The University of the State of New York

The State Education Department
State Review Officer
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No. 24-269

Application of a STUDENT WITH A DISABILITY, by her 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 Nate Munk, 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 to be reimbursed for, or to directly fund, the costs of her daughter's unilaterally-obtained occupational therapy (OT) services delivered by Always A Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's decision awarding speech-language therapy as compensatory educational services. The appeal must be sustained in part. 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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications

of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

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

received services through the Early Intervention Program (EIP) consisting of special instruction, speech-language therapy, and OT (Dist. Ex. 5 at pp. 6-7). The student was referred to the CPSE to determine whether she was eligible for preschool special education services (id. at p. 7). In connection with determining eligibility, an initial evaluation of the student was conducted in March 2023 by an approved evaluator selected by the parent, which included a social history, a psychological evaluation, an educational evaluation, a classroom observation, a speech-language evaluation, and an OT evaluation (id. at pp. 1-32).

On April 3, 2023, the CPSE found the student eligible for special education services as a preschool student with a disability (see generally Dist. Ex. 3). The April 2023 CPSE recommended that the student receive six hours per week of group (2:1) special education itinerant teacher (SEIT) services, two 30-minute sessions per week of group (2:1) speech-language therapy, one 30-minute session per week of group (2:1) OT, and one 30-minute session per week of individual OT (Dist. Ex. 3 at pp. 1, 19).[1] In a prior written notice dated April 3, 2023, the district notified the parent of the student's eligibility for special education services as a preschool student with a disability and summarized the CPSE's recommendations (Dist. Ex. 4 at pp. 1-2).

For the 2023-24 school year, it appears that the student was parentally placed at a religious, nonpublic preschool program (see Parent Exs. A at p. 1; H at p. 1). According to an untitled document identified by the parent as "[a]ttendance [r]ecords" the student began receiving OT services on January 8, 2024 (Parent Ex. G; see Parent Exs. E; H).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice, dated January 24, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (see Parent Ex. A).[2] According to the parent, the last agreed-upon educational program developed for the student "was an Individualized Education Services Program developed on 04/03/2023 (IESP)," which recommended two 30-minute sessions per week of group (2:1) speech-language therapy, one 30-minute session per week of group (2:1) OT, and one 30-minute session per week of individual OT (Parent Ex. A at p. 1).[3] The parent asserted she

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

[2] The hearing record contains duplicative copies of the due process complaint notice (compare Parent Ex. A, with Dist. Ex. 2). For purposes of this decision only the parent's exhibit will be cited.

[3] The parent's due process complaint notice incorrectly refers to the IEP developed by the April 2023 CPSE as an IESP (see Parent Exs. A at p. 1; Dist. Ex. 3). This is an error that was continued through the IHO Decision and by the district on appeal, although the parent corrected the error in her request for review (see Parent Ex. A; IHO Decision at pp. 3-6; Req. for Rev. at ¶¶ 2-3). Given the student's age, the student would have been considered as a preschool student during the 2023-24 school year (see Parent Exs. A at p. 1; see also Dist. Ex. 5 at p. 3). State

was unable to locate service providers on her own at the district's standard rates for the 2023-24 school year and that the district failed to provide the student with services (id.). The parent claimed that she found providers willing to provide the student "with all required services" for the 2023-24 school year but at rates higher than the standard district rates (id.). As relief, the parent sought an order requiring the district to continue the student's services under pendency and an award of funding for speech-language therapy and OT at "enhanced rates" for the 2023-24 school year (id. at p. 2).[4]

On April 11, 2024, the parent electronically signed a document on Step Ahead's letterhead indicating that she was "aware" of the rate charged for related services provided to the student and that she was "aware" that services were being provided to the student "consistent with those listed in" the April 2023 IEP, and that, if the district did not fund the services, she "w[ould] be liable to pay for them" (Parent Ex. C).[5]

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). After a prehearing conference on March 12, 2024, and a status conference on April 2, 2024, an impartial hearing convened and concluded on May 7, 2024 (Tr. pp. 1-50). During the impartial hearing, the parent's representative clarified that, although the student was recommended for SEIT services, OT, and speech-language therapy, SEIT services were not at issue in this matter and "the case related to the lack of implementation of related services only" (Tr. p. 24). The parent's representative also indicated that Step Ahead had not provided the student with speech-language therapy and that, instead, the parent sought funding for a private provider that she might identify before the end of the school year "at a reasonable market rate" (Tr. p. 26).

In a decision dated May 13, 2024, the IHO found that the district's failure to implement the student's IEP denied the student a FAPE for the 2023-24 school year (IHO Decision at p. 4). However, the IHO found that the parent failed to meet her burden to demonstrate how the privately obtained OT services were specially designed to meet the student's needs (id. at p. 6). More specifically, the IHO found that the parent's case consisted of testimony from the agency's secretary

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guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools" and "does not apply to a child who is less than compulsory school age . . . in a preschool program" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [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). For the sake of accuracy, all further references in this decision will be to the April 2023 IEP, even where it was referred to as an IESP by the IHO or parties.

[4] In an agreement signed by the district on February 13, 2024, the parties agreed that student's pendency placement lay in the April 2023 IEP with the following services: two 30-minute sessions per week of group speech-language therapy, one 30-minute session per week of individual OT, and one 30-minute session per week of group OT (Pendency Implementation Form). SEIT services were not requested or included as part of pendency, although they were recommended in the April 2023 IEP which formed the basis of the parent's request for pendency.

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

"who had no personal knowledge of [the] [s]tudent, and who was unable to answer questions specific to this [s]tudent and the services provided" (id.). Without testimony from the parent or OT provider, the IHO found that the "[OT] progress report alone" was not enough to determine whether the unilaterally obtained services were appropriate (id.). The IHO further determined that, even if she gave the progress report greater weight, it appeared from the report that the student did not make any progress from the OT services (id.). Overall, the IHO found that based on the totality of the hearing record, there was insufficient evidence to determine the appropriateness of the program (id.).

As for speech-language therapy, the IHO found that the student was entitled to a related service authorization (RSA) for speech-language therapy for the 2023-24 school year (IHO Decision at p. 6). As relief, the IHO ordered the district to fund, "as compensatory relief," two 30-minute sessions per week of group (2:1) speech-language therapy "by a [p]rovider of the [p]arent's choosing, to be funded via RSA" for the entirety of the ten-month 2023-24 school year (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by denying her request for funding of the unilaterally obtained OT services delivered to the student by Step Ahead during the 2023-24 school year. Initially, the parent argues that a Burlington/Carter analysis should not apply; however, even if assessed under this standard, the parent contends that the IHO erred by finding that the OT services were not appropriate. More specifically, the parent argues that she sustained her burden because she used an agency with "credentialed/license[d] providers." The parent further asserts that "any arguments that the services were not appropriate must be rejected." The parent contends she was not required to testify to establish her case. Additionally, the parent points to the OT session notes and progress report as evidence that the services provided were appropriate. As relief, the parent seeks reversal of the IHO's decision and an order directing the district to fund the unilaterally obtained OT services at the contracted rate of $250.00 per hour for the 2023-24 school year.

In an answer and cross-appeal, the district responds to the parent's allegations and generally argues to uphold the IHO's denial of district funding for OT services provided by Step Ahead. As for its cross-appeal, the district asserts that the IHO erred in awarding compensatory relief, arguing the parent did not request relief in that form. The district also asserts that, even if the parent had established the appropriateness of the unilaterally obtained OT services, equitable factors would not favor an award of district funding for the services.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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, 369-70 [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

The district does not cross-appeal from the IHO's decision that the failure to implement the April 2023 IEP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at p. 6). 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 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.

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

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 (see Dist. Ex. 3). Nevertheless, the district failed to provide the student with the recommended OT and speech-language therapy services.[7] In the due process complaint notice, the parent alleged that the district failed to implement the student's April 2023 IEP 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 services 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 unilaterally-obtained 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 [IEP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; 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"]).

Accordingly, the parent's position on appeal 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).[8]

With respect to the parent's assertion that the above framework should only apply to IEP disputes, and not to disputes solely related to implementation, such a claim is contrary to the IDEA. A district's delivery of a placement and/or services must be made in conformance with the CPSE's or CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP or IESP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a

[7] As noted above, the SEIT services are not an issue in this proceeding (Tr. pp. 24-26).

[8] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the OT services that the parent obtained from Step Ahead (Educ. Law § 4410[1][j], [7][a]).

district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 Fed. App'x 63 [2d Cir. July 29, 2014]).

A. Unilaterally Obtained Services

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

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a

> unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student's Needs

Although the student's needs are not in dispute, a discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained OT services were appropriate to meet those needs.

Initially, the student's physical development was reviewed in connection with a March 13, 2023 educational evaluation (Dist. Ex. 5 at pp. 16).[9] The evaluation indicated that "[b]ased on report, observation, . . . informed clinical opinion," and the student's performance on a developmental assessment, her gross motor skills were in the average range (id.). However, based on the same measures, the student's fine motor skills were found to be in the below average range (id.). The evaluation report noted that the student exhibited an immature grasp, scribbled faintly when asked to duplicate linear lines and circles, had difficulty inserting pegs in a board, did not glue or color neatly, and could not easily turn doorknobs or twist jar lids (id.).

Next, the student underwent a more comprehensive, OT evaluation on March 16, 2023 (Dist. Ex. 5 at pp. 27-32).[10] The evaluating occupational therapist used the Hawaii Early Learning Profile (HELP) checklist, Peabody Developmental Motor Scales (PDMS-2), and Sensory Profile, together with clinical observations and parent and teacher interviews to assess the student's fine motor and sensory needs (id. at p. 27). The occupational therapist observed that the student was unable to imitate pre-writing strokes or block designs, demonstrated immature grasp patterns, had difficulty imitating the actions of the evaluator, had difficulty with bilateral hand activities such as cutting, did not seem to understand what was requested of her, was often distracted, and required re-direction to a task (id. at p. 28). In terms of the student's sensory processing skills, the OT evaluation report stated that the student was only able to respond to verbal directions when accompanied by a visual cue and noted that, according to her teacher, the student required frequent prompting and guidance to follow directions and transition to a new activity (id. at pp. 28-29). The evaluation report indicated that the student was able to sit and attend to activities "for brief periods

[9] The student's full-scale IQ was in the low average range of intelligence with her non-verbal reasoning in the low average range and her verbal reasoning in the borderline impaired range (Dist. Ex. 3 at p. 3). The student's social skills and language were below grade level (id.).

[10] The April 2023 IEP also included a description of the student's physical development (see Dist. Ex. 3 at pp. 4-5).

of time," but was often distracted and required redirection to the task (id. at p. 28). According to the OT evaluation report, the student's teacher noted that she "s[at] and stare[d] during circle time" and did not appear to be "tuned-in to what [wa]s being taught" (id. at p. 27). The teacher also reported that the student often tripped and fell because she was not focused (id.). According to the OT evaluation report, the parent reported that the student could not sit still and often moved from one activity to the next at home (id. at pp. 29, 31). The parent further reported that the student often had temper tantrums at home, where she would scream, hit, and bite when upset (id. at pp. 27, 29). Further, according to the report, the student's mother indicated the student was bothered by some grooming activities, did not use utensils when eating, and did not like to get her hands dirty (id. at pp. 29, 31). Turning to the student's neuromuscular status, the evaluation report reflected the teacher's observation that the student frequently sat in a "w-sit position" which the occupational therapist believed could indicate "low tone in her trunk" (id. at p. 29).

In connection with the student's fine motor/graphomotor skills, the OT evaluation report indicated that the student did not show a hand preference and switched hands during activities (Dist. Ex. 5 at p. 29). The student wrote with a "palmar grasp (four fingers fisted) [and] alternatively with a high quadrapod grasp (four fingers at the top of the marker)" (id.). She was observed to make "one snip" on paper but was unable to cut across the paper, cut a line, or cut shapes (id. at p. 30). The student could build a tower of five cubes but could not imitate block designs (id.). With respect to her visual perceptual skills, the student could scribble on paper and draw small lines and circular strokes but could not imitate shapes or trace a line (id.). In terms of self-care skills, the OT evaluation report indicated that the student could remove her socks and shoes but could not remove other clothing: could not dress herself; fed herself using her hands but not a spoon or fork; and was not toilet trained (id.). The occupational therapist opined that the student had delays in her grasp and visual motor skills as well as sensory deficits (id. at p. 31).

2. OT Services from Step Ahead

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

In this matter, the evidence in the hearing record includes a fillable document, which the parent submitted into evidence and identified as "attendance records"; however, the document, itself, does not bear any title or reflect the origin of the document (see Parent Ex. G). The attendance records include the student's name; the occupational therapist's name; the date of the session, as well as reporting the "time in" and "time out" for each session; the location of the service (i.e., school); areas to describe goals (all blank); and areas for notes (id.). The first entry in the attendance records is dated January 8, 2024 and the last entry is dated April 10, 2024 (Parent Ex. G at pp. 1, 3). The attendance records show that the student attended a total of 23 therapy sessions during that period (Parent Ex. G at pp. 1-3).

