent Ex. B at p. 13).² The hearing record reflects that a SEIT acceptance letter was sent to the district from a State-approved preschool program, which indicated that the SEIT services recommended on the September 11, 2023 IEP could be delivered beginning on September 13, 2023, subject to the district's approval (Dist. Ex. 5).

By prior written notice and final notice of recommendation, both dated September 11, 2023, the district summarized the CPSE's recommendations (Dist. Ex. 6 at p. 1).³

According to a progress report dated December 18, 2023, for the 2023-24 school year, the student was receiving two 30-minute sessions per week of OT services from a provider from Step Ahead (Parent Ex. F at pp. 1-2).⁴

A. Due Process Complaint Notice

In a due process complaint notice dated January 2, 2024, the parent alleged 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 to deliver the student's services (Parent Ex. A at p. 1).⁵ The parent indicated that she agreed with the program

² State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). A list of New York State approved special education programs, including SEIS programs, can be accessed at: <https://www.nysed.gov/special-education/approved-preschool-special-education-programs>. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

³ The hearing record reflects that the September 2023 CPSE recommendation was a change from a prior recommendation of four hours per week of SEIT services in a group of two and three 30-minute sessions per week of individual OT (Dist. Ex. 8). The hearing record does not include any other IEPs and there is no other information describing when the prior recommendation was initially made for the student.

⁴ Step Ahead has not been approved by the Commissioner of Education as a preschool program or provider with which districts may contract to provide special education services to preschool students with disabilities (see Educ. Law § 4410[9]; 8 NYCRR 200.1[mn]).

⁵ As is noted throughout the hearing record, the January 2, 2024 due process complaint notice incorrectly stated that the September 2023 CPSE developed an individualized education services program (IESP) for the student rather than an IEP (Parent Ex. A at p. 1). State guidance explains that Education Law § 3602-c:

pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These

recommended in the September 11, 2023 IEP; however, she asserted that the district did not assign providers to deliver the services (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 an award of two 30-minute sessions per week of OT in a group of three at an enhanced rate for the 2023-24 school year (id. at p. 2). The parent also requested an "[a]llowance of funding for payment to the student's providers/agencies" for the provision of OT services "at the enhanced rate. . . charge[d] for their service for the entire 2023-2024 school year" (id.).

B. Events Post-Dating the Due Process Complaint Notice

On February 19, 2024, the parent electronically signed a document on the letterhead of Step Ahead, which was dated September 1, 2023, and stated that she was "aware" of the rates charged by the company for special education teacher support services (SETSS) and related services provided to the student "and that if the [district] d[id] not pay for the services, [she] w[ould] be liable to pay for them" (Parent Ex. E). The document further stated that the parent was "aware that the services being provided to [her] child [we]re consistent with those listed in [her] child's IEP/IESP dated: 09/11/2023" (id.).

A February 20, 2024 affidavit from a case manager of Step Ahead indicated that the student was "being provided . . . [d]irect OT services" at a specified rate "at a total of 40 hours for the 2023-2024 school year" (Parent Ex. D). The affidavit included the provider's name and the hourly wage paid to the provider by Step Ahead (id.). The affidavit also included a statement that funding for the cost of the student's OT services as well as "funding for any compensatory services requested, [we]re being requested by [the] parent to be directly funded to the [p]rovider so that the parent should not be liable to the provider for services [the district] agree[d] the student [wa]s entitled to receive" (id.). The affidavit further indicated that individual providers "working with the student reviewed the IESP [sic] dated 09/11/2023 and provide[d] service in accordance with what is stated in that IESP [sic], as the student's needs as adapted as necessary to the student's current progress" (id.).

C. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). A prehearing conference was held on February 2, 2024 (Tr. pp. 1-13). The parties reconvened on February 28, 2024 for an impartial hearing, which concluded on March 1, 2024 (Tr. pp. 14-53). In a decision dated March 1, 2024, the IHO found that the district failed to

students would continue to be the responsibility of the district of residence through the CSE.

("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 13, VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf>).

implement the September 2023 IEP and that, accordingly, the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at p. 4).⁶ Turning to the parent's unilaterally obtained OT 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 determined that the hearing record was "lacking with respect to what work [wa]s actually being done with [the s]tudent," that the goals related to improving fine motor coordination and sensory processing skills were "extremely vague and practically immeasurable," and that there was "no evidence in the record as to what [wa]s being done to help [the s]tudent [to] reach th[o]se goals" (id. at p. 6). The IHO also questioned the progress report, which reflected both that the student demonstrated difficulty attending, completing a simple task, and remaining on task and also that the student could remain on task for two-three minutes (id.). The IHO further noted that there were "no goals established with respect to [the s]tudent's difficulties with attention" (id.). Next the IHO recounted that the "only other evidence presented by [the p]arent regarding the OT services consist[ed] of an affidavit" from a case manager at Step Ahead, "which only identifie[d] [the s]ervice [p]rovider, the rate for the services, a reference to the operative IEP, and an unnotarized statement from [the p]arent which only acknowledge[d] the rate for services" (id.). The IHO determined that there was insufficient evidence in the hearing record to determine "the actual services being provided to [the s]tudent" and, as a result, the IHO found that the parent did not meet her burden (id.). The IHO further found that, although the documentary evidence indicated that the student was receiving services in accordance with the September 2023 IEP, the case manager from Step Ahead testified that the student was receiving individual OT services rather than services in a group of three (id.). The IHO determined that group OT services were more appropriate for the student due to his social development needs and found the weight of the evidence failed to establish that the student's individual special education needs were addressed by the OT services provided by Step Ahead (id. at p. 7).

The IHO next addressed equitable considerations and found that the parent failed to provide the district with ten-day written notice of her intention to obtain unilateral services for the student (IHO Decision at p. 7). The IHO also found that the parent did not provide evidence of a contract with Step Ahead (id.). The IHO found that the document the parent offered as a contract was "prepared specifically for the purpose of th[e] hearing, and was not signed by [the p]arent as an acknowledgement of [her] obligation in September at the start of the 2023-2024 school year" (id.). The IHO determined that the parent "had no documented financial obligation at the start of the school year" and the document also did "not contain an acknowledgement of any obligation on" the part of Step Ahead (id. at p. 8). The IHO also found that the document itself was ambiguous as the student had been recommended to receive SEIT services, but the document signed by the parent included the rates for SETSS and related services (id.). The IHO stated it was unclear whether the parent was obtaining SETSS, SEIT services, or OT services (id.). The IHO also questioned whether Step Ahead had the authority to seek direct funding on behalf of the parent and that the language in the case manager's statement further "confuse[d] the record with respect to whether [the p]arent ha[d] any actual financial liability or obligation" to Step Ahead (id.). The

⁶ The IHO also appeared to make a finding regarding the appropriateness of the program offered, finding that the district "failed to offer Student an educational program reasonably calculated to offer a FAPE for the 2023-2024 school year" (IHO Decision at pp. 4-5); however, as noted above, the parent agreed that the September 2023 IEP offered the student an appropriate educational program and the parent only contested the district's failure to implement the IEP (Parent Ex. A).

IHO determined that "[t]he equities weigh[ed] in [the d]istrict's favor" based on "the timing of events" (*id.*). The IHO found the document dated September 1, 2023 to be problematic for several reasons (*id.*). The IHO noted that the parent did not sign the document until February 19, 2024 and that the case manager testified Step Ahead began providing services to the student, at the start of the 2023-24 school year, based on a verbal agreement with the parent (*id.*). Next, the IHO found that the parent was seeking funding for services to which the student was not entitled because the IEP implementation date was September 18, 2023 (*id.*).⁷ The IHO found that the case manager's testimony of a verbal agreement was not credible and that the parent was not contractually liable until February 19, 2024 (*id.*). With regard to the requested rate per hour for OT, the IHO considered the district's arguments but indicated he was "constrained to find the cost requested reasonable" (*id.* at pp. 8-9). The IHO further stated that if he had found the parent's unilaterally obtained service appropriate, he would have deducted ten percent for the parent's failure to provide ten-day written notice, and an additional ten percent deduction "for the failure to adhere to the IEP recommendation in providing services on an individual basis" (*id.* at p. 9). The IHO also determined that the student would have received services for a ten-month school year, consisting of 36-weeks, rather than the requested 40-weeks (*id.*). In conclusion, the IHO denied the parent's request for direct funding of the cost of the student's OT services for the 2023-24 school year; however, the IHO ordered the district to implement the student's recommended OT services by locating two providers within 15 days of his decision, and he awarded a bank of compensatory OT from September 18, 2023 until such time as the district implemented the IEP (*id.* at pp. 9-10).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in denying her requested relief. Initially, the parent asserts that the district conceded the parent was entitled to funding for the OT services, and that the district only disputed the rate for services. Next 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 OT services were inappropriate. The parent also alleges that the IHO's findings related to equitable considerations were erroneous. The parent argues that the IHO's proposed reductions for delivery of individual rather than group OT services, and for failure to provide ten-day written notice to the district were improper. The parent alleges that she established a financial obligation to Step Ahead and that the district failed to demonstrate the unreasonableness of her requested rate. As relief, the parent requests direct funding to Step

⁷ The IHO relied on Application of a Student with a Disability, Appeal No. 21-138 for the proposition that the student was not entitled to services until the implementation date of the IEP on September 18, 2023 (IHO Decision at p. 8). The IHO erred in relying on that case. Application of a Student with a Disability, Appeal No. 21-138, concerned a school aged student who was not then-currently identified as a student with a disability, whose parent had made an initial referral to the CSE and had requested equitable services pursuant to §3602-c for the first time. The student in this matter had been identified as a preschool student with a disability and had received special education and related services pursuant to an IEP prior to the 2023-24 school year (*see* Dist. Ex. 8). The hearing record reflects that the purpose of the September 11, 2023 CPSE meeting was to conduct the student's annual review (Parent Ex. B at p. 1; Dist. Exs. 6 at p. 1; 7). The hearing record does not indicate whether or not the student's annual review was timely, nevertheless, the student would have been entitled to services under the previous IEP on the first day of school for the 2023-24 school year regardless of the implementation date of the September 2023 IEP (*see* 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], *aff'd*, 530 Fed. App'x 81; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]).

Ahead for two 30-minute sessions per week of OT services provided to her son at a specified rates 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 OT services. The district cross-appeals from the IHO's proposed equitable reductions and asserts that the parent's failure to provide ten-day written notice warranted a denial of all relief. The district further argues, as equitable considerations, that the parent failed to establish a financial obligation for the cost of the OT services and that the requested rate was unreasonable. The district also cross-appeals from the IHO's award of compensatory relief because the parent did not request a compensatory award. The district argues that to the extent the parent was entitled to compensatory pendency services, the award should be reduced to the period of time the matter was pending.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR

300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

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 (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

⁸ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Unilaterally Obtained Services

The district does not appeal from the IHO's decision that the failure to implement the student's September 2023 IEP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at pp. 4-5). Accordingly, this determination has become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained OT services delivered to the student by Step Ahead during the 2023-24 school year.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the district developed a preschool IEP for the student and there is no disagreement as to the recommended SEIT services which are being implemented by another agency (see Tr. p. 46; Dist. Ex. 5). However, the district failed to provide the student with the recommended OT services at the student's preschool program. In her January 2, 2024 due process complaint notice, the parent alleged that the district had not implemented the student's September 2023 "IESP" and that 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 OT 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 OT 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 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"]).⁹

⁹ 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.

The parent's 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; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).

Turning to a review of the appropriateness of the unilaterally obtained services, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). 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

Law § 4404[1][c]).

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

As there is no challenge regarding the delivery of the student's recommended SEIT services for the 2023-24 school year, the information in the hearing record relevant to addressing the parent's burden concerns the student's needs related to OT, which are not in dispute (Parent Ex. A at p. 1). To identify these needs, the hearing record includes a June 2023 OT progress report, the September 2023 IEP, and a December 2023 OT progress report (Parent Exs. B; F; Dist. Ex. 10).

The evidence in the hearing record indicates that the student had received three 30-minute sessions per week of individual OT during the 2022-23 school year (Dist. Exs. 8 at p. 1; 10 at p. 5).¹⁰ At the time of the June 2023 OT progress report, the student was three years ten months old and presented with fine motor, sensory processing, and attention span deficits (Dist. Ex. 10 at p. 5). The June 2023 OT progress report indicated that the delays in these areas "must be addressed" for the student "to participate in educational type activities and function age appropriately in school and/or other social settings" (id.). With regard to fine motor skills progress, the student was able to place and remove coins and beads from medium level resistive putty (id.). In the area of sensory processing skills, the student was able to play in the playground on the slides and ride a tricycle (id.). Specifically, the student demonstrated strengths with picking up small coins to place in a container (grasping), bringing both hands to midline to grasp a large object (bilateral coordination), and participating on playground equipment (swings, slides, seesaws, or ladders) (id.). According to the progress report, the student had also demonstrated strengths in participating in activities which required climbing, descending stairs, or using playground equipment/school yard (id.).

Concerns noted in the June 2023 progress report related to the student's deficient attention skills (Dist. Ex. 10 at p. 5). The student was described as jumping from task to task, and he had "great difficulty" attending and completing simple tasks, remaining on task in the presence of distractions, and following class rules (id. at pp. 5, 6). In the area of sensory processing, the June 2023 progress report indicated that the student demonstrated poor body awareness and tended to bump into obstacles (id. at p. 5). Additionally, the June 2023 progress report indicated that the student needed to refrain from touching objects and people, keep his hands to himself, notice when his hands and face were messy, and reduce the need to mouth objects (id.). Recommendations

¹⁰ For the 2022-23 school year, the student received OT services from an agency State-approved to provide special education preschool services (see Educ. Law § 4410; 8 NYCRR 200.1[nn]).

included continuation of OT services to help the student function properly in a classroom environment (id. at p. 6). The occupational therapist identified the "[m]odes of intervention" from which the student would benefit during OT sessions, including grasping skills, scissor skills, bilateral coordination/integration skills, and attention skills (id.). The occupational therapist also indicated that the student would benefit from maximum assistance, tactile prompts, and visual demonstration to facilitate mastery of skills (id.).

According to the September 2023 IEP, the student demonstrated needs in the areas of sensory processing and focusing that negatively affected his ability to fully participate in the classroom (Parent Ex. B at pp. 1, 4, 5). The September 2023 IEP reported that informal assessments were used to assess the student's performance and needs in various areas and that the student had delays in sensory processing skills, gross motor coordination, and motor planning skills (id. at p. 4). The student also presented with deficits in fine motor skills, cognition, as well as social, emotional, and behavioral skills (id. at pp. 4, 6). The September 2023 IEP specifically indicated the student's academic strength was that he had a good memory and he recalled information nicely (id. at p. 4). He displayed an interest in books, preferably when the book was read aloud to him (id. at p. 5). The student's preferred learning style appeared to be visual, auditory, and kinesthetic/tactile (id. at p. 4).

The September 2023 IEP also indicated that the student needed to develop age-appropriate skills in restraining the need to touch objects and people and in keeping his hands to himself, noticing when his hands and face might be messy or unclean, and in reducing the need to mouth objects (pencils, shirt, hands, etc.) (Parent Ex. B at p. 5). The September 2023 IEP also reflected that that the student performed skills such as attending and completing a simple task, remaining on task even when distraction was present, and following class rules with great difficulty (id.).

The September 2023 IEP also noted the parent's concerns about the student's inability to attend to simple tasks, and that the student walked away when activities got challenging or he said he could not do the activity, even if he had the skills to do it (Parent Ex. B at p. 5). The student had difficulty controlling himself not to give answers when it was not his turn and he tried to take extra turns (id.). The student did not like to follow directions, preferring to "do his own thing" (id.).

The September 2023 CSE recommended management strategies for the student consisting of putting exercise bands on the bottom of chairs to keep busy and close to floor, allowing fidget toys and weighted materials for self-soothing, limiting distractions (visuals, noise levels, lighting), modeling cooperative play, and providing calming activities, such as sensory materials (Parent Ex. B at p. 6). The September 2023 IEP also reflected that the student might continue to benefit from the support of SEIT services and OT to address social/emotional, fine motor, sensory processing, and learning deficits (id.). According to the September 2023 IEP, all of the student's support services should be provided in the classroom within a group of at least two to facilitate growth in social/emotional skills (id.). The September 2023 IEP also noted that a sensory diet needed to be implemented to address the student's auditory and tactile processing delays within the classroom (id.).

For the 2023-24 school year, the September 2023 CPSE recommended a change from three 30-minute sessions per week of individual OT to two 30-minute sessions per week of OT in a group of three (Parent Ex. B at pp. 1, 13; Dist. Ex. 8).

2. OT Services from Step Ahead

Based on a review of the hearing record in this matter, the IHO erred in finding the parent's unilaterally obtained OT services were not appropriate. The documentary evidence offered by the parent included a September 1, 2023 contract with Step Ahead signed on February 19, 2024, which demonstrated the parent's financial obligation for the services delivered to the student, a copy of the licensure of the OT provider who delivered services to the student, and the December 18, 2023 progress report (Parent Exs. C; E-F).

According to the December 2023 OT progress report, for the 2023-24 school year, the student was receiving two 30-minute sessions of OT per week from Step Ahead (Parent Ex. F at p. 1).¹¹

The Step Ahead December 2023 OT progress report stated that the student demonstrated deficits in fine motor, sensory processing, and attention skills (Parent Ex. F at p. 1). The report stated that the student's delays "must be addressed to participate in educational type activities and function age appropriately in a school and/or other social settings" (*id.*). The student was described as generally friendly and happy with a preferred learning style that appeared to be visual and kinesthetic/tactile (*id.*). According to the report, the student demonstrated significant delays and needed to develop age-appropriate skills such as tracing complex shapes utilizing dynamic tripod grasp, manipulating small objects, and beading/lacing (*id.*). The student was further described as demonstrating delays in his ability to restrain from touching objects and people and to notice whether his hands and face needed to be cleaned and that he needed to reduce the need to mouth objects (*id.*). Further, by report the student was sensitive to unfamiliar noises due to his dysregulated sensory system and exhibited a tendency to overreact (*id.*). The student also demonstrated difficulty attending and completing a simple task, remaining on task even when distraction was present, and following class rules (*id.*).

The December 2023 OT progress report reflected that the student was working on two annual goals (Parent Ex. F at pp. 1-2). The first annual goal required the student to improve fine motor coordination and manipulation of classroom materials/equipment to participate effectively in educational activities for 80 percent of the time within one year (*id.* at p. 1). The student's second annual goal required the student to improve sensory processing skills to successfully participate in educational and classroom activities for 80 percent of the time within one year (*id.* p. 2). The December 2023 OT progress report also recommended two new annual OT annual goals (*id.*). The first annual goal required the student to use a dynamic tripod grasp during handwriting activities with 80 percent accuracy (*id.*). The second annual goal required the student to tolerate everyday loud noises without behavioral overreaction with 80 percent accuracy (*id.*).

¹¹ The December 2023 progress report did not indicate whether or not the student was receiving individual or group services (Parent Ex. F at p. 1).

The OT provider reported the student's progress toward meeting his annual goals (Parent Ex. F at p. 2). Specifically, the December 2023 OT progress report reflected that the student was able to cut a simple shape with moderate cues and minimal assistance (*id.*). The student could use a static tripod grasp with minimal cues and focus on a task for two to three minutes with minimal cues (*id.*).

The Step Ahead case manager appeared during the impartial hearing for cross-examination (Tr. pp. 34-47). She testified that she was familiar with the student and that he began receiving OT services from Step Ahead in the beginning of September 2023 (Tr. pp. 37-38). She indicated the OT services provided were based on the recommendations in the student's September 2023 IEP and the goals in the December 2023 OT progress report (Tr. p. 38; *see* Parent Exs. B at p. 13; F). According to the case manager, the OT provider worked with the student individually on a pull-out basis at his school during the school day (Tr. pp. 38-39). The OT provider, the student's teacher, and the parent set up a schedule which was followed "as best as possible" (Tr. pp. 39, 42). When asked why the student was not receiving group OT services, the case manager reported that the provider searched to see if there were student peers with similar OT goals who would be appropriate to receive services in a group with the student (Tr. pp. 42-43). According to the case manager, if there were no other students available for an appropriate grouping, the student still needed to receive the OT services, therefore, those services were delivered individually (Tr. p. 43).

The IHO determined that the hearing record did not indicate "what work" was being done with the student, that the goals included in the progress report were vague and immeasurable, that there were no annual goals to address the student's attention difficulties, and that it was unclear whether the student's SEIT or OT provider was working on the student's attention and motor skills (IHO Decision at p. 6). However, a review of the hearing record does not support the IHO's findings. Initially, as noted above, the private provider need not have a formal IEP (*Carter*, 510 U.S. at 13-14). For that matter, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE (*see J.B. v. New York City Dep't of Educ.*, 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). As to the goals related to improving fine motor coordination and sensory processing skills, review of the hearing record shows that the annual goals in the progress report mirrored those set forth in the September 2023 IEP although the IEP included more specific short-term objectives (*compare* Parent Ex. F at pp. 1-2, *with* Parent Ex. B at pp. 7-8). Moreover, the hearing record includes a January 2024 SEIT progress report which, specific to the student's fine motor needs, indicated that a "[t]herapist" was modeling correct letter formation and exposing the student to puzzles to address the student's weaknesses in fine motor skills with copying, writing letters, using scissors, and completing interlocking puzzles (Dist. Ex. 3 at pp. 1, 3). Additionally, the SEIT indicated that the student was in need of curriculum reinforcement, behavior modifications, and reinforcement of concepts and skills (*id.* at p. 3). Additionally, the December 2023 OT progress report sufficiently described the student's needs, the annual goals the student was working on, the student's progress toward those goals—including that he demonstrated improved attention skills such as the ability to focus on task for two to three minutes with minimum cues—and provided new proposed annual goals for the student (Parent Ex. F at pp. 1-2).

The IHO also found that Step Ahead was "not providing the services as recommended in the IEP" and that he was "unpersuaded that providing services to [the s]tudent in a group setting was not possible" (IHO Decision at pp. 6, 7). However, the parent was under no obligation to

implement the district's IEP precisely as written when obtaining unilateral services (Carter, 510 U.S. at 13-14). In particular, although the September 2023 IEP recommended that the student be provided with group OT services and that the student receive "[a]ll support services in the classroom within a group of at least 2 to facilitate growth in social emotional skills," that was not the only manner in which the student's social and emotional needs could be supported. The student also received SEIT services which worked on the student's social, emotional, and behavioral deficits (Dist. Ex. 3 at pp. 1, 3). Accordingly, the provision of individual rather than group OT does not, in this instance, make the service inappropriate for the student.

Based on the totality of the circumstances, the parent's unilaterally obtained OT services were similar in frequency and duration to the OT recommended for the student in the September 2023 IEP, and the parent established that the individual OT services the student received were appropriate for the 2023-24 school year. Although the IHO correctly applied the Burlington/Carter legal standard in evaluating the parent's requested relief, the IHO erred in determining that the parent failed to meet her burden of proof.

B. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st

Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

With regard to the IHO's proposed reduction of funding based on the lack of a ten business day written notice to the district, under the facts of this matter, the reduction was unwarranted. According to the September 11, 2023 IEP, the student's SEIT services were to be provided at an "Early Childhood Program" or a "Childhood Location" selected by the parent and the OT services were to be provided in a "Childcare Location" or in the classroom (Parent Ex. B at pp. 1-2, 13). The district authorized a SEIT provider on September 18, 2023 (Parent Ex. B at p. 1; Dist. Ex. 5). The district knew that it had not located and authorized an OT provider for the student before the first day of school of the 2023-24 school year. As of the time of the SEIT authorization on September 18, 2023, the district had still not located an OT provider for the student (Dist. Ex. 5). In fact, the hearing record does not include any indication that the district made any effort to implement the student's OT services during the 2023-24 school year. In this limited circumstance, it cannot be said that the parent's failure to provide written notice interfered with the district's opportunity to remedy the failure to implement the student's IEP. As the decision as to whether to deny relief is discretionary, based on the above, I exercise my discretion and find that the lack of a written notice to the district prior to the parent initiating privately obtained OT services for the student does not present an equitable basis for reducing or denying the parent's request for direct funding of OT.

In addition, as indicated above, the IHO erred in faulting the parent for obtaining individual OT services rather than group OT services. The parent's unilaterally obtained services were appropriate, and the provision of individual services does not form a proper basis for reducing the amount of funding based on equitable considerations in this matter. The Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]). Thus, the IHO's proposed reduction on that ground was error.

The IHO also found that the parent did not provide evidence of a contract with Step Ahead (IHO Decision at p. 7). The hearing record does not support the IHO's findings. The Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M., 758 F.3d at 458). In New

York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]). Here, while the contract does not include a date when services would begin, the duration of a school year, including the first day of school, is information that may be objectively obtained and, overall, review of the hearing record reflects that the parent established that she intended to be bound to pay for the related services to be delivered by Step Ahead and accordingly, although limited, the evidence in the hearing record established a financial obligation on the part of the parent for the OT services Step Ahead delivered to the student (Parent Ex. E).

The district also cross-appeals the IHO's determination that the requested rate for the OT services was reasonable. The district offered into evidence an October 2023 final report from a study conducted by the American Institutes for Research (AIR report) (Dist. Ex. 4). The district asserts that the AIR report constitutes objective evidence as to how to properly calculate a reasonable rate based on the providers' salaries, or evidence of rates charged for comparable services by providers within the same geographic area (Answer & Cr.-Appeal ¶18). The district argues that based on the report, a reasonable market rate would be no more than \$125 per hour referring to a table on the report as to the inflation-adjusted hourly rate within the district's metro area for services provided to preschool students (id.; see Dist. Ex. 4 at p. 18). The IHO correctly noted that the AIR report included a definition of OT services but did not include any "information as to an appropriate rate of compensation" (IHO Decision at p. 8; see Dist. Ex. 4 at p. 14). The table of inflation adjusted hourly compensation rates cited by the district applies to preschool special education teachers, not occupational therapists (Dist. Ex. 4 at p. 18). There being no evidence in the hearing record to establish a reasonable market rate for individual OT services, I find no basis to disturb the IHO's determination that the parent's requested rate for the OT services was reasonable.

C. Compensatory Education

The district cross-appeals from the IHO's award of a bank of compensatory OT services from "September 18, 2023 until such time as the IEP was implemented," as the parent did not request compensatory education in her due process complaint notice (see IHO Decision at pp. 9-10).

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 for the services 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 "providers/agencies" for the provision of two 30-minute sessions per week of OT services (*id.*).¹² In this instance, the parent appeared to assert that she arranged for the delivery of all of the student's recommended OT services (Parent Exs. A; B at p. 13; D). Accordingly, the parent had no reason to ask for compensatory education as relief. Additionally, as the parent's claims related to the district's failure to deliver services, if the parent did not privately arrange for the delivery of all of the student's related services, the parent should have known this when they filed the due process complaint notice and "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 education (see Tr. pp. 1-53). During the impartial hearing, the IHO elected to "skip over the opening statements and obviously allow everyone to make closing so that we can get to each party's case," to which the parties agreed (Tr. pp. 24-25).

The district representative confined the closing statement to arguing that the parent's provider was not delivering group services consistent with the recommendation in the September 2023 IEP and that the services were provided on an individual basis at an "arguably high" hourly rate (Tr. pp. 48-49). In the parent's closing statement, the parent's attorney asserted that the student had been denied a FAPE and the student was entitled to the services recommended in the September 2023 IEP (Tr. p. 50). The parent's attorney further argued that the evidence reflected that Step Ahead was providing individual services to the student because there were not any appropriate peers with whom the student could be grouped, and that the parent had justified the hourly rate charged by the company (Tr. pp. 50-51). As relief, the parent's attorney asked the IHO to "continue the services as mandated by the IEP" and to "grant the enhanced rate" charged by Step Ahead (Tr. p. 51).

While IHOs and SROs 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

¹² 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.

undelivered and warranted based on the student's needs so that a compensatory education award could be crafted. Therefore, the IHO erred in awarding compensatory OT 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 September 2023 IEP.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's finding that the parent's unilaterally obtained OT services were not appropriate and having found that the equitable considerations do not warrant a reduction or denial of relief, the IHO's denial of relief in the form of district funding for services delivered by Step Ahead during the 2023-24 school year is reversed. In addition, the IHO's order for compensatory education is vacated.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 1, 2024 is modified by reversing those portions which found that the parent did not meet her burden to prove that unilaterally obtained OT services from Step Ahead were appropriate, and that equitable considerations did not support the parent's request for relief, and which denied the parent's request for the district to fund unilaterally obtained OT services delivered by Step Ahead during the 2023-24 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated March 1, 2024 is modified by vacating that portion which awarded a bank of hours of compensatory OT services; and

IT IS FURTHER ORDERED that, upon proof of delivery, the district shall directly fund the costs of up to two 30-minute sessions per week of individual OT services delivered to the student by Step Ahead during the 2023-24 school year.

Dated: **Albany, New York**
 May 31, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER