



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-221

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 Nate Munk, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of the special education teacher support services (SETSS) and occupational therapy (OT) services delivered to her son by Always a Step Ahead, Inc. (Step Ahead) at a specified rate for the 2023-24 school year. The appeal must be sustained.

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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the CSE

convened on March 15, 2023, to formulate the student's IESP for the 2023-24 school year (see generally Parent Ex. B). The March 2023 CSE found the student eligible for special education as a student with a learning disability and recommended that he receive five periods per week of direct group SETSS and two 30-minute sessions per week of individual OT (Parent Ex. B at pp. 7-8).^{1, 2}

The student was parentally placed at a nonpublic religious school for the 2023-24 school year (see Parent Exs. F; G).

In a due process complaint notice dated January 26, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) and/or equitable services under State law for the 2023-24 school year (see Parent Ex. A). Specifically, the parent alleged that she agreed with the IESP developed by the CSE on March 15, 2023 and that the student required the same services for the 2023-24 school year (Parent Ex. A at p. 1). However, the parent asserted that the district failed to provide the student with the SETSS and related services mandated in the March 2023 IESP, and therefore denied the student a FAPE for the 2023-24 school year (id.). The parent also alleged that she was unable to locate any providers willing to work with the student at the district's standard rate but found providers willing to provide the student with services at a higher rate than the standard district rates (id.). As relief, the parent sought an order directing the district to fund five sessions per week of SETSS at an enhanced rate for the 2023-24 school year and awarding all related services recommended in the March 2023 IESP for the 2023-2024 school year either via issuance of related services authorizations (RSAs) for such services if accepted by the parent's chosen providers or via direct funding to each of the parent's chosen providers at the rate each charged, even if the rate was higher than the standard district rate for such service (id. at p. 2). The parent also requested a pendency hearing (id.).

On December 26, 2023, the parent electronically signed a document on Step Ahead's letterhead indicating she was "aware" of the rates charged by Step Ahead for SETSS and related services and that such services would be provided to the student consistent with the mandates set forth in the March 2023 IESP (Parent Ex. C).³ In addition, the parent acknowledged that if the district did not pay for the services she would be liable for them (id.).

On February 1, 2024, the IHO issued a "Standing Order" listing nine cases to which the order applied, including the present matter, and setting forth the IHO's expectations for the impartial hearings (see Standing Order). According to the IHO decision, on February 25, 2024 the resolution period ended without any resolution agreement and on March 6, 2024 a settlement conference was held with the parties (IHO Decision at p. 3). Additionally, the IHO stated that on

¹ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

² The hearing record contains a duplicative exhibit (compare Parent Ex. B, with Dist. Ex. 1). For purposes of this decision only the parent's exhibits will be cited in instances where both a parent and district exhibit are identical in content.

³ The Commissioner of Education has not approved Step Ahead as a private school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

March 21, 2024, the district submitted a proposed subpoena for the parent's appearance at the impartial hearing which the IHO declined to sign as, pursuant to her Standing Order, it was untimely (*id.* at pp. 3-4). An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on April 19, 2024 and concluded the same day (Tr. pp. 1-48). The IHO issued an order on pendency dated April 23, 2024 which was after the impartial hearing concluded (see generally Interim IHO Decision).⁴

In a decision dated April 24, 2024, the IHO found that the district's failure to implement the student's March 2023 IESP denied the student a FAPE for the 2023-24 school year (IHO Decision at pp. 5, 7-9).⁵ The IHO also found that the parent had not met her burden of demonstrating the appropriateness of the services provided to the student by Step Ahead (*id.* at pp. 9-13). The IHO found that the hearing record failed to contain sufficient evidence of "how the SETSS and OT services provided to the [s]tudent were specially designed to meet the [s]tudent's needs" (*id.* at p. 10). The IHO noted that the parent only submitted documentary evidence and no testimonial evidence at the hearing (*id.*). In addition, the IHO stated that there was "no evidence in the record as to when the [s]tudent received SETSS services, if the [s]tudent received services on a 1:1 basis or in a group setting, if the [s]tudent was assessed at the start of services, what the [s]tudent's baseline was at the start of the services in any particular areas of delay, if any modifications were needed throughout the implementation of the services, and if the [s]tudent made any progress since December of 2023" (*id.* at p. 11). With respect to the OT services, the IHO similarly found that there was no witness to testify about the OT services and when the services were delivered and how the services were "uniquely tailored to address the [s]tudent's needs" (*id.* at p. 12). Based on such findings, the IHO determined the evidence did not support that the services provided by Step Ahead were specially designed to address the student's identified needs and, as such, denied the parent's requested relief for the 2023-24 school year (*id.* at pp. 13-15).

While the IHO noted that "[a]s the [p]arent failed to meet their burden under Prong 2, [she] need not conduct a weighing of the equities," she further stated that, in the alternative, "had [she] found the Parent met their Prong 2 burden, and if [she] had to conduct a Prong 3 analysis, [she] would have found that the equities d[id] not weigh in favor of the Parent, as the Parent provided no ten-day notice as evidence" (IHO Decision at p. 14).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her requested relief. The parent argues that she used the services of an agency who employed appropriately credentialed/licensed providers for each service for which funding was requested and there was no evidence introduced showing the rates charged were unreasonable. The parent also argues there was evidence of the services delivered to the student, goals, and frequency of the services and, accordingly, such

⁴ The IHO found that pendency was based upon the March 15, 2023 IESP (Interim IHO Decision at p. 1).

⁵ The IHO issued a findings of fact and decision dated April 8, 2024; however, this date appears to have been in error because the impartial hearing in this matter did not occur until April 19, 2024. Accordingly, the IHO issued an amended findings of fact and decision dated April 24, 2024. For purposes of this decision, only the amended findings of fact and decision shall be referenced.

program could not be deemed inappropriate. Additionally, the parent asserts that the hearing record supports an award for direct funding of the SETSS and OT services provided to the student during the 2023-24 school year by Step Ahead. The parent requests that the IHO's decision to be reversed and a finding directing the district to fund the student's Step Ahead SETSS and OT at the contract rate.

In an answer, the district argues that the IHO correctly determined the parent failed to satisfy her burden and requests the parent's request for review be dismissed.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁶ "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).⁷ Thus, under State law an eligible New

⁶ 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]).

⁷ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at (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

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., 694 F.3d at 184-85).

VI. Discussion

The district does not cross-appeal from the IHO's finding that it failed to provide the student with equitable services for the 2023-24 school year (IHO Decision at pp. 5, 7-9). Accordingly, this determination has become final and binding upon the parties (see 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]). On appeal, the crux of the dispute between the parties relates to the appropriateness of the SETSS and OT services unilaterally obtained by the parent and delivered to the student by Step Ahead during the 2023-24 school year.

A. Unilaterally-Obtained Services

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the district developed an IESP for the student and there is no disagreement as to the recommended SETSS or OT services which are being implemented by another agency (Parent Ex. A; see Parent Ex. B).⁸ However, the district failed to provide the student with the recommended SETSS and OT services at the student's nonpublic school program. In her January 26, 2024 due process complaint notice, the parent alleged that the district had not implemented the student's March 2023 IESP and that the parent was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 1). As a result, the parent unilaterally obtained private SETSS and OT services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (id. at pp. 1-2). Accordingly, the issue in this matter

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.

⁸ The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and it went largely undefined in the hearing record in this case. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district; accordingly, unless the parties and the hearing officer take the time to develop a record in each proceeding with respect to what the SETSS in question actually consisted of, it becomes problematic to determine what type of instruction a particular student has received and whether such instruction addressed his or her unique special education needs (see generally Application of the Dept of Educ., Appeal No. 20-125).

is whether the parent is entitled to public funding of the costs of the private SETSS and OT 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"]).⁹

The parent's request for privately-obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

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 services that the parents obtained from Alpha for the student (Educ. Law § 4404[1][c]).

maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

A brief discussion of the student's needs, which are not in dispute, is warranted to address the issues on appeal. To identify these needs, the hearing record includes a March 2023 IESP (see generally Parent Ex. B).

The March 2023 IESP indicated that based on an administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) on an unknown date, the student's cognitive abilities, including his performance on the verbal comprehension index (VCI) and visual spatial index (VSI), were found to be in the "[b]orderline [d]elayed range" (Parent Ex. B at p. 1).¹⁰ However, the student's performance on the working memory index (WMI) was stronger and "within [l]ow [a]verage limits" (id.). The IESP characterized the student as "more of an auditory

¹⁰ The March 2023 IESP did not indicate the date when the WPPSI-IV was administered (see Parent Ex. B at p. 1).

learner" and noted that he benefited from direct instruction, rote repetition, and memorization (id.). The student also needed redirection as he could become distracted (id.).

The March 2023 IESP indicated that according to a teacher's preschool interview conducted on February 13, 2023, the student knew his primary colors and shapes; he had letter and number recognition (numbers to 10); matched 1:1; and understood direction/position, and quantification (Parent Ex. B at pp. 1-2). The student had not yet mastered other pre-academic skills and concepts necessary for kindergarten including sequencing, similar/different, identifying the use of objects, counting manipulatives to 20, following classroom routines, or on-task behaviors (id. at p. 1). Based on the teacher interview, the IESP noted that the student continued to exhibit delays in copying, scissors skills, focusing, and other age-appropriate fine-motor skills (id.). With regard to activities of daily living (ADL) skills, the March 2023 IESP stated that the student was able to self-feed with a spoon and was toilet-trained but that at times he needed some help with dressing and feeding (id.).

In terms of social development, the March 2023 IESP indicated that the student's special education itinerant teacher (SEIT) reported in a recent IEP that the student might "shut down" when he did not like a specific activity as he could be self-directed (Parent Ex. B at p. 2).¹¹ However, the IESP indicated that according to the preschool teacher interview, he was "better behaved now" (id.). Although he student had made some friends he still sought attention (id.). The March 2023 IESP noted that the SEIT was working with the student to help increase his attention span, and to improve his ability to remain seated and focused during lessons and circle time by providing constant reinforcement and individual attention (id.). The SEIT implemented positive strategies to help keep the student motivated to participate and cooperate (id.). Additionally, the SEIT rewarded the student for good behavior, which motivated the student and helped him be more cooperative in the classroom (id.). The SEIT also worked with the student by going over the day's schedule to prepare him in advance and gave reminders to the student as to what was going to happen next and helped him transition better between activities (id.).

Next, the physical development section of the March 2023 IESP indicated that the student was in good physical health (Parent Ex. B at p. 2). With regard to OT, the IESP stated that the student the student demonstrated difficulty transitioning between activities and required verbal and visual cues to transition to the next task (id.). The student also demonstrated difficulty sitting, attending, and following multi-step directions and required moderate verbal cues to increase his pace during tasks (id. at pp. 2-3). The student was easily distracted by external stimuli (id.).

¹¹ State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf>; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at <http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf>). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]).

According to the IESP, the student presented with delays in fine motor and visual-motor skills (id. at p. 3). In addition, he presented with laxity in the joints of his digits and overall weakness in his hand, wrist, and shoulder muscles, all of which impacted his ability to complete age-appropriate tasks i.e., graphomotor tasks and cutting (id.). The student also demonstrated delays in sensory processing skills and exhibited sensory-seeking behaviors and hyposensitivity (id.). The IESP identified strategies and resources needed to address the student's management needs including preferential seating, direct instruction, rote repetition and memorization, related services, positive reinforcement, teacher modeling, scaffolding and prompts (id. at p. 3). The IESP included goals that targeted the student's fine motor and graphomotor skills, motor planning, sensory processing skills, basic math skills, grade-level academic concepts, on-task behavior and reading comprehension (id. at pp. 4-7).

2. Services from Step Ahead

As for evidence of services provided to the student by Step Ahead during the 2023-24 school year, the hearing record includes the letter signed by the parent stating her awareness of her financial obligation for services, a copy of the certification/licensure of two providers, a December 18, 2023 OT progress report, and a December 23, 2023 special education progress report (Parent Exs. C; E; F; G).

Although the student's SETSS provider did not testify during the impartial hearing, the hearing record includes a December 23, 2023 progress report, written by the provider that indicated the student was attending kindergarten at his private school, and he received five hours of SETSS services per week in accordance with the recommendations in his March 15, 2023 IESP (Parent Ex. G at p. 1). The SETSS provider described the student as easily distracted during circle times and work times (id.). The provider noted that the student was often found touching other objects while the teacher was giving a lesson (id.). He required fidgets to help him stay in place and focus on the lesson and at times he required redirection to bring his attention back to the teacher (id.). The progress report indicated that during work times, the student would move slowly without giving much thought to what he was doing or be busy playing with scissors, pencils, or glue and not focused on the work before him (id.). Additionally, he would become frustrated when something was not going the way he expected it to go (id.). The IESP noted that these difficulties hindered the student's ability to learn and retain information (id.). The provider indicated that she gave the student opportunities to self-soothe using techniques that they created together (id.).

In terms of the student's academic abilities, the December 2023 SETSS progress report indicated that in math the student struggled with staying focused on lessons and activities (Parent Ex. G at p. 1). For example, during math lessons on measurements, the student would be touching papers on the wall near him or playing with his shoelaces (id.). His SETSS provider gave him fidgets, such as a squish ball, and prompted him to keep his eyes focused on the teacher (id.). During math activities, the SETSS provider gave the student consistent verbal prompts to help him remain on task (id.). The student was able to count with 1:1 correspondence and answer the question of "how many are there?" (id. at pp. 1-2). With the supports of prompting and redirection from the provider, he was able to identify numbers 1-20 and use manipulatives to add numbers together (id. at p. 2). The progress report indicated that, in reading, the student was able to identify 26/26 lowercase letters and sounds of the alphabet (id.). However, due to his lack of focus during

circle times, he was unable to ask and answer questions about key details in a text (id.). As a result, the student required repetition of the text in a one-on-one setting with his SETSS provider which allowed him the opportunity to develop ideas and thoughts on a topic in a more focused setting (id.). The progress report stated that because the student was more of a visual learner and often responded better to visual cues his SETSS provider showed the student such as sight words with visual stimuli in order to remember them better (id.). According to the progress report, with support and differentiated instruction, the student was able to memorize sight words and segment and sound out consonant-vowel-consonant (CVC) words (id.). In writing, the student would use various materials such as crayons, markers, paper, scissors, and glue to create and express ideas (id.). However, without prompting and redirection, the student got easily distracted and did not complete his work in the allotted time (id. at pp. 2-3). The progress report indicated that the student's SETSS provider prepared the student by giving him reminders in between transitions of what was expected for the next activity (id. at p. 3). The student had a goal chart that he filled with stickers each time he successfully followed directions for table activities (id.). Turning to language, the SETSS progress report stated that the student could successfully use oral language to express his wants, needs, and ideas (id.). The report noted that this was what usually led to his distractions, as he was often seen talking to his friends during learning time or during quiet activities (id.). The student was able to answer "wh" questions but struggled with retelling stories because of his lack of attention during story and learning times (id.).

With regard to the student's social-emotional functioning, the December 2023 progress report indicated that the student could easily become frustrated when something did not happen according to his expectations (Parent Ex. G at p. 3). When the student made a mistake on worksheets or project, he resorted to throwing the materials aside and complained about how bad it was (id.). It was difficult for the student to compromise in these conflicts, and therefore, his SETSS provider mitigated the situation by using self-soothing techniques and discussions after he calmed down (id.). With respect to interpersonal relationships, the progress report indicated that the student enjoyed playing with his friends and conducted himself respectfully with teachers (id.). The student shared his toys and initiated play and would interact in conversations and even offered his help to other students when needed (id.).

The December 2023 SETSS progress report indicated that interventions used with the student included a positive reward system, goal chart, fidgets for circle times, redirection, verbal cues and reminders, verbal and visual prompting, visual cues for memorization, and repetition of lessons and information (Parent Ex. G at p. 4). The SETSS teacher stated that the student required consistent interventions that included redirection and prompting, along with visual cues, repetition, and positive reinforcers to keep him focused on lessons and tasks (id.).

The December 2023 SETSS progress report included annual goals for the student in math, reading, writing, language, social/emotional functioning, and interpersonal relationships (Parent Ex. G at pp. 2-4). The math goals targeted the student's ability to identify whether the number of objects in one group is greater than, less than, or equal to the number of objects in another group, count to answer "how many?" questions, and describe measurable attributes of objects, such as length or weight and describe several measurable attributes of a single object (id. at p. 2). The reading goals targeted the student's ability to describe the relationship between illustrations and the text, ask and answer questions about key details in a text, know and apply grade-level phonics and word analysis skills in decoding words, and demonstrate an understanding of spoken words,

syllables, and sounds (id. at p. 2). The SETSS provider also recommended writing goals that targeted the student's need to explore a variety of digital tools to produce and publish writing, including in collaboration with peers, recall information from experiences or gather information from provided sources to answer a question, and use a combination of drawing, dictating, and writing to compose informative/explanatory texts in which he named what he was writing about and supply some information about the topic (id. at p. 3). Language goals targeted the student's need to demonstrate command of the conventions of standard English grammar and usage when writing or speaking; to use words and phrases acquired through conversations and reading; to speak audibly and express thoughts, feelings, and ideas clearly; participate in collaborative discussion with peers and adults; and ask and answer questions about key details in texts (id.). The SETSS progress report targeted the student's social/emotional functioning by developing goals that targeted the student's ability to identify situations that may lead to conflict (e.g., hurtful teasing, name calling) and appropriate ways of dealing with conflict, seek assistance to resolve conflict after independent attempt, and compromise in conflict situations by changing his own ideas to reach agreement (id. at pp. 3-4). Additionally, the SETSS progress report targeted the student's interpersonal needs with goals for the student to share toys and/or school equipment upon request with other students in play situations, offer to help a peer or teacher at appropriate times, initiate and join conversations with peers, respect others physical space and personal rights by not touching, and by selecting appropriate means to gain attention or affection (id. at p. 4).

The OT provider also did not testify during the impartial hearing, however, a December 18, 2023 progress report, written by the student's OT provider, indicated that the student received two 30-minute sessions of OT per week as stated in his March 2023 IESP (Parent Ex. F at p. 1). The OT progress report indicated the student presented with poor grasping and visual motor functioning skills (id.). He displayed decreased tone and strength in his hands which negatively impacted his fine motor control (id.). He required increased prompting and assistance to complete simple tasks slowly and with limited coordination (id.). Also, the student had poor bilateral coordinating skills and motor planning, as well as poor attention and focusing skills (id.). The progress report noted that the student displayed sensory processing difficulties, disorganized motor planning skills, and low proprioceptive awareness (id.). The student presented with "a great sensory dysfunction" and was unable to use correct pressure when manipulating objects (id.) He further presented with low attention, low visual regard to the task at hand, and low proprioceptive reception (id.).

With regard to the student's progress, the December 2023 OT progress report indicated that at the time it was written the student showed slow and steady progress in all targeted areas of development (Parent Ex. F at pp. 1-2). According to the progress note, the student's overall challenges in sensory regulation/modulation and graphomotor skills, interfered with his ability to fully engage and participate in academic related tasks and activities, and therefore they needed to continue to be addressed in order for him to be able to function independently within his school and home environments (id. at p. 2). The OT progress report also indicated that based on the student's progress and current level of active participation and engagement, it was recommended that he continue OT services two times per week for 30 minutes in a 1:1 setting in order to develop his fine motor manipulation and dexterity, graphomotor, and sensory regulation skills for greater independence and success in his academic and home environments (id.). Further, the OT progress

report included new annual goals that addressed the student's need to improve his use of sensory information; improve the functions in his arm and hand to increase his success with fine motor tasks; improve his "visual perception and perceptual motor skills;" to facilitate better hand use for manipulation of classroom materials; to improve written communication skills "for greater proficiency when using writing implements;" to improve postural control to provide a stable base of support needed to facilitate better hand use for manipulation of classroom materials, posture while working or playing, and mobility in school and home environments; to improve balance between flexor and extensor musculature; and to improved balance/equilibrium reactions (*id.* at pp. 2-3).

Based on the foregoing, I find that, while the evidence presented at the impartial hearing with respect to whether the SETSS and OT provided by Step Ahead constituted appropriate unilaterally-obtained services for the student could have been more robust in both its description of the educational programming the student received and the progress he made during the 2023-24 school year,¹² the progress reports admitted into the hearing record contain detailed descriptions of the student's needs that comport with those found in the IESP and also reflect a number of strategies and supports the providers used with the student as well as goals they developed for him. While it may have been 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 unique needs related to academics, attention, social skills, muscle strength and coordination, fine motor skills, and perceptual motor skills 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 the 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 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

¹² It is well settled that while progress is one relevant factor that may be considered when determining whether or not unilaterally-obtained services chosen by a parent are appropriate under a Burlington-Carter analysis, a finding of progress or the lack thereof alone is generally not dispositive on the issue (see 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], see also 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]; 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]; Frank G., 459 F.3d at 364).

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 a 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 the IHO was correct in denying the requested relief because of the parent's failure 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.

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

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.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 24, 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 five 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**
 July 22, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER