



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-111

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 Samantha Labossiere, 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 that respondent (the district) fund the costs of the services delivered to her son by Always a Step Ahead, Inc. (Step Ahead) at specified rates for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the

committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

A CSE convened on April 20, 2023, to conduct an annual review and to develop an IESP for the student for the 2023-24 school year, with an implementation date of September 6, 2023

(Parent Ex. B at pp. 1, 15). The April 2023 CSE found the student eligible for special education and related services as a student with a speech or language impairment (*id.* at p. 1).¹ The April 2023 CSE recommended the following services on a weekly basis: five periods of direct group special education teacher support services (SETSS) delivered in a separate location, two 30-minute sessions of individual speech-language therapy delivered in a separate location, and two 30-minute sessions of individual occupational therapy (OT) delivered in a separate location (*id.* at p. 11).²

On October 24, 2023, the parent electronically signed a document on the letterhead of Step Ahead, which was dated September 1, 2023, and stated that she was "aware that the rate of the SETSS services provided to my child is \$225 an hour, and related services at the rate [o]f \$300 an hour, and that if the [district] does not pay for the services, I will be liable to pay for them" (Parent Ex. E).

A November 30, 2023 affidavit from the case worker of Step Ahead indicated that the student was provided direct SETSS at a rate of \$200 per hour for a total of 200 hours for the 2023-24 school year, direct OT services at a rate of \$250 per hour for a total of 40 hours for the 2023-24 school year, and direct speech-language therapy services at a rate of \$250 per hour for a total of 40 hours for the 2023-24 school year (Parent Ex. D). The affidavit included the providers' names and the hourly wages paid to each of the providers (*id.*). The affidavit also included a statement that funding for the cost of all of the student's services as well as "funding for any compensatory services requested, [we]re being requested by [the] parent to be directly funded to the [p]rovider so that the parent should not be liable to the provider for services [the district] agree[d] the student [wa]s entitled to receive" (*id.*). The affidavit further indicated that the providers working with the student reviewed the April 2023 IESP and provided services "in accordance with what is stated in that IESP" (*id.*).

A. Due Process Complaint Notice

In a due process complaint notice, dated August 28, 2023 and filed with the district on August 30, 2023, the parent alleged that the district failed to provide adequate special education and related services to the student for the 2023-24 school year (Parent Ex. A at pp. 1, 6; Dist. Due Process Response at p. 1). The parent further asserted that the district failed to provide the student with a free appropriate public education (FAPE) and/or equitable services "by failing to provide special education and related services providers" (*id.*). According to the parent, she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with all required services for the 2023-24 school year at rates higher than the standard district rates (*id.*). The parent requested "[a]llowance of funding for payment to the student's special education teacher provider/agency for the provision of [five] sessions per week of special education teacher [sic] at an enhanced rate for the 2023-2024 school year" (*id.* at p. 2). Lastly, the parent requested an award of "all related services and aides on the IESP for the 2023-2024 school

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

² SETSS is not defined in the State continuum of special education services (*see* 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

year and (a) related services authorizations for such services if accepted by the parent's chosen providers; or (b) direct funding to each of the parent's chosen providers at the rate each charges" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on December 7, 2023 (Tr. pp 1-17). During the impartial hearing, the parent submitted documentary evidence and both parties gave opening statements (Tr. pp. 4-7; see Parent Exs. A-E). In his opening statement, the parent's advocate sought a "compensatory bank of services equivalent to the services" in the April 2023 IESP (Tr. p. 5). The parent's advocate further requested that the services "be used during the '23/'24 school year, as well as for a reasonable time thereafter" and that the services be "at an enhanced rate -- rather to hire an independent provider at an enhanced rate, based on the rate paid over the last 12 months for similarly situated students pursuant to market rate orders" (id.). In addition, the parent's advocate stated that the parent had "found a provider that's been providing services since the start of the school year" who was "providing the SETSS, OT, and speech services for \$200, \$250, and \$250 an hour" and requested that the IHO order the district to "either reimburse the [p]arent or pay the provider directly for services rendered at that rate" (Tr. pp. 5-6). In her opening statement, the district's attorney did not acknowledge the parent's request for compensatory services, instead she stated that the parent's documentary evidence was similar or identical "to the other cases in this omnibus group," noting that the rates were not the same across the documents from Step Ahead and that the parent had improperly assumed a 40-week school year (Tr. pp. 6-7). The district's attorney also argued that the student was recommended to receive group SETSS, "[s]o that rate should certainly be adjusted" (Tr. p. 7). The IHO then stated that she was taking judicial notice of a 36-week school year and asked the parent's advocate to respond to the district's opening statement (id.). The parent's advocate stated that according to the provider, the student was receiving 40 weeks of services for the 2023-24 school year (Tr. p. 8).

Next, the district conceded that it did not implement the student's April 2023 IESP (Tr. p. 8). The IHO asked the district what its position was on the rates requested by the parent and the district argued that the parent's requested rates were excessive and proposed a market rate of \$125 per hour (Tr. pp. 8-9). The IHO then asked the district's attorney if she had any evidence in support of the rate and she stated she did not (Tr. p. 9). The district's attorney then stated that she wanted to reserve her right to cross-examine the case worker from Step Ahead "regarding the scope and nature of ancillary costs rolled into the agency's rates" (id.). The IHO asked the district's attorney if she had any other defenses other than the reasonableness of the rates and she stated that she did not (Tr. pp. 9-10).³

³ It appears from the transcript that the parent's advocate, the district's attorney, and the IHO appeared for multiple impartial hearings involving different students on the same day (Tr. pp. 3, 6, 10-16). The parties discussed with the IHO the idea of creating a template legal argument and using it for each of the cases (Tr. pp. 11-12). The parties also discussed using the Step Ahead case worker's live testimony from one case and applying it to all of the cases in the interest of judicial economy (Tr. p. 15). The parties and the IHO did not come to an agreement on the two proposed methods of conserving resources and neither proposal was implemented (Tr. pp. 13-15). When the parties and the IHO went back on the record following these discussions, they were under the incorrect

In a decision dated February 20, 2024, the IHO found that the district failed to implement the April 2023 IESP and denied the student a FAPE, but that the parent did not meet her burden of demonstrating that the unilaterally obtained services were appropriate (IHO Decision at pp. 2, 4, 6-7).⁴ Specifically, the IHO found that it was undisputed that the student was entitled to the services recommended in the April 2023 IESP and the parent's evidence merely stated that services were provided "in accordance with what [wa]s stated in that IESP, as the student's needs as adapted as necessary to the student's current progress" (*id.* at p. 6). The IHO found that the parent "failed to present any additional information regarding the services that were provided, the quality, frequency, goals, progress, or even when [the s]tudent began receiving these services from [Step Ahead]" (*id.*). The IHO determined that the weight of the evidence did not establish that the student's individual special education needs were addressed by the unilaterally obtained services or that the instruction provided was reasonably calculated to enable him to receive educational benefits (*id.*). The IHO found it was not necessary to address equitable considerations in light of her determinations (*id.* at p. 7). The IHO denied the parent's requested relief and ordered the district to implement the student's IESP for the remainder of the 2023-24 school year (*id.*).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her requested relief. The parent asserts that a Burlington/Carter analysis should not apply to the circumstances of her appeal and also argues that, even under a Burlington/Carter analysis, she is entitled to her requested relief. The parent argues that she utilized the services of Step Ahead, which used appropriately credentialed/licensed providers for each service for which funding was requested, and each provider followed the detailed discussions, goals, and frequency of services the district itself created and recommended. The parent asserts that the program cannot be deemed inappropriate. The parent further argues that the evidence in the hearing record fully supported an award of direct funding to Step Ahead for SETSS, OT, and speech-language therapy delivered to the student during the 2023-24 school year at the contracted rates. The parent contends that she contracted with Step Ahead, and no evidence was introduced showing the rates charged by the company to be unreasonable. Thus, the parent requests direct funding to Step Ahead for five periods per week of SETSS, two 30-minute sessions per week of speech-language therapy and two 30-minute sessions per week of OT.⁵

impression that closing arguments had been presented, whereupon the impartial hearing concluded (Tr. pp. 14-15).

⁴ The IHO's decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see generally IHO Decision).

⁵ Although the parent's advocate indicated in his opening statement that the parent was seeking a bank of compensatory education, such a claim was not raised in the August 30, 2023 due process complaint notice and the parent's request for review does not include such a claim. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y.

In an answer the district denies the parent's allegations and argues that the IHO's decision should be affirmed in its entirety.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (IEP) (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).⁶

Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]. Accordingly, the parent's claim for compensatory education has been abandoned.

⁶ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Unilaterally Obtained Services

In its answer, the district does not appeal from the IHO's determination that it failed to provide the student with the services recommended in the April 2023 IESP (IHO Decision at p. 4). Accordingly, the IHO's determination has become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the SETSS, speech-language therapy, and OT services unilaterally obtained by the parent and delivered to the student by Step Ahead during the 2023-24 school year.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that the district did not implement the student's IESP for the 2023-24 school year and as a self-help remedy she unilaterally obtained private 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 (Parent Exs. A at pp. 1-2; E). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parent's request for privately 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; 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 parent's primary objection to the employment of the above standard is their contention that they are not rejecting the district's programming, but are only challenging the district's inability or refusal to implement its own recommended programming and that under those circumstances a different standard should be employed.⁷ However, a district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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

⁷ Although the district does not cross-appeal from the IHO's finding that it failed to implement the April 2023 IESP, it is worth noting that at the time the due process complaint notice was filed with the district, on August 30, 2023, the April 2023 IESP was not yet set to be implemented, as the implementation date for the April 2023 IESP was September 6, 2023 (see Parent Exs. A; B; Dist. Due Process Response).

at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). 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). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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 private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student's Needs

Here, the only evidence of the student's needs is the description of the student's present levels of performance included in the April 2023 IESP and the student's needs as set forth in the IESP are not in dispute (Parent Ex. B).

Review of the April 2023 IESP shows that at the time of the April 2023 CSE meeting, the student was five years of age, was attending preschool, and was receiving preschool services including special education itinerant teacher (SEIT) services, speech-language therapy, and OT (Parent Ex. B at p. 1).

In planning for the student's transition to school-age services, the CSE considered information provided by the student's SEIT, a speech-language provider report, a classroom observation, an OT report, as well as information provided by the parent (Parent Ex. B at pp. 1-5). The April 2023 IESP reflected that past cognitive testing had placed the student's functioning within the low average range and further reported that the student continued to present with delays in speech-language skills and attention/concentration (id.).

The April 2023 IESP noted that the student's skills in activities of daily living (ADLs) were emerging and that, in school, the student would initiate tasks and try to work on his own (Parent Ex. B at p. 1). The student reportedly required some repetition and/or redirection in some instances (id.). The student was able to take care of his personal needs and he reportedly attended school regularly (id.). The student was able to follow school rules and routines and handled transitions during the instructional day, with some redirection (id.). The April 2023 IESP included information attributed to "Teacher Report/Teacher Interviews" that indicated the student was picking up basic readiness skills (id.). Those skills included letter and number recognition, the ability to recite the alphabet and to count up to at least ten (id.). The student could identify some letters and the numbers from 1 through 10 (id.). The student was able to identify basic colors, shapes, and body parts (id.).

According to the April 2023 IESP, the student was observed during "Center Time and Circle Time" activities, wherein the student interacted nicely with peers and adults during the observation (Parent Ex. B at p. 2). During "Center Time," the student remained with a teacher and a few students during a read aloud, his attention/concentration was reportedly "fair" with the student needing to be redirected in a few instances (id.). The student interacted with peers during this time, his speech was intelligible, he helped to clean up following "Center Time" (id.). The student was observed to try to attend to tasks but in a few instances he stared ahead (id.).

The April 2023 IESP also stated that the student continued to present with some delays in speech-language skills, noting that he was not always able to express himself, particularly when expressing emotions (Parent Ex. B at p. 2). The student reportedly exhibited delays in receptive language skills, frequently requiring directions to be repeated (id.). The student was described as generally understood by others (id.). Information from a speech-language therapy provider report included on the April 2023 IESP described the student as presenting with a language delay in both receptive and expressive language skills (id.). According to the IESP, the report indicated the student could retell a story; however, he sometimes went off on tangents and talked about random events (id.). The IESP indicated the student did not always appear to be attentive in class and needed to be refocused, especially during circle time and story time (id.). The student was then-currently working on increasing vocabulary, listening to and answering questions from a story, and following three-step unrelated commands (id. at p. 3).

The April 2023 IESP indicated that the student was expected to make steady academic progress, given his intelligence, previous learning, and the support services that he would receive and noted that the student would probably learn best through a multisensory approach and when provided with high interest materials (Parent Ex. B at p. 3). Among the student's strengths were his letter and number recognition, ability to identify basic colors, shapes, and body parts, sequencing three events in chronological order, sorting objects by category, and identifying direction and position (id.).

The IESP noted that the parent reported that the student was "doing okay" in school and she related that some days were better than others (Parent Ex. B at p. 3). The parent felt that it may take him more time than other children his age to grasp concepts (id.). She noted that the student's attention and concentration were fair, as he sometimes lost focus, but there was some improvement in this area (id.). According to the parent, the student completed his homework independently (id.). As reported on the IESP, the parent believed the student had benefited a "little" from his SEIT services and she felt that he would do better with more hours (id.). She saw "a little bit" of improvement in the student's speech-language skills but felt that he continued to need speech-language therapy (id.). The parent further stated that the student had difficulty following directions, and that the student "did not receive services consistently" (id.).

With respect to the student's social development, the April 2023 IESP noted that the student's teachers reported progress in that the student had been interacting more with peers and adults since the beginning of the school year (Parent Ex. B at p. 4). As of the time of the April 2023 CSE meeting, the student had "shown significant growth," he was able to participate in short, simple turn taking and try some new activities (id.). The student occasionally became upset in a social interaction and then "shut down" when he was unable to express his feelings; however, he was generally able to transition from one activity to another with some redirection (id.). The student was noted to follow rules in school and at home (id.). The student was then-currently working on persevering at tasks and expected behavior during the instructional day (id.).

Information about the student's physical development included on the April 2023 IESP was provided by the student's OT provider, teachers, and the parent (Parent Ex. B at p. 5). Overall, the student's fine motor skills were reportedly "still behind"; however, the student's gross motor skills were reportedly within age-appropriate limits (id.). The April 2023 IESP reflected an OT provider report that indicated the student presented with poor fine motor skills, sensory processing skills, and visual motor skills (id.).

The April 2023 IESP included strategies and resources to address the student's management needs such as providing the student with verbal and visual prompts to help him to complete tasks, repeating directions/questions/information as necessary, providing redirection in those instances in which the student lost focus to a task or activity, introducing new material in small units, using hands-on activities and visuals to help the student remain interested in a lesson, and reteaching material when he was having problems with comprehension (Parent Ex. B at pp. 5-6).

2. Appropriateness of Unilaterally Obtained Services

Although the parent asserts that she obtained for the student the same SETSS, OT, and speech-language therapy services for the 2023-24 school year as were recommended in the April 2023 IESP and that the services were provided by an appropriately credentialed and experienced teacher, the hearing record does not include sufficient information to support the parent's assertions and fails to show how any of the educational services provided were designed to address the student's special education needs.

As described above, the April 2023 IESP identified several of the student's needs with respect to his academic abilities, motor skills, social/emotional and physical development and recommended that the student receive five periods per week of SETSS, two 30-minute sessions of

individual OT, and two 30-minute sessions per week of individual speech-language therapy (Parent Ex. B at pp. 1-5, 11). However, there is no evidence in the hearing record that demonstrates what services the student received from Step Ahead or how the services addressed the student's needs.

The parent did not enter a contract with Step Ahead into the hearing record and instead included a statement by the parent which indicated the parent was "aware that the rate of the SETSS services provided to [the student] [wa]s \$225 an hour, and related services at the rate [o]f \$300 an hour, and that if the [district] d[id] not pay for the services, [she] will be liable to pay for them" (Parent Ex. E). The notarized written statement signed by the Step Ahead case manager indicated that the student was receiving 200 hours of "Direct SETSS services at the rate of \$200 an hour" from a named provider, 40 hours of "Direct OT services at the rate of \$250 an hour" from a named provider, and 40 hours of "Direct SPEECH services at the rate of \$250 an hour" from a named provider for the 2023-24 school year (Parent Ex. D).⁸ The case manager's affidavit also stated that the individual providers who were working with the student, reviewed the April 2023 IESP and were providing services in accordance with what was stated in that IESP, "as the student's needs as adapted as necessary to the student's current progress" (*id.*). There is no other evidence in the hearing record which describes the frequency, manner of delivery, or even a description of the services the parent procured. The parent's signed statement does not even identify Step Ahead as the company she the student was receiving services from, other than that the written statement was made on Step Ahead's letterhead (*see* Parent Ex. E). Further there is no evidence that Step Ahead actually provided the services, as reflected in the April 2023 IESP, to the student or any other proof that the student received services (*see* Parent Exs. A-E).

The hearing record includes a printout from the State website for teacher certification and provider licensure, which indicates that the providers listed in the case manager's written statement are licensed and/or certified (Parent Ex. C). However, the hearing record does not include any attendance records, service notes or progress reports demonstrating that the providers identified in the case manager's statement actually provided services to the student or what such services might have been.

Although the parent argues that she attempted to implement the program recommended for the student in the April 2023 IESP, the parent must still come forward with evidence that describes the services and the delivery thereof. The hearing record lacks any information about who provided the student with services, the level of services the student received, and does not explain how any services that may have been provided by Step Ahead addressed the student's needs (*see L.K. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; *L.Q. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; *R.S.*

⁸ It is not clear in the hearing record as to why the parent's written statement and the written statement made by the Step Ahead case manager include different rates for SETSS and related services (*compare* Parent Ex. D, with Parent Ex. E).

v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

In review of the IHO's findings, the IHO correctly applied a Burlington/Carter analysis to the parent's claims and correctly determined that the hearing record did not include sufficient information to find that any services were provided the student during the 2023-24 school year or that any services that may have been provided to the student were appropriate to address his needs. Accordingly, the IHO correctly denied the parent's request for direct funding of unilaterally obtained services for the 2023-24 school year.

VII. Conclusion

Having found that the IHO correctly determined that the parent did not meet her burden of demonstrating the appropriateness of her unilaterally obtained services for the 2023-24 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 3, 2024**

**STEVEN KROLAK
STATE REVIEW OFFICER**