The University of the State of New York

The State Education Department
State Review Officer
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No. 25-044

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 Gail Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her son's unilaterally-obtained services delivered by Always a Step Ahead, Inc. (Step Ahead) for the 2024-25 school year. The appeal must be dismissed.

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 March 12, 2024, and developed a preschool-aged IEP

(March 2024 IEP) for the student for the 2024-25 school year (see Parent Ex. B at p. 1).[1] Finding the student eligible to receive special education as a preschool student with a disability, the March 2024 CPSE recommended that the student receive five 60-minute sessions per week of special education itinerant teacher (SEIT) services in a group (3:1), two 30-minute sessions per week of occupational therapy (OT) in a group (2:1), and two 30-minute sessions per week of speech-language therapy in a group (2:1), all of which were to be delivered on a 10-month school year basis at an early childhood location selected by the parent (id. at pp. 1, 12-13).[2] According to the IEP, the March 2024 CPSE recommended that the student receive one session per week of speech-language therapy in the classroom and one session per week of OT services in the classroom (id. at p. 12).

In a district form executed by the parent on May 9, 2024, the parent informed the district that the student would be parentally placed in a nonpublic school at her own expense, and she wanted the district to provide the student with special education services for the 2023-24 school year (see Parent Ex. F). The notice indicated that the parent had "not received any notice that the [district] w[ould] be providing providers for [the student's] services" and therefore, the parent was "advising that [she was] in the process of searching for [her] own providers to ensure" that the student received services (id.). It was further noted by the parent that if the district did not provide providers, the parent would be "requesting that the [district] fund the providers" she secured (id.).[3]

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[1] The student's eligibility to receive special education and related services as a preschool student with a disability is not in dispute (see 8 NYCRR 200.1[mm]).

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

[3] It is altogether unclear why the parent executed the district's June 1 form in this matter, as it is undisputed that the student would remain a preschool student during the 2024-25 school year at issue, as reflected by the student's March 2024 CPSE IEP (see Parent Ex. B at p. 1). Significantly, State guidance explains that Education Law 3602-c:

> pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These 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 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/programs/special-education/guidance-on-reimbursement-claims-for-

On or about September 3, 2024, the parent electronically executed a document with Step Ahead, which indicated that the parent was "aware that the rate of the related services provided to [the student we]re $250 an hour," and if the district did not fund the services, she would be "liable to pay for them" (Parent Ex. C at pp. 1-2). In addition, the Step Ahead document reflected that the "services being provided to [the student we]re consistent with those listed" in the student's March 2024 IEP (id. at p. 1). According to the document, the parent agreed that, if the student's services increased or decreased after the "signed date," then those services were "agreed upon as well" (id.). The document further indicated that the document memorialized the "agreement" between the parent and Step Ahead for the delivery of services to the student for the entire 2024-25 school year (id.).

Evidence in the hearing record reflects that the student reportedly began receiving speech-language therapy services from Step Ahead on or about September 30, 2024 (see Parent Ex. H at p. 1).[4] The evidence also reflects that the student reportedly began receiving OT services from Step Ahead on or about September 16, 2024 (id.).[5]

A. Due Process Complaint Notice

By due process complaint notice dated October 14, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and "equitable services" for the 2024-25 school year (Parent Ex. A at p. 1).[6] Initially, the parent indicated that the March 2024 IEP was the last program developed for the student, and the IEP included "sufficient and adequate services" to address the student's "academic, social and emotional issues"; the IEP would "enable the student to receive meaningful education benefits"; and the IEP offered the student an "appropriate education" (id.). The parent sought an order that "would make the IEP and the services recommended therein the [s]tudent's educational program for the 2024-2025 school year" (id.).

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the-cost-of-providing-special-education-services-to-parentally-placed-nonresident-students_0.pdf). Therefore, the student in this matter—as a preschool-age student—was not entitled to receive equitable services pursuant to an individualized education services plan (IESP) during the 2024-25 school year, and section 3602-c requirements, such as the June 1 notice, were also inapplicable in this matter. Nonetheless, even if a June 1 notice was required in this matter, the hearing record does not include any evidence that the notice signed by the parent on May 9, 2024, was sent to the district (see generally Tr. pp. 1-12; Parent Exs. A-J).

[4] Step Ahead has not been approved by the Commissioner of Education as a company, a preschool program, or a 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]).

[5] The evidence regarding when Step Ahead initiated OT and speech-language therapy services with the student shows that the services were purportedly delivered to the student from September 16, 2024 through October 31, 2024 (see generally Parent Ex. H).

[6] In a response to the parent's due process complaint notice dated October 16, 2024, the district notified the parent of its intention to "pursue all applicable defenses during the proceedings" and included a non-exhaustive list of potential defenses (Parent Ex. E at pp. 1-2).

Next, the parent indicated that she had not "received any other educational program other than the IEP," and that, in light of the foregoing, the district failed to provide "adequate special education and related services" to the student for the 2024-25 school year (Parent Ex. A at p. 1). More specifically, the parent noted that the district failed to "develop an appropriate educational program" and failed to "provide service providers" for the 2024-25 school year (id.).

As relief, the parent requested an impartial hearing to establish the student's pendency services, and to issue an order "awarding all services recommended in the IEP for the entire 2024-2025 school year, with any services that require[d] adjustment to reflect the student's age to be adjusted accordingly" (Parent Ex. A at p. 2). The parent also sought an order allowing funding to pay the student's providers or agencies for the delivery of services set forth in the IEP, "or awarded on any other basis, for the 2024-2025 school year at the full rate each provider or agency charge[d]" (id.). In addition, the parent sought compensatory educational services based on the district's failure to provide services to the student (id.).

B. Impartial Hearing Officer Decision

On December 9, 2024, the parties proceeded to, and completed, an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-12). On the same date, December 9, 2024, the IHO issued an interim order on pendency, which ordered the district to provide the student with five 60-minute sessions per week of SEIT services in a group, two 30-minute sessions per week of OT in a group, and two 30-minute sessions per week of speech-language therapy services in a group (see Interim IHO Decision at p. 1). According to the pendency order, the student's March 2024 IEP formed the basis for the pendency services and noted that the district had not contested the student's pendency services (id.).

During the impartial hearing, the district did not disclose any documentary evidence or present any testimonial evidence at the impartial hearing (see Tr. pp. 3-4). The district also declined the opportunity to provide an opening statement (see Tr. pp. 6-7). The parent did not present any testimonial evidence at the impartial hearing, either by way of affidavit or with live witnesses (see Tr. p. 6; see generally Parent Exs. A-J). In the parent's opening statement, the parent's attorney acknowledged that the district had been providing the student with SEIT services, as set forth in the March 2024 IEP (a substantial departure from the allegations drafted by the attorney), and therefore, the parent only sought an order funding the related services of OT and speech-language therapy that the parent had unilaterally obtained (see Tr. p. 7).

Thereafter, in a decision dated December 13, 2024, the IHO found that the district failed to offer the student a FAPE for the 2024-25 school year and the parent was not entitled to the relief sought (see IHO Decision at pp. 3, 6-9). With respect to the IHO's finding that the parent was not entitled to reimbursement or funding of the unilaterally-obtained OT and speech-language therapy services from Step Ahead, the IHO examined the documentary evidence submitted by the parent in support of her claims (id. at pp. 8-9). First, the IHO turned to the parent's OT and speech-language progress reports, finding that the progress reports related to the 2023-24 school year and not to services delivered to the student during the school year at issue, to wit, the 2024-25 school year (id. at p. 9). Next, the IHO reviewed the "session log" submitted by the parent, which, according to the IHO, demonstrated that the student received 10 sessions of OT and 8 sessions of speech-language therapy from September 16, 2024 through October 31, 2024 (id.). The IHO noted

that the session log did not "describe the [s]tudent's present levels of performance for OT or [speech-language therapy], areas of delay, how the services were individualized in light of the [s]tudent's disability and needs, how the methodologies addressed their delays, or goals for the school year" (id.). Additionally, the IHO indicated that, even if the session log was accepted as "proof of appropriateness, the session notes fail[ed] to account for services after October 31, 2024" (id.). For these reasons, the IHO determined that the hearing record was "devoid of any evidence or witness testimony supporting" a finding that the unilaterally-obtained services were appropriate for the 2024-25 school year and therefore, the parent's request to fund the OT and speech-language therapy services at an enhanced rate was denied (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by finding that the parent's unilaterally-obtained OT and speech-language therapy services from Step Ahead were not appropriate to meet the student's needs. Initially, the parent argues that a Burlington/Carter analysis was not required in this instance because the parent was providing OT and speech-language therapy services in order to implement the student's pendency services, analogizing this matter with the facts and circumstances the Court faced in Doe v. East Lyme Board of Education, 790 F.3d 440, 453 (2d Cir. 2015). Alternatively, the parent contends that even if the IHO properly analyzed the unilaterally-obtained related services using a Burlington/Carter analysis, the IHO erred by finding that OT and speech-language therapy services from Step Ahead were not appropriate. Next, the parent argues that, while not addressed by the IHO, equitable considerations weighed in favor of the parent's requested relief, and more specifically, that the evidence reflects that the parent was financially obligated to pay for services through a valid contract. As relief, the parent seeks an order reversing the IHO's decision denying funding for said services, and seeks an order directing the district to fund the unilaterally-obtained related services or award compensatory educational services consisting of 36 hours of OT and 36 hours of speech-language therapy to be funded by the district for providers selected by the parent.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. Additionally, the district contends that, although the IHO did not address equitable considerations in the decision, the parent would not be entitled to relief because the hearing record does not establish a legal obligation to pay for services. Next, the district asserts that the parent is not entitled to compensatory educational services. Finally, the district argues that the parent's request for review must be dismissed for failing to comply with practice regulations.

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]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally-obtained OT and speech-language therapy services delivered to the student by Step Ahead during the 2024-25 school year.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the district developed a preschool IEP for the student, and, at the impartial hearing, the parent's attorney indicated that, while the district had been providing the recommended SEIT services, the district had not been providing the related services recommended in the March 2024 IEP (see Tr. p. 7). More specifically, the

[7] 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).

district failed to provide the student with the recommended OT and speech-language therapy services at the student's preschool program. In the October 2024 due process complaint notice, the parent alleged, among other things, that the district had failed to "provide service providers" for the 2024-25 school year (see Parent Ex. A at p. 1). As a result, the parent unilaterally-obtained OT and speech-language therapy 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; see Parent Ex. C). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the unilaterally-obtained OT and speech-language therapy 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"]).[8]

Contrary to the parent's contentions on appeal, the parent's request for funding for the unilaterally-obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).

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

[8] 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 unilaterally-obtained from Step Ahead for the student (Educ. Law § 4404[1][c]).

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]).

A. Unilaterally-Obtained Services

Turning to a review of the appropriateness of the unilaterally-obtained services, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

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

1. Student Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained OT and speech-language therapy services from Step Ahead were appropriate to meet the student's needs during the 2024-25 school year.

According to the March 2024 CPSE IEP, the student, who was four years old at the time, "present[ed] with receptive and expressive language delays as well as articulation mispronunciations" (Parent Ex. B at p. 3). The IEP reflected that the student "require[d] multiple prompts and positive reinforcement to expand verbal utterances and complete tasks," and "to increase his ability to follow directions with concepts embedded within them, increase his expressive vocabulary, and increase his word relationship skills" (id.). Reports reflected in the IEP indicated that the student "engage[d] in dialogue with peers" and that his teachers "f[ound] him unintelligible in connected speech" (id.). At that time, it was reported that the student's "[c]linician use[d] storybooks, scenarios, pictures, and conversations to target these goals" (id.).

According to the March 2024 CPSE IEP, the student's speech-language delays "need[ed] to be addressed for [the student] to participate in educational type activities and function in school and/or social settings" (Parent Ex. B at p. 3).

In the area of physical development, the March 2024 CPSE IEP reflected concerns about the student's "limited focus [or] attention skills, delayed fine motor skills, decreased agility, and coordination, and poor sensory processing skills" (Parent Ex. B at p. 4). The student also "present[ed] with poor visual focus, poor scanning techniques and poor visual motor coordination skills" and had difficulties with activities such as completing non-interlocking puzzles, copying shapes, and catching a ball to his chest (id.). Additionally, the IEP indicated that the student "lack[ed] the focus skills necessary to maintain focus and progress fluidly through activities until completion" (id.). The IEP further indicated that the student appeared "clumsy" navigating new environments due to poor motor planning skills, and he could not hop on one foot or use an alternating step pattern on stairs (id.). The student exhibited "heightened awareness to sensory input and c[ould] display adverse reactions to dirty or messy sensory play" (id.). According to the IEP, the student's prewriting skills were poor, he used an immature grasp on crayons, and struggled with wrist extension and forearm and hand dissociation when writing (id.). He also "present[ed] with poor bilateral coordination and in hand manipulation skills" for tasks such as using scissors,

although he reportedly "manipulate[d] small age-appropriate tools and toys with support" (id. at pp. 3-4).

In describing the effect of the student's needs on his participation in appropriate activities, the March 2024 CPSE reflected that the student had reportedly made "little progress toward his current goals and objectives," and specifically noted that the "data point[ed] to a disconnect between isolated therapeutic moments and the general classroom environment" (Parent Ex. B at p. 5). It was further noted in the IEP that the student required "sensory integrative strategies that support[ed] how he perceive[d] tactile and vestibular areas of sensory processing" (id.). Within the classroom, the IEP indicated that the student required the "support of a special education teacher to directly teach and reinforce concepts, [and to] support age-appropriate peer interactions" (id.). Finally, the IEP reflected that the student required speech-language therapy to "support the expansion of vocabulary, and functional use of language" (id.).

To address the student's needs, the March 2024 CPSE recommended, in part, strategies to address the student's management needs, which included modeling conversations with other students, facilitated group play, use of visual models, positive reinforcement, sensory integrative strategies for the classroom, manipulatives to support comprehension of concepts, and speaking clearly and repeating the student's utterances in a complete sentence (Parent Ex. B at p. 4). In addition, the CPSE recommended annual goals with corresponding short-term objectives targeting the student's speech-language skills and OT skills, and notably, developed some annual goals and short-term objectives that directly targeted the student's skills within the classroom setting (id. at pp. 6-11). As previously noted, the CPSE also recommended that one session per week of speech-language therapy and one session per week of OT services be delivered to the student in the classroom setting (id. at p. 12).

2. Specially-Designed Instruction: Related 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]).

As noted previously, although the parent did not present any testimonial evidence in support of her claims at the impartial hearing, the parent entered documentary evidence into the hearing record (see generally Tr. pp. 1-12; Parent Exs. A-J). For example, the parent entered what appears to be a fillable document, which the parent listed as exhibit "H" and identified as "Attendance Records" on her exhibit list; however, the document, itself, does not bear any title or otherwise reflect the origin of the document (see generally Parent Ex. H). At the impartial hearing, the parent's attorney described this document as reporting the "time, frequency, and duration of the services . . . rendered thus far this school year" to the student, as well as reporting notes about

the student's sessions, which demonstrated "how the program ha[d] been tailored to meet [the student's] needs" (Tr. pp. 8-9).[9]

Upon review, the two-page session log reflects the student's name; the speech-language therapy provider's name; the date of each session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); and an area for notes by the provider (Parent Ex. H at pp. 1-2). With respect to the unilaterally-obtained speech-language therapy services from Step Ahead, the session log indicates that the speech-language pathologist delivered one session of speech-language therapy services to the student in September 2024—i.e., September 30, 2024—and seven sessions in October 2024 (id.). The session log also reflects that the speech-language therapy sessions, which were delivered to the student at school, were provided to the student in 30-minute sessions from 12:30 p.m. to 1:00 p.m. (id.). For every session delivered to the student in September and October 2024, the speech-language pathologist noted that the student was working on "increase[ing] intelligibility and vocabulary skills" or similarly, was working on "increase[ing] intelligibility and expanding vocabulary skills" (id.).

In addition to the session log, the hearing record also includes a "2023-2024 Progress Report," dated May 20, 2024, and prepared on a document bearing the name of the student's nonpublic school by the student's then-current speech-language pathologist (May 2024 speech-language progress report) (Parent Ex. J at p. 1).[10] According to the May 2024 speech-language progress report, the student received two 30-minute sessions per week of individual speech-language therapy "as stated in his IESP" dated November 2022, to address his language and articulation needs (id.).[11] The speech-language pathologist identified the following as the student's then-current annual goals: to improve his speech intelligibility and correct production of specific sounds; and to improve his ability to express himself using grammatically correct, full sentences, and to respond to "wh" questions accurately (id. at pp. 1-2).[12] At that time, the progress report reflected that, with respect to the student's progress on his annual goals from the November 2022 IESP, the student had made "minimal and inconsistent progress" and further noted that the student required maximum assistance with his annual goals (id. at p. 2). Specifically, the progress report indicated that the student "require[d] multiple prompts and positive reinforcement to expand verbal utterances and complete tasks" (id.). The student also needed "to increase his ability to follow directions with concepts embedded within them, increase his expressive vocabulary and increase

[9] For the sake of clarity, parent exhibit "H" will be referred to as the IHO referenced it—that is, a session log—within this decision.

[10] Based on this document and evidence in the hearing record, it appears that the student received speech-language therapy services from the same speech-language pathologist during the 2023-24 and 2024-25 school years (compare Parent Ex. J at p. 1, with Parent Ex. G at p. 2).

[11] The November 2022 IESP referenced in the May 2024 speech-language progress report was not included in the hearing record (see generally Tr. pp. 1-12; Parent Exs. A-J). Additionally, as noted previously, the student, who was not yet school-age in November 2022, would not have been eligible to receive special education services in an IESP pursuant to the dual enrollment statute, as equitable services under Education Law §3602-c are not intended for students continuing in preschool programs.

[12] Each annual goal included what appear to be short-term objectives (see Parent Ex. J at pp. 1-2).

his word relationship skills" (id.).[13] To address these needs, the speech-language pathologist reported using "storybooks, scenarios, pictures and conversations" (id.). The progress report included "New Annual Goals" with what appear to be corresponding short-term objectives for the student, designed to improve his articulation skills for identified sounds in spontaneous speech, improve expressive language skills by using various forms of pronouns and verb tenses, and increase receptive language skills such as following directions and comprehending new vocabulary and "'wh'" questions (id. at pp. 2-4). The speech-language pathologist recommended continued speech-language therapy pursuant to the student's current mandate, two 30-minute sessions per week of individual speech-language therapy, "to address his remaining language delays, maintain acquired skills and promote carryover to [the] classroom and other settings" (id. at p. 2).[14]

With respect to the unilaterally-obtained OT services from Step Ahead, the parent relied on similar forms of documentary evidence to support her claims at the impartial hearing. For example, the two-page session log entered into the hearing record reflects the student's name; the OT provider's name; the date of each session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); and an area for notes by the provider (Parent Ex. H at pp. 1-2). The session log indicates that the occupational therapist delivered five OT sessions to the student in September 2024 and five OT sessions in October 2024 (id.). The session log also reflects that the OT sessions, which were delivered to the student at school, were primarily provided to the student in 30-minute sessions in the mornings (id.). For each session delivered to the student in September and October 2024, the occupational therapist described a variety of skills worked on, such as gross and fine motor skills; his ability to follow directions; visual perceptual, motor, and scanning skills; time management and sequencing skills; graphomotor, prewriting, and copying skills; fine motor manipulation; eye-hand coordination; grasp strengthening; turn-taking; balance, sequencing, and motor processing and planning; sensory processing skills; his ability to transition; and his "initiation and requesting skills for daily needs" (id.).

In addition to the session log, the parent also entered a "2023-2024 Progress Report," dated April 21, 2024, and prepared on a document bearing the name of the student's nonpublic school by the student's then-current occupational therapist (April 2024 OT progress report) (Parent Ex. I at p. 1).[15] According to the April 2024 OT progress report, the student received two 30-minute sessions per week of individual OT to address concerns regarding his "limited focus [and] attention skills, delayed fine motor skills, decreased agility, and coordination," as well as "poor" visual focus, scanning techniques, visual motor coordination, prewriting, and sensory processing skills

[13] The student's March 2024 CPSE IEP and the May 2024 speech-language progress report contain similar, if not identical language, to describe the student's speech-language skills and needs (compare Parent Ex. B at p. 3, with Parent Ex. J at pp. 1-2).

[14] The annual goals and short-term objectives in the May 2024 progress report—including the two annual goals and short-term objectives identified as the student's then-current annual goals—mirrored, verbatim, all of the annual goals and short-term objectives as recommended in the student's March 2024 CPSE IEP (compare Parent Ex. B at pp. 7-9, with Parent Ex. J at pp. 1-4).

[15] Based on this document and evidence in the hearing record, it appears that the student received OT services from the same occupational therapist during the 2023-24 and 2024-25 school years (compare Parent Ex. I at p. 1, with Parent Ex. G at p. 1).

(id. at pp. 1-2).[16] In the progress report, the occupational therapist indicated that OT sessions were designed to address the annual goals from the student's November 2022 "IEP," and that the student required moderate assistance to progress toward the goals (id. at p. 2). Although the specific annual goals the student was then-currently working on were not identified in the progress report, the occupational therapist reported that the student "show[ed] slow and steady progress toward meeting IEP goals in all targeted areas of development" (id.). Specifically, the student exhibited progress with "his fine motor manipulation skills," was "more comfortable with various sensory mediums and rarely display[ed] [an] adverse reaction" (id.).

According to the April 2024 OT progress report, the student's OT "challenges . . . interfer[ed] with his ability to engage and master academic tasks and must continue to be addressed," and the occupational therapist recommended continuation of two 30-minute sessions per week of individual OT (Parent Ex. I at p. 2). The progress report included "New Annual Goals" and what appear to be short-term objectives for the student to improve his "functional upper extremity shoulder arm and hand control for improved success with fine motor tasks and classroom manipulatives . . . [and] tasks that require[d] upper body strength and intrinsic hand strength" (id. at pp. 2-3). In addition, the progress report included "New Annual Goals" to improve the student's visual motor skills for graphomotor tasks such as using scissors, writing, and copying or tracing; improve sensory processing skills necessary for improved regulation, attention, and socialization; and improve core strength, postural control, balance, and motor planning skills needed within his school environment (id. at pp. 3-4).[17]

Having independently reviewed the parent's evidence considered by the IHO in support of her claims, there is no basis to overturn the IHO's determination that the parent failed to sustain her burden to establish the appropriateness of the speech-language therapy and OT services delivered by Step Ahead for the 2024-25 school year. Putting aside the fact that the speech-language and OT progress reports for the 2023-24 school year were not related to the 2024-25 school year at issue, the parent presented no evidence establishing any collaboration between the related services providers and the student's classroom teacher, the instruction the student received in his classroom, or how the related services enabled the student to participate in appropriate activities as a preschool student (see generally Tr. pp. 1-12; Parent Exs. A-J). Instead, the evidence in the hearing record indicates that the student received his speech-language and OT services from Step Ahead in an individual setting (see generally Parent Exs. I-J). Notably however, the student's March 2024 IEP indicated that he had made "limited progress toward his current annual goals and objectives" and that the data pointed to a "disconnect between isolated therapeutic moments and the general classroom environment" (Parent Ex. B at p. 5). In addition to developing annual goals

[16] The student's March 2024 CPSE IEP and the April 2024 progress report contain similar, if not identical language, to describe the student's OT skills and needs (compare Parent Ex. B at p. 4, with Parent Ex. I at pp. 1-2).

[17] The "New Annual Goals" and short-term objectives in the April 2024 progress report mirrored, verbatim, a majority of the annual goals and short-term objectives as recommended in the student's March 2024 CPSE IEP to address his OT needs (compare Parent Ex. B at pp. 6-7, with Parent Ex. I at pp. 2-3). The only distinction between the two documents is that the April 2024 progress report also included a "New Annual Goal" to improve the student's "core strength, postural control, balance, and motor planning" skills (compare Parent Ex. B at pp. 6-7, with Parent Ex. I at pp. 3-4).

and short-term objectives targeting the student's speech-language and OT needs within the classroom setting—which the Step Ahead providers appeared to have adopted as the student's new annual goals and objectives as set forth in the respective progress reports—the March 2024 CSE recommended that the student receive one session per week of OT and speech-language therapy services within the classroom (id. at p. 12). Thus, even assuming for the sake of argument that the information within the 2023-24 progress reports allowed one to glean information about the student's needs and progress therein, the hearing record is devoid of evidence establishing that the student's Step Ahead providers delivered any services in the student's classroom during the 2024-25 school year or establishing how the Step Ahead providers worked on the student's current annual goals in these areas within the classroom setting (see generally Tr. pp. 1-12; Parent Exs. A-J). For example, the March 2024 IEP, as well as the April 2024 OT progress report, reflect the student's focusing and attention needs and an annual goal targeting the student's need to improve these skills to effectively socialize and communicate in the school environment and to perform table-top activities (see Parent Exs. B at pp. 4, 10; I at pp. 1, 3). Similarly, annual goals related to speech-language skills targeted the student's expressive and receptive language skills within the classroom, including the ability to follow directions and to accurately use various parts of speech (i.e., pronouns, verb tenses) when describing a story (see Parent Exs. B at pp. 3, 9; J at pp. 1, 3).

For these reasons, and taking into account the totality of circumstances, the hearing record lacks sufficient evidence explaining how any services that were provided to the student during the 2024-25 school year addressed the student's speech-language or OT needs. Accordingly, there is no reason to disturb the IHO's finding that the parent failed to sustain her burden to show that Step Ahead's services constituted specially-designed instruction to meet the student's identified needs.

B. Relief—Compensatory Educational Services

As a final point, the parent asserts that, alternatively, she is entitled to an award of compensatory educational services—consisting of 36 hours of OT and 36 hours of speech-language therapy services to be funded by the district for parent selected providers—as relief in this matter. The district disagrees, arguing that the compensatory educational services duplicates the reimbursement relief sought.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; 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"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[]

the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In cases involving compensatory education as relief, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent, as in this matter, appears to have already unilaterally chosen the provider—i.e., Step Ahead—and is the party in whose custody and control the evidence necessary to establish appropriateness resides. To that end, the parent in this matter has failed to establish the appropriateness of the Step Ahead providers, and any additional award of OT and speech-language therapy services as compensatory educational services ignores whether the student has already received all of his related services for the 2024-25 school year, either pursuant to pendency services or as unilaterally-obtained services. For example, the parent noted in the request for review that the student continued to receive speech-language therapy and OT services under pendency (see Req. for Rev. ¶ 4, n.2).

Moreover, by arguing in the request for review to alternatively direct the district to fund the compensatory educational services by Step Ahead, the parent is effectively engaged in an end run around bearing the burden of proof for unilaterally-obtained services. The Office of State Review has many times indicated that it may not be appropriate in the administrative due process forum to continue to place the burden of proof regarding compensatory education relief on the district in an administrative due process proceeding, and no Court or other authoritative body in this jurisdiction has addressed the topic to date (Application of a Student with a Disability, Appeal No. 24-213; Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). Where the parent seeks relief in the form of compensatory education to be provided by parentally selected private special education companies, it is appropriate to place the burden of production and persuasion on the parent with regard to the adequacy of the proposed relief. As noted, the parent has not sustained her burden of proof in this regard, therefore, the parent's request for compensatory educational services must be denied.

VII. Conclusion

Having found that the evidence in the hearing record supports the IHO's determination that the parent failed to sustain her burden to establish the appropriateness of the unilaterally-obtained OT and speech-language therapy services delivered to the student from Step Ahead during the 2024-25 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 31, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER