



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-250

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 Berger, Esq., Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail here. Briefly, during the 2022-23 school year the student attended a preschool program and received special education

itinerant teacher and related services (Dist. Ex. 1 at p. 1). The CSE convened on April 28, 2023, found the student eligible for school-age special education services as a student with a speech or language impairment, and developed an IESP for the 2023-24 school year to be implemented beginning September 7, 2023 (id.).¹ The April 2023 CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS); two 30-minute sessions per week of group speech-language therapy; two 30-minute sessions per week of individual occupational therapy (OT); and two 30-minute sessions per week of individual physical therapy (PT) (id. at pp. 10-11).

The student was parentally placed in a nonpublic school for kindergarten during the 2023-24 school year (Parent Ex. G at p. 1). According to the parent, the district failed to provide special education and related service providers to deliver the student's recommended services (Parent Ex. A at p. 1). On December 28, 2023, the parent signed a document on Step Ahead's letterhead indicating that she was "aware that the services being provided to [the student] [we]re consistent with those listed" in the student's April 2023 IESP, and that she was aware SETSS were provided to the student at a rate of \$200.00 per hour and \$250.00 per hour for related services pursuant to the April 2023 IESP (Parent Ex. C).² During the 2023-24 school year Step Ahead delivered SETSS, speech-language therapy, and OT services to the student (Parent Exs. D; G-I).

A. Due Process Complaint Notice

In a due process complaint notice dated January 26, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent "dispute[d] any subsequent program the [district] developed that removed and/or reduced the services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id. at p. 1). The parent asserted that the district failed to provide any special education services and related services to the student for the 2023-24 school year and the parent was unable to locate providers who would accept the district's "standard" rate (id.). The parent asserted that she was able to locate providers who were willing to provide the student with all required services at rates higher than the district's "standard" rate (id.). As relief, the parent sought pendency pursuant to the April 2023 IESP and funding for 5 sessions of special education teacher support services (SETSS) at an "enhanced rate," all related services recommended on the IESP for the 2023-24 school year through either related services authorization (RSA), if RSAs are accepted by the parent's provider, or direct funding to the parent's chosen provider at the rates charged, even if higher than the district's "standard" rate (id. at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO at the Office of Administrative Trials and Hearings (OATH) on May 3, 2024 (Tr. pp. 1-62). In a decision dated May 6, 2024, the IHO found

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

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

that the district conceded that it failed to provide the student with a FAPE for the 2023-24 school year (IHO Decision at p. 9). The IHO further held that the parent failed to prove that the SETSS, speech-language therapy and OT provided by Step Ahead were specially designed to meet the unique needs of the student and therefore denied the parent's requests for: SETSS at an enhanced rate of \$200 per hour; speech-language therapy at an enhanced rate of \$250 per hour; and OT at an enhanced rate of \$250 per hour (*id.* at pp. 11-16). The IHO found that the hearing record lacked any information regarding any assessment of the student, the parent offered no updated progress reports, and there was no explanation of how the goals were developed, which were not aligned with the student's IESP (*id.* at p. 10). The IHO noted that the student's providers did not testify and the evidence was not clear that the staff from Step Ahead were implementing services in accordance with the IESP (*id.* at 11). The IHO held that if she had found that the parent met her burden of proof that the services were appropriate for the student, the IHO would nevertheless have found that the equities did not favor the parent because of the parent's failure to submit a ten-day notice (*id.* at p. 17). The IHO determined that she would have denied the parent enhanced rate relief due to the lack of notice (*id.* at p. 18). The IHO awarded the parent a bank of compensatory services for 34 hours of missed PT services (*id.* at pp. 19, 20). Rather than award direct funding for the costs of Step Ahead, the IHO directed the district to provide SETSS, speech-language therapy, and OT services to the student for the 2023-24 school year (*id.* at p. 20).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in applying the Burlington/Carter analysis to the parents' claims for the 2023-24 school year. Initially, the parent argues that in equitable services cases, such as the instant matter, the burden of proof should lie entirely with the district. The parent asserts in that the standard to be applied must be different because the parent embraced the program recommended by the district, and "claim[ed] they had to pay their own providers" to ensure the program would be provided (Req. for Rev. ¶ 19). Even if the Burlington/Carter analysis applies, the parent asserts that the parent met her burden of establishing that Step Ahead was an appropriate placement by submitting the credentials of the Step Ahead employees and progress reports for the student showing that the student's specific needs were addressed. The parent alleges that the IHO erred when holding that the parent's failure to submit a 10-day notice of unilateral placement weighed against the parent. In the alternative, the parent argues that the IHO failed to properly exercise discretion in balancing the equitable considerations by discounting the district's failure to implement the services (*id.* ¶¶ 28-30).

In an answer, the district requests an affirmance of the IHO's determinations that the parent failed to prove that the unilaterally obtained services were appropriate for the student and that the equitable considerations did not favor the parent.

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]).³ "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.).⁴ 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]).

³ 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]).

⁴ 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.

VI. Discussion

A. Preliminary Matters

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 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. The parent alleged that she unilaterally obtained private services from Step Ahead for the student and then commenced due process to obtain remuneration for the services provided by Step Ahead. Accordingly, the issue in this matter is whether the SETSS, speech-language therapy and OT services obtained by the parent constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent or, alternatively, should be directly paid by the district to Step Ahead upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. "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 IEP 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], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; 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."]).

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.⁵ First, the parent confusingly states that they

⁵ 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

disagree with any subsequent programming offered by the district after the January 2022 "IESP" in the due process complaint notice in this case. Next, the parent suggests in their request for review that they are permitted to substitute their own private providers 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 the 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:

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., 554 F.3d at 252).⁶ 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).

Next, although the parent never alleged that she requested dual enrollment services for the student for the 2023-24 school year, the district does not cross-appeal from the IHO's decision that the district "failed to provide the [s]tudent with SETSS for the 2023-24 school year." Nor do the parties appeal or cross-appeal from the IHO's order directing the district to fund a bank of 34 hours of compensatory PT services to be used either in school or at home. Accordingly, those determinations 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 Phillips v. Banks, 656 F. Supp. 3d 469, 483

[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]).

⁶ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the speech-language therapy that the parent obtained from Step Ahead for the student (Educ. Law § 4410[1][j], [7][a]).

[S.D.N.Y. 2023]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

In review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). 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 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; 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., 459 F.3d at 364 ; 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).

1. The Student's Needs

In this matter, the IHO held that the parent failed to provide sufficient evidence that Step Ahead's SETSS, speech-language therapy, and OT services provided to the student were specially designed to meet the student's unique needs and therefore the parent failed to meet her burden of demonstrating the appropriateness of Step Ahead as a unilateral placement (IHO Decision at p. 11). In order to determine whether the IHO properly determined that the parent failed to meet her burden of proof regarding the appropriateness of Step Ahead, a brief discussion of the student's needs, which are not in dispute, is warranted.

The student's April 28, 2023 IESP, which was developed when he was almost five years old and "aging out" of preschool, reflected that on a February 2021 administration of the Stanford-Binet Intelligence Scale-Fifth Edition, the student's verbal and nonverbal IQ and "overall intellectual functioning" was in the borderline impaired range (Dist. Ex. 1 at pp. 1, 2). An administration of the Vineland Adaptive Behavior Scales, Third Edition, to the parent yielded a standard score of 76, placing the student's overall adaptive functioning and all subdomain scores in the moderately low range (id. at p. 2).

With regard to the student's academic and cognitive skills and needs, the April 2023 IESP indicated that the student had strengths in the area of "literacy skills" and enjoyed listening to stories (Dist. Ex. 1 at p. 1). He could match and identify colors, was a kinesthetic learner, and learned best through using manipulatives (id.). The April 2023 IESP noted that the student was unable to make inferences based on information from a visual text, find more than one solution to a problem, follow multi-step directions, and print upper- and lower-case letters (id. at pp. 1-2). The student engaged in symbolic play with toys but did not carry out a three-part sequence during play (id. at p. 2). The April 2023 IESP indicated that the student had "very good math skills" and could do "mental math," add and subtract (id.). He recognized letters and could provide basic facts from a story but struggled with higher order questions, attention and focusing skills, and following directions (id.). Additionally, the student could not see a task to completion due to not understanding the directions or self-directed behavior (id.). The student also struggled with completing morning routines and needed reminders and visuals, and he asked for help with daily living skills such as "dealing with his lunch and his bag" (id.).

As for the student's language needs, the April 2023 IESP indicated that the student exhibited "moderate" delays in receptive and expressive language skills (Dist. Ex. 1 at p. 1). He had difficulty following directions, answering "wh" questions from stories read, and had limited vocabulary (id.). The student could identify some common nouns but struggled with "identifying pictures to words" (id.). He could retell parts of a story using some details from the story but at times struggled to identify key points in a story and needed prompts in order to answer questions (id.). The student had difficulty sequencing pictures in the correct order to tell a story (id.).

The April 2023 IESP also reflected that the student struggled with social skills and although he wanted to play with peers, he did not initiate interaction (Dist. Ex. 1 at p. 2). He had difficulty sharing toys and taking turns when playing a game, did not tolerate changes in routine or transition from one activity to another (*id.* at p. 1). According to the April 2023 IESP, the student enjoyed playing blocks with peers, responding to interactions when initiated by peers, and choosing a peer as a "preferred friend"; he was described as "sweet," had good sense of humor and "got" jokes, was kind and noticed if peers were sad, and was well liked by his peers (*id.* at pp. 2-3).

Turning to the student's physical needs, the April 2023 IESP indicated that the student had "moderate" delays in fine and gross motor skills, visual perceptual/motor skills, activities of daily living skills, sensory processing skills, and attention (Dist. Ex. 1 at p. 3). With regard to the student's fine motor skills, he had not yet established hand dominance, had poor finger and hand strength, and needed cueing to position and maintain proper grasp on writing utensils "about half of the time" (*id.*). The student could cut in a straight line with "non-fluid snips creating jagged edges," improperly held scissors with wrist flexion, was unable to fasten or unfasten "snap buttons" or buckle a belt (*id.* at pp. 3-4). Regarding sensory processing, the student "constantly" sought vestibular and proprioceptive sensory experiences throughout circle time and required maximum redirection to pay attention (*id.* at p. 4). The April 2023 IESP noted that with regard to gross motor skills, he was a very energetic student who enjoyed puzzles and motor activities (*id.*). He walked independently but often on his toes and required verbal cuing to achieve heel strike, and was able to get on and off a tricycle independently and pedal short distances, stand on one leg for 3-5 seconds, and hop in place five times but his ankle appeared "locked in toe down position" (*id.*). The student participated in coordination activities such as throwing, kicking, and catching, but often disregarded other people or objects and needed verbal cues to improve his awareness of safety and his surroundings (*id.*).

2. Privately-Obtained Services from Step Ahead

Turning to the parties' dispute over whether the student's SETSS, speech-language therapy, and OT unilaterally obtained by the parent were specially designed to meet the student's needs, the evidence in the hearing record shows that on December 2023, the special education teacher who provided the student's SETSS prepared a progress report and indicated that the student received services on a daily basis (Parent Exs. E at p. 3; H). The progress report reflected that "as stated in [the student's] IESP," he was fidgety and had difficulty sustain attention and remaining on task (Parent Ex. H at p. 1; *see* Dist. Ex. 1 at pp. 3, 4). To address this need, the progress report indicated that the SETSS provider delivered "several reminders" to the student to "fix his body," and attend to tasks through completion (Parent Ex. H at p. 1). Additionally, the SETSS provider reported "constantly repeating instructions and directions" for the student and providing him with positive feedback and reinforcement (*id.*). Overall interventions the SETSS provider reported using with the student included positive reinforcement, a reward system, reinforcement, modeling, prompts, and redirection (*id.* at p. 3).

In the area of language skills, the progress report indicated that "when storytelling," the student did not answer "wh" questions, and therefore the SETSS provider asked questions, and provided prompting and support to the student to recall information from experiences and gather information from sources to answer questions (Parent Ex. H at pp. 2-3). A goal for the student's "speaking" skills was to "demonstrate command of the conventions of standard English grammar

and usage," including using frequently occurring nouns and verbs, forming regular plural nouns, understanding and using question words and prepositions, and producing and expanding complete sentences (id. at p. 2).

Specifically in reading, the SETSS progress report indicated that the student struggled to identify letter sounds and sight words, and to address this need, the SETSS provider delivered "differentiated instruction" including sensory letter games and picture sight word cards (Parent Ex. H at p. 2). A reading annual goal included in the progress report was to improve the student's phonics, word analysis, and decoding skills, knowledge of sight words, and ability to distinguish between similarly spelled words (id.).

In the area of writing, the progress report indicated that the student needed support to hand in completed work, and to improve this skill, the SETSS provider broke up work into steps and provided reinforcers to the student until the task was complete (Parent Ex. H at p. 2). The student also struggled with letter size, and the SETSS provider gave him "lines to help him write correctly" (id.). Goals to address the student's writing needs included adding details to strengthen written work, and using conventional capitalization, punctuation, and spelling when writing (id. at pp. 2, 3). Another goal to improve the student's writing skills was to "demonstrate command of the conventions of standard English grammar and usage," including using frequently occurring nouns and verbs, forming regular plural nouns, understanding and using question words and prepositions, and producing and expanding complete sentences (id. at p. 2). Additionally, during SETSS sessions, the student worked on holding pencils, crayons, markers, and manipulatives correctly, consistent with needs described in the April 2023 IESP (compare Parent Ex. H at p. 1 with Dist. Ex. 1 at p. 8). The progress report reflected that a goal in this area was for the student to print upper- and lower-case letters (Parent Ex. H at p. 2).

With regard to math, the SETSS progress report indicated that the student struggled with adding numbers using manipulatives, and identified math goals that included categorizing, counting, adding, and subtracting that were generally consistent with the April 2023 IESP (compare Parent Ex. H at pp. 1-2, with Dist. Ex. 1 at p. 10). When the student stated he could not complete a math worksheet, the SETSS provider used verbal prompts, positive reinforcement, and encouragement to support him during work time (Parent Ex. H at p. 1).

In the area of social skills, the SETSS progress report reflected that the student became frustrated when he got "something wrong" or when he was asked to "redo" incorrect work (Parent Ex. H at p. 3). When another student did something the student did not like, at times he yelled or "behaved[d] similarly towards his peers" (id.). However, according to the report, with "help and support" the student completed work without complaining and expressed how he felt and what he wanted from peers (id.).

The hearing record includes what appears to be a fillable document, which the parent submitted into evidence and identified as "session notes"; however, the document, itself, does not bear any title or reflect the origin of the document (Parent Ex. J at pp. 1-16). The session notes reflect the student's name; the SETSS provider's name; the date of session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); areas to describe goals (all left blank); and areas for notes (id.). According to the session notes, in the student's sessions between October 10, 2023 and December 19, 2023, the SETSS provider "worked on"

writing and tracing letters, letter recognition, reading, fine motor skills, name writing, and sight word, math, listening, phonics, and cutting skills (id. at pp. 2-9).⁷ Overall, the hearing record contains sufficient evidence that the SETSS provided to the student addressed the student's unique needs.

In addition to the SETSS services, the December 2023 speech-language therapy progress report identified that speech sessions focused on improving the student's articulation skills and expressive and receptive language skills, areas of need identified in and consistent with the April 2023 IESP (compare Parent Ex. G p. 1, with Dist. Ex. 1 at p. 1). According to the report, the speech-language pathologist worked on the same annual goals as contained in the April 2023 IESP, and used age-appropriate stories, teacher made materials, verbal prompts, and bingo games during sessions (compare Parent Ex. G at p. 1, with Dist. Ex. 1 at pp. 5-6; see Parent Ex. E at p. 1). Session notes from September 13, 2023 through February 29, 2024 reflect that during sessions the student worked on skills such as increasing: vocabulary, the ability to retell stories, speech intelligibility, and the ability to independently follow directions, accurately produce /l/ in words, label opposites, and identify sight words using items such as a matching game, board games, toy manipulatives, worksheets, and picture cards (id.).⁸ There is sufficient information in the hearing record to establish that the speech-language therapy provided to the student addressed the student's specific needs.

With regard to OT services obtained by the parent from Step Ahead, the December 2023 OT progress report stated that the occupational therapist was following recommendations from the student's April 2023 IESP and identified areas of need such as weak core and hand strength resulting in fine motor coordination deficits, sensory processing difficulties, difficulty with focus and attention, especially in noisy environments, and difficulty with cognitive and perceptual tasks (Parent Ex. I at p. 1). The December 2023 OT progress report reflected that the student was working on the annual goals identified in the April 2023 IESP (compare Parent Ex. I at p. 2, with Dist. Ex. 1 at pp. 7-8). New goals for the student included to improve completion of visual and cognitive perceptual tasks such as puzzles and copying activities, improve fine motor coordination for cutting, coloring, and lacing activities, improve attention and focus on tabletop activities, and improve writing skills (Parent Ex. I at p. 3). Session notes between September 11, 2023 and February 25, 2024 reflect that the student worked on displaying proper grasp on a writing utensil for number formation, writing and coloring skills, developing upper body strength and endurance,

⁷ The note spaces for sessions purportedly held from December 21, 2023 through March 2024 were completely blank (see Parent Ex. J at pp. 9-16).

⁸ The IHO observed that it appeared the Step Ahead providers copied and pasted several of the session notes and review of the session notes confirms this observation (IHO Decision at p. 15; Parent Ex. J). For example, the speech-language pathologist's statement "[student] worked on increasing ability to independently follow directions and accurately produce /l/ in words" appears eight times in the session logs (Parent Ex. J at pp. 5-8). The statement "[student] worked on increasing accurate production of /l/, and increasing ability to follow directions and increasing vocabulary skills through board games and toy manipulatives" appears six times in the session notes (id. at pp. 8-10). The statement "[student] completed goals using worksheets and board games" appears seven times in the session notes (id. at pp. 11, 12, 13). The statement "[student] worked on increasing production of /th/ initial in words, ability to identify sight words, ability to follow directives independently and ability to recall stories accurately using picture cards, manipulative toys, and worksheets" appears nine times in the session notes (id. at pp. 13-16).

participating in proprioceptive, cognitive, and vestibular input activities, and improving fine motor coordination (*id.* at pp. 1-15). To address those skills, the occupational therapist used activities and materials such as a peanut ball, scooterboards, obstacle courses, white boards, sensory swing, trampoline, ball pits, marble maze, scissors, arts and crafts, stringing beads, tracing, massage and joint compression, kinetic sand, theraputty, play doh, peg boards, and sensory buckets (*id.*).⁹ Overall, the hearing record contains sufficient information that the OT services provided to the student were appropriate to meet the student's unique needs.

Additionally, while not dispositive, the hearing record provides some evidence of the student's progress during the 2023-24 school year. Review of the December 2023 progress reports indicated that with support the student was better able to grasp information and improve his reading skills, he improved his focus and attention skills, and demonstrated limited progress toward his speech-language goals (Parent Exs. G at p. 1; H at p. 2; I at p. 2). It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The IHO held that the hearing record contains no information as to whether the student was assessed by the provider, but as noted above the student's needs were not in dispute in this proceeding and the parent was not the party with the obligation to evaluate the student (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). As for the IHO's determination that there were no updated progress reports there was no explanation as to how the goals were created, or that the IESP was followed by the parent's providers, these points were not fully borne out in the evidence as described above, and the IHO held the parent to procedural standards that a school district is obligated to follow when carrying out the terms of an IEP or

⁹ Some of the OT provider's notes appear to have been cut-and-pasted too, with typos repeated, including in the following statement: "[s]essions began with therapeutic activity of writing focusing on proper grasp and number formation. Following that, [the student] was provided with upper body strength and endurance utilizing peanut ball and scooterboard exs," which was repeated twice in the session notes, further buttressing the IHO's finding that "[s]everal of the notes appear to be copied and pasted over and over again" (IHO Decision at p. 15; Parent Ex. J at p. 1). Likewise, the statement that begins with "[s]essions began with a multi step obstacle course focused on providing him with proprioceptive and vestibular input and a sense of his body within space" was repeated twice in the session notes (Parent Ex. J at pp. 2, 3).

IESP. However, as noted above, this is a unilateral placement case and the question was whether the private services are appropriate under the Rowley standard, not whether the parents adequately complied with the district's IESP. Despite my concerns with the session notes, having viewed the evidence in the hearing record, under the totality of the circumstances, I find that the parent has met her burden of establishing that the SETSS, speech-language therapy, and OT services provided by Step Ahead, in view of the totality of the circumstances, tips slightly in favor of the conclusion that they were reasonably calculated to enable the student to receive educational benefits in light of his circumstances.

B. Equitable Considerations

Having found that the SETSS, speech-language therapy and OT provided by Step Ahead was appropriate, the inquiry now turns to consider the final criterion for a reimbursement award, which is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v.

Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

1. 10-Day Notice

During the impartial hearing, the district argued that there was no evidence that the parent followed up with the district to provide a ten-day notice that she would seek the costs of private services at district expense (Tr. p. 48). The parent argued that there was no "removal" of the student from a public school because the student was parentally placed in a nonpublic school and that the ten-day notice required does not apply at all (Tr. p. 56). The parent appeals the IHO's alternative finding that equitable considerations did not favor an award of funding for the unilaterally-obtained services because the parent failed to provide 10-day notice of unilateral placement to the district. The parent asserts that she was not required to provide 10-day notice and the district asserts that a hearing officer retains the fundamental discretion to reduce or bar reimbursement if the parent failed to provide the requisite notice.

Consistent with the IHO's finding, the evidence in the hearing record reflects that the parent did not submit a 10-day notice to the district. In addition, the evidence indicates that although the private agency began delivering OT services to the student on September 11, 2023, speech-language therapy services to the student on September 13, 2023, and SETSS to the student on October 10, 2023, the parent failed to notify the district that she was seeking the costs of privately obtained services that she selected until she filed her due process complaint notice on January 26, 2024. With regard the parent's argument that no 10-day notice is required at all because the student is parentally placed and there is no removal from the public school, the district has the better argument. The parent is not enrolled only in a private school when seeking services under Education Law § 3602-c. When parents of resident students seek such services, they are dually enrolling the student in the public school in order to receive free special education instruction that will complement and support the general education instruction provided by the nonpublic school that is being obtained at parental expense. The parent appears to be operating under the principal that Education Law § 3602-c allows a parent to substitute their own privately selected providers so long as the parent doesn't disagree with the student's IESP, and if the district fails to deliver the services, a private school voucher program is put in its place. But the Legislature did not create a private voucher program for parents of students with disabilities. Thus if the parent is implementing a self-help remedy, that is unilaterally obtaining private services without the consent of school district officials and wants those services retroactively paid at public expense, the parent should provide notice of their intention to seek public funding of the privately selected services 10 days before the private services commence.

The IDEA provides that an award of reimbursement may not be reduced or denied if the parent did not receive a procedural safeguards notice but does not include similar reference to a prior written notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504). Ultimately, however, there was no argument or allegation during the impartial hearing regarding the lack of a procedural safeguards notice or prior written notice.¹⁰

¹⁰ The parent's attorney argued that the parent did not receive a procedural safeguards notice (Tr. pp. 55-56), but I decline to hold that the parent was unaware of the requirement, especially when she did not participate in the impartial hearing at all.

I find that based on the parent's failure to provide the district with a 10-day notice, and the parent's delay in service of the due process complaint notice upon the district until January 26, 2024, the balancing of the equities supports limiting the parent's award for SETSS and related services provided to the student by Step Ahead to after parent's filing of the due process complaint notice on January 26, 2024.

2. Excessive Costs

I turn next to the parties' dispute over whether the parent was unreasonable in selecting the services at \$200 per hour for SETSS and \$250 per hour for speech-language therapy and OT due to excessiveness or if funding of the services from Step Ahead should be limited to \$125.00 per hour and \$140 per hour, respectively, as argued by the district (see Tr. p. 53). During the impartial hearing, the district argued the hourly rate must be reduced to a more reasonable rate of \$125.00 per hour, based on a rate study conducted by the "American Institutes of Research" (AIR study report) and data from the U.S. Bureau of Labor Statistics that was offered into evidence (Tr. pp. 50-51; Dist. Exs. 2; 3). The parent argued that the hourly rates awarded in some prior cases approach the amounts that Step Ahead charges and the rates in this case were reasonable and seeks those rates as relief on appeal (Tr. pp. 59-60). Because the IHO ruled that the lack of a 10-day notice would preclude an award of funding for the services from Step Ahead altogether, the IHO did not make further alternative findings on the parties' arguments related to the excessiveness of costs.

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see 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]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the

[unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires").

Generally, an excessive cost argument for hourly services focuses on whether the hourly rate charged for service was reasonable and requires, at a minimum, evidence of not only of the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services.

With regard to the hourly rate paid to the unilaterally-obtained SETSS provider, the evidence shows that the Step Ahead office manager (office manager) provided an affidavit in lieu of direct testimony regarding the hourly rates paid to the three individuals providing services to the student (Parent Ex. D), however, on cross examination, the witness conceded that she did not know what the providers were paid or how the \$90.00 reflected in her affidavit was calculated (compare Tr. pp. 39-41, with Parent Ex. D).¹¹ She also conceded that she had no familiarity with the individuals providing services to the student and that they were essentially just names on a page (Tr. pp. 39-40). She indicated that the individuals were employees, but did not know if income taxes were withheld from their wages (id. at p. 41). She was not able to identify the location of services provided that was listed as "business" (id. at p. 42). The office manager testified that when she created her affidavit, in order to document the hourly rate paid to the SETSS, speech-language and OT providers, she took the information from her computer (Tr. pp. 35-38). The office manager testified "I know SETSS get \$200 an hour and related services 250 an hour. That's... my knowledge of the agency, but I don't know anything beyond that. What they're getting paid or... where the monies are going, I don't... deal with that" (Tr. p. 38). When asked what was the range of pay for SETSS providers at Step Ahead, the office manager replied "I don't know" (Tr. p. 39). The office manager stated that she did not participate in any capacity with the academic services the speech-language therapy or the OT provided for the student (Tr. p. 43). The office manager had no independent knowledge of the frequency or the duration of the services that were being provided to the student and whether they corresponded with the recommended services contained in the April 2023 IESP (Tr. pp. 33-34). The office manager stated that she would have to refer to the session notes in order to know what services were being provided to the student by Step Ahead (id.).

Based on this testimony, as well evidence that the SETSS provider held an internship certificate, the district argued that the contracted rate of \$200.00 per hour was unreasonable (Tr. pp. 48-50). More specifically, the district asserted that the evidence provided no basis upon which to derive how Step Ahead arrived at their hourly rate of \$90 for SETSS, why Step Ahead needs more than the amount they are paying to their providers, what Step Ahead's net profit would be after expenses were covered, and that, due to the status of the SETSS provider's internship certificate, the district argued that it was unreasonable to award the enhanced rate of \$200.00 per hour to "an individual with limited qualifications and credentialing" (see Tr. pp. 48-49; Parent Ex. E at p.

¹¹ In her affidavit, the IHO testified that the speech-language provider was paid a rate of \$120 per hour and the OT provider was paid a rate of \$150 per hour (Parent Ex. D).

With regard to the AIR study report offered into evidence by the district, the report is dated October 2023 and entitled "Hourly Rates for Independently Contracted Special Education Teachers and Related Services Providers" (Dist. Ex. 2 at p. 1). The district commissioned the report from AIR to "[d]evelop an approach to using data from the [United States Bureau of Labor Statistics (USBLS)] to calculate hourly rates for independently contracted providers" and to "[c]alculate hourly rates for special education teachers in the region that [the district] c[ould] use to determine a fair market rate for its [SETSS] special education teachers" (*id.* at p. 4). The report describes a five step methodology starting with USBLS' Occupational Employment and Wage Statistics (OEWS) data for occupations that resemble the positions in the district (steps one and two), using the district's collective bargaining agreements to convert the salaries into hourly rates (step 3) and then using adjustments from the district's financial reports factor in fringe benefits and indirect costs (step 4) and, last, using the consumer price index to address inflation over time (step 5) (*id.* at pp. 4-6).

The AIR study report offers a secondary adaptation to this methodology for hourly rate adjustments for the district to take into account different combinations of educational attainment ("measured as a combination of degree, earned college credits, and/or other professional development accomplished, such as obtaining a certificate from the National Board for Professional Teaching Standards") and/or experience (number of years teaching within the district) (Dist. Ex. 2 at pp. 6-7, 9-10, 19-24). This adaptation in the methodology was clearly designed to address the fact that the collective bargaining agreement between the district and the United Federation of Teachers that represents the school district's employee teachers contains salary schedules for special education teachers that function similarly in that district employees such as SETSS teachers who have greater educational attainment such as a master's degree versus a bachelor's degree, additional credits that relate to four differentials depending on the types of credits and other criteria (first, intermediate promotional, and second), and certifications and/or experience are entitled to higher salaries under the labor agreement's salary schedules (*id.* at pp. 6-8).¹² However, the AIR report does not specifically factor State certifications in describing hourly rate adjustments, likely because it would be violative of State law to employ a teacher in a public school in contravention of the State's certification requirements, thus dispensing with any need to collectively bargain that factor (*see generally id.*).

The district further argued at the impartial hearing that, based on the wage statistics set forth in the AIR report, the SETSS hourly rate broke down to approximately \$81.33 per hour (Tr. p. 50; *see* Dist. Ex. 2). Regarding the hourly wage rate for speech-language therapy, the district offered 2022 data from the USBLS asserting that the hourly rate would be approximately \$77.69 per hour instead of the \$250.00 per hour being charged by Step Ahead based upon a 36-week school year (Tr. pp. 51-52; *see* Dist. Ex. 3 at p. 3). Using the wage statics from the USBLS, the district calculated the hourly rate for OT to be \$73.12 per hour versus the \$250.00 per hour being charged by Step Ahead for OT based upon a 36-week school year (Tr. pp. 52-53; *see* Dist. Ex. 3 at p. 3). However, the district did not take the position that \$81.33 per hour, \$77.69 per hour or \$73.12 per hour were reasonable hourly rates for SETSS, speech-language and OT, respectively, but rather, used the calculations to demonstrate that they were drastically different than the \$200.00

¹² The 2022-2027 salary schedules for district teachers from the district-UFT agreement are cited in the report.

per hour and \$250.00 per hour requested by the parent in this case or, in other words, that "the math was not mathing" (Tr. p. 53).

With respect to fashioning appropriate equitable relief and its relevancy, I find that the AIR report, the New York wage excerpt and the district's arguments offer some basis to conclude that the rates charged by Step Ahead are excessive, but not all of the AIR report and its methodologies are strictly applicable to a parent's decision to unilaterally obtain private special education services from a private company like Step Ahead. First the AIR report draws data published by the United States Bureau of Labor Statistics, a U.S. government agency, and it is well settled that judicial notice may be taken of such tabulations of data published by government agencies (Canadian St. Regis Band of Mohawk Indians v. New York, 2013 WL 3992830 (N.D.N.Y. Jul. 23, 2013); Mathews v. ADM Milling Co., 2019 WL 2428732, at *4 [W.D.N.Y. June 11, 2019]; Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio, 364 F.Supp.3d 253 [2019]). I find that the wage information contained in the data from the USBLS is relevant to the question of how much special education teachers, speech-language teachers and occupational therapists are paid in the New York City metropolitan region in a given year in which the data is published.¹³ It was not inappropriate for the AIR to use such government-published data in its report, nor was it in error for the district to include the New York wage excerpt as an exhibit. The data set in the New York, New Jersey and Pennsylvania region can be further limited and refined to the New York City, Newark, and Jersey City metropolitan region. It is reasonable to find that most teachers (public and private) working with special education students in New York City fall within this subset of data that is the greater metropolitan region specified in USBLS data ("May 2023 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates New York-Newark-Jersey City, NY-NJ-PA," available at https://www.bls.gov/oes/current/oes_35620.htm).¹⁴ Furthermore, the geographic data in this metropolitan subset does not have to be perfect in order to be sufficiently reliable for use when weighing equitable considerations.

The AIR report appears to address a question of what kind of approach "NYC DOE can use to determine a fair market rate for its Special Education Teacher Support Services (SETSS)" (Dist. Ex. 2 at p. 4). If the district were to offer hourly rates that were formulated on a negotiated basis (i.e. to employees paid on an hourly basis), it would understandably try to do so in a similar manner to the way it used its bargaining power in negotiations with both the United Federation of

¹³ The Occupational Employment and Wage Statistics data is published by the USBLS starting in May of each calendar year, and the AIR report in evidence used May 2022 data, which shortly preceded the 2022-23 school year at issue in this proceeding and would be relevant thereto (see <https://www.bls.gov/oes/tables.htm>); however, I note that May 2023 data is the most recent annual data published by the USBLS as of the date of this decision. While the AIR report presented a snapshot in time, I do not share any concern that the data itself is "fixed in perpetuity" because it is updated annually, which is particularly relevant when considering due process claims under IDEA and Article 89 are almost always related to a specific annual time period.

¹⁴ The New York wage excerpt shows a mean wage of \$117,120 from the USBLS' May 2022 data for the same occupation in the same New York metropolitan region, but because this case relates to the 2023-24 school year, the undersigned has taken judicial notice of the USBLS' data from May 2023, which is closer in time to the events of this case (Dist. Ex. 3 at p. 2). I also note that when using a similar analysis in Application of a Student with a Disability, Appeal No. 24-132, the undersigned also used May 2023 wage figures, but inadvertently referred to them as USBLS' May 2022 figures, and there is a slight difference between the two years.

Teachers and other entities for fringe benefits and incidental costs that result in the pay scales for public school employees.

However, a parent facing the failure of the district to deliver his or her child's IESP services and who is left searching for a unilaterally selected self-help remedy would be unable to hire teachers already employed by the district (unless a teacher is "moonlighting" and thus dually employed), and the parent facing that situation would therefore not be able to negotiate for private teaching services with the same bargaining power that the district holds. Thus, while the AIR report's reliance on the salary schedules negotiated with the United Federation of Teachers that include provisions for steps, longevity, and criteria for additional experience and education, these provisions serve a different purpose—they are designed to ensure fair treatment among union members who are operating in public employment. But the fair treatment among district employees is of little or no interest to a parent who is trying to contract for services with private schools or companies after the district has failed in its obligations to deliver the services using its employees, and thus the district negotiated provisions are not particularly relevant to equitable considerations in a due process proceeding involving the funding of unilaterally obtained services.

Fortunately, the USBLS data does not indicate that it is limited to district-employed teachers. It covers wages in the entire metropolitan region, which would include teachers from across the spectrum including private schools, charter schools, and district special teachers. The USBLS indicated that in May 2023 data annual salaries for "Special Education Teachers, All Other" ranged from \$49,000 in the 10th percentile, \$63,740 in the 25th percentile, \$97,910 in the median, \$146,200 in the 75th percentile, to \$163,670 in the 90th percentile. Regarding the May 2023 data for "Speech-Language Pathologists" for the New York-Newark-Jersey City metropolitan area, the USBLS indicated that annual salaries ranged from \$46,480 in the 10th percentile, \$70,940 in the 25th percentile, \$132,520 in the 75th percentile, to \$159,400 in the 90th percentile (https://www.bls.gov/oes/current/oes_35620.htm). The USBLS indicated that the May 2023 data annual salaries for "Occupational Therapists" for the New York-Newark-Jersey City metropolitan area ranged from \$70,900 in the 10th percentile, \$87,590 in the 25th percentile, \$138,150 in the 75th percentile, to \$158,080 in the 90th percentile (*id.*).¹⁵ In my view this is consistent with the fact that some local and private employers within the metropolitan region pay less than those in the district, and it leaves room for the fact that a few employers may have paid more. As for fringe benefits and incidental costs, private employers who offer benefits and have overhead costs are not necessarily the same as those costs cited in the AIR report, which is premised upon the district's costs, not the parent's costs. Reliance on such costs may be permissible when the district is managing its own operations and negotiating with a labor organization, but it is not relevant to the private situation in a Burlington/Carter unilateral private placement. Again, the USBLS provides data for indirect and fringe benefit costs for civilian, government employees and private industry expressed as a percentage of salary and for private industry such educational services costs were 27.7 percent, which tends to show that government benefits are often slightly better (and more expensive) than those offered in private industry (see Employer Costs For

¹⁵ The 2023 data for the metropolitan area is available in a downloadable Excel format, or the most recent statics offered can be searched using the USBLS Query System for "Multiple occupations for one geographical area" (see <https://data.bls.gov/oes/#/home>).

Employee Compensation (ECEC) – June 2023, available at https://www.bls.gov/news.release/archives/ecec_09122023.pdf.¹⁶

The undersigned had little difficulty with the explanation in the AIR report that children must be educated for 180 days per year in this state and that school days are typically between six and seven hours long.¹⁷ When using the USBLS data, a calculation leads to the conclusion that the \$200.00 per hour rate for SETSS and \$250 per hour for speech-language and OT falls above the 90th percentile of salary for the metropolitan region in which the district is located, using indirect and fringe benefit costs of 27.7 percent. I will take this into account when ordering equitable relief.

The \$90.00 per hour costs for the teacher's hourly wage was within the USBLS data in between the median and 75th percentile. The \$120 per hour figure for the speech language therapists hourly wage was slightly less than the 75th percentile. The \$150 hourly wage for OT services exceeded the 90th percentile in the USBLS data. When considering the testimony described above, in which Step Ahead's own office manager was unable to provide any explanation at all as to why indirect employer costs above the staff's hourly wages were approximately 55 percent for the teacher, 52 percent for the speech-language therapist, and 40 percent for the occupational therapist, all of which were far in excess of the 27.7 percent in the USBLS data, and the evidence leads me to the conclusion that the parent arranged for services from Step Ahead at excessive costs as the district argues and that it is more than what the district should be required to pay. The \$90 per hour when adding indirect costs supported by USBLS data would yield a result of approximately \$115 per hour in costs. Because the district does not assert that SETSS rates should be less than \$125 per hour based on its own study, I will as a matter of equitable considerations require the district to pay the \$125.00 rate for SETSS. As for the speech language therapy and OT services, I find that the data supports \$150 per hour, which is reasonably what the district should be required to pay as it takes into account wages significantly above the mean at approximately the 75th percentile in the student's geographic region plus indirect costs of approximately 27 percent.

Based on the foregoing, the evidence in the hearing record supports a finding that the parent is entitled to district funding for the costs of SETSS for up to five periods per week, at a rate of 125.00 per hour, for the period of January 26, 2024 through the end of the 2023-24 school year. Likewise, the evidence in the hearing record supports a finding that the parent is entitled to district funding for the costs of speech-language therapy for up to two 30-minute sessions per week and OT for up to two 30-minute sessions per week at a rate of \$150 per hour, for the period of January 26, 2024 through the end of the 2023-24 school year.

¹⁶ The ECEC covers the civilian economy, which includes data from both private industry and state and local government. One could make an argument that a company like a Step Ahead should fall in one of the different rows of private employers, but it would result in only nominal differences in calculation, and the parent did not avail herself of the opportunity to develop the record further regarding the indirect costs beyond that of the teacher's hourly wage.

¹⁷ Using 6.5 hours results in approximately 1170 hours of instruction time for students during a school day, and similar to teachers, related services are typically provided to students on a similar schedule during the school day.

VII. Conclusion

The evidence in the hearing record, when examined under the totality of the circumstances, does not support the IHO's conclusion that there was inadequate evidence to show that services delivered by Step Ahead to the student during the 2023-24 school year were appropriate for the student. However, the IHO's alternative factual findings as to equitable considerations were largely correct, however I find that equitable considerations weigh partially in favor of the parent's requested relief.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 6, 2024, is modified by reversing those portions which found that the SETSS, speech-language therapy and OT delivered by Step Ahead were not appropriate to meet the student's needs; and

IT IS FURTHER ORDERED that the IHO's decision, dated May 6, 2024 is modified by reversing the alternative finding that equitable considerations precluded all of the parent's requested relief; and

IT IS FURTHER ORDERED that the district shall directly fund the costs of the student's SETSS delivered by Step Ahead at a rate not to exceed \$125 per hour and, further, shall directly fund the costs of the student's speech-language and OT services, delivered by Step Ahead at a rate not to exceed \$150 per hour, upon presentation of proof of attendance and services delivered for the period of January 26, 2024 through the end of the 2023-24 school year.

Dated: Albany, New York
August 6, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER