



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-267

**Application of a STUDENT WITH A DISABILITY, by her 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., Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the cost of the special education teacher support services (SETSS) delivered to her daughter by Always a Step Ahead, Inc. (Step Ahead) at a specified rate for the 2023-24 school year. The district cross-appeals from the IHO's decision. The appeal must be sustained. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

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

### **III. Facts and Procedural History**

A CSE convened on October 25, 2023 to develop an IESP with an implementation date of November 8, 2023 (Parent Ex. B at p. 1). The October 2023 CSE found the student eligible for

special education and related services as a student with a speech or language impairment (id.).<sup>1</sup> The October 2023 CSE recommended that the student receive three periods per week of direct group SETSS delivered in a separate location, two 30-minute sessions per week of individual speech-language therapy delivered in a separate location, and two 30-minute sessions per week of individual occupational therapy (OT) delivered in a separate location (id. at pp. 7-8).<sup>2</sup>

The student was parentally placed in a religious, nonpublic school for the 2023-24 school year at issue (see Parent Exs. A at p. 1; B at p. 10). According to session notes kept by private providers from Step Ahead, the student began receiving SETSS on September 11, 2023, speech-language therapy on September 13, 2023, and OT on February 7, 2024 (Parent Ex. G at pp. 1, 11; see Parent Ex. E).<sup>3</sup>

In December 2023, SETSS and speech-language therapy progress reports were issued on the religious nonpublic school's letterhead (Parent Exs. I; J).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated January 29, 2024, the parent alleged that the district failed to provide adequate special education and related services for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further asserted that the district failed to provide the student a free appropriate public education (FAPE) and/or equitable services by failing to provide "special education and related services providers" in accordance with the October 2023 IESP (id.). The parent also claimed that she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with all required services for the 2023-24 school year at rates higher than the standard district rates (id.). The parent requested an "[a]llowance of funding for payment to the student's special education teacher provider/agency" for the provision of three sessions per week of "special education teacher at an enhanced rate" for the 2023-24 school year (id. at p. 2). The parent also requested "[a]warding all related services and aides on the IESP for the 2023-2024 school year," and "related services authorizations for such services if accepted by the parent's chosen providers" or "direct funding to each of the parent's chosen providers at the rate each charges, even if higher than the standard [district] rate for such service" (id.).

After the due process complaint notice was filed, on March 26, 2024, the parent electronically signed a document on the letterhead of Step Ahead, and stated that she was "aware that the rate of the SETSS services provided to [her] child [wa]s \$200 an hour and the rate of the

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<sup>1</sup> The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

<sup>2</sup> SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

<sup>3</sup> Step Ahead has not been approved by the Commissioner of Education as a school program or provider with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

related services are \$250 an hour, and that if the [district] d[id] not pay for the services, [she] w[ould] be liable to pay for them" (Parent Ex. C at p. 1).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on April 3, 2024 (Tr. pp. 1-26). In a decision dated May 13, 2024, the IHO found that the district failed to implement the October 2023 IESP, and as a result the district denied the student a FAPE (IHO Decision at p. 4). With regard to the parents' unilaterally obtained services, the IHO found that "it [wa]s unclear what SETSS services [we]re being provided to [the s]tudent, the strategies or methodologies being employed to address [the s]tudent's needs, and whether [the s]tudent [wa]s progressing because of [the] SETSS [p]rovider's efforts" (id. at p. 5). The IHO further found that "the session notes provided by [the p]arent only provide[d] dates and times that services were purportedly provided to [the s]tudent," that "all of the session goals fields [we]re blank," and that the notes fields for special education services on the document "[we]re blank for the period of September 11, 2023 to March 18, 2024" (id.). The IHO also indicated that "three session notes that [we]re completed but [we]re vague and d[id] not provide detailed information of the methodologies and strategies being used to address [the s]tudent's needs" (id.). With regard to the SETSS progress report in evidence, the IHO found that "it indicate[d] that [the] SETSS provider [wa]s only utilizing praise and encouraging [the s]tudent to remain focused and adhere to [the] teacher's instructions" (id.). The IHO then noted that the parent was in agreement with the October 2023 IESP, which had stated that the student required "'small group instruction to preteach and reteach new concepts, information, and skills [as well as r]epetition of directions and redirection to enable her to attend to and complete a task'" (id.).

The IHO determined that the parent's evidence did "not substantiate that the SETSS provider [wa]s utilizing these interventions or what other interventions or methodologies [we]re being implemented to address [the s]tudent's deficits" and that the parent's "evidence regarding SETSS services d[id] not substantiate that [the s]tudent's individual special education needs [we]re being addressed by the program, the services [we]re reasonably calculated for [the s]tudent to receive educational benefit, nor that [the s]tudent [wa]s progressing in the [p]rogram" (IHO Decision at p. 5). The IHO then found that the parent did not meet her burden of demonstrating "that the private education program met [the s]tudent's needs regarding SETSS under Prong II of the Burlington/Carter standard" (id.). Turning to the parent's unilaterally obtained speech-language therapy and OT, the IHO found that the session notes and speech-language therapy progress report demonstrated that those services addressed the student's needs (id.). The IHO further stated that the session notes "outline[d] the strategies being employed and the deficits being addressed in [the s]tudent's OT and [speech-language therapy] sessions" (id.). The IHO also found that the speech-language therapy progress report "indicate[d] specific methodologies being used to address [the s]tudent's needs, such as "The Visualizing Verbalizing program," scaffolding, and processing games" (id.). The IHO determined that the parent had met her burden of demonstrating the appropriateness of her unilaterally obtained OT and speech-language therapy (id.). The IHO next addressed equitable considerations (id. at pp. 5-6). The IHO found that testimony provided by the secretary of Step Ahead did not support the parent's requested rates (id. at p. 6). The IHO found that the secretary of Step Ahead "did not have any knowledge of how the rate was determined" and that the parent "did not provide any evidence on the rate the actual provider [wa]s being paid or the overhead costs associated with the requested rate" (id.). The IHO noted that the

district had argued that a reasonable rate for SETSS would be \$125 per hour and determined that neither party had substantiated their requested rates (*id.*). For those reasons, the IHO reduced the parent's award to \$200 per hour for both OT and speech-language therapy (*id.*). The IHO also noted that had she found the parent's unilaterally obtained SETSS to be appropriate, she would have awarded the parent funding in the amount of \$175 per hour (*id.*). As relief, the IHO ordered the district to implement the student's SETSS services for the remainder of the 2023-24 school year from the date of her order until the end of the school year (*id.*). The IHO also ordered the district to directly fund two 30-minute sessions per week of speech-language therapy at a rate of \$200 per hour and to directly fund two 30-minute sessions per week of OT at a rate of \$200 per hour delivered by qualified providers of the parent's choosing (*id.* at p. 7).

#### **IV. Appeal for State-Level Review**

The parent appeals, alleging that the IHO erred in denying funding for the parent's unilaterally obtained SETSS and erred in reducing the amount of funding at the parent's requested hourly rate for OT and speech-language therapy services.

In an answer and cross-appeal, the district asserts that the parent lacks standing and that equitable considerations do not favor the parent. The district argues that the parent did not provide any evidence of a personal stake in the outcome of the dispute.<sup>4</sup> The district also alleges that the parent did not file a 10-day written notice that the parent was unilaterally obtaining private services and would seek public funding therefor. The district further contends that the IHO failed to develop the hearing record prior to imposing a rate reduction and in the event the SRO addresses equitable considerations, the district requests that the matter be remanded to the IHO on this issue. In addition, the district argues that the IHO correctly found the parent's unilaterally obtained SETSS were not appropriate, however the district alleges that the IHO incorrectly found the parent's unilaterally obtained OT and speech-language therapy services were appropriate. As relief, the district requests a finding that the parent failed to establish the appropriateness of her unilaterally obtained services and that the parent's requests for direct funding be denied.

#### **V. Applicable Standards**

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (*see* 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (*see* 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

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<sup>4</sup> While the district points to *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 445 (2d. Cir. 2014) in support of its argument that the parent lacked standing to pursue this matter, the district has not successfully rebutted the parent's allegation with respect to the district's failure to implement the student's October 2023 IESP, nor has the district addressed the parent's injury in fact. Accordingly, this aspect of the district's cross-appeal is dismissed.

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).<sup>5</sup> "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).<sup>6</sup> Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

## VI. Discussion

The district does not appeal from the IHO's decision that the failure to implement the student's October 2023 IESP resulted in a denial of a FAPE to the student for the 2023-24 school year (IHO Decision at p. 4). Accordingly, this determination has become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; see M.Z. v. New York City Dep't of

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<sup>5</sup> State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

<sup>6</sup> State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

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 SETSS, speech-language therapy and OT services delivered to the student by Step Ahead during the 2023-24 school year.

### **A. Unilaterally Obtained Services**

Turning to the parent's argument that she has no burden at all regarding the services from Step Ahead, the parent challenges the IHO's reliance on the Burlington/Carter model of analysis for resolving the parties dispute, accordingly, I will first address the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. In her January 29, 2024 due process complaint notice, the parent alleged that the district had not implemented the October 2023 IESP and 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 from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (*id.* at pp. 1-2). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private SETSS, speech-language therapy and OT services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).<sup>7</sup>

The parent's request for district funding of privately obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).<sup>8</sup> In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the

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<sup>7</sup> 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]).

<sup>8</sup> 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 that the parent obtained from Always a Step Ahead (Educ. Law § 4404[1][c]).

student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally obtained services, the federal standard for adjudicating these types of disputes is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. 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 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a



handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. The Student's Needs**

Although the student's needs are not in dispute, a description thereof provides context to determine whether the unilaterally obtained services were appropriate to address those needs. According to the evaluation results section of the October 2023 IESP, the student met the standards for being able to read grade level texts with sufficient accuracy and fluency; employ comprehension skills when reading grade level texts; properly form all uppercase and lowercase letters with appropriate sizing and spacing; write a nonfiction text about a topic with facts in an organized manner; solve word problems by adding and subtracting within 20; subtract within 20 using various strategies; decompose two-digit numbers into tens and ones; add within 100 without regrouping, and measure the length of an object using nonstandard units (Parent Ex. B at p. 1). The October 2023 IESP indicated the student was approaching standards for being able to identify the main topic of a nonfiction text and retell facts about the topic; write complete sentences that included capital letters and proper end punctuation; spell words using Foundations rules, and recognize and spell trick words; apply Foundations rules when writing independently, and add within 20 using various strategies (id.).

With regard to the student's present academic levels of performance, the October 2023 IESP indicated the student was friendly, respectful, and motivated to succeed (Parent Ex. B at p. 2). In addition, it noted that she put a lot of effort into her work and "had come a long way" that year (id.). According to the October 2023 IESP, the student was seen twice per week in the resource room for reading and writing skills, beginning in October 2022 (id.). During reading sessions, the student worked on developing her decoding, comprehension, and written expression skills (id.). She had learned to decode short and long vowel words that contained blends, digraphs, vowel teams and suffixes (id.). She had learned to further decode multisyllabic words (id.). The IESP stated that the student's ability to recognize/write trick words had led to her increased improvements and noted that she had made considerable gains in her ability to use picture clues as context for decoding passages and making inferences (id.). She had also learned to apply various strategies in order to decode unfamiliar words (id.). The IESP indicated that as the student read, emphasis was placed on her expression and phrasing and her comprehension also improved over the course of the school year (id.). The student had learned to identify the characters, setting, problem and solution in a story and through the use of nonfiction books, had worked on identifying key details/the main idea within a passage (id.). In terms of written expression, the October 2023 IESP indicated that the student had worked on writing a short paragraph with sequenced events (id.). The IESP described the student as eager to please and participate and stated that she benefited from the small group instruction in a small group setting (id.). Her pleasure in reading and motivation for success had assisted in her growth and confidence (id.). The present levels of performance in the October 2023 IESP recommended that "[g]oals for next year" in the resource room should include continued reinforcement of the student's decoding, comprehension, and

written skills (id.).<sup>9</sup> The IESP reflected the parent's concern regarding the student's reading ability and comprehension skills (id.). According to the IESP, the parent reported that the student read quickly and would guess at the word based on initial sound (id.). In terms of math, the parent reported that the student could count to 100 and do simple addition and subtraction (id.). The student would use her fingers sometimes to do math (id.). With regard to writing, the student could form her letters and write on a line (id.).

Turning to the student's social development, the October 2023 IESP indicated that according to the parent, the student was well behaved at school, had friends, and was part of a social group (Parent Ex. B at p. 2). However, at home, the student could be difficult (id.). According to the IESP, the parent reported that she tried to set out the student's clothes in the evening, and in the morning, the student would state she would not wear them (id.). The parent stated that she wanted the student to be more patient and compliant at home (id.). The IESP indicated the student's social strength was that she made friends easily (id.). It noted that according to the school, the student was compliant and had friends (id.).

With regard to the present levels of the student's physical development, the October 2023 IESP indicated that according to the parent, the student was a healthy child (Parent Ex. B at p. 3). The student could navigate stairs appropriately, ride a bike, and throw and catch a ball appropriately (id.). The IESP indicated that the student held a pen correctly and was beginning to form all letters in an appropriate size (id.). According to the IESP, the student's school staff stated they were concerned about the student's organizational and focusing skills (id.). The IESP noted that the student did not receive OT during the prior school year, but the parent wanted to pursue getting OT for the 2023-24 school year (id.). The IESP indicated that the parent did not express any concerns regarding the student's physical development (id.).

The IESP included a list of strategies and resources needed to address the student's management needs (Parent Ex. B at p. 3). These included small group instruction to pre-teach and re-teach new concepts, information and skills, and repetition of directions and redirection to enable the student to attend to and complete a task (id.). Additional resources included speech-language therapy to address the student's phonological processes and misarticulations along with her difficulty answering questions and providing cohesive, detailed narratives (id.). The IESP indicated that OT was required to assist the student in maximizing her achievement of age-appropriate skills for optimal success within the educational environment (id.).

With regard to the effect of the student's needs on her involvement and progress in the general education curriculum, the October 2023 IESP stated that the student presented with a speech-language impairment, decreased fine motor skills, low muscle tone in her upper body extremities, and delayed visual motor coordination and perceptual skills (Parent Ex. B at p. 3). These IESP further stated that the student's deficits would be addressed by the speech-language

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<sup>9</sup> The wording in the present level of performance suggests that the language about goals was copied from another document, perhaps an evaluation report or other document that preceded the CSE meeting, but the matter is not in dispute in this appeal.

therapist (2x30 1:1) and occupational therapist (2x30 1:1) (id.). In addition, the student would be provided with SETSS, as her academic and social skills were below age expectancy (id.).

## 2. SETSS, Speech-language therapy and OT from Step Ahead

Based on a review of the evidence in the hearing record in this matter as further described below, the IHO erred in finding the parent's unilaterally obtained SETSS were not appropriate, and correctly determined that the parent's unilaterally obtained speech-language therapy and OT services were appropriate. The documentary evidence offered by the parent included a contract with Step Ahead signed on March 26, 2024, which demonstrated the parent's financial obligation for the services delivered to the student, a copy of the licensures/certifications of the providers who delivered services to the student, session notes, a December 17, 2023 SETSS progress report, and a December 23, 2023 speech-language therapy progress report (Parent Exs. C; E; G; I; J).

The description of the student needs in the December 17, 2023 SETSS progress report is consistent with the description in the October 2023 IESP (compare Parent Ex. B at p. 1, with Parent Ex. I at p. 1). The SETSS progress report indicated the student was in the second grade at her private school, and her challenges in reading and math resulted in her falling behind grade level (Parent Ex. I at p. 1). The report noted that the primary reason for her struggle was a speech-language impairment that affected her communication skills (id.). The student encountered difficulty expressing herself effectively, leading to challenges in following directions from the teacher or any authority figure (id.). According to the December 2023 SETSS progress report, the student's academic performance was at a mid-second-grade level, but her challenges with focus, in addition to communication, persisted (id.). Due to her speech-language impairment, she frequently engaged in class discussions without a full understanding of the questions, and expressing herself took a considerable amount of time (id.). The SETSS progress report indicated that in math, the student faced challenges learning new math concepts, particularly due to her speech-language impairment, which made engaging with addition and subtraction difficult (id.). Understanding word problems was notably more challenging for her due to language-related struggles (id.). The SETSS progress report included four math goals, some of which were similar to the math goals in the student's IESP (see Parent Exs. B at p. 5; I at pp. 1-2). The Step Ahead math goals targeted the students' ability to read and write numbers up to 1000, add and subtract within 1000, use addition and subtraction within 100 to solve one- and two-step word problems, and improve math problem solving skills by listing the sequential steps involved in solving one- and two-step word problems (id. at p. 2). In reading, the SETSS progress report indicated that although the student read "at an approaching second-grade level with some assistance," she had a hard time with reading comprehension challenges (Parent Ex. I at p. 2). The progress note attributed the student's struggle to her tendency to rely on guessing words based on their initial sounds, rather than employing a more comprehensive reading approach (id.). Similar to the math goals, the SETSS progress report included four reading goals (id.). The Step Ahead reading goals focused primarily on reading comprehension while the district IESP goals targeted the student's decoding skills as well (see Parent Exs. B at pp. 4-5; I at p. 2). With regard to writing, the SETSS progress report indicated the student struggled to express her thoughts effectively (Parent Ex. I at p. 2). Her phonetic spelling did not match the sounds of words, which hindered accurate communication (id.). The progress note indicated that forming complete sentences was

challenging for the student and she required substantial assistance to comprehend details in writing (id.). The progress note indicated that the student needed continued support in phonetic awareness, spelling alignment, and forming complete and meaningful sentences to have her advance in her writing (id.). While the district IESP did not include writing goals, the SETSS progress report included four goals that targeted the student's ability to demonstrated command of the conventions of standard English (i.e., capitalization, punctuation, generalization of learned spelling patterns when writing, use of references materials to check and correct spelling); focus on topic and strengthen her writing by revising and editing: produce written narratives that recount a well-elaborated event or short sequence of events, , and demonstrate command of the multiple conventions of standard English grammar and usage while speaking and writing (Parent Ex. I at p. 3; see Parent Ex. B at p. 5).

With regard to language comprehension, the SETSS progress report indicated the student faced challenges in language comprehension and communication due to an impairment (Parent Ex. I at p. 3). The progress report stated that the student's communication was difficult to understand, characterized by unclear speech and an abnormal tone (id.). The report indicated that the student's responses to directions might be delayed, often because her attention was frequently directed elsewhere (id.). However, in a small group setting, where she received individual attention, the student excelled (id.). The SETSS progress report noted that "this environment" allowed the student to focus more effectively and pay better attention, showcasing her ability to do better with personalized support (id.). The SETSS progress report included three language goals (id.). The first goal focused on the student's ability to use of words and phrases including use of adjectives and adverbs to describe (id.). A second goal addressed the student's ability to produce complete sentences, when appropriate to task and situation, to provide requested detail or clarification (id.). A third goal targeted the student's ability to tell a story or recount an experience with appropriate facts and relevant, descriptive details, speaking audibly in coherent sentences (id.). Further, the SETSS progress report included sections on social/emotional functioning and interpersonal relationships (id.). With regard to the student's social/emotional functioning, the SETSS progress report described the student as "sensitive" and indicated when confronted with frustration, she tended to become noticeably quiet and embarrassed (id.). Additionally, she often erased her work, especially when she perceived that her performance fell short of her standards (id.). The report noted that this behavior indicated a response to feelings of inadequacy or disappointment and suggested that providing support to address these emotional challenges would contribute to fostering a more resilient and confident approach to learning for the student (id.). With regard to the student's interpersonal relationships, the SETSS progress report indicated the student tried to make friends and liked working with adults (id. at p. 4). However, because it was hard to understand her when she spoke, the student's classmates found it tough to hang out with her (id.). According to the SETSS progress report, the student's speech-language impairment made it tricky for her to join in social activities (id.). Additionally, her friends appeared to be more advanced in their language development, further accentuating the communication gap (id.). The SETSS report noted that in school, the student loved to read and participate in class discussions (Parent Ex. I at p. 4).

The interventions detailed in the SETSS progress report included the use of consistent praise when the student spoke loudly and provided clear answers (Parent Ex. I at p. 4). The report noted that the student excelled in small reading groups and took pleasure in showcasing her reading skills (Parent Ex. I at p. 4). According to the progress report, the SETSS provider consistently encouraged the student to remain focused and to adhere to the teacher's instructions (id.).

The session notes completed by the student's SETSS provider included the date, time, and location of services; however, none of the notes identified the goals being addressed by the provider and only some detailed what took place during SETSS sessions (Parent Ex. G). The session notes that included detail showed that the provider worked with the student on "math activities," such as measurement; writing facts on George Washington's life based on a video the student viewed; and reading her lines as part of a theater activity (id. at pp. 14-15). During one session the student participated "in activities centered around Foundations writing and spelling" (id. at p. 15). According to the session notes, the student SETSS were delivered in one hour blocks several times a week at her school (Parent Ex. G).

Thus, review of the hearing record does not support the IHO's findings. Initially, as noted above, the private provider was not required to develop a formal IEP for the student (Carter, 510 U.S. at 13-14). The IHO faulted the teacher for leaving the goal field blank on the form in which her session notes were recorded, while relevant to the analysis, the defect is not fatal in this instance because the reader can infer from the note fields what skill area the teacher was working on and criteria for measurement, which is similar to how goals function on an IEP.<sup>10</sup> The evidence shows they were offered in a similar frequency and duration as those recommended by the CSE which in turn aligned with the student's needs described above. Accordingly, I find that the IHO erred in finding the instruction inappropriate.

Turning to the district's cross-appeal, the hearing record supports the IHO's determinations that the parent's unilaterally obtained speech-language therapy and OT services were appropriate.

The December 23, 2023 speech-language therapy progress report indicated that the student was receiving speech-language therapy two times per week for 30 minutes per the recommendations on her most current IESP dated October 25, 2023 (Parent Ex. J at p. 1). According to the progress report, the student presented with a receptive and expressive language disorder, as well as with reading comprehension deficits (id.). The student's receptive language deficits were characterized by difficulty processing complex language, which (caused her to have difficulty following multi-step directions or directions that included modifiers (id.). In addition, the student had difficulty responding to literal and critical thinking questions based on listening passages (id.). The progress report noted that there was often a delayed response time before the student answered a question, which was evidence of weak language processing (id.). The

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<sup>10</sup> If the roles were reversed this would amount to more of a procedural violation had a school district failed to properly fill out a form involving a student's annual goals. For that matter, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). Thus, the IHO's criticism of the SETSS teachers' adherence to the formalities of the form were given to much weight in this instance.

student's expressive language deficits included formulating simple stories and event retell (*id.*). According to the progress report the student was able to formulate her thoughts into complete sentences, but they were mostly syntactically simple because they lacked conjunctions or clauses (*id.*). The student omitted details and descriptive language, as well as sequential/temporal terms in her narratives, and therefore it was difficult to understand her stories without asking prompting questions (*id.*). Turning to reading comprehension, the progress report noted that the student had difficulty using information in a text, along with critical thinking skills, to respond to literal and abstract questions based on the text (*id.*). The speech-language therapy progress report included four goals that were aligned to the speech-language therapy goals included in the October 2023 IESP (*id.*). The goals targeted the student's ability to demonstrate improved speech intelligibility skills by eliminating phonological processes, correctly pronouncing misarticulated sounds; and increasing motor planning skills; improved expressive language skills to use complete and complex sentences with correct syntax; and improved receptive language skills to be able to comprehend complex sentences, stories, and questions (compare Parent Exs. B at pp. 5-6, with Parent Ex. J).

The December 2023 speech-language therapy progress report indicated that although the student's skills had improved, they were still below expected levels and her language deficits continued to negatively contribute to her reduced academic performance (Parent Ex. J at p. 3). The report indicated that speech-language sessions targeted the student's processing skills using following directions worksheets and processing games. In addition, the "Visualizing Verbalizing" program was used to help the student visualize what she read and heard in stories so that she could better retain and access the information (*id.*). The therapist targeted the student's expressive language skills by practicing describing items using games such as Headbanz (*id.*). According to the progress report, the student could describe objects using three descriptors but therapy sessions worked on increasing the number (*id.*). The student's reading comprehension skills were still emerging and required continued support (*id.*).

The hearing record did not include an OT progress report. It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Review of the session notes document reveals the SETSS, speech-language therapy, and OT providers documented over time, the date and time of their sessions with the student (Parent

Ex. G). Entries by the speech-language therapy provider frequently included the student's level of success for the task presented during a given day's session (*id.*). For example, a session note dated November 29, 2023 indicated the student "read a passage and then had to color details in the page that correspond with details from the story- 10/12 [,] also had to identify compound words 8/8" (*id.* at p. 6). Another example of a February 8, 2024 entry by the OT provider indicated, "In today's school based occupational therapy session [the student] was engaged in activities targeting visual scanning and discrimination skills" (*id.* at p. 11). According to the progress note, "verbal cues were provided to promote proper writing skills" and the student "engaged well in the session" (*id.*). Although the SETSS provider primarily documented only the date and time of her sessions with the student in the session notes, as discussed above, the SETSS progress report adequately provided information about the SETSS services provided, the SETSS teacher's understanding of the student's difficulties, how the student's speech-language deficits affected her in the classroom, and that the teacher supported the student in her work (Parent Exs. G; I). Based on the foregoing, the IHO correctly determined that the parent's unilaterally obtained speech-language therapy and OT services were appropriate.

The IHO did not evaluate the parent's privately obtained special education services for the student using the totality of the circumstances test and instead evaluated the services obtained from Step Ahead separately in a segmented fashion, granting some, and denying some in her analysis. However, "[t]he first two prongs of the test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any." (*A.P. v. New York City Dep't of Educ.*, 2024 WL 763386, at \*2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). For purposes of achieving the level of thoroughness necessary for the analysis, it was appropriate to discuss each element of the privately-obtained special education services from Step Ahead in a logical sequence when analyzing the evidence; however, the IHO was then required to then assess as a whole whether the services were, under the totality of the circumstances, "reasonably calculated to enable the child to receive educational benefits" (*Carter*, 510 U.S. at 11; *Gagliardo*, 489 F.3d at 112). Accordingly, applying the standard I find that based on the totality of the circumstances, the parent's unilaterally obtained SETSS, OT and speech-language services she obtained for the student were appropriate for the 2023-24 school year. Although the IHO correctly identified the *Burlington/Carter* legal standard in evaluating the parent's requested relief, the IHO erred in applying the standard when determining that the parent failed to meet her burden of proof.

## **B. Equitable Considerations**

Having found that the unilaterally obtained services from Step Ahead were appropriate, I will now address equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (*Burlington*, 471 U.S. at 374; *R.E.*, 694 F.3d at 185, 194; *M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 [2d Cir. 2000]; see *Carter*, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; *L.K. v. New York City Dep't of Educ.*, 674 Fed. App'x 100, 101 [2d Cir. Jan. 19,

2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

In her analysis of equitable considerations, the IHO reduced the parent's requested hourly rates based in part on the testimony of the secretary of Step Ahead (IHO Decision at p. 6). The IHO found that the secretary of Step Ahead "did not have any knowledge of how the rate was determined" and that the parent "did not provide any evidence on the rate the actual provider [wa]s being paid or the overhead costs associated with the requested rate" (id.). The IHO found that neither party had substantiated their requested rates, and nevertheless reduced the hourly rate to \$200 per hour for both OT and speech-language therapy (id.). The IHO also indicated that she would have reduced the hourly rate for SETSS to \$175, if she had found the services appropriate. (id.). In its cross-appeal, the district argues that the parent's contract with Step Ahead "tends to refute that the [p]arent had any such financial stake" as the contract was not signed until March 26, 2024 (Answer and Cr.-Appeal ¶ 6). In addition, the district asserted the provision of services beginning on September 9, 2023 prior to the parent entering into a contract with Step Ahead undermined the existence of a financial obligation (id.). The district also noted that the parent did not appear at the hearing to confirm her electronic signature and did not provide an affidavit that described her understanding of her financial obligations (id.). The district also contends that the parent's contract was with Step Ahead and that the services were provided by Yeshivah of Flatbush. The district argues that the secretary from Step Ahead did not provide any testimony describing how the two entities were affiliated. The district also challenges the reasonableness of the rates charged by Step Ahead, and asserts that the parent failed to provide the district with 10-day written notice of her intention to unilaterally obtain services and seek public funding.

Here, the district is correct that the letter stating the parent's obligation was not signed by the parent until March 2024 but, by its terms, the letter stated the parent's intention to be bound to pay the costs of services delivered by Step Ahead for the "entire" 2023-24 school year at specified rates (Parent Ex. C). The district's assertion that services were not provided beginning on September 9, 2023 are belied by the session notes and the December 2023 progress reports (Parent Exs. G at pp. 1-15; I at pp. 1-4; J at pp. 1-3).

With regard to the rates charged by Step Ahead for SETSS and related services, among the factors that may warrant a reduction based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d. Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court



determines that the cost of the private education was unreasonable"]; L.K., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An excessive cost argument focuses on whether the rate charged for a service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Here, the district has not offered any evidence to demonstrate that the rates were unreasonably excessive and thus there is no evidentiary record upon which to reduce or deny the funding award for unilateral SETSS, speech-language therapy and OT services due to excessive costs by Step Ahead. Further, there was no basis in the hearing record for the IHO to reduce the hourly rates and that aspect of the IHO's decision must be reversed.

Turning to the parent's failure to provide 10-day written notice, reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the district correctly notes that the hearing record does not include evidence that the parent provided the district with 10-day written notice stating the parent's intent to unilaterally obtain private services. However, the district did not raise this issue at all before the IHO and instead raises it for the first time on appeal. Furthermore, with regard to equitable considerations, the district affirmatively indicated to the IHO that the only issue for the impartial hearing was the rates (Tr. p. 7), thus it is unsurprising that the IHO did not rule upon whether lack of a 10-day notice of unilateral placement by the parent should result in a reduction or denial of funding. In this instance, I decline to review the issue for the first time on appeal, especially when the district already took the position before the IHO that it was not a disputed issue.<sup>11</sup>

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

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<sup>11</sup> The parent is equally at fault because she was not aggrieved by findings by the IHO on the issue of a ten-day notice of unilateral placement and should not have attempted to raise anticipatory defenses on the topic in the request for review in the first place.

**VII. Conclusion**

In summary, the IHO correctly determined that the evidence in the hearing record supported an award of funding for the parent's unilaterally obtained speech-language therapy and OT services but erred in determining that the parent failed meet her burden of demonstrating the appropriateness of her unilaterally obtained SETSS. Under the totality of the circumstances, the evidence shows that the unilaterally obtained services from Step Ahead were appropriate. The hearing record further shows that equitable considerations do not warrant a reduction or denial of relief. The IHO's denial of relief in the form of district funding for SETTS delivered by Step Ahead and reduction of hourly rates for speech-language therapy and OT services from Step Ahead during the 2023-24 school year must be reversed.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated May 13, 2024 is modified by reversing those portions which found that the student's SETSS services from Step Ahead were not appropriate and denied the parent's request that the district fund the unilaterally obtained SETSS, speech-language therapy and OT services at the rates specified in the parent's contract with Step Ahead for the 2023-24 school year; and

**IT IS FURTHER ORDERED** that, upon the parent's submission of proof of attendance and delivery of services, the district shall directly fund the costs of up to three periods of SETSS per week, up to two 30-minute sessions per week of individual speech-language therapy, and up to two 30-minute sessions per week of individual OT services delivered to the student in accordance with the terms of the parent's contract with Step Ahead during the 2023-24 school year.

**Dated: Albany, New York  
August 23, 2024**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**