"APPROPRIATE" IHO DECISIONS: LEGAL POINTERS

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This presentational outline provides pointers for New York impartial hearing officers (IHOs) to facilitate defensible decisions in "free appropriate public education" (FAPE) cases, which account for the vast majority of their workload. The basis, as the footnotes amply provide for IHOs, consists of the statutory and regulatory provisions under the Individuals with Disabilities Education Act (IDEA)[1] and pertinent case law.[2] The emphasis in the case law is on published court decisions of the Second Circuit and New York federal district courts, although a) both unpublished court decisions from these courts and judicial rulings from other jurisdictions, and b) New York state review officer (SRO) decisions are included to fill in the gaps. The three successive parts are: 1) the decisional norms, which focuses on the legal defensibility of the written decision; 2) the FAPE standards, which are presented as a three-step framework for decision-making; and 3) the primary remedies—tuition reimbursement and compensatory education—other than prospective injunctive relief.

[1] New York's relevant special education legislation and regulations are also included to the illustrative extent they add to the federal requirements. For a more comprehensive comparison, see http://www.p12.nysed.gov/specialed/idea/2012regsanalysis.htm.

[2] For more comprehensive citations of published court decisions respectively in this jurisdiction and nationally, see Perry A. Zirkel, Second Circuit and New York Decisions 1995 to the Present Under the IDEA and Section 504/ADA, available at http://www.p12.nysed.gov/specialed/ (under "Additional Resources"); Perry A. Zirkel, A National Update of the Case Law 1998 to the Present under the IDEA and Section 504/ADA, available at www.nasdse.org (under "Publications").

I. The Decisional Norms

Courts accord deference to the IHO where the written opinion is "thorough and careful."[3]

1) Use a clear and concise statement of the issues as the organizing framework.[4]

2) The IHO's factual findings[5] need specific support cited from the record.[6]

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[3] See, e.g., Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 196 (2d Cir. 2005); Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 (2d Cir. 1998); *see also* M.H v. New York City Dep't of Educ., 685 F.3d 217, 244 (2d Cir. 2012) ("Determinations grounded in thorough and logical reasoning should be provided more deference than decisions that are not."). Within this overall standard, the Second Circuit has established that substantive and methodology determinations are entitled to more judicial deference that procedural and non-methodology determinations. M.H v. New York City Dep't of Educ., 685 F.3d 217, 246 and 244 (2d Cir. 2012). Although in a two-tier state, such as New York, the state review officer (SRO) level receives primary judicial deference, the local IHO shares this deference, especially but not exclusively in methodology cases. See, e.g., T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009); Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 383 (2d Cir. 2003); *cf.* Woods v. Northport Pub. Sch., __ F. App'x __ (6th Cir. 2012) (deference to IHO rather than district personnel where the two levels conflict). Moreover, in cases where the IHO meets the norm and the SRO does not, the IHO is entitled to presumptive correctness. See, e.g., M.H v. New York City Dep't of Educ., 685 F.3d 217, 246 and 248-49 (2d Cir. 2012); Doyle v. Arlington Cnty. Sch. Dist., 953 F.2d 100, 105 (4th Cir. 1991). In the latest iteration of this issue, the Second Circuit declared: "a court must defer to the SRO's decision on matters requiring educational expertise unless it concludes that the decision was inadequately reasoned, in which case a better-reasoned IHO opinion may be considered instead." R.E. v. New York City Dep't of Educ.,__ F.3d __ (2d Cir. 2012). Finally, although the focus for such deference is the IHO's written opinion, the Ninth Circuit extended the "thorough and careful" to the IHO's participation in the questioning of witnesses. R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942 (9th Cir. 2007).

[4] See, e.g., Options Charter Sch. v. Howe, 512 F. Supp. 2d 55, 57 (D.D.C. 2007) (finding the IHO's ambiguous statement of the issues as one of the sources for a remand); SRO Decision No. 09-002 (affirmed IHO's decision based in part on clearly identified issues). In setting forth the issues, the IHO may re-state version of either or both parties within reasonable limits. See, e.g., J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010); Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1096 (9th Cir. 2002); M.M. v. Lafayette School District, 58 IDELR ¶ 132 (N.D. Cal. 2012); K.E. v. Indep. Sch. Dist. No. 15, 54 IDELR ¶ 215 (D. Minn. 2010), *aff'd on other grounds*, 747 F.3d 795 (8th Cir. 2011). However, the IHO may not expand the scope of the issues *sua sponte*. See, e.g., Student with a Disability, 59 IDELR ¶ 150 (N.Y. SRO 2012).

[5] 34 C.F.R. § 300.513(a); 8 NYCRR § 200.5(j)(4)(i).

[6] 8 NYCRR § 200.5(j)(5)(v) ("The decision shall reference the hearing record to support the findings of fact "). *Compare* S.G. v. Dist. of Columbia, 498 F. Supp. 2d 304 (D.D.C. 2007) (arbitrary and capricious); *cf.* Stanton v. Dist. of Columbia, 680 F. Supp. 2d 201 (D.D.C. 2010) (failure to include sufficient findings and reasoning for calculation of compensatory education); Options Pub. Charter Sch. v. Howe, 512 F. Supp. 2d 55 (D.D.C. 2007) (entire lack of factual findings nullified IHO's decision); Blount v. Lancaster-Lebanon Intermediate Unit, 40 IDELR ¶ 62 (M.D. Pa. 2003) (fatal lack of "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses"), *with* D.B. v. Craven County Bd. of Educ., 32 IDELR ¶ 86 (4th Cir. 2000); Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991) (deference); *cf.* Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995) (credibility-based factual findings entitled to deference); Ravenswood City Sch. Dist. v. J.S., __ F. Supp. 2d __ (N.D. Cal. 2012) (deference based on thorough and careful factual findings, including that IHO discussed qualifications of witnesses on which she chose to rely). For examples at the SRO level, see SRO Decision No. 10-007, at 18-19 (overturning the IHO's decision, noting that "the [IHO's] 1 1/2 page decision is devoid of any specific cites to transcript pages, exhibit numbers, or to any legal authority"); *see also* SRO Decision No. 10-086, at 7; SRO Decision No. 08-064, at 5 n.7. For the SRO's deferential review standard for factual findings, see, e.g., SRO Decision No. 11-146, at 12 (including Third Circuit's approach in *Carlisle* for credibility-based findings).

Factual findings (Cont.):

- Here is an example that a federal court provided in concluding the IHO fell fatally short of this expectation: "[T]he hearing officer refers to '[t]he credible testimony of Paris Adon' and the 'compelling [,]' 'logical and credible' testimony of 'Dr. [Cranford][,]' [sic], but makes no findings with respect to the basis upon which she credited their testimony."[7]

- Just at courts defer to IHOs based on presumed expertise and direct observation,[8] IHOs should consider the qualifications regarding the issue and familiarity with the child in assessing the weight of testimony.[9]

- In arriving at factual findings in a FAPE case, IHOs may not rely on testimony that supports modifications materially different from the contents of the IEP: "a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP."[10]

3) Similarly, legal conclusions should cite specific support in terms of the legal standards and their clear application to the pertinent factual findings.[11]

- The same federal district court that identified the aforementioned defective factual findings offered these examples of fatal error in the IHO's legal conclusions:

  - "'it is **entirely conceivable** ... that the mother's participation in the IEP meetings should have alerted ... [the school district] that more comprehensive evaluations were warranted[ ]'"[12]

  - "'it is **most probable** that the provision of a FAPE to this Petitioner might have required ... [the district] . . . to file a due process hearing complaint once the mother insisted on a change of special education instruction hours.'"[13]

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[7] *Options Charter Sch. v. Howe*, 512 F. Supp. 2d at 57.

[8] See, e.g., M.H. v. New York City Dep't of Educ., 685 F.3d 217, 244 (2d Cir. 2012); Woods v. Northport Pub. Sch., __ F. App'x __, __ (6th Cir. 2012) (expertise); D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 554 (3d Cir. 2010); Doyle v. Arlington Cnty. Sch. Bd., 953 F.2d 100, 104 (4th Cir. 1991) (observation).

[9] See, e.g., Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632 (7th Cir. 2010); *cf.* Sebastian M. v. King Phillip Reg'l Sch. Dist., 685 F.3d 79 (1st Cir. 2012) (due deference to IHO valuation of expert testimony). These same two factors apply to the parents' witnesses; exclusive or arbitrary deference to the school personnel is contrary to the adjudicative mechanism of the IDEA and, thus, be a possible basis for reversal. See, e.g., K.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046 (N.D. Cal. 2009), *aff'd*, 426 F. App'x 536 (9th Cir. 2011).

[10] R.E. v. New York City Dep't of Educ., __ F.3d __ (2d Cir. 2012).

[11] See, e.g., Marc M. v. Dep't of Educ., State of Hawaii, 762 F. Supp. 2d 1235 (D. Hawaii 2011); Joshua A. v. Rocklin Unified Sch. Dist., 49 IDELR ¶ 249 (E.D. Cal. 2008); Arlington Cnty. Sch. Bd. v. Smith, 230 F. Supp. 2d 704 (E.D. Va. 2002); *cf.* 8 NYCRR § 200.5(j)(5)(v) ("[The IHO's decision] shall set forth the reasons and the factual basis for the determination."). The SRO applies an "independent" standard of review for the IHO's legal conclusions. See, e.g., SRO Decision No. 1145, at 16. The courts have characterized this standard as "de novo." See, e.g., M.W. v. New York City Dep't of Educ., __ F. Supp. 2d __, __ (E.D.N.Y. 2012).

[12] *Options Charter Sch. v. Howe*, 512 F. Supp. 2d at 57.

[13] *Id.*

Other Decisional Considerations:

4) As a general matter, but particularly in close cases, it is good practice to make clear which party had the burden of persuasion.[14] The burden of proof—both in terms of production and persuasion—is on the district according to New York legislation, when went into effect on Oct. 14, 2007.[15]

5) Finally, in accordance to New York regulations, "include a statement advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State review officer."[16]

[14] See, e.g., Blount v. Lancaster-Lebanon Intermediate Unit, 40 IDELR ¶ 62 (M.D. Pa. 2003).

[15] With an express exception, which is for the appropriateness of the parent's unilateral placement in a tuition reimbursement case, the burden of proof—both in terms of production and persuasion—is on the district according to New York legislation, when went into effect on Oct. 14, 2007. N.Y. EDUC. LAW Art. § 4404(1)(c). For recognition of this change as of October 14, 2007, see, e.g., J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 641 n.29 (S.D.N.Y. 2011). The Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49 (2005) put the burden of persuasion in FAPE cases on the parent, but the Court ducked the question as to whether a contrary state law would be controlling. In cases arising in the interim between *Schaffer* and the effective date of the New York law, the Second Circuit placed the burden of persuasion on the parent for both the appropriateness of the district's and the parent's unilateral placement. T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 (2d Cir. 2009); Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112 (2d Cir. 2007). A recent federal district court decision placed the burden of persuasion on the parents, but the court apparently missed the New York law (only citing *Schaffer* and these interim Second Circuit decisions) and the ruling amounted to dicta (because the court concluded that "were the burden placed on the [district], the outcome of the instant case would remain the same"). M.W. v. New York City Dep't of Educ., __ F. Supp. 2d __ (S.D.N.Y. 2012). In its most recent opinion, the Second Circuit acknowledged but declined to address the issue, observing the burden of persuasion only applies when the evidence is in equipoise. M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 (2d Cir. 2012); *cf.* SRO Decision No. No. 12-025, at 13 n.8 (noting that the evidence favored the party that prevailed rather than being in equipoise, thus rendering alleged misapplication of the burden of persuasion harmless); SRO Decision No. 10-033, at 32; SRO Decision No. 09-057, at 19 (noting that the evidence showed that the district failed to offer a FAPE regardless of which party bore the burden of proof); SRO Decision No. 08-015, at 11 (noting conflicting statements in the IHO decision regarding which party bore the burden of persuasion).

[16] 8 NYCRR § 200.5(j)(5)(v). For examples, see SRO Decision No. 09-096; SRO Decision No. 07-011; SRO Decision No. 03-086. For a related issue intersecting with the IDEA's finality requirement, see SRO Decision No. 07-128 (overturning IHO "supplemental" decision after the final one, granting two 30-day extensions to allow extra time for filing a petition with the SRO).

II. FAPE Standards

For FAPE cases, here is a framework that facilitates a thorough and careful analysis:

1) What are the individual needs of this particular eligible child?[17]

2) Is the IEP substantively tailored to meet this child's needs?[18]

   a) More specifically, the standard is whether the IEP is "reasonably calculated to enable the child to receive educational benefit[s]."[19] They key questions to be answered based on "objective evidence"[20] are as follows:

      • Is the IEP "likely to produce progress, not regression"? AND

      • Does it provide the student with an opportunity greater than mere "trivial advancement"[21]

   b) "IEP" here melds the program and the placement, which refers to "the general type of educational program in which the child is placed."[22]

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[17] See, e.g., 20 U.S.C. §§ 1414(b)(3)(B) and 1414(d)(1)(A); *see also* 34 C.F.R. §§ 300.300(c)(4) (evaluation "in all areas related to the suspected disability"), 300.320(a)(1) (IEP statement of child's "present levels academic achievement and functional performance"), and 300.321(a)(2) (IEP statement of measurable annual goals to "meet each of the child's . . . needs that result from the child's disability"). Although these various requirements may be regarded as procedural, they inevitably merge with the substantive standard for FAPE. See *infra* note 17 and accompanying text. For examples of denials of FAPE based on this threshold standard, see N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202 (9th Cir. 2008) (failure to evaluate child with speech impairment for reasonably suspected autism); SRO Decision No. 12-027, at 13-15 (noting the district's failure to sufficiently identify the child's speech-language deficits); SRO Decision No. 11-142, at 21-25; SRO Decision No. 11-041, at 12-14; SRO Decision No. 10-101, at 10-11.

[18] See, e.g., Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982) ("The [FAPE] required by the Act is tailored to the unique needs of the child [with a disability] by means of an [IEP]"); *see also id*. at 188-189 ("educational instruction specially designed to meet the unique needs for the child [with a disability]"); SRO Decision No. 10-050, at 14-15.

[19] *Bd. of Educ. v. Rowley*. 458 U.S. at 207.

[20] "Objective evidence" for a mainstreamed child includes "passing grades and regular advancement." Walczak v. Florida Union Free Sch. Dist., 142 F.3d at 130 (citing Bd. of Educ. v. Rowley, 458 U.S. at 207 n.28). However, this evidence does not per se amount to FAPE. See, e.g., M.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000). More generally, objective evidence includes grades and test scores. See, e.g., E.W.K. v. Bd. of Educ., __ F. Supp. 2d __ (S.D.N.Y. 2012); M.H. v. Monroe-Woodbury Cent. Sch. Dist., 296 F. App'x 126, 128 (2d Cir. 2008); Grim v. Rhinebck, Cent. Sch. Dist., 346 F.3d 377, 383 (2d Cir. 2003).

[21] E.S. v. Katonah-Lewisboro Sch. Dist., __ F. App'x __, __ (2d Cir. 2012); T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 254 (2d Cir. 2009) (citing Cerra v. Central Pawling Cent. Sch. Dist., 427 F.3d at195); *Cerra v. Pawling Cent. Sch. Dist*., 427 F.3d at 195 (citing Walczak v. Florida Union Free Sch. Dist., 142 F.3d at 130); SRO Decision No. 08-038; SRO Decision No. 06-044 (finding that the child's IEP was likely to produce progress that was more than trivial).

[22] Concerned Parents v. New York City Bd. of Educ., 629 F.2d 751, 756 (2d Cir. 1980). Citing *Concerned Parents*, the Second Circuit more recently explained that educational placement under the IDEA is "the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school." T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009); SRO Decision No. 10-070, at 13-15; SRO Decision No. 07-049, at 10. Nevertheless, the site may well be relevant; the determination of whether the district's placement or, in tuition reimbursement cases at the second appropriateness prong, the parent's unilateral placement amounts to FAPE is often in the context of a particular school. See, e.g., E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417 (S.D.N.Y. 2010), *aff'd*, __ F. App'x __ (2d Cir. 2012). For the related issue of identifying the service provider on the IEP, see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-placement.htm (Q/A 4).

Substantive standard (Cont.):

c) Thus, LRE may well be an integral part of the substantive FAPE analysis, triggering identification and application of the *Oberti* test.[23]

d) The Second Circuit recently joined the majority of other circuits in adopting the "snapshot" approach to determining substantive appropriateness, adding the exception of amendments made during the resolution period.[24]

e) In any event, the substantive standard is clearly not whether the district's IEP is best[25] or, in tuition reimbursement cases, better.[26]

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[23] See, e.g., P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008) (citing Oberti v. Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993)); *see also* K.L.A. v. Windham Se. Supervisory Unit, 371 F. App'x 151 (2d Cir. 2010). For lower court applications of this test, see, e.g., G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552 (S.D.N.Y. 2010); J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74 (N.D.N.Y. 2008); Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422 (W.D.N.Y. 2008). As clarified in SRO Decision No. 11-143, LRE refers to access to nondisabled peers, typically but not exclusively in general education, not to teacher-to-student ratios in special education.

[24] R.E. v. New York City Dep't of Educ., __ F.3d __ (2d Cir. 2012).

[25] See, e.g., *Bd. of Educ. v. Rowley*, 458 U.S. at 7; *Cerra v. Pawling Cent. Sch. Dist*., 427 F.3d at 195; J.G. v. Kiryas-Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 (S.D.N.Y. 2011).

[26] See, e.g., Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir. 1991).

Procedural standard:

3) Did the district violate one or more of the various applicable procedural requirements of the IDEA?

   a) If so, was the violation the failure to "significantly impede[] the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child"[27]

   b) For other violations, was the result a loss of educational benefit?[28]

      - incorporated state law standards[29] are included in this two-step analysis,[30] but with differentiated weight between FBAs (serious, requiring special scrutiny at the benefit step) and parent counseling/training (rarely if absent alone)[31]

      - e.g., a district's failure to specify the school site in the IEP is not, in relation to the IDEA's procedural requirement for the IEP to specify the "location" for the services,[32] a per se denial of FAPE[33]

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[27] 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2)(ii). In general, the courts have not focused on this statutory language and have been slow in accepting its violation as a per se denial of FAPE. *Compare* L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 90 (2009) (prevailing two-step approach), *with* J.T. v. Dep't of Educ., 59 IDELR ¶ 4 (D. Hawaii 2012); Bd. of Educ. v. Schaefer, 923 N.Y.S.2d 579 (App. Div. 2011) (per se denial). Similarly, the SRO decisions have addressed this procedural violation on an ad hoc, not per se, basis. See, e.g., SRO Decision No. 12-055, at 13-14; SRO Decision No. 12-048, at 7-8; SRO Decision No. 11-100, at 18-19; SRO Decision No. 11-031, at 11-12; SRO Decision No. 10-070, at 12-13.

[28] 20 U.S.C. § 1415(f)(3)(E)(i and iii); 34 C.F.R. § 300.513(a)(2)(i and iii). For recent illustrative applications, compare A.H. v. Dep't of Educ. of New York City, 394 F. App'x 718 (2d Cir. 2010); T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247 (2d Cir. 2009) (no), *with* R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28 (S.D.N.Y. 2011) (yes). For examples applying this two-step test at the second tier, see SRO Decision No. 12-013, at 14; SRO Decision No. 09-080, at 5-6; SRO Decision No. 07-030, at 14.

[29] See, e.g., 8 NYCRR § 200.1(ww)(3)(i) (four areas of individual need); *id*. § 200.3(a)(1)(iv), (vii), (viii) (additional members of IEP team); and *id*. § 200.4(b)(v) (functional behavioral assessment). See, e.g., SRO Decision No. 11-049, at 13-15 (concluding that failure to follow multiple state procedures, including consideration of an FBA resulted in a denial of a FAPE).

[30] See, e.g., A.C. v. Bd. of Educ., 553 F.3d 165, 172 (2d Cir. 2009); M.W. v. New York City Dep't of Educ., __ F. Supp. 2d __ (S.D.N.Y. 2012).

[31] R.E. v. New York City Dep't of Educ., __ F.3d __ (2d Cir. 2012).

[32] 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7).

[33] See, e.g., R.E. v. New York City Dep't of Educ., __ F.3d __ (2d Cir. 2012) (concluding that "the [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP"); T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3277 (2010) (emphasizing that the ruling is "not … that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements. We simply hold that an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA"); SRO Decision No. 10-070, at 13-15; SRO Decision No. 07-034, at 13-14 (noting that the school site need not be identified on the IEP, but finding a denial of a FAPE because the district nevertheless failed to provide special education services accordance with the IEP).

III. Primary Remedies

1) Tuition reimbursement[34]

   a) The preliminary equities step concerns timely notice and evaluation request/availability.[35]

   b) The first appropriateness step concerns whether the district provided FAPE,[36] thus invoking the "FAPE Standards" section of this document.[37]

   c) The second appropriateness step, which need not be addressed if the district provided FAPE, concerns whether the parent's unilateral placement met the substantive standard[38] in a timely manner.[39]

      - The same "objective evidence" standard applies.[40]
      - LRE is a pertinent but not primary consideration at this step.[41]
      - The child's progress at the private placement also is relevant[42] but not necessarily determinative.[43]

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[34] For a detailed description of the applicable multi-step test and supporting case citations specific to this jurisdiction, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, __ EDUC. L. REP. __ (in press).

[35] 20 U.S.C. § 1412(a)(10)(C)(iii-(iv)); 34 C.F.R. § 300.148(d)-(e). See, e.g., SRO Decision No. 11-103, at 6-9; SRO Decision No. 11-015, at 17-19; SRO Decision No. 10-087, at 22-24; SRO Decision No. 10-099, at 24-25.

[36] 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. §§ 300.148(a) and 300.148(c).

[37] The limited exceptions or extensions include child find and eligibility cases. See, e.g., Muller v. Comm. on Special Educ., 145 F.2d 95 (2d Cir. 1998); Mr. N.C. v. Bedford Cent. Sch. Dist., 300 F. App'x 11 (2d Cir. 2008); J.D. v. Pawlet Sch. Dist., 224 F.3d 60 (2d Cir. 2000); P.C. v. Oceanside Union Free Sch. Dist., 818 F. Supp. 2d 516 (E.D.N.Y. 2011); Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282 (S.D.N.Y. 2010).

[38] The Supreme Court's decision in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) largely eliminated the procedural standards.

[39] The codification in the IDEA regulations specified this procedural requirement and otherwise made clear that an IHO may find the unilateral placement was appropriate "even if it does not meet the State standards that apply to education provided by the SEA and LEAs." 34 C.F.R. § 300.148(c). For the burden of proof at this stage, see *supra* note 14.

[40] See, e.g., Frank G. v. Bd. of Educ., 459 F.3d 356, 364 (2d Cir. 2006); SRO Decision No. 11-078; SRO Decision No. 09-048; SRO Decision No. 08-151; SRO Decision No. 08-042; SRO Decision No. 04-024; SRO Decision No. 01-055.

[41] See, e.g., Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir. 2007); M.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000); SRO Decision No. 09-033, at 13. For examples of LRE contributing to the inappropriateness of the private placement, see Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529 (S.D.N.Y. 2010); Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477 (S.D.N.Y. 2007); SRO Decision No. 08-151, at 12. On the other hand for an example where LRE contributed to the appropriateness of the private placement, see M.H. v. New York City Dep't of Educ., 685 F.3d 217 (2d Cir. 2012).

[42] See, e.g., Matrejek v. Brewster Cent. Sch. Dist., 293 F. App'x 20 (2d Cir. 2008); Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006). For the converse, where the lack of progress contributed to the conclusion that the private placement was inappropriate, see Davis v. Wappingers Cent. Sch. Dist., 772 F. Supp. 2d 500, 56 IDELR ¶ 248 (S.D.N.Y. 2011), *aff'd*, 56 IDELR ¶ 248 (2d Cir. 2011).

[43] Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d at 115 (not targeted specifically to the child's disability-related needs).

Tuition reimbursement (Cont.):

d) The final equities step concerns whether, on balance,[44] the parent's other actions were unreasonable.[45]

- For applying this step, consider the full balance of the equities.[46]
- After doing this equitable balancing, provide sufficient factual foundation in your written opinion to justify granting, reducing or denying tuition reimbursement.[47]

2) Compensatory Education[48]

a) It is not well settled[49] whether the gross violation standard applies in this jurisdiction to compensatory education generally as compared with only after age 21.[50]

b) An even more open question is whether the applicable approach for calculation in New York is quantitative or qualitative.[51]

c) The equities, including parental actions, apply to compensatory education cases.[52]

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[44] See, e.g., J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635 (S.D.N.Y. 2011); Gabel v Bd. of Educ., 368 F. Supp. 2d 313 (S.D.N.Y. 2005).

[45] 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. §§ 300.148(d)(3).

[46] See, e.g., S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346 (S.D.N.Y. 2009); SRO Decision No. 12-001, at 19-21; SRO Decision No. 11-131, at 10-12; SRO Decision No. 11-056, at 13-16.

[47] See, e.g., Wolfe v. Taconic-Hills Cent. Sch. Dist., 167 F. Supp. 2d 530 (N.D.N.Y. 2001); *see* also Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402 (S.D.N.Y. 2005), *aff'd mem*., 192 F. App'x 62 (2d Cir. 2006).; Loren F. v. Atlanta Indep. Sch. Dist., 349 F.3d 1309 (11th Cir. 2003).

[48] The courts in this jurisdiction have only provided limited and rather cryptic guidance as to this remedy. For a synthesis of the pertinent case law on a national basis, see, e.g., Perry A. Zirkel, *Compensatory Education under the IDEA: An Annotated Update of the Law*, 151 EDUC. L. REP. 501 (2010

[49] See, e.g., Student X v. New York City Dep't of Educ., 51 IDELR ¶ 122 (E.D.N.Y. 2008).

[50] *Compare* French v. New York State Dep't of Educ., 57 IDELR ¶ 241 (2d Cir. 2011); P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008) (implying that this standard only applies after age 21), *with* J.A. v. E. Ramapo Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009) (applies generally). The state review officer's decisions that distinguished "added services" (for students who have not reached age 21 or graduation) from compensatory education indirectly have limited the gross violation cases to these ex-students. See, e.g., SRO Decision No. 09-056 (noting a gross violation standard when the student had graduated); SRO Decision No. 02-019. The courts have continued to use the term compensatory education generically without addressing the "added services" distinction and without decisively resolving the scope and standards for gross violations. See, e.g., Student X v. New York City Dep't of Educ., 51 IDELR ¶ 122 (E.D.N.Y. 2008).

[51] Without specifically addressing the question, the Second Circuit in *P. v. Newington Board of Education* arguably supported the qualitative approach by affirming the IHO's flexible form of compensatory education, with citations to decisions from other jurisdictions that use the qualitative approach. Yet in a subsequent unpublished decision, the trial court applied a quantitative approach. Student X v. New York City Dep't of Educ., 51 IDELR ¶ 122 (E.D.N.Y. 2008). For an explanatory comparison, with the applicable case law from other jurisdictions, between the quantitative and qualitative approaches, see Perry A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 EDUC. L. REP. 550 (2010).

[52] See, e.g., French v. New York State Educ. Dep't, 57 IDELR ¶ 241 (2d Cir. 2011); *see also* Garcia v. Bd. of Educ., 520 F.3d 1116 (10th Cir. 2008); B.T. v. Dept' of Educ., 56 IDELR ¶ 218 (D. Hawaii 2011); SRO Decision No. 11-096, at 10, 19 (upholding the portion of an IHO decision that denied compensatory education services due to the parents' failure to cooperate with the district).

Remedies (Cont.):

d) As applicable for remedial relief more generally, the IHO's decision needs to provide sufficient factual foundation for the basis and calculus of the compensatory education award.[53]

e) Similarly applicable more generally, the IHO needs to make sure that the order for this relief is reasonably specific and clear; courts overturn compensatory education awards that are too vague to be enforceable.[54]

[53] See, e.g., Streck v. Bd. of Educ., 280 F. App'x 66 (2d Cir. 2008); Walker v. Dist. of Columbia, 786 F. Supp. 2d 232 (D.D.C 2011); Stanton v. Dist. of Columbia, 680 F. Supp. 2d 201 (D.D.C. 2010); B.T. v. Dep't of Educ., 676 F. Supp. 2d 982 (D. Hawaii 2010); Mr. C v. Maine Sch. Admin. Unit No. 6, 49 IDELR ¶ 36 (D. Me. 2007). *But cf.* Cousins v. Dist. of Columbia, __ F. Supp. 2d __ (D.D.C. 2012); G."J."D' v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455 (E.D. Pa. 2011); T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902 (N.D. Ill. 2012) (ruling that the calculus need not be exacting where reasonably justified). To avoid such problems, a federal court recently warned that "[the IHO decision] must provide a detailed explanation as to why or why not compensatory education is warranted and his reasons for developing a particular compensatory program." B.T. v. Dep't of Educ., 676 F. Supp. 2d 982 (D. Hawaii 2010). For examples of second tier review, see SRO Decision No. 11-132, at 18-24 (denying a request to increase the quantity of compensatory or make-up services that the IHO awarded); SRO Decision No. 03-075 (finding a miscalculation in the amount of services that the IHO awarded); *see also* SRO Decision No. 11-121, at 14-22; SRO Decision No. 10-057, at 8-9.

[54] See, e.g., Sch. Bd. of Osceola County v. M.L, 30 IDELR ¶ 655 (M.D. Fla. 1999).