The University of the State of New York

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

No. 24-252

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Lindsay VanFleet, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's unilaterally obtained services delivered by Always a Step Ahead, Inc. (Step Ahead) at a specified rate for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's order that the district locate a provider for the student's occupational therapy (OT) services and if it does not, the parent would not be precluded from filing a subsequent action seeking funding for those services. The appeal must be dismissed. The cross-appeal must be sustained in part.

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, a CPSE convened on January 8, 2024, and found the student eligible for special education services as a preschool student with a disability (see generally Parent Ex. B). The January 2024 CPSE recommended that the student receive five hours per week of group special education itinerant teacher (SEIT) services and three 30-minute sessions per week of group OT (id. at pp. 1, 12).[1]

According to an untitled document identified by the parent as "[s]ession [n]otes" the student began receiving OT services on January 29, 2024 (Parent Ex. F at p. 1; see Parent Ex. E).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated February 12, 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).[2] According to the parent, the January 2024 CSE developed an individualized education services program (IESP) that mandated three 30-minute sessions per week of group OT services and the parent agreed with the services (id.).[3] Further, 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 all required services" for the 2023-24 school year at rates higher than the standard district rates (id.). 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 three 30-minute sessions per week of OT at an "enhanced rate" for the 2023-24 school year (id. at p. 2).

---

[1] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs.

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

[3] The parent's due process complaint notice incorrectly refers to the IEP developed by the January 2024 CPSE as an IESP (see Parent Ex. A at p. 1). However, given the student's age, the student would have been considered as a preschool student during the 2023-24 school year (id.; see Parent Ex. B; see also Educ. Law § 4410[f], [i]). State guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools" and "does not apply to a child who is less than compulsory school age . . . in a preschool program" ("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).

On March 14, 2024, the district countersigned a Pendency Implementation Form, which indicated that the January 8, 2024 IEP formed the basis for the student's pendency services, which consisted of three 30-minute sessions per week of group OT (see Pendency Imp. Form).

On March 21, 2024, the parent electronically signed a document on Step Ahead's letterhead indicating 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).[4]

B. Impartial Hearing and Decision

After a prehearing conference on March 14, 2024 (Tr. pp. 1-13), an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on March 28, 2024 (Tr. pp. 14-57).[5]

In a decision dated May 9, 2024, the IHO found that the district failed to provide the student with equitable services and failed to implement the student's January 2024 IEP thereby denying the student a FAPE for the 2023-24 school year (IHO Decision at pp. 3, 5-7). Next, the IHO found that the evidence in the hearing record did not demonstrate that Step Ahead provided the student "appropriate services to meet [the] [s]tudent's individual special education needs" (id. at pp. 7-8). More specifically, the IHO stated that under a Burlington/Carter analysis, the parent's "evidence must be scrutinized" and a determination made based on the "totality of the circumstances" as to whether the unilateral services "provide[d] 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" (id.). Here, the IHO found that the session notes from Step Ahead failed to contain information on how the student's fine motor deficits were being addressed or the activities that the student engaged in during OT sessions (id. at p. 8). The IHO found no progress noted in the session notes (id.). Accordingly, the IHO found that the OT services provided by Step Ahead failed to meet the student's special education needs (id.).

Additionally, the IHO addressed the reasonableness of the OT provider's rate (IHO Decision at p. 9). The IHO found a lack of evidence as to the amount paid to the OT provider, training of the OT provider, or the administrative costs associated with the OT provider (id.). Further, the IHO stated that there was a lack of evidence in the hearing record regarding whether the OT services were delivered individually or in a group, and regarding the provider's knowledge of the student's fine motor deficits (id.). The IHO held that, if the services provided by Step Ahead were deemed appropriate, the rate of $250 was unreasonable and would be reduced to the district's "lowest hourly rate" for the OT provider's services (id.). Lastly, the IHO held that the district remained obligated to provide the student's OT services for the 2023-24 school year and ordered the district to locate an OT provider to provide the student with OT services (id. at p. 10).

[4] Step Ahead is a private corporation and has not been approved by the Commissioner of Education as a preschool program or provider with which districts may contract to instruct students with disabilities (see Educ. Law § 4410[9]; 8 NYCRR 200.1[nn]).

[5] On March 18, 2024, the IHO issued a prehearing conference summary and order (see IHO Ex. I).

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 an equitable services case such as the present matter and that, therefore, the burden of production and persuasion should remain entirely with the district. However, the parent asserts that, even under the Burlington/Carter standard, her requested relief should be granted. The parent contends that the OT provider was providing services consistent with the student's IEP. The parent argues that she used the services of an agency who employed appropriately credentialed/licensed providers for each service for which funding was requested and there was no evidence introduced showing that the rates charged were unreasonable. Additionally, the parent asserts that the hearing record supports an award for direct funding of the OT 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 OT services from Step Ahead at the contract rate.

In an answer and cross-appeal, the district responds to the parent's material allegations and argues that the IHO's decision that the services provided by Step Ahead during the 2023-24 school year were not appropriate and that equitable considerations did not weigh in favor of the parent should be upheld in its entirety. The district also argues that the IHO's order for the district to locate a provider for the OT services for the 2023-24 school year has been rendered moot as the school year has ended and the student received OT services through pendency for the 2023-24 school year. As relief, the district seeks to dismiss the parent's request for review. The parent did not submit an answer to the district's answer with cross-appeal.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the

Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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

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

VI. Discussion

Initially, the district has not appealed the IHO's determination that it failed to meet its burden to prove that it provided the student a FAPE for the 2023-24 school year, that finding has become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained OT services delivered to the student by Step Ahead during the 2023-24 school year.

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, it is undisputed that the district failed to provide the student with the recommended OT services. In the due process complaint notice, the parent alleged that the district had not implemented the student's January 2024 "IESP" and that the parent was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 1). As a result, the parent unilaterally obtained private services for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (id. at pp. 1-2). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the unilaterally-obtained services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can,

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

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]; 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"]).

Accordingly, the parent's request for privately obtained services must be assessed under this framework. That is, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).[7]

With respect to the parent's assertion that the above framework should only apply to IEP disputes, and not to disputes solely related to implementation, such a claim is contrary to the IDEA. A district's delivery of a placement and/or services must be made in conformance with the CPSE's or 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 is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 Fed. App'x 63 [2d Cir. 2014]).

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

A. Unilaterally Obtained Services

Turning to a review of the appropriateness of the unilaterally obtained services, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. 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

In this case, although the student's needs are not in dispute, a description thereof provides some context to determine whether the parent's unilaterally obtained OT services were appropriate to address those needs.[8] Based on the hearing record, the student's needs for the 2023-24 school year can best be gleaned from the student's January 2024 IEP (see Parent Ex. B).

According to the January 2024 IEP, the student was referred to the CPSE by his mother due to concerns with his "expressive language and social emotional skills" (Parent Ex. B at p. 3). During testing, it was reported that the student's "attention to task was not appropriate" and he required cues and prompting to complete tasks as he was "easily distracted by internal and external stimuli" (id.). His verbal IQ fell within the average range and nonverbal IQ was in the low average range of cognitive abilities (id.). The January 2024 IEP noted that the student's physical and adaptive development were in the average range (id.). According to the January 2024 IEP, the student presented with below average cognitive skills, communication skills, and social/emotional development which affected his ability to appropriately function in the classroom (id.).

Measures of the student's language revealed average to below average receptive and expressive language skills (Parent Ex. B at pp. 3-4). Receptively, the student was unable to understand the following: "negatives" in a sentence, complex pronouns, complex spatial concepts, quantity concepts, or complex sentences (id.). Further it was noted that the student could not identify shapes and colors (id. at p. 4). In terms of the student's expressive language, he showed a "slowly growing vocabulary" but still relied on gestures for communication (id.). The student's speech was not conversational but described as saying "random things" (id.). The January 2024 IEP noted that he was not using pragmatic language for requesting, labeling, answering yes/no questions, or getting attention (id.). The student was unable to name described objects, name categories, produce basic sentences, and could not "answer simple what and where questions" (id.). His speech was difficult to decipher and he achieved a standard score of 72 on a formal measure of articulation skills (id. at pp. 3, 4). The January 2024 IEP stated that the student could not "rote count to 3," could not complete simple patterns, and lacked age appropriate comprehension skills (id. at p. 4). In terms of strengths, the student was able to imitate scribbling, use everyday items, point to simple objects in a book, stacked blocks, and matched objects with corresponding pictures (id.).

In terms of social development, measures of the student's socialization skills yielded results that fell in the moderately low and below average ranges (Parent Ex. B at p. 5). The student was described as demonstrating difficulty in communicating with his peers and that he would scratch and hit peers and grab items from them instead of using words (id. at p. 4). However, the January 2024 IEP also described the student as friendly and that he liked interacting with other students (id. at p. 5).

[8] The parent asserts in her request for review that the district obtained a SEIT for the student, and therefore, the student's receipt of SEIT services was not an issue in this case (Req. for Rev. ¶ 2).

On measures of physical development, the student's fine motor skills fell within the moderately low range and his gross motor skills were in the average range (Parent Ex. B at p. 5). The January 2024 IEP described the student's fine motor skills and noted that the student "h[e]ld[] writing utensils in his fist, d[id] not copy lines, and d[id] not always turn pages in a book one by one" (id.). Additionally, the student used one hand consistently for most activities, did not use a hand to hold the paper in place when drawing, and did not imitate or use vertical, horizontal, or circular strokes when drawing (id.). Further concerns noted in the January 2024 IEP were the student's limited attention span; aggression with peers; and need for one-to-one assistance for following instructions, responding to his name, and to transition from activities (id. at p. 6). The January 2024 IEP stated that the student frequently had temper tantrums, tripped and fell, had decreased safety awareness, and had delayed visual motor skills (id.).

The January 2024 IEP identified that the student required redirection, "multi-modality cues," and repetition (Parent Ex. B at p. 6). Additionally, the January 2024 IEP contained 13 annual goals (id. at pp. 8-12). The annual OT goals were focused on "strengthening activities, bilateral hand activities, use of assessment manipulatives, use of writing materials, multi-sensory activities, repetition and review;" demonstrating age-appropriate sensory processing skills, i.e., following directions, transitions, and attending to activities; and eye hand coordination and visual perceptual skills (id. at pp. 11-12).

2. OT 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]).

In finding that the unilaterally obtained services were inappropriate, the IHO determined that the OT provider's session notes did not include any information from the January 2024 IEP annual goals relating to the student's fine motor deficits (IHO Decision at p. 8). Also, the IHO stated that the session notes failed to contain any information regarding "the various activities that [the] [s]tudent engage[d] in during his OT sessions," but, instead, "appear[ed] to focus on [the] [s]tudent's gross motor skills" (id.). The IHO further noted that there was no noted progress in the area of the student's fine motor skills (id.). Based upon the "totality of the circumstances" the IHO found that the OT services the student received from Step Ahead were not appropriate to meet the student's needs (id.).

The hearing record includes 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. F). The session notes reflected the student's name, the occupational therapist's name, dates of sessions (beginning on January 29, 2024 with the last session note dated March 20, 2024), times in and times out, and location (school), with areas to describe goals (all left blank), and notes (see Parent Exs. E; F). None of the notes state the annual goals targeted during a particular session but show that the OT provider generally worked with the

student on improving his grasp, attention, balance, and coordination (Parent Ex. F). It was noted that the student demonstrated "enhanced attention and focus" with "moderate verbal cuing" (id. at p. 1). However, the notes also reflect that during a number of the sessions the student had reduced attention and focus on the activities presented by the occupational therapist which required maximum verbal and visual cues to complete a task (id. at pp. 1-3). Other session notes stated that the student demonstrated "extreme resistance to leaving the classroom" by crying and needed maximum verbal cues (id. at p. 2). The occupational therapist used three step obstacle courses with the student during sessions and noted both minimal, moderate, and maximum assistance to complete the course (id. at pp. 1-3).

However, as noted by the IHO, the session notes do not describe how the occupational therapist provided specially designed instruction to address the student's fine motor skill deficits, and many of the activities that the student engaged in such as completion of the obstacle course on several occasions "appear[ed] to focus on [the] [s]tudent's gross motor skills" which were in the average range of development and were not a stated need or a concern to the parent (IHO Decision at p. 8; see Parent Ex. B at pp. 5-6). There is no explanation for this in the hearing record as neither the parent nor the provider from Step Ahead testified at the impartial hearing. On appeal, the parent summarily states that the OT provider delivered services set forth in the January 2024 IEP, which had detailed goals, and worked on areas of need that "matched what was addressed in the IEP" (Req. for Rev. ¶¶ 6, 17); however, this is nor borne out in the hearing record and the parent does not grapple with the IHO's finding that the OT provider focused on addressing gross motor skills despite that this was not an area of deficit for the student. Although the session notes describe some 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 OT 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]).

Accordingly, there is insufficient basis in the hearing record to disturb the IHO's determination that, based upon the totality of the circumstances, the evidence in the hearing record did not include sufficient information to support a finding that the unilaterally obtained services were appropriate to meet the student's unique needs. Accordingly, the IHO correctly denied the parent's request for direct funding of the OT services Step Ahead provided to the student during the 2023-24 school year.

B. Other Relief

Finally, as to the district cross-appeal, the IHO ordered the district to locate a provider for the OT services and, further, ordered that, if the district failed to do so, the parent "shall not be precluded from filing a subsequent action" seeking funding for services from a different provider (IHO Decision at p. 10). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15,

2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). As the district argues, the order for the district to implement the OT services is moot as the district agreed that the student was entitled to OT services as pendency and the 2023-24 school year has now concluded (Pendency Impl. Form).

As to the IHO's conclusion that the parent would not be precluded from filing a subsequent action, the IHO does not have the authority to address justiciability issues that may arise in future actions.[9] Accordingly, the portion of the IHO's order purporting to allow the parent to file a subsequent action will be vacated and any determination regarding the permissibility of a future action relating to the 2023-24 school year will be reserved for the administrative hearing officer assigned to such future hypothetical matter.

VII. Conclusion

Having determined that the hearing record supports the IHO's determination that the parent failed to demonstrate the appropriateness of the OT 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. That portion of the IHO's decision which indicated that parent would not be precluded from filing a subsequent action to seek district funding for services from another OT provider is vacated for the reasons set forth above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[9] It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

IT IS ORDERED that the IHO's decision dated May 9, 2024 is modified by vacating that portion which provided the parent would not be precluded from filing a subsequent action seeking district funding for private OT services from a different provider for the 2023-24 school year.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER