The University of the State of New York

The State Education Department
State Review Officer
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No. 24-241

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 the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the cost of the 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 in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see

20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, 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

A CPSE convened on October 23, 2023 to develop an IEP for the student for the 2023-24 school year (Parent Ex. B at pp. 1, 3). The CPSE found the student eligible for special education as a preschool student with a disability and recommended that the student receive five hours per

week of special education itinerant teacher (SEIT) services in a group of two, two 30-minute sessions of speech-language therapy in a group of two, and two 30-minute sessions per week of OT in a group of two at a childcare location selected by the parent (Parent Ex. B at pp. 1, 12).[1]

In a final notice of recommendation dated October 23, 2023, the district summarized the CPSE's recommendations (Parent Ex. F). The parent consented to the provision of 10-month preschool services by signing the final notice of recommendation on October 23, 2023 (id.).

According to session notes kept by private providers from Step Ahead, the student began receiving OT on November 2, 2023 and began receiving speech-language therapy on November 6, 2023 (Parent Ex. G at p. 1; see Parent Ex. D).[2,] According to a 2023-24 school year, undated speech-language therapy progress report, the provider was following the recommendations of the "IESP" dated October 23, 2023 (Parent Ex. H at p. 1).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated January 2, 2024, and received by the district on January 3, 2024, the parent alleged that the district failed to provide adequate special education

[1] 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 https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs. 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]; see Educ. Law § 4410[1][k]).

[2] Step Ahead has not been approved by the Commissioner of Education as a preschool program or provider with which districts may contract to provide special education services to preschool students with disabilities (see Educ. Law § 4410[9]; 8 NYCRR 200.1[nn]).

[3] The parent's request for review and the January 2, 2024 due process complaint notice incorrectly state that the October 2023 CPSE developed an individualized education services program (IESP) for the student rather than an IEP (Parent Ex. A at p. 1; see Tr. pp. 4, 12-13; IHO Decision at p. 3 n.2). State guidance explains that Education Law § 3602-c:

> pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE.

("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 p. 13, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf).

and related services for the student for the 2023-24 school year (Parent Ex. A at p. 1).[4] The parent further asserted that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services by failing to provide "services providers" (id.). The parent also claimed that she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with all required services for the 2023-24 school year at rates higher than the standard district rates (id.). The parent requested an "[a]llowance of funding for payment to the student's providers/agencies" for the provision of speech-language therapy and OT at the enhanced rates for the 2023-24 school year (id. at p. 2).

After the due process complaint notice was filed, on March 12, 2024, the parent electronically signed a document on the letterhead of Step Ahead, and stated that she was "aware that the rate of the related services are $250 an hour, and that if the [district] does not pay for the services, I will be liable to pay for them" (Parent Ex. C at p. 1).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). A prehearing conference was held on February 2, 2024 (Tr. pp. 1-8). The parent's attorney appeared before the IHO on February 15, 2024 for a pendency hearing, but the district did not appear (Tr. pp. 9-20). The parties reconvened on March 20, 2024 for an impartial hearing (Tr. pp. 21-46). In a decision dated April 29, 2024, the IHO found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 3, 6). Turning to the parent's unilaterally obtained speech-language therapy, the IHO found that the student's special education needs were met, that the instruction was reasonably calculated to enable the student to receive educational benefit, and that the student made progress (id. at pp. 7-8). With regard to the parent's unilaterally obtained OT services, the IHO found that the parent did not meet her burden of demonstrating that the services met the student's needs (id. at p. 8). The IHO determined that the parent failed to submit any documentation or provide any testimony regarding the student's present level of performance at the time he began receiving OT, failed to indicate any short-term or annual goals the student was working on for the 2023-24 school year, and failed to provide any evidence of progress (id.). The IHO found that the only evidence submitted in support of the student's OT services were timesheets from the 2023-24 school year, which indicated "the activity done during each OT session" but failed "to provide any guidance as to the reason for those activities" (id. at pp. 8-9). The IHO further noted that "of the approximately 28 sessions reported in the submitted session notes, only two entries actually indicate[d] the reason for the activities done during those sessions of OT" (id. at p. 9). For those reasons, the IHO determined that the parent had not met her burden of demonstrating the appropriateness of her unilaterally obtained OT services (id.).

The IHO next addressed equitable considerations and found that the parent produced as evidence "the last developed IEP, a contract with [Step Ahead] for the related services recommended in such IEP, an affidavit from [Step Ahead] confirming the [related services] provided to [the s]tudent" for the 2023-24 school year at the rate of $250 per hour for each service,

[4] The parent's due process complaint notice was dated January 2, 2024, but was not filed until after the close of business on January 2, 2024 (Parent Ex. A at p. 5). Accordingly, the IHO referenced the date that the district received the due process complaint notice, January 3, 2024, in his decision (IHO Decision at p. 3).

"timesheets" for both services and proof that both providers were licensed by the State (IHO Decision at p. 9). The IHO further found that there was no evidence or claim made by the district asserting or suggesting that the parent did not cooperate with the district or interfered in any manner with the district's obligation to provide the student with a FAPE for the 2023-24 school year (id.). The IHO also noted that the district had failed to present any evidence as to what would constitute a reasonable market rate for a speech-language pathologist in the relevant area (id.). The only evidence of any rate was the parent's contract with Step Ahead (id.). The IHO then determined that the rate charged by Step Ahead for speech-language therapy was not unreasonable (id.). As relief, the IHO ordered the district to implement the recommendations set forth in the October 2023 IEP and, until such time as the district implemented the October 2023 IEP, to reimburse and/or directly fund one hour per week of speech-language therapy at a rate of $250 per hour for the 2023-24 school year upon submission of proof of services (id. at p. 10).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in denying her requested funding for OT services. Initially, the parent argues that a Burlington/Carter analysis should not apply to this matter. The parent further asserts that the IHO erred in finding the parent's privately obtained OT were inappropriate. As relief, the parent requests direct funding for two 30-minute sessions per week of OT services provided to her son at a rate of $250 per hour for the 2023-24 school year.

In an answer, the district denies the parent's claims and argues that the IHO correctly denied her request for direct funding of unilaterally obtained OT services.[5]

[5] In its answer, the district argues that equitable considerations do not favor direct funding to the parent because the parent failed to establish a financial obligation to Step Ahead and failed to provide ten-day written notice of her intention to unilaterally obtain private services and seek public funding (Answer ¶¶ 10-11). However, the district has not interposed a cross-appeal of any of the IHO's determinations. State regulations provide that a respondent who disagrees with a portion of an IHO decision must set forth a cross-appeal in an answer that "clearly specif[ies] the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.4[f]; 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Thus, the IHO's determinations that the district failed to offer the student at FAPE for the 2023-24 school year, that the parent was entitled to direct funding for speech-language therapy provided by Step Ahead, and that equitable considerations did not bar reimbursement or direct funding to the parent have become final and binding on the parties and will not be reviewed on appeal (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]).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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 (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; 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., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The 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).

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion—Unilaterally Obtained Services

On appeal, the crux of 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' 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 SEIT services (see Tr. pp. 25-27). Nevertheless, the district failed to provide the student with the recommended OT and speech-language therapy services at the student's preschool program. In her January 3, 2024 due process complaint notice, the parent alleged that the district had not implemented the student's October 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 OT and speech-language therapy 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 is whether the parent is entitled to public funding of the costs of the private OT and speech-language therapy 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 Carter, 510 U.S. at 14 [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'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; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).

Turning to a review of the appropriateness of the unilaterally obtained services, 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; Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522

[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]).

[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 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). 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

As there is no challenge regarding the delivery of the student's recommended SEIT and speech-language therapy services for the 2023-24 school year, the information in the hearing record relevant to addressing the parent's burden concerns the student's needs related to OT, which are not in dispute (Parent Ex. A at p. 1). To identify these needs, the hearing record includes the October 2023 IEP, and OT session notes from November 2, 2023 through March 6, 2024 (Parent Exs. B; G).

The student's October 23, 2023 IEP reflected that, on an undated administration of the Stanford-Binet Intelligence Scales-Fifth Edition, the student obtained a full scale IQ of 84, in the low average range (Parent Ex. B at p. 3). On the Developmental Assessment of Young Children-Second Edition (DAYC-2), the student received a cognitive score of 77, in the poor range (id.). The October 2023 IEP related that the student's daily living skills fell in the "moderately low" range, he was not toilet trained, sometimes resorted to eating with his hands, and needed help with dressing and undressing (id.). The student was careful around hot objects, sometimes cleaned up at the end of an activity, and counted "some" objects one by one (id.).

The October 2023 IEP further related that on an undated administration of the Preschool Language Scales-Fifth Edition the student exhibited "overall delayed receptive and expressive language skills" (Parent Ex. B at p. 3). The student obtained a standard score total of 79 (eighth percentile) (id.). The student's receptive and expressive language skills were "delayed," and his speech intelligibility was "significantly delayed" during conversation (id.). Receptively, the student demonstrated difficulty with syntactical (grammatical) development, auditory directives, critical thinking, vocabulary, and linguistic concepts (id.). Expressively, he had difficulty with syntax, vocabulary and answering questions. Articulation errors and use of phonological processes delayed the student's speech intelligibility for single words and connected conversational utterances (id.). According to the October 2023 IEP, the student's oral motor skills were reduced by "decreased jaw, labial and/or lingual strength, coordination, dissociation and/or range of motion and reduced saliva management" (id.). He exhibited immature chewing, cup drinking and swallowing patterns and decreased oral sensory abilities that included food overstuffing (id.).

Speaking to the student's social/emotional development, the October 2023 IEP noted that on the DAYC-2 the student received a standard score of 83, in the below average range (Parent Ex. B at p. 4). He was "disconnected" from the class, did not focus within the classroom, and required "constant" cues and prompts (id.). The October 2023 IEP reflected that the student did not make transitions, attend to a story, follow directions, or attend during circle time (id.). He "sometimes" interacted with peers, played well for a short time in groups of two or three children, spontaneously greeted a familiar person, and separated from his parent without crying (id.). The student tried to do many things without help, showed pride in his accomplishments, quietly listened to a story, music, a movie, or television, and used please and thank you with occasional reminders (id.). He looked at the person he was speaking to, and recognized when another person was happy or sad but did not attempt to comfort others in distress (id.).

The October 2023 IEP reported that the student's gross motor skills were in the average range, however he exhibited significant delays in fine motor, graphomotor, and visual perceptual skills and moderate difficulty with sensory processing (Parent Ex. B at p. 4). The October 2023 IEP further noted that on the Peabody Developmental Motor Scales-Second Edition (PDMS-2), the student received a PDMS-2 "quotient" of 76 (fifth percentile) (id.).

The October 2023 IEP included 13 annual goals focused on the student's identified needs, including his cognitive skills, receptive and expressive language, fine motor skills, adaptive skills, social/emotional skills, oral motor skills, speech intelligibility, following directions, and sensory processing skills (Parent Ex. B at pp. 6-11).

B. OT Services from Step Ahead

The IHO determined that the parent failed to provide evidence of the student's present levels of performance at the time he began receiving OT or evidence that the OT provider developed goals for the 2023-24 school year and did not establish that the student made progress with the OT services provided (IHO Decision at pp. 8-9). The parent argues that she did not disagree with the October 2023 IEP and the information provided in the IEP regarding the student's fine motor needs was sufficient to identify the student's needs. The parent additionally argues that the OT session notes included in the timesheet were sufficient to show the "detailed work being done" (Req. for Rev. ¶ 18). The evidence in the hearing record supports the parent's position.

As noted above, the physical needs section of the IEP related that the student exhibited delays in fine motor, graphomotor, visual perceptual skills and sensory processing skills (Parent Ex. B at p. 4). While the physical needs section of the October 2023 IEP provided limited information on the student's specific needs, it included multiple annual goals to address the student's identified OT needs. The October 2023 IEP included annual goals focused on the student's fine motor skills with short term objectives focused on holding a crayon or pencil in adaptive fashion, using his hand to hold his paper while drawing, and imitating circular, vertical, and horizontal strokes, copying a square using tripod grasp, cutting a square using correct grasp, and demonstrating one-handed manipulation (id. at pp. 7, 11). An adaptive skills goal focused on the student's dressing and toileting needs, and a sensory processing goal focused on working on challenging tasks with auditory and visual distractions, tolerating suspended equipment, and navigating the classroom without collision (id.).

The OT sessions notes included in the related services time sheet identified that the student's OT addressed the fine motor and sensory needs identified in the October 2023 IEP. OT session notes identified that the student worked on graphomotor skills, fine motor strength, hand-eye coordination, visual motor skills, cutting skills, core strengthening, vestibular and balance skills, and dressing skills (Parent Ex. G at pp. 1-8). Session notes further showed that the OT used techniques such as proprioceptive input via joint compression, vibration massage, brushing and vestibular input via platform linear swing and cocoon swing (id. at pp. 2, 3-4, 6).

Thus, review of the hearing record does not support the IHO's findings. Initially, as noted above, the private provider need not have a formal IEP (Carter, 510 U.S. at 13-14). For that matter, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). Based on the totality of the circumstances, the parent's unilaterally obtained OT services were similar in frequency and duration to the OT recommended for the student in the October 2023 IEP, and the parent established that the individual OT services the student received were appropriate for the 2023-24 school year. Although the IHO correctly applied the Burlington/Carter legal standard in evaluating the parent's requested relief, the IHO erred in determining that the parent failed to meet her burden of proof.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's finding that the parent's unilaterally obtained OT services were not appropriate and that the district did not cross-appeal the IHO's determinations related to FAPE, related to the appropriateness of the parent's unilaterally obtained speech-language therapy delivered by Step Ahead, or related to equitable considerations, the necessary inquiry is at an end. The IHO's denial of relief in the form of district funding for OT services delivered by Step Ahead during the 2023-24 school year is reversed.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 29, 2024 is modified by reversing those portions which found that the parent did not meet her burden to prove that unilaterally obtained OT services from Step Ahead were appropriate, and which denied the parent's request for the district to fund unilaterally obtained OT services delivered by Step Ahead during the 2023-24 school year; and

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

Dated: **Albany, New York**
July 12, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER