



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-249

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 Lindsay R. VanFleet, 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 and physical therapy (PT) services delivered to her daughter by Always a Step Ahead, Inc. (Step Ahead) at specified rates for the 2023-24 school year. The district cross-appeals and asserts that equitable considerations do not favor direct funding. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (*see* Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational 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

A CSE convened on April 11, 2022 to develop an IESP for the student for the 2022-23 school year (Dist. Ex. 2 at p. 1). The CSE found the student eligible for special education as a student with an orthopedic impairment and recommended that she receive two 30-minute sessions per week of individual OT and two 30-minute sessions per week of individual PT to be implemented starting on September 1, 2022 (*id.* at pp. 1, 8).¹

According to a progress report dated December 26, 2023, for the 2023-24 school year, the student was receiving two 30-minute sessions per week of OT services from a provider from Step Ahead (Parent Ex. G at pp. 1-3).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated December 24, 2023, the parent, through her attorney, alleged that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services by failing to provide adequate special education and related services for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent indicated that she agreed with the program recommended in the April 2022 IESP but had been unable to find providers willing to accept the district's standard rates to deliver the services; however, the parent asserted she 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 award of funding for two 30-minute sessions per week of individual OT and two 30-minute sessions per week of individual PT at enhanced rates for the 2023-24 school year (*id.* at p. 2).

On February 6, 2024, the parent electronically signed a document on the letterhead of Step Ahead, which was dated September 1, 2023, and stated that she was "aware" of the rates charged by the company for services provided to the student "and that if the [district] d[id] not pay for the services, [she] w[ould] be liable to pay for them" (Parent Ex. C). The document further stated that the parent was "aware that the services being provided to [her] child [we]re consistent with those listed in [her] child's IEP/IESP dated: 04/11/2022" (*id.*).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). The parties convened on March 28, 2024 for an impartial hearing (Tr. pp. 1-17). In a decision dated May 8, 2024, the IHO found that the district failed to implement the PT and OT services mandated by the April 2022 IESP and that, accordingly, the district's failure to implement the student's equitable services was a denial of a FAPE for the 2023-24 school year (IHO Decision at p. 4). Turning to the parent's unilaterally obtained OT services, the IHO found that the OT provider was delivering two 30-minute sessions of OT services as mandated in the April 2022 IESP, that the OT provider was properly certified, and that the December 2023 OT progress report outlined the student's present levels of performance, deficits, and goals (*id.*). However, the IHO found that the December 2023 progress report did "not provide any information on what

¹ The student's eligibility for special education programs and related services as a student with an orthopedic impairment is not in dispute (*see* 34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

methodologies or strategies the OT [p]rovider [wa]s utilizing to address [the s]tudent's needs" and that this was "of particular concern as the April 11, 2022 IESP recommend[ed] a specific methodology stating: '[a] sensory integrative approach should be utilized in conjunction with principles of motor learning and behavioral techniques'" (id.). The IHO further found that the OT progress report noted "very limited progress stating [the s]tudent c[ould] 'briefly attain a more efficient grasp with minimal verbal reminders and support'" (id. at pp. 4-5). The IHO determined that the "[p]arent's evidence d[id] not demonstrate that the OT [p]rovider [wa]s complying with the recommendations of the April 11, 2022 IESP and addressing [the s]tudent's individual special education needs" (id. at p. 5).

Next, the IHO considered the parent's unilaterally obtained PT services and found that the parent had provided a contract for services and a copy of the provider's certification (IHO Decision at p. 5). The IHO determined that the parent "failed to provide any testimony, progress report or other document which outline[d] what deficits the PT provider [wa]s addressing, goals set for [the s]tudent or what methodologies/strategies [we]are being used to address [the s]tudent's needs" (id.). The IHO further determined that the parent did not meet her burden of demonstrating the appropriateness of her unilaterally obtained OT and PT services and denied the parent's requested relief of direct funding.

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in denying her requested relief. 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 services were inappropriate. The parent contends that the evidence of the OT services received by the student should be considered sufficient evidence of the PT services the student received because the IESP recommended both services "to address . . . overlapping issues." The parent further asserts that the IHO's findings related to progress were without merit. As relief, the parent requests direct funding to Step Ahead for two 30-minute sessions per week of OT services and for two 30-minute sessions per week of PT services provided to her daughter at specified rates for the 2023-24 school year.

In an answer with cross-appeal, the district argues that the IHO correctly denied the parent's request for funding of privately obtained OT and PT services. The district further asserts that, if the parent's unilaterally obtained services are found to be appropriate, equitable considerations do not favor full funding of the parent's requested relief. Specifically, the district contends that the parent did not sign a contract for services until February 6, 2024, and that it was not credible that Step Ahead was providing services from the beginning of the school year. In addition, the district argues that the rates charged by Step Ahead are unreasonably excessive and lastly, that the parent failed to provide the district with 10-day written notice of her intention to unilaterally obtain services and seek public funding.

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]).² "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.*).³ 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

² 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]).

³ 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 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.

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Unilaterally Obtained Services

The district does not appeal from the IHO's decision that the failure to implement the student's April 2022 IESP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at p. 4). Accordingly, this determination has become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR200.5[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 parent's unilaterally obtained OT and PT services delivered to the student by Step Ahead during the 2023-24 school year, and whether equitable considerations favor direct funding of the parent's unilaterally obtained services.

Turning to the parent's argument that she has no burden at all regarding the services from Step Ahead, the parent challenges the IHO's reliance on the Burlington/Carter model of analysis for resolving the parties' dispute, accordingly, I will first address the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private 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 (Parent Ex. A at pp. 1-2). Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue that was presented to the IHO was whether the parent is entitled to public funding of the costs of the privately-obtained OT and PT services from Step Ahead. "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"]).

Thus, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85;

T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).⁴ 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; 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 [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

⁴ 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]).

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

Although not in dispute, a review of the student's identified needs is necessary in order to determine if the related services provided by Step Ahead were appropriate. Review of the hearing record indicates that the CSE met on April 11, 2022, to develop the student's IESP for the 2022-23 school year (Dist. Ex. 2 at p. 1). According to the April 2022 IESP, the student was evaluated pursuant to the district's turning five process in order to determine her educational needs as she transitioned into kindergarten (id.). The April 2022 IESP indicated that, based on a November 2021 administration of a Stanford Binet Intelligence Scales, Fifth Edition (SB-5), the student's cognitive skills fell within the high average range (id.). In addition, results of the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) indicated that the student's communication skills were adequate; however, her daily living skills, and socialization skills were considered to be in the moderately low range, and her motor skills fell within the low range (id.). The student's adaptive behavior composite score was also in the moderately low range (id.). According to the April 2022 IESP, an administration of the Peabody Developmental Motor Scales, Second Edition (PDMS-II), indicated that the student's fine motor quotient (76) fell -1.60 standard deviations below the mean, and her gross motor quotient (72) fell -1.87 standard deviations below the mean (id. at p. 2). In addition, the student's performance on the Sensory Profile (sensation seeking and auditory filtering skills) yielded a score that fell -2.00 standard deviations below the mean (id.). Lastly, the April 2022 IESP indicated that as measured by the Battelle Developmental Inventory (BDI) the student's cognitive and communication skills were within the average range; however, her motor quotient (75) was -1.67 standard deviations below the mean, and her social quotient (88) was -.80 standard deviations below the mean (id.).

With regard to academic achievement, the April 2022 IESP indicated that the student could sort, match, and name colors and shapes; match quantities with the corresponding number; recite the alphabet; and match upper and lowercase letters (Parent Ex. 2 at p. 2). No academic concerns were noted (id.). According to the IESP, the student was well behaved and responded well to frustration, sought help when necessary, and understood directions (id.). The student was able to work independently and separate easily from adults (id.).

With regard to social skills, the April 2022 IESP reported that according to the student's then current teacher the student was easily engaged, participated in group play, and took turns and shared (Dist. Ex. 2 at p. 2). The IESP further noted that the student responded positively to teacher direction, as well as praise and affection, and noted that she asserted herself in socially acceptable ways (id.).

With regard to the student's physical development, the April 2022 IESP indicated that the student had polydactyly, and noted that her most recent surgery was in October 2021 (Dist. Ex. 2 at p. 3).⁵ Additionally, the IESP stated that the student presented with significant delays in the areas of sensation seeking and auditory filtering; exhibited deficits in muscle strength, balance, and coordination; and ran with poor form and fell frequently (id.). The IESP also indicated that the student was unable to alternate feet walking downstairs and had delayed jumping, overall balance, and ball play skills (id.).

In addition, the April 2022 IESP reported that the student used an awkward grasp on a writing utensil, had difficulty with fasteners and cutting tasks, and she presented with decreased attention span and poor auditory filtering skills (Dist. Ex. 2 at p. 3). The IESP indicated that the student's poor grasp on writing utensils could have a negative impact on her ability to complete prewriting, drawing, and other high level graphomotor tasks as well as a significant impact on her ability to function in the classroom and to achieve academic success (id.). The April 2022 IESP indicated that the student could open and close scissors with one hand, color simple shapes, and open doors by turning knobs (id.). The IESP indicated that based on the Short Sensory Profile, the student had significant delays which put her in the "performance at high-risk category" in the sub area of auditory filtering (id.). The April 2022 IESP suggested that a "sensory integrative approach should be utilized in conjunction with principles of motor learning and behavioral techniques" (id.).

The April 2022 CSE recommended the student receive the related services of two 30-minute sessions per week of individual OT and two 30-minute sessions per week of individual PT (Dist. Ex. 2 at p. 8). Additionally, to further address the student's identified needs, the April 2022 CSE recommended the following to address the student's management needs: visual and verbal cueing, positive reinforcement, and modeling (id. at p. 4).

2. Unilateral Services from Step Ahead

As for the services provided by Step Ahead, the documentary evidence offered by the parent included a September 1, 2023 contract with Step Ahead signed on February 6, 2024, which demonstrated the parent's financial obligation for services delivered to the student, a copy of the licensures of the OT and PT providers who purportedly delivered services to the student, and the December 26, 2023 OT progress report (Parent Exs. C; F; G).

According to the December 2023 OT progress report, for the 2023-24 school year, the student received two 30-minute sessions of individual OT per week from Step Ahead (Parent Ex. G at p. 1). The December 2023 OT progress report indicated that the student presented with

⁵ The April 2022 IESP indicated that polydactyly was a condition characterized by extra fingers or toes (Dist. Ex. 2 at p. 3).

deficits in fine motor coordination skills, sensory integration, focusing and attention skills (*id.*). Specifically, the occupational therapist reported that the student used a static tripod grasp with limited wrist extension and noted that the limitations of her graphomotor skills caused challenges in spacing and sizing in her handwriting which impacted her ability to keep up with writing assignments (*id.*). Additionally, the occupational therapist indicated that the student demonstrated poor hand and finger strength, which impacted her activities of daily living (ADL) skills, such as dressing and noted that she required assistance buttoning and unbuttoning clothes (*id.*). The occupational therapist reported that the student experienced sensory processing difficulties and constantly sought input from her environment (*id.*). She further reported that the student presented with diminished sensory information, which affected her understanding and effective interaction with people and objects (*id.*). Additionally, the student sought proprioceptive sensory input, including deep pressure and proprioceptive activities, as well as exhibited tactile defensiveness, which caused disruptions to her daily routine especially during dressing due to disliking certain textures and clothing tags (*id.*). Finally, the occupational therapist indicated that the student had difficulty sitting during classroom lessons and was easily distracted by external stimuli, thereby requiring verbal and visual cues to regain attention to task, and opined that these delays adversely affected the student's ability to sustain participation in tasks for appropriate durations, hindered full engagement within the classroom, and impacted academic success (*id.*). With regard to progress, the December 2023 OT progress report indicated that the student could briefly attain a more efficient grasp with minimal verbal reminders and support (*id.* at p. 2).

A review of the hearing record does not support the IHO's findings with regard to the parent's unilaterally obtained OT services. Initially, as noted above, the private provider need not have a formal IEP (*Carter*, 510 U.S. at 13-14). As to the IHO's findings that the OT provider did not specify the methodologies utilized and that the parent did not demonstrate that the OT provider was complying with the April 2022 IESP, the parent was under no obligation to implement the district's IESP precisely as written when obtaining unilateral services (*Carter*, 510 U.S. at 13-14). In particular, although the April 2022 IESP stated "[a] sensory integrative approach should be utilized in conjunction with principles of motor learning and behavioral techniques," the statement was related to the student's performances on the PDMS-II and "the Short Sensory Profile" (Dist. Ex. 2 at p. 3). Additionally, the December 2023 OT progress report described the student's needs, included annual goals, and indicated that that the student had attained a more efficient grasp with minimal verbal reminders and support (Parent Ex. G at pp. 1-3).

Turning to the parent's unilaterally obtained PT services, other than the contract and licensure of the provider (Parent Exs. C; F at p. 2), the hearing record includes no further information about the PT services the parent obtained for the 2023-24 school year. As a result, there was no evidence regarding Step Ahead's provision of the PT services identified in the contract. Neither the parent, the provider, nor any representative from Step Ahead appeared or provided written testimony at the impartial hearing, and the hearing record does not include any progress reports, service records, or even invoices.⁶ Although the parent claims that the Step Ahead PT provider was following the IESP and that the December 2023 OT progress report addressed overlapping PT needs and therefore demonstrated the appropriateness of the unilateral

⁶ The parent offered an affidavit from a representative from Step Ahead into evidence, however the document was excluded by the IHO (Tr. pp. 9-12).

PT services delivered by Step Ahead, the parent must still come forward with evidence that describes the unilateral PT services and the delivery thereof. The hearing record lacks any information about the level of PT services the student received or where or when the PT services were delivered and does not explain how any PT services that may have been provided by Step Ahead addressed the student's PT needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

Notwithstanding the lack of information in the hearing record about any PT services purportedly delivered, even removing consideration of PT services from the equation, the hearing record supports a finding, based on the totality of the circumstances, that the unilaterally obtained OT services were specially designed to meet the student's needs. The parent's unilaterally obtained OT services were similar in frequency and duration to the OT recommended for the student in the April 2022 IESP, and the parent established that the individual OT services the student received were appropriate for the 2023-24 school year. While the IESP recommended PT services for the student, a parent need not show that a unilateral placement or provider provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). Based on the foregoing, I find that the parent met her burden to prove that OT services delivered by Step Ahead were specially designed to meet the student's needs. However, absent any evidence about the delivery of PT services, the IHO correctly denied the parent's request for district funding of PT services from Step Ahead.

B. Equitable Considerations

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

any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IHO did not make any findings related to equitable considerations. In its cross-appeal, the district argues that the parent did not sign a contract with Step Ahead for services until February 6, 2024. The district alleges that it was "not credible that [the] parent had contracted with [Step Ahead] prior to that date or that the student was receiving services since the beginning of the school year" (Answer with Cr.-Appeal ¶ 17). In addition, the district asserts that the rates charged by Step Ahead are unreasonably excessive. The district also alleges that the parent failed to provide the district with 10-day written notice of her intention to unilaterally obtain services and seek public funding.

Here, the district is correct that the letter stating the parent's obligation was not signed by the parent until February 2024 but, by its terms, the letter stated the parent's intention to be bound to pay the costs of services delivered by Step Ahead for the 2023-24 school year at specified rates (Parent Ex. C). The district's assertion that it was not credible "that the student was receiving services since the beginning of the school year" is belied by the December 2023 OT progress report (Parent Ex. G at pp. 1-3).

With regard to the rate charged by Step Ahead for OT services, among the factors that may warrant a reduction based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d. Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An excessive cost argument focuses on whether the rate charged for a service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Here, the district has not offered any evidence to demonstrate that the rate was unreasonably excessive and thus there is no evidentiary record upon which to reduce or deny the funding award for unilateral OT services due to excessive costs by Step Ahead.

Turning to the parent's failure to provide 10-day written notice, 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, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the district correctly notes that the hearing record does not include evidence that the parent provided the district with 10-day written notice stating the parent's intent to unilaterally obtain private services. However, the hearing record reflects that the CSE had not convened to develop an IESP for this student since April 2022. Given that the purpose of the 10-day written notice is to give the district an opportunity, before the child is removed, to convene a CSE and in this instance, to develop an IESP (Bd. of Educ. of Yorktown Cent. School Dist. v. C.S., 990 F.3d 152, 171 [2d Cir. 2021]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland, 358 F.3d at 160), the district had already failed to convene prior to the first day of school for the 2023-24 school year. In this limited circumstance, it cannot be said that the parent's failure to provide 10-day written notice before engaging a provider for unilateral services interfered with the district's opportunity to remedy the failure to convene a CSE or implement the student's IESP.

Based on the foregoing, there is no equitable basis for reducing or denying the parent's request for direct funding of OT services and the district shall be required to fund the costs of up to two 30-minute sessions per week of OT services delivered by Step Ahead during the 2023-24 school year.

VII. Conclusion

In summary, the IHO correctly determined that the evidence in the hearing record did not support an award of funding for the parent's unilaterally obtained PT services but erred in determining that the parent did not meet her burden of demonstrating the appropriateness of her unilaterally obtained OT services. The hearing record further supports a finding that equitable considerations do not warrant a reduction or denial of relief, 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 TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated May 8, 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**
 August 8, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER