The University of the State of New York

The State Education Department
State Review Officer
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No. 24-284

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 Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay R. VanFleet, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Always a Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. The 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 in detail.

Briefly, the CPSE convened on February 14, 2023 and finding the student eligible for special education as a preschool student with a disability developed an IEP for the student (see IHO Ex. II).[1] The CPSE recommended that the student receive four 60-minute sessions per week (one session per day) of special education itinerant teacher (SEIT) services in a group of two, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of small group (2:1) speech-language therapy, two 30-minute sessions per week of small group (2:1) occupational therapy (OT), and two 30-minute sessions per week of small group (2:1) physical therapy (PT) (id. at p. 17).[2]

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated January 24, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent asserted that the last program developed by the district was in February 2023 and argued that the student required that same program for the 2023-24 school year (id.).[3] The parent contended that she was unable to locate providers at the district standard rates for the 2023-24 school year and that the district did not provide any (id.). According to the parent, she was able to find providers to deliver all required services for the 2023-24 school year, but at rates higher than the standard district rates (id.). The parent requested a pendency hearing and an order directing the district to fund the student's speech-language therapy, OT, and PT at enhanced rates for the 2023-24 school year (id. at p. 2). The parent also requested any other relief deemed appropriate (id.).

On March 28, 2024, the parent electronically signed a document on Step Ahead's letterhead indicating that she was "aware that the services being provided to [her] child [we]re consistent with those listed" in the student's February 2023 IEP (Parent Ex. C). She also indicated that she

[1] The parent submitted a summary information form and an attendance form from the February 2023 IEP (see Parent Ex. B).

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

[3] The parent's due process complaint notice incorrectly refers to the IEP developed by the February 2023 CPSE as an individualized education services program (IESP) (see Parent Ex. A at p. 1). However, given the student's age, the student would have been considered as a preschool student during the 2023-24 school year (see Parent Ex. B; see also Educ. Law § 4410[f], [i]). State 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).

was "aware that the rate of . . . the related services provided to [her] child [we]re $250 an hour" (id.).[4]

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on March 6, 2024 and concluded on May 8, 2024 after two days of proceedings (see Tr. pp. 1-52).

In a decision dated May 21, 2024, the IHO held that there was no dispute that the student was entitled to services pursuant to the February 2023 IEP, that the district failed to provide those services, and therefore, failed to sustain its burden that it offered the student a FAPE (IHO Decision at pp. 7, 8).[5] The IHO noted that the parent only succeeded in finding a speech-language therapy provider at a rate of $250 per hour, and sought compensatory education services for OT and PT (id. at p. 7). In a footnote, the IHO found that the February 2023 IEP recommended SEIT services, but that the parent did not request them in the due process complaint notice or at the impartial hearing, as such, the IHO "deem[ed] any claim for SEIT services waived" (id.).

Turning to the requested relief, the IHO noted that the parent was seeking district funding of twice weekly 30-minute sessions of speech-language therapy at the rate of $250 per hour and a bank of compensatory OT and PT services, totaling 36 hours each, at a reasonable market rate (IHO Decision at p. 8). The IHO found that the parent provided a contract, session notes, a progress report dated December 2023, and a "certificate" from the speech-language therapist who wrote the progress report and whose name appears on the session notes (id. at p. 10). However, the IHO determined that without witness testimony, "the documentary evidence [wa]s too unclear and insubstantial to show that the services obtained by the [p]arent for the [s]tudent [we]re appropriate, and that the relief requested [wa]s reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied to the [s]tudent" (id.). As an example, the IHO noted discrepancies between the contract and the services provided to the student, specifically noting that the contract indicated services were provided consistent with the student's IEP but the documents in the hearing record only showed that the student received speech-language therapy services (id.). Accordingly, the IHO denied the parent's requested relief and dismissed the due process complaint notice with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by denying her relief. The parent contends that the IHO used the incorrect standard. According to the parent, she utilized the services of appropriately credentialed/licensed providers for speech-language therapy and simply requested that the agency be paid for delivering the services on the IEP, which details the goals

[4] Step Ahead is a private corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[5] The IHO noted that on January 31, 2024, the district issued a Pendency Implementation Form granting the student pendency pursuant to a February 2023 IEP (IHO Decision at pp. 1, 3, 11).

and frequency of services the district itself created and recommended. Moreover, the parent contends that the lack of a witness was not a reason to deny relief. Regarding the request for compensatory services for OT and PT, the parent asserts that the student was entitled to the services and the district did not provide them, facts that the district did not dispute.

As to equitable considerations, the parent asserts a contract is not required to establish a financial obligation and the terms of the parent's agreement with Step Ahead was memorialized in writing; and therefore, a valid and binding financial obligation exists. According to the parent, the date of the contract does not negate the parent's financial obligation to pay. The parent argues that there is nothing in the hearing record showing inequitable conduct by her and that the district is the party that has acted inequitably.

The parent requests an order reversing the IHO's decision and granting her request for direct funding for speech-language therapy at the rate of $250 per hour and compensatory services for OT and PT for 36 hours each at the reasonable market rate.

In its answer, the district asserts that the IHO properly held that the parent failed to prove the unilaterally obtained services were appropriate. The district contends that the IHO properly used the Burlington-Carter standard. The district asserts that the parent obtained SETSS for the student but did not present any evidence or testimony as to how related services were implemented or how they were designed to meet the student's unique needs. Nor is there evidence of progress. The district argues that the request for OT and PT should also be denied because the agency was not providing them. Further, the district contends that the parent did not request compensatory services in her due process complaint notice and only requested this relief at the end of the impartial hearing. Turning to equities, although the IHO did not reach the issue, the district contends that they do not favor the parent. The district asserts that the parent signed the contract three month after services allegedly began and two months after the due process complaint notice was filed. Therefore, the district asserts that there is no evidence of contract prior to March 28, 2024.

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

Here, neither party appealed from the IHO's determinations that the student was entitled to services pursuant to the February 2023 IEP and that the district failed to meet its burden to show that it provide the student with mandated services and thus, that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at p. 8). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Legal Standard

Prior to reaching the substance of this matter, some consideration must be given to the appropriate legal standard to be applied. In this matter, the parent challenges the district's failure to implement the student's mandated public special education services under the student's preschool IEP for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private speech-language therapy services from Step Ahead for the student without the consent of

[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).

the school district officials, and then commenced due process to obtain remuneration for the costs thereof.

Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

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 (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 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. 2014]).

B. Unilaterally Obtained Services

On appeal, the parent argues that, contrary to the IHO's determination, she sustained her burden to establish that the unilaterally obtained speech-language therapy services delivered by Step Ahead were appropriate, because the speech-language provider was "credentialed," and as the provider delivered services pursuant to the student's February 2023 IEP, it was "not possible that such a 'program' c[ould] be deemed inappropriate."

Initially, the hearing record does not support the parent's factual assertion that Step Ahead was delivering services to the student pursuant to the student's February 2023 IEP. Review of the hearing record shoes that the parent asserted she "found providers who [we]re willing to provide the student with all required services for the 2023-2024 school year" (Parent Ex. A at p. 1) and she signed an agreement indicating she was "aware that the services being provided to [her] child [we]re consistent with those listed in [her] child's IEP/IESP dated: 02/14/2023" (Parent Ex. C). However, as noted by the IHO, the hearing record only includes evidence related to speech-language therapy services, while the February 2023 IEP recommended that the student receive four hours per week of SEIT services, one individual and one group 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of group OT, and two 30-minute sessions per week of group PT (IHO Decision at p. 10; see Parent Exs. G; H; IHO Ex. II at p. 17). Additionally, the hearing record does not indicate whether the speech-language therapy services delivered to the student were delivered individually or in a group, or if the student received some of each (see Parent Exs. G; H). Accordingly, it cannot be said that the student was provided with services as recommended in the February 2023 IEP. Nevertheless, this is not the standard and instead, a review must be made of the appropriateness of the unilaterally-obtained services, which in this case is just the speech-language therapy services and for this analysis, the federal standard for adjudicating these types of disputes is instructive.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 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 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).

It is well settled that 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). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (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]).

1. The Student's Needs

Although not in dispute, a discussion of the student's needs provides context to resolve the issue on appeal, namely whether the speech-language therapy services delivered by Step Ahead were appropriate to meet the student's needs. Administration of the Wechsler Preschool and Primary Scales of Intelligence (WPPSI-IV) to the student yielded a verbal comprehension score of 87 (low average), a visual spatial score of 67 (extremely low), a working memory score of 61 (extremely low), and a full-scale IQ of 68, indicating overall cognitive functioning in the extremely low range (IHO Ex. II at pp. 3, 5). According to results of the Vineland Adaptive Behavior Scales administered to the parent, the student's communication, daily living, motor skills, and adaptive behaviors composite scores were all in the moderately low range, with socialization skills in the low range (id.). Measures of the student's general development, gross and fine motor skills, and sensory processing also yielded below average and definite difference scores (id. at pp. 3-5, 7-9).

The IEP reflected reports that the student had difficulty following the classroom rules and routine, was rigid in his preferences, did not like to get messy, and had aversions to textures (id. at p. 8).

Specific to the student's speech-language needs, administration of the Preschool Language Scale, Fifth Edition (PLS-5) yielded an auditory comprehension standard score of 82 and an expressive communication standard score of 84 (IHO Ex. II at p. 4). On the Goldman Fristoe Test of Articulation the student achieved a score of 85, and according to results of the Stuttering Severity Rating Guide, the student exhibited moderate dysfluencies (id.). The February 2023 IEP present levels of performance indicated that the student demonstrated moderately delayed language skills and reduced speech intelligibility (id. at p. 5). The student did not follow multi-step commands without cues, understand pronouns, make inferences, label described objects, or tell object functions (id.). Additionally, the student demonstrated difficulty verbalizing, and required visual cues before responding to most multi-step directives (id.). The student's fluency deficits included part word repetitions and interjections, and according to his teachers, the student had difficulty "getting the words out and that his dysfluencies at times t[ook] over his speech" (id.). Further, the student presented with misarticulations, could not produce the /r, s, z, th/ sounds, and exhibited several phonological processes including liquid simplification and stopping (id.). The IEP reflected the parent's concerns about the student's speech-language development, that he struggled to express himself effectively to others and understand instructions, and often said 'what' in response to a question or request (id.).

According to the February 2023 IEP, socially the student recognized family members and responded with a smile to a friendly voice (IHO Ex. II at p. 6). The student did not play with another child for 30 minutes but sought comfort when hurt or upset and sometimes asked for help when he needed it (id.). The student followed routines, sat during circle time, and interacted with other peers but often played on his own (id.). The parent had concerns regarding the student's socialization delays and reported that he did not ask for assistance when having difficulty or change from one activity to another when required by an adult or parent (id. at pp. 6-7).

The February 2023 CPSE identified strategies to address the student's management needs including use of visual, verbal, gestural and modeled cues, positive reinforcement, repetition, and use of a visual schedule (IHO Ex. II at p. 10). The CPSE also determined that the student could participate in classroom activities with support as needed (id.).

The February 2023 CPSE developed annual goals and short-term objectives in the areas of preacademic readiness, fine motor, gross motor, and speech-language skills (IHO Ex. II at pp. 11-17). Specific to this appeal, an annual speech-language goal to improve the student's receptive language skills to participate effectively in school and community included short-term objectives to increase comprehension of questions, pronouns, expanded sentences, and location words, identify object category features, and make inferences (id. at p. 14). To improve expressive language skills, the CPSE developed short-term objectives to improve the student's ability to answer "why" questions, identify objects, answer questions, and name categories and items that fit into categories (id. at pp. 14-15).

2. Speech-Language Therapy 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]).

The hearing record included what appears to be a fillable document, which the parent submitted into evidence and is identified as "Session Notes"; however, the document, itself, does not bear any title or reflect the origin of the document (Parent Ex. G at pp. 1-4). The session notes reflect the student's name; the speech-language 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.). Overall, a review of the session notes shows that from December 7, 2023 to March 19, 2024 the student generally received two 30-minute sessions per week with a speech-language provider who holds a "Speech and Language Disabilities, Initial Certificate" (Parent Exs. E; G at pp. 1-4).[7] The document indicates that the student received a total of 27 sessions of speech-language therapy consisting of a total of 14 hours of services.

According to the session notes, the student worked on skills such as: following directions, understanding spatial concepts, describing objects, sorting, and categorizing (Parent Ex. G at pp. 1-4). In addition, the session notes indicated that the student worked on answering comprehension questions and using descriptive language to describe pictures and scenes (id.). The session notes also reflected that the student worked on engaging in activities such as playing a game, completing crafts, and responding to questions about a story read aloud (id.). Additionally, the student worked on making inferences, retelling stories, and expressing reasoning behind certain actions or events (id. at pp. 3-4).

A December 28, 2023 speech-language therapy progress report indicated that the student "began treatment in the beginning of December" and identified his needs as impairments in speech intelligibility, understanding, asking, and answering "WH" questions, following directions, expressing needs and feelings, using descriptive vocabulary, turn-taking, and maintaining a conversation with teachers and peers (Parent Ex. H at p. 1). According to the progress report, the student became distracted quickly and required multiple redirection prompts when completing 1-2 step directions (id.). He was described as speaking quickly and having poor speech intelligibility (id.). The progress report indicated that the student required assistance in asking and answering "WH" questions and required support to sequence a story (id.). According to the provider, the student did not independently express his needs and feelings, and he had difficulty taking turns in an activity and maintaining a conversation with others (id.). Additionally, the student needed moderate prompting to describe an object due to limited vocabulary and use of vague terms (id.).

[7] Although the evidence was entered into the hearing record on May 8, 2024, the hearing record does not include any information indicating the student received speech-language therapy services between March 19, 2024 and May 8, 2024 (see Tr. p. 40; Parent Ex. G).

The speech-language provider developed five new annuals goals to improve the student's speech intelligibility, expressive language skills by using appropriate descriptive vocabulary and retelling a story or event using appropriate vocabulary and grammar, receptive language skills by following 1-2 step directions, and pragmatic language skills by turn taking with peers in a structured therapy session (id.).

The IHO concluded that "[w]ithout witness testimony . . . the documentary evidence [wa]s too unclear and insubstantial to show" that the speech-language therapy services provided by Step Ahead were appropriate (IHO Decision at p. 10). Within this discussion, the IHO found that while the evidence included a "signed contract" between the parent and Step Ahead, "it raise[d] multiple questions that could have been answered by a witness," including that the student's speech-language therapy services started on December 7, 2023, but the parent did not sign the contract until March 28, 2024 (id.). Upon review of this finding, the IHO's discussion of the parent's contract conflates equitable considerations with an analysis of whether the unilaterally obtained speech-language therapy was appropriate, which was an error on the part of the IHO.[8]

Next, regarding the IHO's finding that without witness testimony the documents were not sufficiently clear to show that the unilaterally obtained speech-language therapy was appropriate, review of the progress report shows that the speech-language provider identified the student's needs, which were consistent with the February 2023 IEP, and developed annual goals to address those needs (see IHO Ex. II; Parent Ex. H). The session notes, as previously described, reflect what the student was working on during the speech-language therapy sessions, although the session notes' description of the interventions, modifications, or specific strategies the speech-language provider used with the student to show how, if at all, the instruction provided was tailored to the student and met the student's unique needs was limited (see generally Parent Ex. G).

Based on the foregoing, while it would be preferrable to have the testimony of the speech-language therapy provider at the impartial hearing, there is nonetheless sufficient evidence to show that the student received speech-language therapy from Step Ahead and that such services addressed the student's specific needs related to his speech-language skills during the 2023-24 school year. On appeal, the district raises questions regarding the veracity of the parent's documentary evidence; however, during the hearing, the evidence presented by the parent was not objected to by the district (see Tr. p. 36). The district offered no evidence or testimony to contradict or rebut the documentary evidence produce by the parent. Nor did the district seek to

[8] The Second Circuit Court of Appeals has held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]). The IHO should have separated her analysis of the appropriateness of the unilaterally obtained speech-language therapy and the equitable consideration of the parent's financial obligation to pay for those services.

cross-examine any potential witnesses.[9] Accordingly, as the parent's evidence was presented without objection or rebuttal, the IHO's dismissal of the documentary evidence based on the lack of witness testimony was unwarranted.

In light of the foregoing and contrary to the IHO's determination, the totality of the evidence in the hearing record, limited as it is, supports a finding that the parent sustained her burden to prove that the unilaterally obtained speech-language therapy delivered by Step Ahead during the 2023-24 school year between December 7, 2023 and March 19, 2024 was appropriate to meet the student's needs.

C. Equitable Considerations

Having found that the unilaterally obtained services were appropriate, next I turn to whether equitable considerations warrant an award or reduction of the parent's requested relief.

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

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

[9] It is noted that the parent did testify (Tr. pp. 6-24). However, her testimony was sought due to confusion regarding the due process complaint notice and whether the parent obtained her counsel. The parent's attorney indicated that they would not call a witness, but that an employee from Step Ahead could testify to clarify records if the district wished to cross-examine the witness, the district declined to do so (Tr. pp. 41-44).

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"]).

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "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]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [1985] [noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247[2009] [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

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]). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

Here, the district failed to submit any evidence to demonstrate that the requested rate was unreasonable. Although, the timing of the contract is questionable, as to when the parent actually signed the contract, the hearing record does establish that the parent signed an agreement of some kind with Step Ahead (Tr. p. 11). Additionally, regardless of when the parent signed the contract, the hearing record indicates that services were delivered to the student between December 7, 2023 and March 19, 2024 (Parent Ex. G).

At the May 2024 hearing, the district's attorney acknowledged that there was nothing in the hearing record regarding the district's standard rate, but that "it's generally agreed upon" that the rate sought is not a rate the district would "normally pay" (Tr. p. 45). This statement is insufficient to establish that equities bar or warrant a reduction in the relief sought. As such, the parent is entitled to funding of $250 for speech-language therapy delivered to the student by Step Ahead during the 2023-24 school year.

D. Compensatory Education

Turning to the parent's request for a bank of compensatory OT and PT services, the district argues that the parent did not request compensatory educational services as relief in the 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 request compensatory education services for OT and PT in her due process complaint notice dated January 24, 2024, 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 speech-language therapy, OT, and PT at an enhanced rate (id. at p. 2).[10]

As the parent's claims related to the district's failure to deliver services, and as it appears from the hearing record that the parent did not privately arrange for the delivery of all of the student's related services, "compensatory education would have been an appropriate form of relief for [the parents] to seek at the outset of their case" (M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]; see A.K. v. Westhampton Beach Sch. Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [finding that a request for compensatory education damages was not properly before the IHO or the SRO as it was "not raised in their administrative due process complaint"]).

However, 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. 1-52). In this case, at the impartial hearing, during the closing statement, the parent's attorney did mention a "bank of hours" (Tr. p. 46).

[10] 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 education and, as further noted, the parent did not request relief in this form at any point during the impartial hearing.

However, this statement alone does not support a finding that the parent sought compensatory education services for OT and PT. The hearing record demonstrates that the parent knew or should have known that she did not obtain those services for the student at the time the due process complaint was filed in January 2024.

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. As such, the parent did not properly raise compensatory education for OT and PT as a form of relief and the request for such relief, on appeal, is denied.

VII. Conclusion

The IHO erred in finding that the parent did not demonstrate that the unilaterally obtained speech-language therapy services delivered to the student by Step Ahead during the 2023-24 school year were appropriate. There is no evidence of an equitable bar to the parent's requested relief regarding speech-language therapy. Finally, for the reasons stated above, the request for compensatory education services is denied.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district must directly fund Step Ahead at the rate of $250 per hour for the speech-language therapy services delivered to the student during the 2023-24 school year, in the total amount of $3,500 representing the 14 hours of services the hearing record shows that the student received.

Dated: **Albany, New York**
August 30, 2024

STEVEN KROLAK
STATE REVIEW OFFICER