The University of the State of New York

The State Education Department
State Review Officer
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No. 24-240

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 in part her request that respondent (the district) fund the costs of her daughter'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 determined that the unilaterally obtained services Step Ahead provided to the student were appropriate. The appeal must be dismissed. The cross-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 programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 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 in detail here.

Briefly, the Committee on Preschool Special Education (CPSE) convened on February 15, 2023, found the student eligible for special education services as a preschool student with a disability, and developed an IEP to be implemented on February 21, 2023 that recommended that the student receive two 30-minute sessions per week of occupational therapy (OT) in group of two (Parent Ex. B at pp. 3, 8). On May 30, 2023, the CSE convened, found the student eligible for special education services as a student with other health-impairment, and developed a school-aged IESP for the following school year that recommended the student receive two 30-minute sessions per week of OT in a group of 2 with an implementation date of September 1, 2023 (Dist. Ex. 1 at pp. 1, 6).[1]

On September 1, 2023, the parent signed a document from Step Ahead indicating that she was aware that Step Ahead charged $250 per hour for related services, among other services, and that she would be responsible to pay for services delivered to the student (Parent Ex. F).[2]

In a due process complaint notice, dated December 17, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) "and/or" equitable services for the 2023-24 school year (see Parent Ex. A). The parent asserted that the last educational program that the parent agreed with was developed for the student on February 15, 2023 and included two 30-minute sessions per week of OT in a group of two and, further, that the parent disputed any program that the district later developed that either removed or reduced the student's services (Parent Ex. A at p. 1). The parent also indicated that the district failed to provide the student with her related services for the 2023-24 school year and the parent found providers for the student's services but "at rates higher than standard [district] rates" (id.). The parent sought a pendency hearing and an order for funding of the two 30-minute sessions per week of group OT at enhanced rates for the 2023-24 school year (id. at p. 2).

After the appointment of an IHO by the Office of Administrative Trials and Hearings (OATH), a prehearing conference was held on January 25, 2024, a status conference was held on February 2, 2024, and an impartial hearing convened on March 27, 2024 and concluded on April 10, 2024 after two days of hearings (Tr. pp. 1-70). Neither party appeared for the prehearing conference held on January 25, 2024 (Tr. pp. 1-4). In a decision dated April 30, 2024, the IHO found that the district denied the student equitable services for the 2023-24 school year and thus denied the student a FAPE (IHO Decision at p. 5). The IHO found the parent was not credible, and she was "unable to find that there is a binding agreement putting the [p]arent fully at risk for payment of the [r]ecommended [s]ervices" and, therefore, she denied the parent's request for direct funding (id. at p. 7).[3] The IHO also stated that she could not "rule out the possibility of collusion in [the] case" and that "[t]he evidence indicates, rather, that [p]arent is not the real party in interest in this case (id.). As relief, the IHO ordered the district to reimburse the parent up to seventeen

[1] The student's eligibility for special education as a student with an other health-impairment is not in dispute (8 NYCRR 200.1[zz][10]).

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

[3] The IHO also found that that "the record as a whole contains insufficient evidence that Parent ever requested the Agency's services, is familiar with the 2023 IEP, or ever entered into any binding agreement with the Agency" (IHO Decision at p. 9).

hours for the cost of the private OT services provided by Step Ahead during the 2023-24 school year, but at lesser rates of $140 per hour or $160 per hour, depending on the provider, upon proof of services provided (id. at pp. 9-10). The IHO reasoned that reimbursement relief was warranted because two of the providers "should be paid for their work" (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer with cross-appeal thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The parent alleges among other things, that the IHO erred finding that there was no agreement between Step Ahead and the parent, denying direct funding, and in reducing the hourly rates for reimbursement. The parent faults the IHO for insisting that the parent appear and when scheduled to appear on another day, merely states that the parent was "unable to appear at the next hearing date." The parties' dispute on appeal also centers on whether the IHO should have applied the Burlington/Carter standard in this matter and, if so, whether the unilaterally-obtained services from Step Ahead were appropriate.[4]

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]).[5] "Boards of education of all school districts of the state

[4] In her request for review the parent alleges the IHO erred by failing to issue an interim decision pursuant to section 8 NYCRR 279.10[d] of the Regulations of the Commissioner of Education determining the student's pendency placement during the due process proceeding. The parent alleges that she should be granted funding under pendency from the date of her due process complaint notice, December 18, 2023, but does not state further what the student's pendency program should consist of. As indicated above, the parent alleged in her due process complaint notice that the last program developed for the student was a February 2023 "IESP" which recommended two 30-minute sessions of OT per week in a group of two and that she disagreed with any subsequent program developed (see Parent Ex. A); however, she does not maintain the same argument on appeal, nor does she request any relief pursuant to an interim pendency order (see Req. for Rev. at p. 9). The parent did not request compensatory education due to a lapse in pendency.

[5] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in

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

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

VI. Discussion —Unilaterally Obtained OT Services

I will turn to the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained OT services delivered to the student by Step Ahead during the 2023-24 school year.

Prior to reaching the substance of the parties' factual arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the district developed a preschool IEP for the student, and it is unclear whether the student received the recommended OT services (see Tr. pp. 5-70). In her December 17, 2023, due process complaint notice, the parent alleged that the district did not provide any services during the 2023-24 school year 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 OT services from Step Ahead for the

[Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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 is whether the parent is entitled to public funding of the costs of the privately-obtained 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"]).[7]

The parent emphasizes Burlington/Carter cases are primarily for cases in which a parent is challenging and rejecting an IEP developed by a school district, and that if they "embrace" the IEP then parents are then permitted to substitute their own private programming without having to demonstrate that such programming is appropriate.[8] First, the parent confusingly states that they disagree with any subsequent programing offered by the district after the February 2023 IEP in the due process complaint notice in this case. Next, the parent suggests that they are permitted to substitute their own private providers anytime any time the school district fails to implement some or all of an IEP, and that they do not have to show that the services were appropriate for the student. But IDEA does not permit parents who have opted to parentally place their child in a nonpublic school to substitute their own providers for special education services and states that:

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

[8] The parent's statements regarding the limited applicability of Burlington/Carter to IEP disputes only is incorrect. A district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP or IESP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP or IESP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 F. App'x 63 [2d Cir. 2014] [minor possible discrepancy between the 6:1:1 staffing ratio called for in the student's IEP and the possible 12:1:2 staffing ratio during gym class three times per week is not material when the student would have been accompanied to gym by his own paraprofessional]).

> The provision of [equitable] services pursuant to this subparagraph shall be provided--
>
> (aa) by employees of a public agency; or
>
> (bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(20 U.S.C. § 1412[a][10][A][vi] [emphasis added]). In this case it is the parent, not the district, who contracted with Step Ahead as a self-help remedy. While the parent may have an avenue to pursue the relief she seeks, that avenue is assessed under the Burlington/Carter 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; Burlington, 471 U.S. at 369-70; 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

[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 Always a Step Ahead (Educ. Law § 4404[1][c]).

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).

A. Student's Needs

In this matter, the IHO erroneously declined to apply a Burlington/Carter analysis, therefore, her decision lacked an analysis of whether the unilaterally obtained OT services provided the student with specially designed instruction to meet the student's unique needs (see IHO Decision).

To address the issues on appeal, a description of the student's special education needs related to OT is warranted. The student's February 15, 2023 IEP, developed when she was five years old, reflected results of administration of the Peabody Developmental Motor Scales-II, which indicated the student's fine motor skills were in the eighth percentile in the areas of visual motor integration and grasp (Parent Ex. B at p. 3). Although review of the IEP shows that the student could perform many fine motor tasks, she sometimes switched hands, she held a marker "using a high quadrapod grasp" most of the time, she did not consistently use her other hand to assist and stabilize, she was unable to fold a paper into a crease, and she was not yet able to draw a cross and

square (id. at pp. 4-5).[10] The IEP reflected an annual goal to improve the student's fine motor skills including her ability to imitate shapes, cut, trace, and write at an age appropriate level (id. at p. 7). Additionally, the IEP included an annual goal to improve the student's visual perceptual skills by assembling a puzzle and copying her name (id.).

Results of the Sensory Profile indicated that the student exhibited a "definite difference in auditory filtering and underresponsiveness/seeks sensation" and her score "was two standard deviations below the mean in these areas" (Parent Ex. B at p. 3). According to the IEP, "as part of her sensory behaviors [the student] jump[ed] on top of her friends and lick[ed] them," she hugged "tightly and with intensity," and she fell "hard on her friends when she jump[ed] on them" (id. at p. 4). The IEP indicated that the student often laid on the floor, "constantly" touched objects and people and often was aggressive with other children, frequently tripped, fell, bumped into things, and fell off her chair, broke crayons without realizing it, stomped her feet heavily when she walked, and "appear[ed] to have a poor awareness of her body in space" (id. at p. 5). Additionally, the IEP indicated that the student had "a limited attention span," was "easily distracted" and "not focused," and she had difficulty following directions consistently and sitting still during structured activities (id.). Further, the student put non-food objects in her mouth, was "very messy" when eating and participating in arts and crafts activities, she had frequent temper tantrums at home, and required prompting and 1:1 guidance to follow classroom rules and instructions (id.). The IEP included an annual goal to improve the student's sensory processing skills including her ability to attend to an activity and follow verbal directions, and decrease instances of touching other students, and temper tantrums (id. at p. 7).

B. OT Services from Step Ahead

On December 22, 2023, one of the student's OT providers prepared a progress report (Parent Ex. E). According to the report, the student was participating in two 30-minute weekly sessions that "follow[ed]" the February 2023 IESP (id. at p. 1).[11] The OT provider identified the student's then-current needs as having challenges with attention and focus, sustaining engagement in tasks for more than five minutes, and exhibiting difficulty with writing and coloring (id.). The report indicated that the student had worked on "many sensory modulation techniques to improve her focus and attention, however she still need[ed] many verbal cues to be redirected to classroom activities" (id.). Additionally, the report indicated that the student was still working on handwriting and grasp and needed tactile cues to engage in age-appropriate tasks (id.). The OT provider reported that the student had made "slight improvements towards her goals," recommended that OT services continue "on a 1:1 basis," and developed goals for the student to improve her attention

[10] The May 2023 IESP reflected some of the information regarding the student's fine motor and sensory processing needs from the February 2023 IEP, and continued to offer two 30-minute sessions per week of group OT, although the size of the group was not defined (compare Parent Ex. B at pp. 4-5, 8, with Dist. Ex. 1 at p. 2-3, 6).

[11] The student's February 2023 IESP called for the OT services to be delivered in a group; however, the December 2023 OT progress report reflected that the OT services were delivered individually (compare Parent Ex. B at p. 8, with Parent Ex. E at p. 2). The Step Ahead case manager testified that when an appropriate peer group cannot be found, providers deliver the services on an individual basis to ensure that students continue to work on their IESP goals (Tr. pp. 48-49).

span, fine motor skills for writing and coloring, and ability to complete writing and coloring tasks more efficiently (id. at p. 2).

From September 2023 to mid-January 2024, one occupational therapist provided the student's OT services, and prepared the December 2023 progress report (Tr. pp. 49-51). According to the case manager, the student received the OT services at her school on a pull-out basis (Tr. pp. 54-55). At the hearing, the case manager for Step Ahead testified that the two other providers named in her affidavit were those providing the student's OT services, and the evidence reflects that both are licensed occupational therapists (Tr. pp. 42-43, 44; Parent Exs. C; D). However, in her request for review, the parent admits that these two providers did not deliver any OT services to the student, and the only provider of the student's OT was the person who prepared the December 2023 OT progress report (Req. for Rev. ¶¶ 1, 7-8). Thus, according to the hearing record and the parent's concessions, Step Ahead only provided OT to the student for half of the 2023-24 school year, from September 2023 to January 2024.

After a review of the evidence in the hearing record, it does not appear that the OT service delivered by Step Ahead was specially designed to address the student's identified needs. Though the parent introduced a December 2023 OT progress report prepared by the student's OT provider, such progress report lacks specifics as to what approaches or specific strategies were used for the student and how the OT services provided were tailored to the student to meet her unique needs. Moreover, the evidence is unclear as to who actually provided OT services to the student despite a notarized document from Step Ahead's OT director naming two different providers—neither of these providers created a progress report nor testified during the hearing as to what the student was working on during their sessions. Instead, the evidence showed that a different occupational therapist provided services, created a "[p]rogress [r]eport" purporting what the student was supposedly working on, but yet such provider did not testify during the impartial hearing and the Step Ahead OT director testified that the two other providers provided services to the student during the 2023-24 school year. The evidence is unconvincing, as it is indiscernible who provided services to the student during the 2023-24 school year. Accordingly, under the totality of the circumstances I find that the parent has not met her burden to establish that the services provided by Step Ahead were reasonably calculated to enable the student to receive education al benefits. Accordingly, the IHO erred when she ordered the district to reimburse the parents for up to 17 hours of OT services provided by Step Ahead during the 2023-24 school year and such determination shall be reversed.

VII. Conclusion

Having determined that the IHO erred by failing to apply the Burlington/Carter framework to this matter and that the parent failed to sustain her burden of proof that the private OT services delivered by Step Ahead to the student during the 2023-24 school year were appropriate, the IHO's order for the district to reimburse the parent for up to 17 hours of OT services for the 2023-24 school year must be reversed.

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

THE APPEAL IS DISMISSED.

TTHE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 30, 2024 is modified by reversing those portions that directed the district to reimburse the parent for the cost of up to 17 hours of OT delivered by Step Ahead during the 2023-24 school year at a rate of $140 per hour and $160 per hour depending on the occupational therapist.

Dated: **Albany, New York**
July 31, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER