The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-251

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 Thomas W. MacLeod, 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 daughter's unilaterally-obtained services delivered by Always a Step Ahead, Inc. (Step Ahead) at a specified rate for the 2023-24 school year. The district cross-appeals that equitable considerations do not favor the parent. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see

20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the CPSE convened on January 19, 2022, and found the student eligible for special education services as a

preschool student with a disability (see generally Parent Ex. B).[1] The January 2022 CPSE recommended that the student receive four hours per week of group special education itinerant teacher (SEIT) services and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 12-13).[2]

On April 8, 2024, the parent signed a letter acknowledging that the student was receiving related services from a private agency, Step Ahead, at a specified rate "and that if the [district] d[id] not pay for the services, [she] w[ould] be liable to pay them" (Parent Ex. C at pp. 1-2).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated February 13, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) and failed to provide appropriate equitable services to the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent contended that she agreed with the January 2022 individualized education services program (IESP) developed for the student (id.).[4] In particular, the parent asserted that she was unable to find providers willing to accept the district's "standard" rates but found providers willing to provide the student with related services for the 2023-24 school year at rates higher than the

[1] The copy of the January 2022 IEP in evidence noted that the CPSE reconvened on August 8, 2022 but there is no stated reason for the purpose of the August 2022 reconvene meeting (Parent Ex. B at p. 1).

[2] Parties often use the acronym "SEIT" to refer to "special education itinerant services" which under State law means "an approved program provided by a certified special education teacher on an itinerant basis in accordance with the regulations of the commissioner, at a site determined by the board, including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in paragraph a of subdivision eight of this section. If the board determines that documented medical or special needs of the preschool child indicate that the child should not be transported to another site, the child shall be entitled to receive special education itinerant services in the preschool child's home" (Educ Law § 4410[1][k]; see 8 NYCRR 200.16[i][3][ii]).

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

[4] The parent's due process complaint notice incorrectly reflects that the January 2022 CPSE developed an IESP for the student, rather than an IEP (see Parent Ex. A at p. 1). However, given the student's age, the student would have continued to have been considered as a preschool student during the 2023-24 school year (id.; see also Parent Ex B). It therefore follows that the 2024-25 school year would be the first school year in which the student would be eligible for school-age equitable services through an IESP pursuant to the State's dual-enrollment statute. State guidance explains that section 3602-c:

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

("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 13, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf).

standard district rates (id.).[5] The district filed a response to the due process complaint notice (see Due Process Response).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency and an order awarding the student two 30-minute sessions per week of speech-language therapy at an "enhanced rate" for the 2023-24 school year (Parent Ex. A at p. 2). The parent also requested an "[a]llowance of funding for payment to the student's providers/agencies" for the provision of the two weekly sessions of speech-language therapy at the enhanced rate for the 2023-24 school year (id.).

On March 21, 2024, the district countersigned a Pendency Implementation Form, which indicated that the January 2022 IEP formed the basis for the student's pendency services consisting of two 30-minute sessions per week of individual speech-language therapy (see Pendency Imp. Form).

B. Impartial Hearing Decision

After a prehearing conference on March 21, 2024 (Tr. pp. 1-22), an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on April 18, 2024 (Tr. pp. 23-53).[6]

In a decision dated May 7, 2024, the IHO found that the district failed to implement the student's January 2022 IEP thereby denying the student a FAPE for the 2023-24 school year (IHO Decision at p. 6). Next, the IHO found that the parent had failed to meet her burden because there was insufficient evidence to demonstrate how the privately-obtained speech-language therapy services were specially designed to meet the student's needs (id. at pp. 6-7). More specifically, the IHO found that the testimony from the secretary from Step Ahead, who was the parent's only witness, "only served to authenticate business records of [the] agency" (id. at p. 6). The IHO noted in her decision that the parent failed to submit "any documentary or testimonial evidence to establish that [the speech-language therapy provider] [wa]s working on any specific goals for [the] [s]tudent, what areas of need [we]re being addressed or how the services provided by provider address[ed] the goals listed in the January 19, 2022 IEP" (id. at p. 7). In addition, the IHO noted that the parent's representative argued against being required to have a witness testify (id.).[7] Next, with regard to equitable considerations, the IHO determined that although the parent did not meet her burden of demonstrating the services she unilaterally obtained for the student were appropriate, the hearing record indicated the parent was cooperative and did not interfere with the IEP process (id.). However, the IHO called into question the validity of the contract between the parent and

[5] Based on the limited evidence, it appears that the student was parentally placed at a religious, nonpublic school for the 2023-24 school year (see Parent Ex. A at p. 1).

[6] The IHO stated in her decision that she provided the parties a prehearing conference summary and order; however, the order was not submitted as part of the hearing record (see IHO Decision at p. 7).

[7] The parent's representative stated that she was unsure if an affidavit of the parent would be submitted and did not see a need for the parent to attend the hearing "at all," but if the district wanted to cross-examine the parent, he would need to subpoena her (Tr. p. 11).

Step Ahead and noted that if funding was awarded it would be from when the parent signed the agreement on April 8, 2024, through the end of the 2023-24 school year (id.).

Consequently, the IHO denied the parent's request for relief (IHO Decision at p. 8). Furthermore, the IHO ordered the district, "within twenty days of this order," to implement the speech-language therapy services set forth in the January 2022 IEP for the remainder of the 2023-24 school year, and for the CSE to "reconvene and consider all available evaluative material to develop an appropriate [IESP] in advance o[f] the 2024-[]25 school year within thirty days of the date of this Order" (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her requested relief. The parent argues that a Burlington/Carter analysis should not apply to the present matter and that, therefore, the burden of production and persuasion should remain entirely with the district. However, the parent argues that, even under the Burlington/Carter standard, her requested relief should be granted. The parent asserts that she utilized the services of Step Ahead, which used an appropriately credentialed/licensed provider for the speech-language therapy for which funding was requested, and that the private provider followed the detailed discussions, goals, and frequency of services the district itself created and recommended in the IEP. Regarding equitable considerations, the parent argues that her agreement with Step Ahead was not indicative of fraud or collusion and that the contract established the parent's legal obligation to pay for the speech-language therapy services. The parent asserts that the hearing record supports an award for direct funding of the speech-language services provided to the student during the 2023-24 school year by Step Ahead. The parent requests that the IHO's decision be reversed and a finding directing the district to fund the student's speech-language therapy services at the contract rate.

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly determined that the parent did not meet her burden to prove the appropriateness of speech-language therapy from Step Ahead for the 2023-24 school year. As a cross-appeal, the district asserts that equitable considerations do not favor an award of any relief to the parent because the parent failed to provide ten-day written notice of her intention to seek unilateral services for the student, failed to establish a financial obligation for the cost of the speech-language services, and the requested rate was unreasonable. The district also cross-appeals from the IHO's directive for the district to implement the speech-language therapy services set forth in the January 2022 IEP and to convene a CSE meeting for the 2024-25 school year.[8]

[8] Here, the parent did not seek prospective relief to remedy a past harm (i.e., compensatory education), and the district's argument that the IHO's directive to implement the speech-language therapy services is not analogous to a compensatory award. The IHO enjoys broad discretion when fashioning equitable relief (see L.S. v. Fairfield Bd. of Educ., 2017 WL 2918916, at *13 (D. Conn. July 7, 2017), and it was not error for the IHO to direct the district to implement the services recommended in the January 2022 IEP or to convene a CSE meeting for the 2024-25 school year. If the parent is interested in the student receiving the services from the district in the manner specified by law, the parent may seek enforcement of the IHO's order in a court of competent jurisdiction.

V. Applicable Standards

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

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

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[9]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

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

VI. Discussion

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 district developed a preschool IEP for the student (see Parent Ex. B). Nevertheless, the district failed to provide the student with the recommended speech-language therapy services at the student's preschool program.[10] In the February 13, 2024 due process complaint notice, the parent alleged that the district failed to implement the student's January 2022 "IESP" during the 2023-24 school year,[11] and that the parent was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 1). As a result, the parent unilaterally-obtained speech-language therapy services from Step Ahead for the student during the 2023-24 school year without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (id. at pp. 1-2). Accordingly, the issue that was presented to the IHO was whether the parent is entitled to public funding of the costs of the unilaterally-obtained speech-language therapy services from Step Ahead during the 2023-24 school year. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).[12]

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.[13] First, the parent confusingly states that they

[10] In her request for review, the parent stated that the district contracted with a SEIT provider for the student and therefore, SEIT services were not an issue in this matter and will not be further discussed here (Req. for Rev. ¶ 2).

[11] The January 2022 IEP expired on January 19, 2023 and there is no evidence in the hearing record about what, if anything, the CSE did after January 2023 regarding the student's transition to school-age programming.

[12] 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]).

[13] 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

disagree with any subsequent programing 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 anytime any time the school district fails to implement some or all of an IEP, and that they do not have to show that the services were appropriate for the student. But IDEA does not permit parents who have opted to parentally place their child in a nonpublic school to substitute their own providers for special education services and states that:

> 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).[14] 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 at192). "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

---

a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 F. App'x 63 [2d Cir. 2014] [minor possible discrepancy between the 6:1:1 staffing ratio called for in the student's IEP and the possible 12:1:2 staffing ratio during gym class three times per week is not material when the student would have been accompanied to gym by his own paraprofessional]).

[14] 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]).

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 failure to implement the January 2022 IEP, which had expired, resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at p. 6). Accordingly, this determination has become final and binding upon the parties (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 speech-language therapy services delivered to the student by Step Ahead during the 2023-24 school year.

B. Unilaterally Obtained Speech-Language Therapy

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

Although the student's speech and language needs are not in dispute, a description thereof provides some context to determine whether the parent's unilaterally-obtained speech-language therapy services were appropriate to address those needs.

According to the student's January 2022 IEP, the student was evaluated using the Wechsler Preschool and Primary Scales of Intelligence-Fourth Edition (WPPSI-IV), the Vineland Adaptive Behavior Scales (Vineland),[15] the Preschool Language Scales-Fifth Edition (PLS-5), the BDI,[16] the Peabody Developmental Motor Scales-Second Edition (PDMS-2), and the Sensory Profile (Parent Ex. B at pp. 3-4).

The IEP indicated that on the WPPSI-IV, the student's scores fell in the average range on measures of verbal comprehension and working memory, and in the borderline range on measures of visual spatial skills, which yielded a full-scale IQ in the low average range (standard score 86) (Parent Ex. B at p. 3). On the Vineland, the student's scores fell in the moderately low range in all areas rated by the parent, including communication, daily living, socialization, and motor skills, resulting in a composite score which fell in the moderately low range (standard score 80) (id.). On the BDI, the student's scores fell in the below average range on measures of cognition and social skills, low average range in communication, and average range in motor and adaptive skills (id.). On the PLS-5, the student's scores fell at the 10th percentile in auditory comprehension and the 12th percentile in expressive communication, resulting in a total language score which fell at the 9th percentile (id.). On the PDMS II, the student's grasping ability fell at the 9th percentile and his visual motor integration skills fell at the 25th percentile, with a fine motor quotient falling at

[15] The IEP does not indicate which edition of the Vineland Adaptive Behavior Scales was used to assess the student.

[16] Although only the initials BDI were identified on the student's IEP, it is assumed that the evaluation identified was the Battelle Developmental Inventory.

the 12th percentile (id. at p. 4). Based on the Sensory Profile, the student's sensory processing was determined to be within the range of "typical performance" (id.).

The present levels of performance in the January 2022 IEP indicated that the student performed average on a test of general knowledge but performed below average in his ability to name pictured objects, as he was unable to identify items such as a star and scissors (Parent Ex. B at p. 4). Although the student could occupy himself for 5-10 minutes, he had difficulty attending to circle time and was unable to sustain attention to a task "for long" (id.). According to the IEP, the student was able to identify body parts and clothing items, understand some pronouns, follow one-step directions with cues, identify pictures of actions, identify pictures of objects by function, and understand quantity concepts of one/all (id.). The student was unable to locate hidden items in a picture scene, understand simple inferences given visual cues, follow directions involving simple spatial concepts, understand the concepts of "more" and "most," or sequence familiar events in logical order (id. at p. 5).

In the area of social skills, the IEP indicated that the student had difficulty communicating and socializing with peers due to his delayed speech and language skills (Parent Ex. B at p. 6). With respect to interpersonal skills, the IEP stated that the student recognized family members, smiled in response to a friendly voice, and was affectionate toward people he knew (id. at p. 5). In terms of leisure and play skills, the IEP noted that the student would rather play with children than play alone and used things around the house to play make-believe (id.). In terms of coping skills, the IEP stated that the student asked for help when needed and adjusted to changes in his routine (id.). The student also, greeted his father spontaneously, enjoyed interacting with adults and initiated social interaction with familiar adults, and sometimes separated easily from his parents (id.). The student's parent expressed concern about his poor focus, delayed language skills, difficulty with articulation causing unintelligible speech, and difficulty communicating with others (id. at pp. 5-6). The parent was concerned that the student did not express himself effectively or interact much with his peers (id.). The student was unable to play with peers for 30 minutes without supervision (id. at p. 5).

Turning to the student's physical development, the January 2022 IEP indicated that the student presented with moderate to significant deficits in fine motor and visual perceptual skills (Parent Ex. B at p. 6).

The student's January 2022 IEP identified strategies and resources to address the student's management needs such as the use of visual, verbal, and gestural cues; modeling; positive reinforcement; repetition; multisensory instruction; and "[o]pportunities for reciprocal play to facilitate purposeful interactions with peers" (Parent Ex. B at p. 8).

2. Unilateral Services from Step Ahead

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

With regard to services from Step Ahead, the IHO found that the testimony from the agency secretary had no involvement with the student and further did not offer any evidence that the services from Step Ahead were specially designed to meet the student's needs (Tr. pp. 34-39; IHO Decision at p. 6).

However, I find that the IHO erred in stating that the speech-language pathologist did not describe how the services provided addressed the annual goals in the January 2022 IEP (IHO Decision at p. 7). A unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP. Rather, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]).

Here, the hearing record includes a fillable document that reflects the speech-language pathologist's name, dates of sessions, times in and times out, and locations, with areas to describe goals and notes (see Parent Ex. F). In addition, the hearing record includes a document reflecting the State licensure and registration of the provider to practice as a speech-language pathologist (Parent Ex. E). Review of the sessions notes shows that the speech-language pathologist provided the student with 30-minute therapy sessions at the student's school from October 31, 2023 through April 2, 2024 (see Parent Ex. F). None of the entries stated the annual goals targeted during a particular session (Parent Ex. F at pp. 1-4).

According to the speech-language pathologist's notes, she worked on some of the student's identified needs including following directions, comprehension, sequencing, basic concepts, rhyming, phonemic awareness, matching, articulation, auditory discrimination, memory, inferencing, labeling emotions, answering wh- questions, and problem solving (see Parent Ex. F). However, most of the entries do not describe the actual activities the student engaged in, or the needs addressed, but rather simply state "articulation /r/," "who, where, what, question task," or "rhyming pairs task" (see Parent Ex. F). In addition, there are no activities which directly addressed the student's most significant identified needs of using language for social situations (compare Parent Ex. B at pp. 3-8, with Parent Ex. F). Further, there were no activities identified which addressed the student's needs related to reciprocal play or interactions with peers (see Parent Ex. F).

The January 2022 IEP identified the student's articulation deficits as a primary hinderance to his social development (Parent Ex. B at pp. 5-6, 8). The January 2022 IEP identified the student's "misarticulated phonemes" in the goals section of his IEP which included his need to work on specific sounds such as "j(y)," "dzg," and "th" (id. at pp. 10-11). However, the only specific phoneme which the speech-language therapist addressed was the "r" sound, which was not identified as a need on the student's IEP (see Parent Ex. F).

While it is not required that the private provider implement the student's IEP, the parent must still come forward with evidence that describes the unilateral services and the delivery thereof. In this case, the hearing record does not explain how any services that may have been

provided by Step Ahead addressed the student's identified needs in articulation and using language for social situations. Accordingly, I find that the hearing record lacks sufficient evidence to show that the speech-language therapy services delivered by Step Ahead to the student constituted specially designed instruction sufficient to meet the student's identified needs (see IHO Decision at p. 7). Neither the speech-language pathologist nor the parent testified at the impartial hearing to describe the services or how, if at all, the speech-language pathologist addressed the student's unique needs. Although the session notes provide a general list of activities, they do not adequately describe the specially designed instruction used during therapy to address the student's identified needs. Without such evidence, I find that the parent did not sustain her burden to demonstrate how the unilaterally-obtained speech-language therapy services provided specially designed instruction to meet the student's unique needs (see L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]).

Based upon the foregoing, I find that the IHO correctly determined that the hearing record did not include sufficient evidence to find that the speech-language therapy procured for the student was appropriate and therefore, correctly denied the parent's request for direct funding of her unilaterally-obtained speech-language therapy for the 2023-24 school year.

VII. Conclusion

Having determined that the hearing record supports the IHO's determination that the parent failed to demonstrate the appropriateness of the services unilaterally obtained from Step Ahead during the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parent's request for relief.[17]

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

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

JUSTYN P. BATES
STATE REVIEW OFFICER

[17] The district's request to reverse the IHO's order for it to implement the IEP and for the CSE to reconvene and develop an IEP or an IESP is without merit. The district does not dispute that the student is entitled to special education services in this case. The failure of the parent to request dual enrollment services does not, by itself, eliminate the district's obligation to evaluate the student and develop appropriate public school programming. The district may not simply treat the student as if he had been declassified when he has not. Mere inaction by the parent does not establish that the parent made clear her intention to keep the student enrolled in the nonpublic despite needing special education services and would thus not be required to make a FAPE available in the public school ("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 12, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf).