The University of the State of New York

The State Education Department
State Review Officer
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No. 24-210

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 Cynthia Sheps, 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 son's private services delivered by Always a Step Ahead (Step Ahead) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which ordered the district to conduct evaluations of the student and reconvene its Committee on Special Education (CSE). The appeal must be sustained in part. 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 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

On a form signed by the parent on April 16, 2023, the parent notified the district that the student would be parentally placed at a nonpublic school at the parent's expense for the 2023-24

school year and requested that the district "continue" to provide special education services to the student (Parent Ex. I).

A CSE convened on June 14, 2023, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP for the student with a projected implementation date of June 28, 2023 (Parent Ex. B).[1] The CSE recommended that the student receive two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 4-5).

In a due process complaint notice, dated December 3, 2023, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services under State law for the 2023-24 school year by failing to provide related service providers (Parent Ex. A at p. 1). The parent asserted she was unable to locate service providers on her own at the district's standard rates for the 2023-24 school year and the district failed to provide those services in accordance with the IESP (id.). The parent claimed that she found providers willing to provide the student "with all required services" for the 2023-24 school year but at rates higher than the standard district rates (id.). The parent sought an order requiring the district to continue the student's services under pendency and an award of funding for speech-language therapy and OT delivered by a private company at an enhanced rate (id. at p. 2).[2]

On March 14, 2024, the parent electronically signed a document on Step Ahead's letterhead indicating that she was "aware" of the rate charged for related services provided to the student consistent with the June 2023 IESP and that, if the district did not fund the services, she "w[ould] be liable to pay for them" (Parent Ex. C).[3]

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 24, 2024 and concluded on March 29, 2024 after four days of proceedings including two prehearing conferences (Tr. pp. 1-71).[4] At the outset of the March 22, 2024 hearing date the IHO informed the parties that she intended to use "the Burlington/Carter standard as the method of analysis in this matter, since it [wa]s the parent's selection of provider" (Tr. p. 42). During the impartial hearing, the district conceded that it failed to offer or provide the student with a FAPE and/or equitable services (Tr. p. 46).

In a decision dated April 18, 2024, the IHO found that "the District denied Student a FAPE," but that the parent did not meet her burden to prove that services delivered by Step Ahead were appropriate and that equitable considerations did not support the parent's requested relief

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

[2] In an agreement signed by the district on December 5, 2023, the parties agreed that student's pendency placement lay in the June 2023 IESP (Pendency Implementation Form).

[3] Step Ahead is a corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] After a prehearing conference on March 1, 2024, the IHO issued a "Pre-Hearing/Status Summary and Order" setting forth the IHO's expectations for the impartial hearing (see Pre-Hr'g Order).

"due to extreme credibility concerns in the record" (IHO Decision at pp. 5-6). Regarding the unilaterally-obtained services, the IHO found that the parent did not present evidence of how services from Step Ahead met the student's needs, noting that the representative from the company who testified could not "articulate with clarity and specificity the services received, student's current level of academic performance, student instructional deficits, instructional strategies and methods used to develop those deficits, assessments of student current level of academic performance, or benchmarks towards progress" and that, "[i]n fact, the Agency Representative had no direct knowledge of the service providers or the student" (id. at p. 6). The IHO further noted that, after providing the parent an opportunity to present additional clarifying testimony of Step Ahead's representative via affidavit, the parent through her counsel failed to appear at a scheduled impartial hearing date to allow for the district to cross-examine the witness (id. at pp. 6-7). Because the parent failed to appear through her counsel, the IHO "discredited" the witness's "affidavit and sworn testimony" (id.). Regarding equitable considerations, the IHO noted that "disparate recordkeeping" in the matter "present[ed] suspicious activity," particularly noting that, although the services purportedly began on September 6, 2023, the parent did not sign a services contract until March 13, 2024 (id. at p. 7).

The IHO also considered compensatory education as a possible remedy but found no evidence in the hearing record regarding "the scope of the loss of educational opportunity to [the] Student," noting there was no evidence that "a licensed provider ha[d] ever evaluated Student for these concerns or made these claims" (IHO Decision at pp. 7-8). On this ground, the IHO determined that the student required evaluations (id. at p. 8). Thus, the IHO ordered the district to conduct psychoeducational, speech-language therapy, and OT evaluations on an expedited basis and convene a CSE to review the results thereof (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her requested relief. The parent asserts that a Burlington/Carter analysis should not apply to the circumstances of her appeal and also argues that, even under a Burlington/Carter analysis, she is entitled to her requested relief. The parent argues that she utilized the services of Step Ahead, which used an appropriately credentialed/licensed provider for the speech-language therapy for which funding was requested, and that the provider followed the detailed discussions, goals, and frequency of services the district itself created and recommended in the IESP. The parent also asserts that the hearing record includes the speech-language provider's session notes, which reflect the student's areas of need being addressed through the services. To the extent there is insufficient evidence in the hearing record, the parent argues that the matter should be remanded given what occurred on the last hearing date, which the parent attributes to "the lack of clarity given" to her attorney regarding the scheduling of the hearing date.[5] Regarding equitable considerations, the parent argues that the date of the parties' agreement was not indicative of fraud or collusion and that the contract established the parent's legal obligation to pay for the speech-language therapy services. The parent also argues that in balancing equitable considerations, the IHO failed to take into account the district's conduct. The parent argues that the evidence in the hearing record fully supports an

[5] The parent submits additional evidence with the request for review to support her contention that her attorney was not provided adequate notice of the last hearing date.

award of direct funding to Step Ahead for speech-language therapy delivered to the student during the 2023-24 school year at the contracted rate.

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly determined that the parent did not meet her burden to prove the appropriateness of speech-language therapy from Step Ahead for the 2023-24 school year and that equitable considerations did not weigh in the parent's favor. In addition, the district objects to consideration of the additional evidence proffered by the parent with the request for review.[6] As an additional equitable consideration that the district argues supports denial of the parent's requested relief, the district alleges that the parent failed to provide the district with notice of her intent to unilaterally obtain speech-language therapy from Step Ahead and seek public funding for the costs of such services. As for a cross-appeal, the district asserts that the IHO erred in ordering the district to conduct evaluations and convene a CSE. The district asserts that the parent did not disagree with any district evaluations or request independent educational evaluations at district expense.

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 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]).[7] "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]).

[6] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the additional evidence consists of email correspondence between the parent's attorney and the IHO relating to the scheduling of the final hearing date on March 29, 2024 (see SRO Exs. A-C). Given the determinations set forth below, the additional evidence is unnecessary to consider in order to render a decision.

[7] 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]).

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.).[8] 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]).

VI. Discussion

A. Unilaterally-Obtained Services

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 and, as a self-help remedy, she unilaterally obtained private speech-language therapy 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

[8] 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.

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]).[9] 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).

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, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). 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.,

[9] 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 that the parent obtained from Step Ahead (Educ. Law § 4404[1][c]).

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).

Here, the only evidence of the student's needs is the description of the student in the June 2023 IESP (Parent Ex. B). The student's needs as set forth in the IESP are not in dispute (see Parent Ex. A at p. 1).

The June 2023 CSE determined the student was eligible for special education as a student with a speech or language impairment and identified that he "present[ed] with reduced speech intelligibility as well as mild dysfluencies in his speech" and a mild delay in expressive language skills (Parent Ex. B at p. 1).[10] The June 2023 IESP indicated that the student exhibited distortions of multiple sounds including /l/, /r/, and /s/, and that he needed to maintain fluent speech as his speech rate increased, increase speech intelligibility by correctly producing target sounds in all positions, and improve expressive language skills by formulating sentences that clearly conveyed his thoughts (id. at pp. 1, 3-4). Socially, the student kept and maintained friendships, got along with peers, and was respectful to adults (id.). The student's overall health was reported to be good, he fully participated in all school activities throughout the day, and the parent did not report any concerns regarding the student's physical development (id. at p. 2). The CSE determined that the student needed to improve his ability to use academic tools such as writing utensils to improve

[10] According to the June 2023 IESP, the student "appear[ed] to be cognitively intact" (Parent Ex. B at p. 1).

fine motor skills (id. at p. 4). The June 2023 CSE determined that the student required speech-language therapy and OT to address his delays and enable him to "handle the challenges of his general education curriculum" (id. at pp. 1, 2).

With regard to services from Step Ahead, I agree with the IHO that the testimony of the secretary from Step Ahead, who testified that she did not know the names of either the student's speech-language pathologist or occupational therapist and did not have any involvement with the student (Tr. pp. 49, 50; see Parent Ex. D), did not offer any evidence that the services from Step Ahead were specially designed to meet the student's needs.

However, the hearing record also includes a fillable document that reflected the speech-language pathologist's name, dates of sessions, times in and times out, and locations, with areas to describe goals and notes (session notes) (see Parent Ex. G). In addition, the hearing record includes a document reflecting the State licensure and registration of the provider to practice as a speech-language pathologist (Parent Ex. E). Review of the sessions notes shows that the speech-language pathologist provided the student with 30-minute therapy sessions at the student's school from September 12, 2023 through March 6, 2024 (see Parent Ex. G). While most of the entries did not explicitly state the annual goals targeted during a particular session, two annual goals were referenced that provided the student would increase expressive language skills through formulating sentences and increase speech intelligibility by correctly pronouncing /s/ sounds (id. at p. 3). These goals mirror two of the annual goals included in the March 2023 IESP (compare Parent Ex. G at p. 3, with Parent Ex. B at p. 4). In addition, the sessions notes identified several skills addressed during sessions included providing items in different categories, producing target sounds in different positions of words, answering questions about a book he had read, writing sentences containing target words and related to a topic, and asking questions to find hidden objects (see id.).

According to the parent's request for review, the student received OT services "from a provider being funded by [the district]" (Req. for Rev. ¶ 2 n.1), and, accordingly, on appeal, the parent does not seek relief related to the private OT services.

Based on the foregoing, I find that, while the evidence admitted at the hearing cannot be described as robust concerning the implementation of the privately-obtained services, there is sufficient evidence to show that the student received speech-language therapy and it further shows that the speech-language pathologist delivered services specially designed to address the student's specific needs related to expressive language and articulation 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 speech-language therapy services delivered by Step Ahead were appropriate to meet the student's needs.

B. Equitable Considerations

Having found that the speech-language therapy from Step Ahead was appropriate, I turn to consider 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"]).

1. Financial Obligation

I will first address the IHO's finding regarding the date on which the parent signed the letter stating her understanding that she was bound to fund the services delivered by Step Ahead in the event the district did not fund the services.

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

Regarding proof of financial risk, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]).

Here, the document, signed by the parent on March 2024, included a sufficient statement of the parent's intent to be legally bound to pay the costs of the services from Step Ahead consisting of services mandated in the June 2023 IESP at specified rates delivered during the 2023-24 school year (Parent Ex. C). I do not agree with the IHO that the fact that the parent did not sign the document until March 2024 demonstrated "disparate recordkeeping" or "suspicious activity" (IHO Decision at p. 7; Parent Ex. C).

2. 10-Day Notice

In its answer with cross-appeal, the district raises the lack of a 10-day notice as another equitable consideration, arguing that it provides an additional basis for denying the parent's requested relief. Under the federal statute, 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).

Here, the hearing record does not include a letter from the parent to the district stating the parent's intent to unilaterally obtain private services. As noted above, the parent filed the due process complaint notice in this matter on December 3, 2022, which is the first notice that the parent provided to the district that she intended to engage in self-help by obtaining services through private providers and seek district funding for the costs thereof (Parent Ex. A). Thus, to the extent the district was on notice that the parent was unilaterally obtaining services as of December 3, 2022, only a partial reduction of funding is warranted, amounting to twenty percent of the total amount sought by the parent.

C. Evaluations

As a final matter, the district cross-appeals the IHO's order for the district to reevaluate the student and reconvene a new CSE meeting, arguing that the parent did not disagree with district evaluations or request an IEE at district expense. The district's arguments are directed at an order for district funding of IEEs; however, here, the IHO ordered the district to conduct evaluations of the student. Federal and State regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). In addition, the district is required to review the IEP, or IESP as the case may be, of a student with a disability at least annually or as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]).

At the March 22, 2024 hearing date the IHO reminded the parties that she had requested the student's evaluations as part of her pre-hearing conference summary and confirmed that neither

party was aware of any evaluations of the student (Tr. pp. 57-58; see IHO Pre-Hr'g Order at p. 4). The district's attorney also confirmed that a review of the district's events log for the student did not show any evaluations (Tr. p. 62). Given the district's failure to come forward with information about when the student was last evaluated, the IHO did not abuse her discretion under the circumstances of this case in ordering the district to evaluate the student and convene the CSE to review the results of the evaluations.

VII. Conclusion

In summary, the parent demonstrated the appropriateness of speech-language therapy services unilaterally obtained from Step Ahead; however, a reduction in the award of district funding for the costs of the services is warranted on equitable grounds. In addition, the IHO did not abuse her discretion in ordering the district to conduct evaluations of the student and convene the CSE. In light of these determinations, I need not address the parties' remaining contentions, including the portion of the parent's appeal relating to the conduct of the impartial hearing.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated April 18, 2024, is modified by reversing that portion which found that the parent did not meet her burden to prove that the speech-language therapy services from Step Ahead were appropriate and denied the parent's request for district funding for the costs thereof;

IT IS FURTHER ORDERED that the district shall fund 80 percent of the costs of up to two 30-minute sessions per week of individual speech-language therapy delivered by Step Ahead during the 2023-24 school year upon submission of provider affidavits as to services rendered.

Dated: **Albany, New York**
June 28, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER