



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-202

Application of a STUDENT WITH A DISABILITY, by her 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 Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's unilaterally-obtained services delivered by Always a Step Ahead, Inc. (Step Ahead or agency) at a specified rate for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which ordered the district to provide compensatory education services. The appeal must be sustained. 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 programming 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

§ 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, 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 is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The hearing record is sparse with regard to the student's educational history. In February 2023, the student began receiving occupational therapy (OT) and physical therapy (PT) through the Committee on Preschool Special Education (CPSE) (Parent Ex. B at p. 1). In May 2023, a CSE convened for the student's "turning five process" and determined the student was eligible for special education as a student with an other health-impairment (id.).¹ The CSE developed an IESP with a projected implementation date of September 1, 2023, and recommended that for the 2023-24 school year, the student receive three periods per week of direct group special education teacher support services (SETSS), two 30-minute sessions per week of OT in a group, and two 30-minute sessions per week of individual PT (id. at p. 8).

The parent executed a contract with Step Ahead, dated September 1, 2023, but electronically signed by the parent on December 27, 2023, indicating that the parent was aware of the rates charged for SETSS and related services provided to the student consistent with the student's May 2023 IESP (Parent Ex. C).² During the 2023-24 school year, the student attended kindergarten at a nonpublic school and received SETSS and OT (Parent Ex. F at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated January 26, 2024, the parent, through an attorney, alleged that the district denied the student a free appropriate public education (FAPE) and failed to provide appropriate equitable services to the student for the 2023-24 school year (Parent Ex. A at p. 1). In particular, the parent contended that the last program the district developed for the student that the parent agreed with was the May 22, 2023 IESP (id.). The parent also asserted that 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.).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency and an order awarding the student three weekly sessions of SETSS at an "enhanced rate" for the 2023-24 school year (Parent Ex. A at p. 2). The parent also requested an "[a]llowance of funding for payment to the student's special education teacher provider/agency" for the provision of the three weekly sessions of SETSS at the enhanced rate for the 2023-24 school year (id.). Lastly, the parent requested an "[a]ward[of] all related services and aides on the IESP for the 2023-2024 school 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, even if higher than the standard [district] rate for such service" and "[s]uch other and further relief" that was deemed appropriate (id.).

¹ 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]).

² The Commissioner of Education has not approved Step Ahead as a school or agency with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On January 29, 2024, the district countersigned a Pendency Implementation Form, which indicated that the May 22, 2023 IESP formed the basis for the student's pendency services consisting of three periods per week of group SETSS, two 30-minute sessions per week of group OT, and two 30-minute sessions per week of individual PT (see Pendency Imp. Form).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on March 20, 2024 (Tr. pp. 1-51).

In a decision dated April 8, 2024, the IHO initially recounted the procedural history and then briefly discussed the legal standards, burdens, and framework under Burlington/Carter that apply to examining relief in the form of unilaterally-obtained private services in instances where a student is dually enrolled in a nonpublic school and also sought special education services from a district under Education Law § 3602-c (IHO Decision at pp. 3-7). The IHO found that the district failed to provide the student a FAPE for the 2023-24 school year because it conceded that it failed to implement the student's May 2023 IESP (id. at p. 9).

Next, the IHO found that the parent had failed to meet her burden because there was insufficient evidence to demonstrate how the privately-obtained SETSS and OT services were specially designed to meet the student's needs (IHO Decision at pp. 11-14). More specifically, the IHO found that the office manager from Step Ahead, who was the parent's only witness, lacked fundamental information concerning the provision of SETSS and OT services that Step Ahead delivered to the student and did not have any personal knowledge about the frequency and duration of such services that the student received (id. at pp. 11-12). The IHO noted in her decision that she had "grave concerns regarding the credibility" of the office manager and was also "alarmed" by the office manager's lack of knowledge about "critical information related to the services the [s]tudent receiv[ed], how the services were individualized to the [s]tudent's disability, how [the student's] disability affected [her] ability to learn, and how the services allowed the [s]tudent to access [her] curriculum" (id. at p. 11).³

In addition, the IHO determined that the progress reports and session notes submitted by the parent were also insufficient to demonstrate how the SETSS and OT services delivered by Step Ahead met the student's unique needs (IHO Decision at pp. 12-14). With respect to SETSS, the IHO found that the progress report noted that the student was receiving a different frequency of SETSS than what was recommended in the IESP, and that the SETSS progress report and sessions notes contained vague and limited baseline information and goals (id. at p. 12). Likewise, with respect to OT, the IHO found that the OT progress report and session notes failed to sufficiently describe the student's needs and only provided vague descriptions of the student's progress (id. at pp. 13-14).

³ The IHO noted that, while the office manager knew the rates charged by Step Ahead, and how much the providers were actually paid, the office manager was unsure whether the progress reports were written on agency forms, where the services were provided, and which IESP was used to provide the student with services (IHO Decision at p. 11).

The IHO next determined that, had she determined that the parent met her burden to demonstrate the appropriateness of the unilaterally-obtained services, she would have found that equitable considerations did not weigh in favor of the parent because she failed to provide the district with 10-day notice (IHO Decision at p. 16).

Finally, the IHO emphasized that the district failed to implement the May 2023 IESP, leaving the parent with no other option but to unilaterally find private providers (IHO Decision at p. 16). Noting her broad discretion to employ appropriate, equitable relief, the IHO ordered the district to "provide the [s]tudent special education services and related services for the remainder of the 2023-24 school year according to the January 2024 IESP to prevent any regression" (*id.*).⁴ Specifically, the IHO ordered that the district provide the student with three 30-minute periods of group SETSS, two 30-minute sessions of group OT, and two 30-minute sessions of individual PT per week (*id.* at pp. 16, 18). With respect to the award of PT, the IHO ordered that those services be awarded in the form of compensatory services, as the student received no PT services throughout the school year (*id.* at pp. 17, 18).

IV. Appeal for State-Level Review

The parent appeals, asserting the IHO erred in finding that the parent failed to demonstrate the appropriateness of the privately-obtained related services by utilizing an incorrect legal standard. 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 the related services for which funding was requested, and that the providers followed the detailed discussions, goals, and frequency of services the district itself created and recommended in the IESP. With respect to equitable considerations, the parent first asserts that the 10-day notice rule does not apply to matters arising under Education Law § 3602-c, but even if it did apply, reduction or denial of reimbursement is not authorized when, as here, the parent did not receive prior written notice from the district.

The district answers, asserting general admissions and denials. The district cross-appeals the IHO's decision asserting that equitable factors do not favor any award of relief to the parent and that the IHO also erred in awarding compensatory education services.

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

⁴ There is no reference in the hearing record to a January 2024 IESP; accordingly, it appears that the IHO's mention of a January 2024 IESP was a typographical error (*see* IHO Decision at p. 16).

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 public school 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]).⁵ "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 Thus, under State law an eligible New 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]).

⁵ 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]).

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 (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.

VI. Discussion

A. Unilaterally Obtained Services

The parent challenges the IHO's reliance on the Burlington/Carter model of analysis for resolving the parties' dispute. Accordingly, I will first address 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 from the district for the cost of the parental placement. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year, 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. 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 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 district funding of privately obtained services must be assessed under this framework. Thus, 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]).⁷ 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 claims involve a self-help remedy seeking public funding of the special education services that she privately obtained from Step Ahead. That is the hallmark of a

⁷ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from Step Ahead (Educ. Law § 4404[1][c]).

Burlington/Carter style of claim and analysis, and such relief is permissible if the parent meets the evidentiary burden of showing that the private services she obtained were appropriate under the totality of the circumstances. Based on the foregoing, the IHO in this case correctly relied on the Burlington/Carter analysis.

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; ; Walczak 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).

1. The Student's Needs

A brief discussion of the student's needs, which are not in dispute, is warranted to address the issues on appeal. The IHO found no "baseline" for the student's needs prior to the receipt of services during the 2023-24 school year (IHO Decision at p. 13); however, the May 2023 IESP offers an adequate description of the student's needs (see Parent Ex. B at pp. 1-3). Moreover, any deficiency in the identification of the student's needs would be attributable to the district, not the parent (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).

The student's May 2023 IESP reflected that cognitive assessments of the student yielded scores in the average range, with the exception of verbal comprehension, which was in the superior range of intellectual functioning (Parent Ex. B at p. 1). The student demonstrated receptive understanding of a variety of concepts, she followed simple and unrelated two-step directions, and showed understanding of negatives (id. at p. 2). Expressively, the student demonstrated age-appropriate vocabulary that she combined into short sentences, she asked and answered "wh" questions, and her speech was "clear and intelligible" (id.). The student's teacher reported that the student had difficulty focusing, attending, and functioning in a group (id.). According to the IESP, the student required prompting and repetition to follow instructions, to respond to her name, and transition from one activity to the next; she required 1:1 guidance throughout the school day to follow classroom routines and participate in classroom activities (id. at p. 4). The student's teacher reported that the student's academic skills were delayed, and that she reportedly knew most of the alphabet, counted to 10, knew colors and shapes, wrote her name, and at times was able to recognize it (id. at p. 2).⁸ Socially, the May 2023 IESP indicated that the student exhibited appropriate eye contact, played with peers, and knew how to ask for help, but had difficulty initiating play with other children (id.). According to the IESP, at times, the student lost focus in large groups but was easily redirected (id.).

The May 2023 IESP reflected reports that, physically, the student displayed decreased muscle strength in her trunk and lower extremities while performing gross motor activities (Parent Ex. B at p. 3). She demonstrated uncoordinated movements while performing jumping jacks and throwing a ball (id.). The student was not able to walk tandem on a line and slowly ascended and

⁸ According to the parent, the student was "doing ok academically," and she believed the student was able to follow classroom rules and routines (Parent Ex. B at p. 2).

descended stairs using a handrail and reciprocal stepping pattern (*id.*). Regarding fine motor skills, the IESP indicated that the student exhibited an emerging three finger grasp on a writing utensil, did not consistently use her other hand to assist, and was not able to cut out shapes with scissors or fold paper to make a crease (*id.*). In the area of sensory processing, the IESP indicated that the student exhibited deficits including a limited attention span, difficulty focusing, that she became bothered by loud noises and often tripped and fell (*id.*).

2. Services from Step Ahead

With regard to services from Step Ahead, I agree with the IHO that the testimony of the office manager from Step Ahead, who testified that she did not have personal knowledge about the services being delivered to the student by Step Ahead, did not offer any evidence that the services from Step Ahead were specially designed to meet the student's needs (IHO Decision at p. 12; *see* Tr. pp. 28-32; Parent Ex. D).⁹ However, the hearing record also includes a December 2023 SETSS progress report, a December 2023 OT progress report, and a fillable document that reflects the SETSS and OT providers' names, dates of sessions, times in and times out, and locations, with areas to describe goals and notes (session notes) (Parent Exs. F-H). In addition, the hearing record includes documents reflecting the SETSS provider's certifications to teach prekindergarten through sixth grades and to teach special education and the OT provider's license and registration to practice as an occupational therapist (Parent Ex. E; *see* Parent Ex. D).

Regarding SETSS, the December 2023 progress report indicated that the student received four periods of SETSS per week (Parent Ex. F at p. 1).¹⁰ According to the report, the student presented with difficulty focusing on the teacher during group lessons, required constant support

⁹ To the extent the IHO determined that the office manager's testimony was insufficient to authenticate the documentary evidence, the formal rules of evidence applicable in civil actions generally do not apply in impartial hearings (*see H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 528 Fed. App'x 64, 68 [2d Cir. June 24, 2013] [*cit*ing *Richardson v. Perales*, 402 U.S. 389, 400 (1971) for the proposition that the strict rules of evidence do not apply in an administrative proceeding and noting that application of the *Daubert* gatekeeper requirement is highly questionable in IDEA proceedings]; *Council Rock Sch. Dist. v. M.W.*, 2012 WL 3055686, at *6 [E.D. Pa. July 26, 2012]; *Matos v. Hove*, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], *cit*ing *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 [7th Cir. 1977]; *Cowan v. Mills*, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; *Tonette E. v. New York State Office of Children and Family Servs.*, 25 A.D.3d 994, 995-96 [3d Dep't 2006]). This is in part because the "IDEA hearings are deliberately informal and intended to give [hearing officers] the flexibility that they need to ensure that each side can fairly present its evidence" (*Schaffer*, 546 U.S. at 61). At most, the lack of testimony pertaining to the documentary evidence may warrant affording the documents less weight overall. However, in this instance, I find that, given the totality of the evidence, the documentary evidence is sufficient to demonstrate that the services provided by Step Ahead constituted instruction specially designed to meet the student's unique needs.

¹⁰ Although the progress report reflects the SETSS were delivered at a frequency of four periods per week, the parent's agreement with Step Ahead indicated the company would provide SETSS according to the student's May 2023 IESP, which mandated three periods per week, and the December 2023 SETSS progress report also indicated that the provider was "currently following the recommendations listed on [the student's] IESP dated May 22, 2023" (*compare* Parent Ex. F at pp. 1, 4, *with* Parent Ex. B at p. 8, and Parent Ex. D). Session notes reflect that the number of periods of SETSS delivered each week between September 2023 and March 2024 varied but, for most weeks, the student received either three or four sessions (Parent Ex. H). The varied frequency is unexplained in the hearing record. The parent only seeks district funding of three periods per week of SETSS; accordingly, I need not resolve the discrepancy.

during transitions, was a slow worker, and had difficulty keeping pace with her classmates (id.). The student did not have difficulty comprehending oral language; however, she needed repetition when instructions were provided due to lost focus, and for her to repeat instructions to ensure she understood what was required of her (id. at p. 3). The SETSS provider developed annual goals for the student to use words and phrases acquired through various means and remain focused for five-to-ten-minute periods with minimal prompting (id.).

In reading, the student was functioning at a beginning kindergarten level with support, had difficulty distinguishing between middle vowel sounds, remembering when to use "the tap-and-blend method of sounding out" consonant vowel consonant (CVC) words, and matching rhyming words even with picture support (Parent Ex. F at p. 2). The SETSS provider developed reading annual goals for the student to demonstrate understanding of spoken words, syllables, and phonemes; recognize and produce rhyming words; count, pronounce, blend and segment syllables in spoken words; blend and segment sets of rimes; isolate and pronounce the initial, medial vowel, and final sounds in words; and add or substitute individual sounds in words to make new words (id.). Another annual reading goal developed for the student was for her to know and apply grade level phonics and word analysis skills to decode words; demonstrate basic knowledge of letter-sound correspondence, associate "long and short sounds" with common spellings; read high-frequency words by sight; and distinguish between similarly spelled words by identifying the sounds of the letters that differ (id.).

In writing, the SETSS provider reported that the student's letter formation was inconsistent, she tended to retrace her letters, had difficulty forming thoughts into written words, and needed assistance to turn her ideas into sentences (Parent Ex. F at p. 2). The SETSS provider developed goals for the student to compose informative/explanatory tests about a topic and write a narrative about an event or linked events in order and with "a reaction to what happened" (id.).

In math, the SETSS provider indicated that the student was approaching a kindergarten level with support, and she counted numbers 1-10 but had difficulty with numbers 1-20 (Parent Ex. F at p. 1). Annual goals developed for the student were for her to compare two objects with measurable attributes in common, write numbers from 0-20, and represent a number of objects with a written numeral 0-20 (id. at p. 2).

According to the December 2023 progress report, at times the student pouted or became tearful when "stressed or d[id] not wish to follow directions," and she did not tolerate perceived correction of her work well (Parent Ex. F at p. 3). The student reportedly had difficulty forming relationships with peers in class, often chose to "parallel play" and at times, did not follow game rules (id.). The SETSS provider developed annual goals for the student to accept gentle correction of her work without becoming distressed and join and/or initiate conversation with peers (id.).

Additionally, the SETSS provider reported that "[m]any interventions were used this year to help [the student] acquire skills," she responded well to individual attention and incentives, and "[c]onstant encouragement and reinforcement and games were utilized to varying effect" (Parent Ex. F at p. 3). The student's language and social/emotional goals included that she would receive minimal prompting, support, and teacher guidance (id.).

The session notes include logs of SETSS sessions delivered to the student between September 7, 2023 and February 8, 2024 (see Parent Ex. H). According to the document, on September 7, 2023, the SETSS provider observed the student in class for two hours and refocused her "as necessary during carpet time" (id. at p. 1). On September 11, 2023, during the 60-minute session, the SETSS provider guided the student to stay focused and assisted the student in identifying lines for writing and completing a drawing activity (id.). On September 12, 2022, the SETSS provider assisted the student while she learned new alphabet letters, participated in fire drill practice, and supported the student during gym class (id.). Review of the remainder of the document shows that the provider's name, date of session, time in and time out, and location were filled out; however, the document does not reflect what goals the SETSS provider worked on with the student or any notes for any subsequent sessions through February 8, 2024 (id. at pp. 1-10).

Regarding OT, on December 24, 2023, the student's occupational therapist prepared a progress report (Parent Exs. E at p. 1; G). According to the report, the student received OT twice weekly for 30-minute sessions at Turning Point OT, described as a "sensory gym" (Parent Ex. G at p. 1). The progress report indicated that the student had been "issued a customized treatment plan" to address "retained" primitive reflexes, "sensory seeking, and low registration of environmental stimuli" (id.). The occupational therapist reported that per the student's May 2023 IESP, OT focused on improving her fine motor, bilateral, gross motor, vestibular, balance, motor planning, executive functioning, and sensory processing abilities (id.). The progress report indicated that the student had made some progress with her fine motor and "bilateral skills," but she continued to have "difficulty with her pre-writing skills" including appropriate letter sizing and spacing (id. at p. 2). Additionally, the occupational therapist reported that the student continued to require verbal cues to stay focused, and redirection when engaging in fine motor and visual perceptual skills (id.). Regarding sensory processing skills, the occupational therapist reported that the student had made "some progress"; however, she continued to have difficulty with transitions, emotional regulation, and processing environmental stimuli (id.). Accordingly, the occupational therapist indicated that the student required "alerting sensory stimuli" to raise her arousal levels in order to "register[] stimuli more frequently" (id.). One new annual goal for the student was developed to improve her emotional regulations skills as evidenced by successful transition between high and low arousal activities using calming techniques (id.). The occupational therapist recommended that the student continue to receive two 30-minute sessions of OT per week to address her deficits (id.).

Review of the session notes shows that the occupational therapist logged sessions with the student between September 6, 2023 and March 6, 2024 (see Parent Ex. H). The occupational therapist provided notes on what occurred with the student during OT sessions (id.). For example, the document reflected that the student worked on coloring and visual perceptual activities, completed activities to improve core and upper body strength, motor planning, body coordination, and executive functioning skills, and engaged in sensory input and vestibular activities (id.).¹¹

The IHO noted a lack of information in the hearing record regarding the student's progress (IHO Decision at pp. 13, 14); however, progress, while a relevant factor to be considered in

¹¹ There are discrepancies in the OT logs, including one entry reflected a different student's name and another entry the student was referred to by male pronouns (Parent Ex. H at p. 2).

determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), is not required for a determination that a unilateral placement is appropriate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).

Based on the foregoing, I find that, while it would be preferable to have the testimony of the providers at the impartial hearing, there is nonetheless sufficient evidence to show that the student received SETSS and OT from Step Ahead and that such services were specially designed to address the student's specific needs related to academics, attention, social skills, muscle strength and coordination, fine motor skills, and sensory processing during the 2023-24 school year. In light of the foregoing and contrary to the IHO's determination, I find that the parent met her burden to prove that parent's privately-obtained SETSS and OT services delivered by Step Ahead were appropriate to meet the student's needs.

B. Equitable Considerations

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public

school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The parent appeals the IHO's alternate finding that equitable considerations did not favor an award of funding for the unilaterally obtained services because she failed to provide 10-day notice to the district. The parent asserts that she was not required to provide 10-day notice because the district did not provide the parent with prior written notice. The district asserts that a hearing officer retains the fundamental discretion to reduce or bar reimbursement if the parent failed to provide the requisite notice.

The IDEA provides that an award of reimbursement may not be reduced or denied if the parent did not receive a procedural safeguards notice but does not include similar reference to a prior written notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504). Ultimately, however, there was no argument or allegation during the impartial hearing regarding either the lack of 10 day notice or a lack of procedural safeguards notice or prior written notice. The IHO should utilize the prehearing conference procedures to discuss with the parties whether such issues are germane to the matter before her so that the parties are on notice and the hearing record is properly developed (see 8 NYCRR 200.5[j][3][xi]). While the hearing record does not include a 10-day notice from the parent, given the lack of discussion during the impartial hearing and the undeveloped state of the hearing record, I decline to exercise my discretion to reduce the award of district funding for the unilaterally-obtained services on equitable grounds.

Finally, with respect to the district's assertion that the parent failed to demonstrate that she had a financial obligation to pay for the SETSS and OT services, this assertion is without merit, as the parent produced the parent's un rebutted affidavit of liability (Parent Ex. C).

Based on the foregoing, I find that the parent is entitled to district funding for the costs of up to three sessions per week of SETSS and up to two 30-minute sessions per week of OT for the 2023-24 school year.

C. Compensatory Education

The district cross-appeals the IHO's award of compensatory PT services, primarily arguing that the parent did not request compensatory education in her due process complaint notice.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708 [7th Cir. 2007]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

Here, as the district argues, the parent did not expressly request compensatory education services in the due process complaint notice, as she instead sought funding for the services delivered by her preferred private providers for the 2023-24 school year (see Parent Ex. A). However, at the time of the March 20, 2024 impartial hearing on the merits, the district did not respond nor object to the parent's attorney's statements that the parent sought a compensatory bank of hours for PT services that were mandated in the student's May 2023 IESP, but never provided by the district, by a provider selected by the parent at an enhanced rate of \$250 (see Tr. p. 18).¹² At no time during the March 20, 2024 impartial hearing did the district argue that such a request for compensatory services was improperly raised nor did the district propose what remedy might serve to place the student in the position she would have been had the district not denied the student a FAPE or equitable services. Moreover, there is no dispute that the district has not delivered or facilitated the delivery of related services during the 2023-24 school year (id.).¹³ Under the circumstances, I do not find that the IHO erred in awarding compensatory education for PT services not delivered and not privately-obtained by the parent during the 2023-24 school year.

In its appeal, the district does not challenge the type or amount of compensatory education ordered by the IHO on the grounds that the award was not aligned with the student's needs or would not serve to place the student in the position she would have occupied but for the district's

¹² The IHO ordered the district to provide the compensatory PT and the parent has not appealed that aspect of the IHO's decision; accordingly, it has become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

¹³ The district argues that the evidence "fails to support" the parent's claim that the student did not receive any PT, but the district carried the burden of proof regarding the claim that services were not implemented (see Educ. Law § 4404[1][c]). Further, during the impartial hearing, the district's attorney stated that "[t]he District acknowledge[d] that there were no services provided in this particular matter" (Tr. p. 18). Accordingly, the district's position on appeal is without merit.

violations of Education Law § 3602-c.¹⁴ Further, as noted above, the district made no argument during the impartial hearing regarding an appropriate compensatory award. Thus, there is insufficient basis to disturb the IHO's award of compensatory PT services.

VII. Conclusion

In summary, the IHO erred in determining that the parent failed to sustain her burden to demonstrate the appropriateness of the unilaterally-obtained SETSS and OT delivered by Step Ahead to the student for the 2023-24 school year and that equitable considerations precluded a full award of reimbursement or district funding for the costs of such services. In addition, there is no basis to disturb the IHO's determination to award compensatory PT services.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated April 8, 2024 is modified by reversing those portions which found that the parent failed to meet her burden to demonstrate the appropriateness of the unilaterally-obtained SETSS and OT delivered by Step Ahead to the student during the 2023-24 school year and that equitable considerations precluded an award of relief to the parent; and

IT IS FURTHER ORDERED that the district shall directly fund or reimburse the parent for the costs of up to three 30-minute sessions per week of SETSS and two 30-minute sessions per week of OT delivered by Step Ahead to the student during the 2023-24 school year upon proof of delivery of services.

Dated: **Albany, New York**
 June 21, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

¹⁴ The district does request that the award be limited to cover the period of time during which the matter was pendency. While such limitation may be warranted in instances where the request for compensatory education was not raised by the parent, but the district would nevertheless be required to provide compensatory education to make-up for a lapse in pendency services, that is not circumstance presented here.