The University of the State of New York

The State Education Department
State Review Officer
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No. 24-272

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 Hanna Giuntini, 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 for reimbursement or direct funding for the costs of unilaterally-obtained occupational therapy (OT) services delivered to her son by Always A Step Ahead, Inc. (Step Ahead or agency) during the 2023-24 school year. The appeal must be sustained.

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[a]). 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

In this case, the evidence in the hearing record concerning the student's educational history is sparse. Briefly, a CPSE convened on July 19, 2022, and developed a preschool-aged IEP for

the student for the 2022-23 school year (July 2022 CPSE IEP) (see IHO Ex. I at p. 1).[1] Finding the student eligible to receive special education as a preschool student with a disability, the July 2022 CPSE recommended that the student receive two 30-minute sessions per week of OT in a group and two 30-minute sessions per week of physical therapy (PT) in a group, both on a 10-month school year basis, at a childcare location selected by the parent (id. at pp. 1, 13). In addition, the July 2022 CPSE developed annual goals with corresponding short-term objectives targeting the student's needs in the areas of fine motor skills (fine motor coordination, visual-motor coordination, and visual-percentual skills) and gross motor skills (balance, gross motor coordination, and core muscle strength) (id. at pp. 10-12).

In a final notice of recommendation, dated July 16, 2022, the district summarized the CPSE's recommendations (see Parent Ex. B). The parent signed the notice on July 20, 2022, thereby consenting to the provision of 10-month preschool services, consisting of OT and PT, to the student (id.).

Evidence in the hearing record reflects that the student reportedly began receiving OT services from Step Ahead on or about October 24, 2023 (see Parent Ex. G at p. 1).[2]

A. Due Process Complaint Notice

By due process complaint notice dated January 19, 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 at p. 1). According to the parent, the student's July 2022 individualized education services program (IESP) represented the last program developed for the student, which included recommendations for two 30-minute sessions per week of OT in a group and two 30-minute sessions per week of PT in a group (id.).[3, 4] The parent further indicated

[1] The July 2022 CPSE IEP was not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see IHO Ex. I at pp. 1-19).

[2] 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[nn]).

[3] Based on the limited evidence, it appears that the student was parentally placed at a religious, nonpublic school for the 2023-24 school year at issue (see Parent Ex. A at p. 1).

[4] The parent's due process complaint notice incorrectly reflects that the July 2022 CPSE developed an IESP for the student, rather than an IEP (see Parent Ex. A at p. 1). However, given the student's age, the student would have continued to have been considered as a preschool student during the 2023-24 school year (id.; see IHO Ex. I at p. 1; see also Tr. pp. 18-28). It therefore follows that the 2024-25 school year would be the first school year in which the student would be eligible for equitable services through an IESP pursuant to the State's dual-enrollment statute. State guidance explains that section 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 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 [IDEA] 2004 and New

that she "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that, for the "full 2023-2024 school year," the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers to work at the district's "standard rates," and the district had not provided any for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency and to directly fund the costs of the student's related services (i.e., two 30-minute sessions per week of OT in a group and two 30-minute sessions per week of PT in a group at the "enhanced rate each charge[d] for their service" for the 2023-24 school year (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

On March 6, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-13). On that day, the IHO conducted a prehearing conference, and the district's attorney executed a pendency implementation form, which indicated that the parties agreed that the student's July 2022 IEP formed the basis for the student's pendency services consisting of two 30-minute sessions per week of OT in a group and two 30-minute sessions per week of PT in a group on a 10-month school year basis (see Tr. pp. 2-6; Pendency Impl. Form). The first day of the impartial hearing concluded with the IHO and the parties scheduling the next date of the impartial hearing to take place on April 8, 2024 (see Tr. pp. 6-12).

After the conclusion of the first day of the impartial hearing, a "Secretary" with Step Ahead signed a statement, dated March 27, 2024, on Step Ahead's letterhead, which indicated that the documents provided for this student's case, including the "parent contract, provider's certification, attendance records, progress reports and rate list of approved cases, were taken from Always A Step Ahead's files that it ke[pt] for this student in the ordinary course of its business" (Parent Ex. D). The next day, on March 28, 2024, the parent signed a document on Step Ahead's letterhead indicating that she was "aware that the services being provided to [the student] [we]re consistent with those listed in [the student's] IEP/IESP" dated July 2022, and similarly, that she was aware that related services were provided to the student at a rate of $250.00 per hour (Parent Ex. C).[5]

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).

[5] The same document includes a signature by the director of Step Ahead, but it does not indicate when the director may have signed the statement (see Parent Ex. C).

On April 8, 2024, the impartial hearing resumed as scheduled, and concluded on the same day (see Tr. pp. 14-61). Initially, the IHO informed the parties that he had not seen a copy of the student's preschool IEP, and the IHO asked the district's attorney to locate a copy so it could be included as evidence in the hearing record as an IHO exhibit (see Tr. pp. 16-19). The district's attorney located a copy of an IESP, dated March 2024, but the parent's attorney noted that that IESP had been developed after the due process complaint notice for the instant matter and resulted from the student's "Turning 5" meeting (Tr. pp. 19-20). As the district's attorney continued to search for the student's preschool IEP, the IHO asked that the district to forward copies of both the March 2024 IESP and the July 2022 CPSE IEP to determine whether the recommended special education programs were the same (see Tr. pp. 20-21). According to the IHO, if the programs were the same in the IESP and the IEP, then he would "likely consider th[e IESP] to be the operative IEP," as the parent's claims would necessarily be the same, and the parent's attorney concurred with the IHO (Tr. p. 21). The district's attorney interjected, however, that the parent's due process complaint notice might "need to be amended" (Tr. pp. 21-22). The IHO then reviewed the parent's due process complaint notice, stating that the "complaint involve[ed] 3602-c," and if the student was "entitled to anything, [he] was entitled to the services recommended in the[] IESP" (Tr. p. 22). The IHO further noted that if the "operative IESP [wa]s the [March 2024] IESP, . . . that would be what the student [wa]s entitled to" (id.). According to the IHO, he did not consider the instant matter as a "traditional case under the IDEA" but the parties could make whatever arguments necessary (id.). The IHO also explained that he did not "believe that this would be a case in which the [p]arent would be able to make an argument for the preschool IESP or IEP" as "being operative" (id.). However, the IHO repeated that the parties were free to make whatever arguments they deemed necessary, but if the parent's claims did not seek consideration of what was recommended in the March 2024 IESP, then he might be limited if the parent was seeking something outside of the March 2024 IESP (see Tr. pp. 22-23). The IHO indicated that they could discuss an adjournment if the district had no objections to the parent refiling in this matter (see Tr. p. 23).

After the parent's attorney had received and reviewed copies of the July 2022 IEP and the March 2024 IESP, she stated that the March 2024 IESP was scheduled for implementation in September 2024; therefore, the IHO concluded that the July 2022 preschool IEP remained as the operative IEP and the IHO entered the July 2022 IEP into evidence as an IHO exhibit (see Tr. pp. 24-28, 33; see generally IHO Ex. I). The IHO then allowed the parties to present opening statements (see Tr. pp. 28-32).[6]

Next, the parent entered documentary evidence into the hearing record (see Tr. pp. 35-43; Parent Exs. A-G). The district did not proffer any documentary or testimonial evidence; the parent also did not present any witnesses, either in-person or via affidavits, to testify on the parent's behalf (see Tr. pp. 17-18, , 32-33, 43; see generally Parent Exs. A-G). Thereafter, the parties presented closing statements to the IHO (see Tr. pp. 43-53). After the conclusion of the parties' closing statements, the IHO noted that he "d[id] not think is [wa]s appropriate to apply a Burlington/Carter standard" to this matter, as although he believed some 3602-c cases may be right for applying a

[6] As part of the parent's opening statement, the parent's attorney requested a bank of compensatory educational services for PT, "should an appropriate provider be located prior to the completion of this school year" (Tr. p. 32).

Burlington/Carter standard, applying it in this matter would put an undue burden and expectation on the [p]arent for things that the law, that 3602-c, just doesn't put on [p]arent as a burden" (Tr. pp. 54-56).

In a decision dated May 15, 2024, the IHO initially described the procedural history of the matter, and within the findings of fact, determined that the student, during the 2023-24 school year, was a preschool student with a disability and that it was "uncontested" that the student attended a "private religious school" during the 2023-24 school year (IHO Decision at pp. 3-6). As part of the procedural history, the IHO indicated that, as had been explained during the impartial hearing, he did not agree that the Burlington/Carter legal standard was an appropriate analysis to use in this matter (id. at p. 6).

Turning to the conclusions of law, the IHO found that Education Law § 3602-c—or the dual enrollment statute—also did not apply to this matter because, during the school year at issue, the student was not yet five years old and remained a preschool student (see IHO Decision at p. 7, citing Educ. Law §§3202[1], 3602-c[1][d], 4401[1]). Therefore, the IHO concluded that the student was not eligible to receive the relief sought by the parent, and alternatively, was not entitled to services under the federal regulations implementing the IDEA as a parentally-placed private school student (id.). The IHO further noted that the student did not have an IESP, which further disqualified the student from receiving the relief sought by the parent (id.). As a result, the IHO dismissed the parent's due process complaint notice with prejudice (id. at pp. 7-8).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by denying her request for direct funding of the unilaterally-obtained OT services delivered by Step Ahead for the 2023-24 school year.[7] Initially, the parent argues that the student was entitled to services under Education Law § 4404(1) as a preschool student, and thus, the district bore the burden of proof and persuasion to establish that it offered the student an appropriate program. The parent further argues that this matter should not be subjected to a Burlington/Carter analysis; however, even if assessed under this standard, the parent contends that the unilaterally-obtained OT services were appropriate. With respect to the OT services allegedly delivered to the student by Step Ahead, the parent contends that she used appropriately credentialed and licensed providers. In addition, the parent contends that the IHO's finding that the student was not entitled to equitable services pursuant to section 3602-c was "nonsensical" given that this student is a preschool student. Next, the parent asserts that, to the extent the district contends that equitable considerations exist with regard to the absence of a 10-day notice of unilateral placement, the validity of the contract, or the reasonableness of hourly rates, these arguments lack merit and must be rejected. Finally, the parent argues that, to the extent that the IHO's decision rests on what amounts to a typographical error in the due process complaint notice referring to an "IESP" rather than an "IEP," such reliance was not rationale. As relief, the

[7] The parent affirmatively asserts that her appeal is limited to seeking direct funding of the student's OT services, but does not seek direct funding of the student's PT services (see Req. for Rev. ¶ 27). In addition, the parent does not challenge the IHO's failure to award a bank of compensatory educational services for PT services not delivered to the student, relief she had requested at the impartial hearing (see generally Req. for Rev.).

parent seeks an order directing the district to directly fund the costs of the OT services delivered by Step Ahead during the 2023-24 school year at the contracted rates.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. In addition, the district asserts that the parent's appeal must be dismissed as it fails to comply with practice regulations because the parent did not timely file the notice of intention to seek review. The district also argues that the parent failed to sustain her burden of proof with respect to establishing that the OT services delivered by Step Ahead were appropriate and that equitable considerations do not weigh in favor of the parent's requested relief.

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 or CPSE 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]).[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, 369-70 [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

[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" (Endrew F., 580 U.S. at 402).

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. Preliminary Matters—Compliance with Practice Regulations

As noted, the district seeks to dismiss the parent's request for review by alleging that the parents did not timely serve the notice of intention to seek review.

An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). The petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision and thereafter, must serve the opposing party with the request for review no later than 40 days after the date of the IHO's decision (8 NYCRR 279.2[b]). The petitioner must also file the "notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review . . . within two days after service of the request for review is complete" (8 NYCRR 279.4[e]).

The practice regulations envision an efficient process by which a notice of intention to seek review is served upon the respondent approximately 10 days before a request for review is served (but not later than 25 days after the date of the IHO decision).[9] Among other things, the "service of a notice of intention to seek review upon a school district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (see Application of a Student with a Disability, Appeal No. 24-083; Application of a Student with a Disability, Appeal No. 21-054; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014). The district must file the completed and certified record with the Office of State Review within 10 days after service of the notice of intention to seek review (see 8 NYCRR 279.9[b]).

Here, consistent with the district's assertion, the parent—who is represented by an attorney with significant experience practicing before the Office of State Review—served the notice of

[9] If the respondent in an appeal is a school district, this provides school district personnel ample time to examine, prepare and certify the complete administrative record. On the other hand, if the respondent is a parent, a parent who has been timely provided with a notice of intention to seek review has ample notice before the parent's responsive pleading is due to facilitate engagement (or reengagement) of legal representation and/or to begin to consider possible defenses to favorable outcomes obtained in the hearing process or cross-appeal any unfavorable aspects of the IHO's decision.

intention to seek review and case information statement on the district on June 21, 2024, and then three days later, served the notice of request for review and request for review on the district on June 24, 2024. Based on the date of the IHO's decision, May 15, 2024, and the timelines set forth in State regulations, the parents were required to serve the district with the notice of intention to seek review no later than June 10, 2024.[10] Therefore, it is undisputed that the parent untimely served the notice of intention to seek review. However, an SRO "may, in his or her discretion . . . review the determination of an impartial hearing officer notwithstanding a party's failure to timely serve a notice of intention to seek review" (8 NCYRR 279.2[f]).

Based on the parent's noncompliance with State regulation, together with what the district characterizes as a developing pattern of untimely filing of notices of intention to seek review by the parent's attorney, the district asks the undersigned to take judicial notice of this alleged pattern and to consider the inherent prejudice to the district arising from its receipt of the parent's notice of intention to seek review approximately one week after its own deadline for filing a notice of intention to cross-appeal would have passed, as a basis upon which to dismiss the parent's appeal.

However, despite attributing a pattern of late filings to the parent's attorney, the district fails to point to any specific evidence to support this claim, other than the filing in this appeal. In addition, the district has not identified any prejudice in responding to the parent's request for review or its ability to timely file a certified hearing record with the Office of State Review. Therefore, at this juncture, as the district has not demonstrated sufficient prejudice, I will exercise my discretion and decline to dismiss the parent's request for review for the failure to timely file the notice of intention to seek review (see 8 NCYRR 279.2[f]).

B. Unilaterally-Obtained OT Services

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 (see IHO Ex. I at p. 1). Nevertheless, the district failed to provide the student with the recommended OT services at the student's preschool program.[11] In the January 19, 2024 due process complaint notice, the parent alleged that the district failed to implement the student's July 2022 "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 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 unilaterally-

[10] Although the district asserts that the parents had until June 9, 2024 to serve the notice of intention to seek review, June 9, 2024 fell on a Sunday; as a result, State regulations permitted the parents to timely serve the notice of intention to seek review on Monday, June 10, 2024 (see 8 NYCRR 279.11[b]).

[11] Although not at issue on appeal, it also appears that the student did not receive any of the recommended PT services during the 2023-24 school year (see generally Tr. pp. 1-61; Parent Exs. A-G).

obtained 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"]).[12]

In this instance, the IHO did not rely on the Burlington/Carter model of analysis to resolve the parties' dispute (see IHO Decision at pp. 4-6). In reaching the determination to deny the parent's requested relief, the IHO relied on the undisputed fact that the student was not yet eligible to receive equitable services pursuant to an IESP under the State's dual enrollment statute because the student was not five years old, as well as a finding that, despite the parent's assertion in the due process complaint notice that the student was entitled to services pursuant to an IESP, the parent failed to produce an IESP for the student (id. at pp. 6-7). In denying all relief, the IHO noted that the evidence in the hearing record included a "pre-school IEP, not an IESP" (id. at p. 7). However, regardless of the acronym used to describe the student's educational program in the due process complaint notice, the parent's due process complaint notice identified that the parent was challenging programming that was developed on July 21, 2022 that recommended two 30-minute sessions per week of OT and two 30-minute sessions per week of PT (Parent Ex. A at p. 1). Additionally, in the district's due process response, the district identified the January 2022 IEP, noting that the "IEP team" met on July 19, 2022 and found the student eligible for special education as a preschool student with a disability (Parent Ex. F at p. 1). Accordingly, it should have been clear from the due process complaint notice and the district's response that the parent was challenging the July 2022 IEP and was seeking OT services for the 2023-24 school year.

Additionally, contrary to the IHO's determination and the parent's assertion now on appeal, the parent's request for privately obtained services is properly 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).[13]

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

[13] In addition, the parent argues on appeal that, to the extent that the IHO's decision was "based on an a (sic) typo[graphical error] in referring to the IEP as an IESP," this error does not support the IHO's conclusion because the parent was "clear as to what IEP was relied on" and the district "conceded [that the s]tudent was entitled to the services under the IEP." A review of the IHO's decision, as well as the evidence in the hearing record, reflects that the IHO did not make a typographical error when referring to the student's July 2022 CPSE IEP, as opposed to an IESP, and moreover, the IHO properly noted that the student was not eligible for special education as a preschool student with a disability who was four years old during the 2023-24 school year at issue (see IHO

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; 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

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Decision at pp. 3-7; IHO Ex. I at p. 1). Instead, the parent mistakenly referred to the student's last-agreed upon program as an IESP, rather than an IEP, in the due process complaint notice. Nevertheless, because the student was entitled to receive special education as a preschool student with a disability pursuant to an IEP, the IHO was required to analyze the parent's claims under a Burlington/Carter legal standard, as explained herein.

> 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).

Based on the foregoing, the IHO, while properly noting that Education Law Section 3602-c, the State' dual enrollment statute, was inapplicable to the parties' disputes over the student's programming in this case student, nevertheless erred in finding that the July 2022 IEP was not challenged in this proceeding and by failing to apply the Burlington/Carter analysis to assess the parent's claim for reimbursement and/or direct funding for the unilaterally-obtained OT services from Step Ahead for the 2023-24 school year.

1. The Student's Needs

Although the student's OT 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 his needs and whether the student was provided with specially designed instruction to meet those needs. Based on the limited evidence in the hearing record, the July 2022 CPSE IEP reflected the results of evaluative information, which was obtained when the student was 2.10 years old (see IHO Ex. I at pp. 3-8). The present levels of performance in the July 2022 CPSE IEP indicated that, administration of the Vineland Adaptive Behavior Scale to the parent yielded a motor skills domain score of 82 (moderately low) for the student, the student's Peabody Developmental Motor Scale—2 fine motor/grasping subtest standard score was 38 with a fine motor quotient of 76, and results of the sensory profile administered to the parent indicated the student's performance was "[t]ypical" (id. at pp. 3-4). The IEP indicated that the student had difficulty engaging in fine and gross motor tasks, and he could not connect blocks in an appropriate manner (id. at p. 3).[14] According to the IEP, the student's difficulty with block design, which assessed perceptual reasoning skills, "m[ight] impair his ability to engage with fine-motor tasks within the classroom setting" (id. at pp. 5, 7).

Specifically, the July 2022 CPSE IEP indicated that the student's pincer grasp was "immature," and he had difficulty holding a crayon and scissors correctly, was unable to adequately control his hand movements, did not copy vertical and horizontal strokes, and had difficulty replicating simple shapes and stringing large beads together (IHO Ex. I at pp. 3, 7). Further, the IEP reflected that the student had difficulty dressing and undressing himself without assistance, manipulating large buttons and zippers, and eating appropriately with a spoon or fork (id. at p. 7). Additionally, the student had difficulty engaging in coloring, arts and crafts, jumping, and exercising activities (id. at p. 3).

[14] According to the July 2022 CPSE IEP, the evaluative information revealed that the student's overall cognitive, and receptive and expressive language skills were in the average range; however, he exhibited oral motor weakness, articulation and speech intelligibility deficits, and significant gross motor delays (see IHO Ex. I at pp. 3-5). The July 2022 CPSE IEP included a recommendation that the student receive PT to address the student's needs, as well as annual goals with corresponding short-term objectives targeting the student's gross motor skills (id. at pp. 11, 13). As noted, however, the parent did not obtain PT services from Step Ahead and she is not now seeking reimbursement or direct funding or compensatory educational services for any missed PT services.

To address these needs, the July 2022 CPSE IEP included a recommendation that the student receive two 30-minute sessions per week of OT services in a small group (see IHO Ex. I at pp. 1, 13). In addition, the July 2022 CPSE developed annual goals with corresponding short-term objectives targeting the student's fine motor coordination, visual-motor coordination, and visual-perceptual skills (id. at p. 10).

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 what appears to be a fillable document, which the parent submitted into evidence and identified as a "Session Report"; however, the document, itself, does not bear any title or reflect the origin of the document (Parent Ex. G at pp. 1-5). The session report reflects the student's name; the OT provider's name; the date of session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); areas to describe goals (all left blank); and areas for notes (id.).[15] Overall, a review of the session report shows that the student generally received 30-minute sessions with the OT provider from October 24, 2023 through February 28, 2024 (id.). According to the session report, the student worked on skills such as improving fine motor and hand strength, visual-perceptual skills, sensory regulation, and gross motor coordination and strength (id.).

More specifically, to address fine motor and hand strength skills, the student engaged in activities such as manipulating and squeezing theraputty, placing coins into a container, playing various games, drawing on a chalkboard, cutting shapes in hard paper, coloring while maintaining "boarder integrity," writing his name on a tablet, tracing letters of his name and shapes, peeling stickers, and using modeling clay (Parent Ex. G at pp. 1-5). The student's need to improve visual-perceptual skills was addressed by activities such as completing a puzzle, engaging in various games, throwing bean bags at a target, finding hidden pictures, matching color cards, using parquet blocks to make a train, and placing shapes in designated spots (id.). To improve the student's sensory processing skills, the occupational therapist used items such as sensory foam, tunnels to crawl through, water beads, balloons, sand, and weighted balls (id.). With respect to gross motor strength and coordination, the student completed activities such as bouncing on a ball, jumping, using a balance beam, rock climbing, moving through an obstacle course, throwing and catching

[15] Based on the session report, the student generally received OT beginning anywhere from 9:00 a.m. to 12:30 p.m. (see generally Parent Ex. G). The hearing record does not include any evidence describing the student's school day at his religious, nonpublic school, such as the length of his day or a class schedule (see generally Tr. pp. 1-61; Parent Exs. A-G; IHO Ex. I). According to the student's July 2022 CPSE IEP, the OT services recommended therein were to be delivered in a childcare location selected by the parent (see IHO Ex. I at pp. 1, 13).

a ball, using a balance/rocking board, monkey bars, prone scooter board, and wheelbarrow walking (id.).

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 were specially designed to meet his unique needs during the 2023-24 school year.

C. Equitable Considerations

Having found that the OT services were appropriate, the next inquiry focuses on 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"]).

The parent asserts that equitable considerations are not relevant to the analysis of whether she is entitled to direct funding of the costs of the unilaterally-obtained OT services. More specifically, 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. Finally, the parent asserts that she was not required to have a contract in writing.

The district asserts that equitable considerations do not weigh in favor of the parent's requested relief because the parent failed to provide the district with a 10-day notice of unilateral placement and failed to establish that she had a legal obligation to pay for OT services delivered to the student by Step Ahead prior to the date that she signed a "purported contract" with Step Ahead on March 28, 2024.

1. Financial Obligation

With respect to the district's contention regarding the date the parent signed the Step Ahead statement or contract, in Burlington, the Court stated that "[p]arents who unilaterally withdraw

their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

Regarding proof of financial risk, 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. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]).

Here, the document, signed by the parent on March 28, 2024, included a sufficient statement of the parent's intent to be legally bound to pay the costs of the services from Step Ahead consisting of services mandated in the July 2022 "IEP/IESP" at specified rates delivered during the 2023-24 school year (Parent Ex. C). Thus, the statement signed by the parent is sufficient to establish that she was financially obligated to fund the unilaterally-obtained OT services.

2. 10-Day Notice

As noted, the district contends that the parent's failure to provide a 10-day notice of unilateral placement constitutes another equitable consideration upon which to deny the parent's requested relief. Under the federal statute, reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent IEP team 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 v. Medina City Sch. Dist., 348 F.3d 513, 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).

Here, 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. 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 was when she filed her due process complaint notice, dated January 19, 2024 (see Parent Ex. A at pp. 1-2). Thus, to the extent the district was on notice that the parent was unilaterally obtaining services as of January 19, 2024, a partial reduction of funding is warranted, amounting to thirty percent of the total amount sought by the parent.

VII. Conclusion

In summary, the evidence in the hearing record demonstrates that the parent established the appropriateness of the unilaterally-obtained OT services from Step Ahead; however, a reduction in the award of district funding for the costs of the services is warranted on equitable grounds. In light of these determinations, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision dated May 15, 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 70 percent of the total hourly rate of $250.00, or $175.00 per hour, upon presentation of proof of services delivered during the 2023-24 school year and invoices for such services for the 2023-24 school year.

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

JUSTYN P. BATES
STATE REVIEW OFFICER