According to the attendance records, the student worked on fine motor activities including manipulating medium putty and finding beads, buttoning and buckling with visual cues, drawing a circle, writing letters O and L on vertical surfaces, cutting putty, and a fine motor pincer grasp activity (Parent Ex. G at pp. 1-3). With respect to sensory processing, the attendance records indicated the student received proprioceptive input via vibration massage, a slide crawl and therapy ball activities, rock climbing, a pit ball jump, monkey bar task, and brushing and joint compression (id.). In addition, the student received vestibular input via a linear swing, trampoline jump, linear cocoon swing, a zip line, and platform swing (id.). The student also practiced pursed lip breathing for regulation (id. at p. 3). According to the attendance records, the student engaged in motor planning acts with a therapy ball with moderate assist worked with a zoom ball to develop upper body strengthen; participated in an eye hand coordination and motor control activity via a fishing game and worked on core strengthening by a therapy ball and rock and ladder climbing (id.). The occupational therapist noted in the attendance records that she also provided instruction to the student's teacher on a sensory diet (id.).

In a progress report dated March 28, 2024, the occupational therapist detailed the student's then-present levels of performance (Parent Ex. H at p. 1). The occupational therapist reported that the student presented with moderate delays in fine motor skills, sensory integration, and activities of daily living (id.). Additionally, the occupational therapist reported that the student was right-handed and presented with poor finger and hand strength, which impeded her fine motor development (id.). When cutting the student used shoulder elevation to compensate for weaknesses and was unable to fasten and unfasten buttons (id.). In regard to gross motor skills, the student required maximum reminders and cues to refrain from "W sitting" (id.). According to the occupational therapist, the student also presented with poor body awareness during gross motor, fine motor, and sedentary activities (id.). The student descended stairs without alternating feet (id.). Regarding sensory processing and attention, the student required maximum redirection to attend to a task as the student's attention span was very short, and she switched from one activity to another very rapidly (id.). Lastly, the occupational therapist reported that the student required maximum coaxing to participate during therapy and class sessions (id.).[11]

Next, the progress report listed the student's current OT annual goals and noted that the student had not yet achieved progress in meeting those goals (Parent Ex. H at pp. 1-2). The occupational therapist recommended that the student continue to receive two 30-minute sessions of individual OT per week and recommended new annual goals for the student (id. at p. 2). The newly recommended annual goals were directed at having the student use a tripod grasp for graphomotor activities, cutting skills, and fastening and unfastening buttons, as well as breathing exercises for transitions, following a sensory diet for help with regulation, and activities to work on improving hand strength, balance, and ball skills (id.).

In finding that the parent did not meet her burden to prove the OT services were appropriate, the IHO noted the lack of testimony offered in support of the parent's burden other than that of the Step Ahead secretary who did not have personal knowledge of the student (IHO Decision at pp. 5-6). While I agree with the IHO that the testimony of the secretary did not help

[11] The OT report also indicated that the student's teacher reported the student was "very defiant and refuse[d] to follow directions and classroom rules," demonstrated aggressive behaviors such as hitting, and also demonstrated fidgety behaviors "such as continuously donning and doffing shoes and socks" (Parent Ex. H at p. 1).

the parent's case and that the testimony of the provider would "have been helpful" (id.), the weight of the documentary evidence is sufficient in this instance to describe the OT services delivered.

The IHO also found that the student did not appear to have made any progress as a result of the OT services (IHO Decision at p. 6). It is well settled that, while progress is a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). Here, while the progress report stated that the student "ha[d] not achieved progress in meeting goals," at the time of the March 2024 report, the student had only been receiving OT services from the provider since January 2024 and, therefore, had only worked on the "annual" goals for a couple of months (see Parent Exs. G at p. 1; H at p. 1). Accordingly, I do not find that this statement supports a conclusion that the services were not specially designed to allow the student to make progress.

Based on the evidence in the hearing record, the parent sustained her burden to establish that the unilaterally-obtained OT services delivered to the student by Step Ahead after January 8, 2024 were specially designed to meet her unique needs during the 2023-24 school year.[12] In particular, the progress report shows that the OT services delivered to the student were designed to work on the student's areas of need as related to fine motor and sensory processing skills.

B. Equitable Considerations

Having found that the OT services from Step Ahead were appropriate, I turn to consider the final criterion for a reimbursement award, which 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

[12] To the extent the parent seeks OT services for the entire 2023-24 school year, as the evidence in the hearing record does not show that any private services were delivered to the student prior to January 8, 2024, relief will be limited to funding for services delivered on and after that date.

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 [6th Cir. 2003]; 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).

In connection with equitable considerations, the district, as part of its cross-appeal, asserts that relief should be denied in total as the parent did not provide the district with notice of her intent to unilaterally obtain OT services by a private provider. The parent argues that she was not required to provide the district with a 10-day notice of unilateral placement because she did not remove the student from a public-school placement. The parent also contends that she had no notice of such requirement, therefore, the 10-day notice defense is inapplicable and that as an equitable factor, the district's conduct in abdicating its responsibility to locate a provider must be weighed as well.

Based on the evidence in the hearing record, it appears that the district was first informed of the parent's intentions to engage in self-help by obtaining OT services from private providers and seeking funding from the district when the parent filed her due process complaint notice, dated January 24, 2024 (see Parent Ex. A at pp. 1-2).

Consistent with the parent's argument, the IDEA provides that an award of reimbursement may not be reduced or denied if the parent did not receive a copy of the procedural safeguards notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504). However, review of the hearing record shows that a prior written notice was sent to the parent on April 3, 2023 and the prior written notice indicated that a copy of the procedural safeguards notice was included in the initial packet sent to the parent (Dist. Ex. 4 at p. 2). In addition, the consent for an initial evaluation, signed by the parent on March 8, 2023, includes a statement that the parent received a copy of the procedural safeguards notice.

As the hearing record indicates that the parent received a copy of the procedural safeguards notice and the hearing record does not include a letter from the parent to the district stating the parent's intent to unilaterally-obtain OT services and to seek funding from the district for those services, a partial reduction of funding is warranted, amounting to ten percent of the total amount sought by the parent.

C. Compensatory Education

The district cross-appeals the IHO's award of compensatory speech-language therapy services, primarily arguing that the parent did not request compensatory education in her due process complaint notice.

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, the parent did not expressly request compensatory education services in the due process complaint notice, and she instead sought funding for the services delivered by her preferred private provider for the 2023-24 school year (see Parent Ex. A). In particular, the parent requested relief of pendency and direct funding to the student's "providers/agencies" for the provision of services at an enhanced rate (Parent Ex. A at p. 2).[13]

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"]).

[13] 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.

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. 1-50). In this case, at the time of the May 7, 2024 impartial hearing on the merits, the parent requested authorization to locate a speech provider at a reasonable market rate if the parent should locate one before the end of the school year (Tr. p. 26). In her closing statement, the parent asserted that whether the case is analyzed under the "compensatory standard" or the Burlington/Carter standard, she should receive the same relief (Tr. pp. 42, 46-47). The parent then specifically requested that for "speech-language therapy services, the [p]arent be authorized to hire a provider at reasonable market rate" explaining that related services authorizations were capped as to a rate that was "usually not enough to get a provider" (Tr. p. 47). Thus, the parent was specific in seeking a remedy of funding for private services on an going-forward basis but did not seek make-up services (i.e., future services to make up for past violations).

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 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. 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 April 2023 IEP.

With that said, nothing in this decision should be deemed to relieve the district of its obligations to the student pursuant to pendency, which may include make-up services; however, the hearing record is not developed in this matter regarding implementation of pendency so I decline to opine on the question.

VII. Conclusion

The evidence in the hearing record demonstrates that the parent established the appropriateness of the unilaterally-obtained OT services from Step Ahead after January 8, 2024; however, a 10 percent reduction in the award of district funding for the costs of the services is warranted on equitable grounds. Additionally, the hearing record supports the district's cross-appeal of the IHO's award of compensatory speech-language therapy services as the parent did not sufficient raise such relief in her due process complaint notice or at the hearing.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 13, 2024, is modified by reversing that portion which found that the parent was not entitled to direct funding of the costs of the unilaterally-obtained OT services by Step Ahead; and,

IT IS FURTHER ORDERED that the district is ordered to directly fund the costs of the unilaterally-obtained OT services by Step Ahead at a rate not to exceed 90 percent of the total hourly rate of $250.00, or $225.00 per hour, upon presentation of proof of delivery to the student of up to two 30-minute sessions per week of such services during the 2023-24 school year after January 8, 2024; and

IT IS FURTHER ORDERED that that the IHO's decision dated May 13, 2024 is modified by vacating those portions which ordered the district to provide compensatory education as relief.

Dated: **Albany, New York**
August 12, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER