The University of the State of New York

The State Education Department
State Review Officer
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No. 24-125

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 Ezra Zonana, 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 or to directly fund the costs of her son's privately-obtained occupational therapy (OT) services for the 2023-24 school year delivered by the Always A Step Ahead, Inc. (Step Ahead or agency). The district cross-appeals from the IHO's decision. The appeal must be dismissed. The cross-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 programing for students with disabilities under the 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 §§ 3602-c; 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[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. Based on the limited evidence, it appears that the student has been parentally placed at the same nonpublic, religious school since at least the 2022-23 school year (see Parent Exs. A at p. 1; G).

On May 9, 2023, the parent executed a notice to the district, indicating that the student was parentally placed at her own expense at a nonpublic school and that she wished for the district to provide special education services to the student for the 2023-24 school year (see Parent Ex. G).[1]

A CSE convened on September 11, 2023 to develop an IESP for the student that would be implemented from September 18, 2023 through the projected annual review date of September 11, 2024 (see Parent Ex. B at pp. 1, 8). Finding that the student remained eligible for special education as a student with an other health impairment, the September 2023 CSE recommended the following related services to address the student's needs: two 30-minute sessions per week of individual OT (id. at pp. 1, 5).[2]

A. Due Process Complaint Notice

By due process complaint notice dated November 19, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the student's September 2023 IESP represented the last-agreed upon program, which included a recommendation for two 30-minute sessions per week of individual OT services (id.). The parent "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers at the district's "standard rates," and the district had not assigned any providers to deliver services to the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).[3]

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency, and to fund two 30-minute sessions per week of

[1] At the time the parent executed this notice, she indicated on the notice that the student was in second grade (see Parent Ex. G).

[2] The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[3] The hearing record contains an agreement between the parent and Step Ahead dated September 1, 2023 for services to be provided to the student that "are consistent with those listed" in the student's IESP dated September 11, 2023 (Parent Ex. F).

individual OT services at an enhanced rate for the entire 2023-24 school year (see Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) on January 3, 2024, which concluded thereafter on February 21, 2024 after three days of proceedings (see Tr. pp. 1-62).[4] In a decision dated March 1, 2024, the IHO initially described the position of the parties, and specifically noted that it was uncontested that the parent timely submitted a request for equitable services to the district, the student's September 2023 IESP included an appropriate recommendation for OT services, and the district failed to implement those services during the 2023-24 school year (see IHO Decision at p. 4). The IHO further noted that because the parent had not alleged that the student's IESP was untimely, thus, "any potential denial of equitable services prior to the implementation date (September 18) ha[d] not been appropriately raised and w[ould] not be considered" by the IHO (id.).

Turning to the findings of facts in this matter, the IHO indicated that, while the parent alleged in her due process complaint notice that she was unable to locate providers willing to work at the district's standard rates, the hearing record lacked evidence of any efforts the parent made to locate such provider and the parent had not testified at the impartial hearing (see IHO Decision at p. 4). In addition, the IHO noted that the hearing record lacked evidence regarding whether the parent had given the district an opportunity to implement the September 11, 2023 IESP, especially when, as here, the parent allegedly entered into a "verbal agreement" with Step Ahead on September 1, 2023 for "enhanced rate services before an IESP was even developed or set to be implemented by the [district]" (id. at pp. 4-5). The IHO also found that the parent failed to provide the district with a 10-day notice of intention to privately obtain OT services for the student and to seek public funding for those services (id. at p. 5).

With respect to the parent's written contract with Step Ahead, the IHO found that it was dated September 1, 2023, but not executed by the parent until January 11, 2024 and failed to include any countersignature (see IHO Decision at p. 5; Parent Ex. F).[5] The IHO also found that, although the case manager testified that it was the agency's "'ordinary course of business' to enter into verbal agreements initially and then later memorialize them in writing," she did not "credit this assertion" in light of the "other irregularities with the contract" (id.). For example, the IHO noted the case manager's testimony concerning the "boilerplate" nature of the parent's contract, which included a reference to delivering special education teacher support services (SETSS) when OT was the only service the student required, as well as the fact that the agency purportedly entered a verbal agreement with the parent prior to receiving the student's September 2023 IESP and that

[4] On January 3, 2024, the district executed a pendency implementation form, which indicated that the student's September 2023 IESP formed the basis for pendency services and consisted of two 30-minute sessions per week of individual OT services (see Pendency Imp. Form).

[5] A case manager from Step Ahead testified that September 1, 2023 reflected the date of the parent and agency's "verbal agreement" (Tr. pp. 32, 51-52).

the case manager's testimony confirmed that the agency had not yet received the student's IESP at the time of the verbal agreement with the parent (id.).

Next, the IHO found that the hearing record provided "very little" with respect to the student's needs, such as evaluations, and "no witnesses with personal knowledge of the student" testified at the impartial hearing (IHO Decision at p. 5). In reviewing the student's September 2023 IESP, the IHO indicated that the "student's Full-Scale IQ [wa]s in the high average range and his academic achievement scores [we]re all average or high average" (id.). According to the IESP, the student took a "long time to follow directions and answer questions," especially in group settings; he also had difficulty with "sustained attention and focus" and required "prompts and reminders" (id.). The IHO noted that, as reported in the IESP, the student exhibited "significant delays" in "Auditory Filtering and Sensation Seeking" (id.). With respect to the student's OT needs, the IHO found that the September 2023 IESP included one annual goal targeting his ability to "carry out instructions to begin work after an assignment [wa]s distributed and when given verbal instructions from the teacher to the whole group" (id.).

Turning to the agency's delivery of OT to the student, the IHO described the case manager's testimony concerning the hourly rate and how the fees were distributed between the OT provider and the agency to apply to its expenses (see IHO Decision at p. 5). Notably, the IHO found that the agency derived the hourly rates based on a "typical rate requested by the individual providers," rather than by "market rates in the area" (id. at pp. 5-6). Evidence in the hearing record indicated that the OT provider was "certified by the National Board for Certification in [OT]," but the IHO noted that the hearing record did not indicate whether the OT provider was "also certified" by the State (id. at p. 6). The IHO clarified, however, that the case manager testified that "all their providers [we]re 'properly licensed and educated within their respective fields'" (id.). Based on the case manager's testimony, the IHO indicated that the agency OT provider reviewed the student's September 2023 IESP to deliver services consistent with the student's needs in the IESP, and the OT services were delivered to the student in school on a "pull-out basis" (id.). However, the IHO further noted that the hearing record did not provide any "more specific information . . . as to how the services [we]re provided or how they may [have] be[en] tailored to meet the student's needs" (id.). In addition, the IHO noted that neither the parent nor the OT provider had testified at the impartial hearing with respect to the OT sessions or the "student's progress therein" and the hearing record lacked any progress reports (id.). The IHO indicated that, although the case manager testified that the OT provider had input "session notes into [the agency's] database," she could not recall "what the student was working on in the sessions" (id.). Moreover, the hearing record did not include copies of the sessions notes, and while the case manager had testified that the agency issued "progress reports at least twice yearly," the hearing record did not include copies of the progress reports (id.).

Reaching the conclusions of law, the IHO initially determined that the district failed to sustain its burden to demonstrate that it provided the student with equitable services for the 2023-24 school year (see IHO Decision at pp. 6-9). With regard to the unilaterally obtained OT services, the IHO determined that the parent similarly failed to sustain her burden to establish that the services met the student's needs (id. at p. 10). Here, the IHO pointed to the legal standard used to analyze the parent's burden of proof, and while noting that the OT provider appeared to be appropriately qualified to deliver services, the IHO found that the "conclusory evidence that the sessions [we]re being provided in accordance with the IESP" was insufficient to sustain the parent's

burden (id.). Significantly, the IHO noted that the hearing record lacked any evidence, such as sessions notes or progress notes or testimony from any individual "who ha[d] met the student and [wa]s familiar with his needs or how they [we]re being met"; additionally, the hearing record lacked evidence "as to if or how the sessions address[ed] the student's unique needs or whether instruction ha[d] been modified to meet his needs" (id.). Consequently, the IHO concluded that the hearing record lacked sufficient evidence to find that the student was provided with "specially designed instruction" and the parent had failed to sustain her burden (id.).[6]

Next, the IHO turned to equitable considerations (see IHO Decision at p. 10). While noting that an analysis of equitable considerations was unnecessary because the parent had failed to sustain her burden of proof, the IHO nonetheless concluded that "equities here would not support the full relief sought" (id.). Overall, the IHO found that the equities in this case were "mixed, to be sure" (id.). First, the district did not implement the student's mandated OT services in the September 2023 IESP; however, the IHO noted that the parent "apparently entered an agreement with a private provider before the student's IESP was even developed and before giving the [district] an opportunity to implement it" (id.). Second, the IHO described the parent's contract with Step Ahead as having the "appearance of impropriety, as not only d[id] the alleged contract purport to incorporate the terms of the IESP, which did not yet exist at the time of the agreement, but it also was not signed until months later, seemingly in anticipation of this hearing" (id.). Third, the IHO found that the case manager's testimony contradicted the parent's "financial obligation," and the contract, itself, did not identify the "services to be provided" because the September 2023 IESP had not yet been developed (id.). Fourth, the IHO noted that the hourly rate for the OT services was "quite high" and "less than half" of the hourly rate was paid to the provider; additionally, the evidence reflected that the rate was not based on "market rates for similar services" (id.). Fifth, the IHO found that the hearing record lacked evidence of "invoices or service records," and the hearing record similarly lacked evidence of the parent's efforts to secure a provider who would accept the district's rates (id.). Finally, the IHO indicated that the parent failed to provide the district with a 10-day notice of unilateral placement until the parent filed the due process complaint notice (id.). As a result of the foregoing, the IHO concluded that equitable considerations did not weigh in favor of the parent's requested relief, and even if the evidence supported a finding that the unilaterally obtained OT services were appropriate, the IHO would have denied funding for the services delivered to the student prior to the parent filing the due process complaint notice (November 20, 2023) based on equitable considerations (id.).

As a final point, the IHO addressed "Other Relief," including the student's pendency services in this case (see IHO Decision at pp. 10-11). Having found that the parent was not entitled to funding for the unilaterally obtained OT services, the IHO noted that "some funding [wa]s still warranted under pendency" (id. at p. 10). The IHO indicated that the district "agreed to pendency here by signing the agreement form on January 3, and [had] agreed at the [impartial] hearing that if the services matched the [September 2023] IESP, they had no objection to them being paid under pendency" (id.). The IHO found that, if the agency could "provide invoices and service records for twice weekly OT provided between November 20, 2023 [the date of the due process complaint notice] and the date of this Order, those [OT] services should be funded under pendency" (id.).

[6] In addition, the IHO noted in the decision that the parent had been "warned" at the prehearing conference about the evidence required to sustain her burden of proof (IHO Decision at p. 10).

Next, the IHO determined that the district "should implement the student's OT" services recommended in the September 2023 IESP through the conclusion of the 2023-24 school year, or "until such time as a new IESP [wa]s developed and implemented, whichever [wa]s sooner" (id. at p. 11). The IHO noted that she "decline[d] to speculate" whether the district would "fail to implement this program in the future" and that "to order prospective funding for a future failure of implementation would be akin to awarding compensation for harms not yet realized" by the parent (id.).

As relief, the IHO ordered the district to provide "direct funding to the [a]gency for up to two 30-minute session of OT per week provided between November 20, 2023 and the date of this Order, pursuant to pendency, upon receipt of service records and invoices corresponding to those dates" (IHO Decision at p. 11). Additionally, the IHO ordered the district to implement the student's OT services recommended in the September 2023 IESP within 14 days of the date of the decision through the conclusion of the 2023-24 school year or until such time as a new IESP was developed and implemented, whichever occurred sooner (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by denying her request for direct funding of the unilaterally obtained OT services for the 2023-24 school year. More specifically, the parent contends that, at the impartial hearing, the district agreed the student was entitled to receive two 30-minute sessions per week of OT services, but challenged the appropriateness of the unilaterally obtained services and the hourly rate charged for those services. With regard to the IHO's decision, the parent asserts that the IHO initially erred by applying an incorrect legal standard to this matter, which involved the provision of equitable services under State law. In addition, the parent contends that the IHO erred by finding that equitable considerations did not weigh in favor of the parent's requested relief. The parent argues that her contract with the agency is "not a contract required to be in writing" under the State Statute of Frauds, and rather than being a legal requirement, whether a contract is in writing is a question of evidentiary reliability. According to the parent, the contract in this case establishes the services to be delivered, and the parent's legal obligation to pay for such services at $250.00 per hour if the district did not pay for the services. With regard to the hourly rate charged by the agency, the parent argues that the district failed to present any evidence of unreasonableness, and the IHO's finding that the rate was quite high was without support or evidence in the hearing record. The parent further argues that the district's conduct of requiring the parent to locate providers to implement the student's IESP is illegal, and the IHO failed to consider this when analyzing equitable considerations. As relief, the parent seeks to overturn the IHO's decision and to order the district to directly fund the costs of the unilaterally obtained OT services for the 2023-24 school year at the rate of $250.00 per hour.[7]

[7] In two footnotes, the parent argues that she is not required to file a 10-day notice of her intention to unilaterally obtain OT services for the student, as it does not apply to an equitable services dispute under State law (see Req. for Rev. ¶ 9 n.1, ¶ 27 n.2). Contrary to the parent's arguments, a 10-day notice of unilateral placement is required when, as here, a parent rejects services from a public school setting (see Application of a Student with a Disability, Appeal No. 24-097 [applying a Burlington/Carter legal framework for matters related to an IESP arising under State Education Law § 3602-c and finding a corollary between State law and the IDEA]; see also 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]).

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. As a "cross-appeal," the district initially argues that the parent failed to establish that she had standing to bring this matter. Specifically, the district asserts in its cross-appeal that the hearing record lacks any evidence that the parent had a personal stake in the outcome of this dispute.[8] Next, the district argues that the IHO properly found that the parent failed to sustain her burden to establish the appropriateness of the unilaterally obtained OT services and that equitable considerations did not weigh in favor of the parent's requested relief. The district seeks to uphold the IHO's decision 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]).[9] "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 [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.).[10] Thus, under State law an eligible New

[8] While the district points to E.M. v. New York City Department of Education, 758 F.3d 442, 445 (2d. Cir. 2014) in support of its argument that the parent lacked standing to pursue this matter, the district has not successfully rebutted the parent's allegation with respect to the district's failure to implement the student's September 2023 IESP, nor has the district addressed the parent's injury in fact. Moreover, the district's cross-appeal does not contain any challenges to the IHO's decision. Accordingly, the district's cross-appeal is dismissed.

[9] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[10] 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

York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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. Legal Standard

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. But in terms of the parent's dual enrollment in the public school for special education purposes, the parent alleged that the district did not offer appropriate equitable services or deliver the services mandated in the IESP for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private OT services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (see Parent Ex. A). Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private OT services the parent obtained for the student during the 2023-24 school year. "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

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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). 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 guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web-based versions.

program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).[11]

Thus, even though the public school officials in this case failed to show that they carried out the special education mandates in terms of the public school enrollment aspect of the case under the student's September 2023 IESP and it amounts to a material failure, contrary to the parent's arguments, 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).

B. Unilaterally Obtained OT Services

Initially, there is no dispute that the student was entitled to receive two 30-minute sessions per week of individual OT services during the 2023-24 school year, consistent with the recommendation in the September 2023 IESP. There is also no dispute that the district failed to

[11] 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 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 or IESP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 F. App'x 63 [2d Cir. 2014] [minor possible discrepancy between the 6:1:1 staffing ratio called for in the student's IEP and the possible 12:1:2 staffing ratio during gym class three times per week is not material when the student would have been accompanied to gym by his own paraprofessional]).

implement the OT services and similarly failed to assign a provider to deliver the OT services to the student at his religious, nonpublic school.

Having determined that the district failed to offer the student appropriate equitable services, the next inquiry is whether the parent's unilaterally obtained services, as described above, were appropriate to meet the student's needs. The parent argues that the IHO erred by finding that she failed to sustain her burden to establish that the privately-obtained OT services were appropriate for the student. The parent contends that, in this case, she used Step Ahead to provide the student with OT services by an appropriately credentialed provider to implement the OT services as mandated in the September 2023 IESP. As a result, the parent's program cannot be "deemed inappropriate."

As for 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]). 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). 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. v. Bd. of Educ. of Hyde Park, 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). 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).

At the impartial hearing, a case manager from Step Ahead testified that the agency had a verbal agreement with the parent to provide OT services from the date of the contract—September 1, 2023—until the parent executed the contract on January 11, 2024 (see Tr. pp. 30, 32-33; Parent Ex. F).[12] The case manager confirmed that, as reflected in her direct testimony by affidavit, Step Ahead charged $250.00 per hour for OT services for the student for the 2023-24 school year (see Tr. pp. 34-35; Parent Ex. D). The case manager also confirmed that the OT provider, in this case, was paid $120.00 per hour out of the $250.00 per hour charged for the OT services; the remaining $130.00 per hour was applied to "expenses of the agency in order to provide services," which included searching for providers, ensuring that the providers were properly certified and licensed, training and supervision of providers, ongoing payments for the agency's database, overhead expenses, payments for outstanding loans, and purchasing of equipment (see Tr. pp. 35-38; Parent Ex. D). The case manager testified that the $250.00 per hour rate for OT services was derived from a range of rates that the providers had requested, which she believed ranged from $90.00 per hour to $160.00 per hour; and the remainder of the $250.00 per hour would then go to agency expenses (see Tr. pp. 45-46). Prior to the 2023-24 school year, Step Ahead had charged $300.00 per hour for OT services, but, according to the case manager, Step Ahead worked to keep hourly rates "as low as possible for the parents" (Tr. p. 46).

The case manager testified that the student was receiving the OT services at his religious, nonpublic school (see Tr. p. 36). She also testified that, although the parent executed the contract with Step Ahead on January 11, 2024, the student began receiving OT services as soon as the agency received the student's IESP, sometime in September 2023 (see Tr. p. 47; Parent Ex. F). The case manager further testified that the parent approached Step Ahead for services in September 2023 (see Tr. p. 47). The case manager explained that the contract reflected an effective date of September 1, 2023, and the contract was to "apply for the entirety" of the 2023-24 school year, consistent with the student's IESP (Tr. p. 48; see Parent Ex. F). She confirmed that, as the student's IESP was dated September 11, 2023, the agency had not yet received the IESP as of the date of

[12] The case manager explained that the contract between Step Ahead and the parent in this case referenced an hourly rate for special education teacher support services (SETSS) because the agency used a "set contract" that always included a SETSS hourly rate as well as the hourly rate for related services (Tr. pp. 33-34; see Parent Ex. F). She further explained that the reference to the student's specific IESP in the contract was used to identify the specific services to be delivered to the student (see Tr. p. 34; Parent Ex. F).

the contract, September 1, 2023 (see Tr. p. 48; Parent Ex. B at p. 1). Based on the information in the case manager's direct testimony by affidavit, the agency was providing OT services to the student for a "total of 40 hours" for the 2023-24 school year, which comprised a "40-week school year, at two 30-minute sessions per week for the entirety of the school year," from September to June (Tr. p. 51; Parent Ex. D).[13]

Following the district's cross-examination of the case manager, the IHO asked her what, if anything, had changed from the date of the contract, September 1, 2023, to January 11, 2024, when the parent executed the contract "that prompted [the agency] to memorialize [the agency's] oral agreement to writing" with the parent (Tr. p. 51). The case manager testified that the agency had "been entering into verbal agreements initially upon meeting the parents" and "then later on memorializing everything into writing" in "just the ordinary course of business" (Tr. p. 52).

Based on a review of the case manager's testimony, together with the remaining documentary evidence entered into the hearing record as evidence, there is little, if any, information in the hearing record regarding the student's needs, other than the September 2023 IESP. As reflected in the September 2023 IESP, an administration of the Wechsler Intelligence Scale for Children—Fifth Edition (WISC-V) to the student resulted in scores ranging from the average to the very superior range (see Parent Ex. B at p. 1). An administration of the Wechsler Individual Achievement Test—Fourth Edition (WIAT-IV) to the student resulted in scores ranging from the average to the high average range (id. at pp. 1-2). According to the September 2023 IESP, the student "took a long time to follow directions and answer questions," and as reported by the student's teacher, "these deficits occur[red] more frequently in a group setting" (id. at p. 2). At that time, the student "excel[led] in math and [wa]s working hard on his reading" (id.). The IESP also reflected that the parent "indicated that [the student wa]s one grade below in reading, but his classroom teacher [wa]s not concerned at th[at] time" (id.).

With respect to the student's social development, the September 2023 IESP indicated that, according to the parent, he had "age-appropriate friends and work[ed] and play[ed] well individually and in groups" (Parent Ex. B at pp. 2-3). The parent reported no concerns with respect to the student's social development (id. at p. 3).

With respect to his physical development, the September 2023 IESP noted that he had "significant delays (which put[] him in the performance at high risk category) in the sub-areas of Auditory Filtering and Sensation Seeking" (Parent Ex. B at p. 3). According to the parent, the student was "very active and enjoy[ed] riding his bike"; at that time, the parent reported "no concerns" about the student (id.).

To address the student's needs, the September 2023 CSE recommended two 30-minute sessions per week of individual OT and developed one annual goal related to his OT services (see Parent Ex. B at pp. 4-5). The annual goal targeted the student's ability to carry out instructions to begin work after being provided with verbal instructions from the teacher, such as finding a pencil, writing his name on the worksheet, and starting his work (id.). In addition, the CSE recommended

[13] The hearing record did not include a copy of a calendar for the student's religious, nonpublic school; nevertheless, the 10-month school year consists of approximately 36 weeks (180 school days divided by 5 days per week) (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]; 200.1[eee]).

strategies to address the student's management needs, such as verbal and visual cueing, positive reinforcement, repetition, chunking and simplification of directives, small group instruction, verbal preparation, and modeling (id. at p. 3).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

In the decision, the IHO found that the parent failed to sustain her burden to establish that the unilaterally obtained OT services allegedly delivered to the student constituted specially designed instruction to meet the student's needs (see IHO Decision at p. 10). After reviewing the evidence in the hearing record, as described above, and considering the parent's arguments on appeal, there is no basis to disturb the IHO's determination. For example, consistent with the IHO's findings, the hearing record is devoid of any progress reports or session notes describing OT services delivered to the student by Step Ahead, which could shed light specific strategies used for the student and, how the OT services provided were tailored to the student and met his unique needs. Additionally, although the hearing record indicates that Step Ahead delivered the OT services at the student's religious, nonpublic school, neither the OT provider nor the parent testified at the impartial hearing to describe those services or how, if at all, the OT provider worked on the student's annual goal related to his OT services or what the OT provider otherwise did with the student.

Moreover, at the impartial hearing and prior to the parties' disclosure deadline, the IHO specifically explained the burden of proof assigned to each party, as well as the evidence she expected to have in order to meet each party's burden of proof (see Tr. pp. 12-16). With regard to the parent's burden to establish the appropriateness of the unilaterally obtained OT services, the IHO noted that the parent's evidence should include notice of a timely request for equitable services, the service provider's qualifications, the parent's financial obligation and the reasonableness of the hourly rate, the appropriateness of the services provided, and how those services were tailored to meet the student's needs (see Tr. pp. 15-16). In addition, the IHO stated that "[j]ust matching the IESP [wa]s not enough to meet" the parent's burden of proof in this matter (Tr. p. 15). These instructions provided the parent, who was represented by an attorney with significant experience in these matters, with sufficient notice of the evidence required to sustain her burden of proof with respect to establishing the appropriateness of the unilaterally obtained OT services and the IHO also explained the legal standard that would be applied to this matter. And regardless of whether the parent's attorney may or may not have agreed with the legal standard applied to matters involving equitable services under Education Law § 3602- c, it was incumbent upon the parent's attorney to avail himself of the opportunity to be heard by following the IHO's instructions. Also, the case manager testified that Step Ahead had prepared progress reports and sessions notes (see Tr. pp. 31, 50). However, neither were entered into the hearing record as evidence and the case manager did not possess any personal knowledge of the OT services delivered to the student and could not recall the information she may have read in the session notes

for this student, thus the IHO was not required to find case manager's testimony particularly probative or weighty in this regard.

Consequently, consistent with the IHO's determination, the evidence in the hearing record, as described above, lacks sufficient information to show that the OT services Step Ahead allegedly delivered to the student constituted specially designed instruction sufficient to meet the student's identified needs. Accordingly, the parent failed to meet her burden to prove that the OT services were specially designed to meet the student's needs, and there is no basis to disturb the IHO's determination.

VII. Conclusion

Having found, consistent with the IHO's determination, that the parent failed to sustain her burden to establish the appropriateness of the unilaterally obtained OT services, there is no need to reach the issue of equitable considerations and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 24, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER