The University of the State of New York

The State Education Department
State Review Officer
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No. 24-268

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.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Always a Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that equitable considerations did not favor the district. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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 in detail here.

The CSE convened on November 17, 2021, determined the student was eligible for special education as a student with a learning disability, and created an IESP with an implementation date

of December 3, 2021 (Parent Ex. B at p. 1).[1] At the time of the CSE meeting, the student was attending a religious nonpublic school (id. at p. 2). The CSE recommended that the student receive three periods of direct group special education support services (SETSS) per week and two 30-minute sessions of individual occupational therapy (OT) per week (id. at p. 10).

Session notes and a progress report indicated that Step Ahead began delivering the student's SETSS at her home on September 12, 2023 (Parent Exs. G at p. 1; I at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated January 29, 2024, the parent alleged, through her attorney, that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year because it failed to implement the special education programming for the student (Parent Ex. A at p. 1).[2] The parent was not present during the proceeding. The parent asserted that she was disputing any subsequent program created by the district that removed or reduced services and any action by the district to "deactivate of declassify" the student (id.). The parent argued that the student required the same program for the 2023-24 school year that was recommended by the November 2021 IESP (id.). The parent contended that she had been unable to locate a service provider for the student at the district's "standard rates" and the district failed to offer the parent a provider to implement the program during the 2023-24 school year (id.). The parent, then asserted, that that she had found a provider for the student; however, at a higher rate than the district's standard rate (id.).

The parent requested an order for the student to receive three sessions per week of SETSS at the enhanced rate for the 2023-24 school year and an order for funding of those services to the provider agency (Parent Ex. A at p. 2). For related services, the parent requested all related services recommended on the IESP for the 2023-24 school year through either related services authorization (RSA), if RSAs are accepted by the parent's provider, or direct funding to the parent's chosen provider at the rates charged, even if higher than the district's "standard" rate (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on April 3, 2024 (see Tr. p. 1-28).[3] In a decision dated May 13, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year as there was no evidence in the hearing record that the district implemented the services mandated in the November 2021

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10].

[2] The parent requested pendency based on what she asserted was the last agreed upon program, the November 17, 2021 IESP, which per the parent, recommended three sessions of group SETSS per week with related services (Parent Ex. A at p. 1).

[3] It is noted that the parent did not appear at the impartial hearing, rather she was represented by her attorney (Tr. pp. 1, 4).

IESP (IHO Decision at pp. 4, 7). The IHO found that the district failed to implement the student's equitable services and the district failed to meet its burden (id.).

Turning to whether the services obtained by the parent from Step Ahead were appropriate, the IHO noted that it was undisputed that the November 2021 IESP was "controlling" and that the parent agreed with that program therein (IHO Decision at p. 4). The IHO also noted that the student was being provided with SETSS and that the provider offered session notes and a progress report (id.). However, the IHO found that the evidence in the hearing record regarding the services being offered to the student were limited as the session goals are blank and much of the session notes were blank (id.). Moreover, the IHO held that the testimony from the Step Ahead secretary that the provider would enter the information in the session notes and progress report was not credible as the IHO did not believe the provider "would refer to themselves in the third person" when documenting activities and the IHO was "unconvinced" that the provider entered the notes (id. at pp. 4-5). The IHO determined that, even if the notes were credible and reliable, the notes insufficiently described any strategies and methodologies that were being used by the provider or what deficits the provider was addressing (id. at p. 5). The IHO held that the parent's evidence did not "substantiate that [the] Student's individual special education needs [were] being addressed by the program", that the services were "reasonably calculated for [the] Student to receive educational benefits," and that the student was progressing in the program (id.). Based on these findings, the IHO found that the parent did not meet her burden to prove that the private education program met the student's needs under the Burlington-Carter standard (id.).

The IHO addressed equitable considerations in the alternative despite concluding that the program was not appropriate (IHO Decision at pp. 5-6). The IHO determined that the parent had not entered a contract or parent affidavit demonstrating the parent's obligation to pay the requested rate, and therefore, there was no evidence of that parent "having any financial obligation to pay for SETSS services being provided by" the provider agency (id. at p. 6). The IHO held that even if, the parent had met her burden, the parent's claim fails under equitable considerations (id.).

Regarding related services, the IHO noted that the parent requested a bank of compensatory education services for the recommended OT since the parent had yet to find a provider to implement those services (IHO Decision at p. 6). As there was no dispute that the November 2021 IESP was controlling and not implemented, the IHO ordered a bank of 36 hours of OT by a qualified provider of the parent's choosing at the rate paid for the same or similar services within the past 12 months by the district's implementation unit (id. at pp. 6-7).[4] The IHO also ordered the district to initiate and conduct new evaluations in all areas of suspected disability and for the district to reconvene to develop a new IEP or IESP (id. at p. 7).

IV. Appeal for State-Level Review

The parent appeals. The parent, through her attorney, argues that with equitable services cases, "the burden and proof of persuasion lies entirely with the district" and that if the district fails to offer proof of an appropriate program or funding, the parent "should be entitled to funding for their Provider for the last agreed upon education program." The parent argues that Burlington-

[4] The IHO ordered the bank of compensatory education services be utilized within two years from the date of her decision (IHO Decision at p. 7).

Carter should not be applied as they are not trying to place the student in a different program or challenge the district's IEP. The parent argues that in this case, she is simply asking for her providers to be paid for delivering the services based on the IESP and that it is "not possible" for the SETSS the parent obtained from Step Ahead to be deemed inappropriate. The parent asserts that "[t]he IESP itself surely is sufficient to demonstrate Student's present level of performance when services began as it was created right before services began."

The parent contends that any argument "of an equitable issue with lack of notice to DOE, the potential that the contract is not a valid, or that the rate being charged was unreasonable, must be rejected." The parent asserts that the 10-day notice requirement does not apply to dual enrollment cases and there is nothing in the law to require notice to the district when that district failed to offer a placement, since there was no removal. As to the financial obligation finding by the IHO, the parent asserts that she attempted to place the contract into the hearing record but placed the wrong document in her evidence disclosure. According to the parent, the IHO wrongfully failed to accept the parent's proffer of a different contract into the hearing record. The parent argues that a written contract is not required under the Statute of Frauds as the parties agreed to the essential terms and, therefore, asserts that a financial obligation exists. The parent contends that nothing in her conduct was inequitable. The parent requests three periods of SETSS per week from Step Ahead at the rate of $200 per hour for the 2023-24 school year.[5]

In an answer, the district asserts that the IHO correctly held that the parent failed to meet her burden of proof and notes that the IHO used the correct standard in her decision. The district argues that the hearing record lacks any information from the agency regarding whether the services provided to the student were appropriate.

In what was improperly styled as a "cross appeal," the district contends that IHO "correctly" held that equitable considerations do not favor the parent as the parent failed to demonstrate an obligation to pay for SETSS.[6] The district argues that the IHO properly did not allow the parent to enter the contract into the hearing record as the parent failed to comply with the five-day disclosure rule, and that the undersigned should not accept the additional evidence by the parent on appeal as it was available at the time of the impartial hearing. Should the SRO review the document, the district asserts that it does not demonstrate a contract because it was signed in March 2024, months after the student allegedly began receiving services from Step Ahead. Moreover, the district argues the parent failed to send a 10-day notice of her intent to unilaterally obtain private services as a self-help remedy and make the district responsible for the costs, which should preclude recovery in this case.

Lastly, in a genuine cross-appeal, the district argues that the IHO erred by ordering the CSE to reconvene and develop an IESP or IEP. The district asserts that there is no indication that

[5] Parent attached the contract but did not specifically request to have it entered but did cite to it in the request for review.

[6] Most of the parent's arguments regarding equitable considerations a not a "cross appeal" challenging the IHO's findings, but rather defenses to the parent's request for review or additional reasoning to uphold the IHO's findings.

the parent wants an IEP and a parent seeking services under 3602-c must request such services, and in this case there is not indication the parent has made such a request.

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]). In some instances, parents voluntarily enroll their children in private schools. In those instances, 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]).

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]).[7] "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.).[8] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at

[7] 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]).

[8] 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.

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

A. Privately-Obtained Services from Step Ahead

In this matter, the student has been parentally placed in a nonpublic religious school and the parent does not seek tuition reimbursement from the district for the cost of the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she unilaterally obtained private services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof.[9]

The parent argues throughout her request for review that the parent need not prove anything at all in this case because she agreed with the November 2021 IESP that was created for the student and is merely carrying out its terms with private providers that she obtained for the 2023-24 school year. I disagree. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private 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"]).

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

[9] Neither party appealed the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year or the award of compensatory OT services (IHO Decision at pp. 5, 6-7). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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]).[10] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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 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

[10] 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]).

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).

In order to determine whether the parent demonstrated that the services provided to the student by Step Ahead were appropriate, a discussion of the student's needs is necessary.[11]

At the time the November 2021 IESP was developed, the student was in fourth grade at the private religious school, eligible to receive special education as a student with a learning disability, and "mandated" to receive three periods per week of SETSS and two 30 minute sessions per week of OT, although at that time she "ha[d] not received her [OT]" (Parent Ex. B at p. 2). The IESP reflects that according to her "previous IESP," results of an administration of cognitive testing to the student yielded scores in the average range for all indices and full-scale IQ (id. at pp. 1, 2).[12] The student occasionally needed repetition to comprehend new directions and material, and to follow directions as she became "easily distracted and need[ed] refocusing on a task" (id. at p. 3).

Academically, the November 2021 IESP indicated that the student struggled when reading more complex, multisyllabic, compound, and "R controlled vowel" words (Parent Ex. B at p. 3). According to the IESP, the student often guessed at difficult words and needed prompts to break down words and look at each part separately (id.). The student read some sight words, but

[11] The parent asserts on appeal that this IESP demonstrates that the services privately provided by Step Ahead were appropriate because "it was created right before services began" (Req. for Rev. ¶17). It is several years old but is the most recent IESP in the hearing record and, more to the point, it does not change the fact that the parent is required to show how the private services she selected were appropriate for the student during the 2023-24 school year.

[12] The November 2021 IESP did not indicate when the student's "prior" IESP was developed (see Parent Ex. B).

struggled with others (id.). The IESP indicated that the student was working on reading fluency, and had difficulty comprehending stories on "a higher level" because she worked so hard on decoding, it was difficult for her to comprehend the story line (id.). In the area of writing, the student had difficulty formulating her thoughts and writing them down in a "clear organized manner" (id.). She also had difficulty "coming up with content to write about" and her paragraphs usually consisted of two or three short sentences (id.). In math, the IESP indicated that the student was not fluent with multiplication tables, and needed help with "mental addition," and recognizing and applying the correct operation when solving math problems (id.).

According to the November 2021 IESP, socially the student had "appropriate relationships with peers and adults," and was described as "extremely respectful," and "well-liked by her teachers" (Parent Ex. B at p. 4). Regarding the student's physical development, the IESP reflected parent report that the student fatigued easily when writing, and that her "prior" IESP indicated that she wrote slowly, and appeared to have difficulty with visual motor integration and motor coordination skills, and focusing in the class (id. at p. 5). The student was able to participate in all physical activities in the school and her overall health was good (id.). The CSE identified strategies to address the student's management needs that included a multisensory approach to learning, flash cards for phonics and vocabulary skills, positive reinforcement, praise for motivation, refocusing prompts, and preferential seating close to the teacher (id.).

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]).

The IHO held that the evidence in the hearing record was insufficient to support a finding that the SETSS provided to the student were appropriate, noting that with regard to the session notes "all of the session goals fields [we]re blank and all but five note fields on the document [we]re blank" (IHO Decision at p. 4; see Parent Ex. G). A review of the session notes demonstrates that none of the session fields from September 2023 until March 11, 2024 contained goals or notes from the provider (Parent Ex. G at pp. 1-7). For the sessions of March 12, 13, 18, 19, and 20, 2024, each session contained a note (id. at pp. 7-8). However, review of these five notes shows that several were not specific as to how the student's needs were addressed, rather they generally indicated the provider worked on improving the student's math, problem-solving, and vocabulary skills (id.). The most specific session note was from the March 13, 2024 session, which noted progress in the student's literacy skills and that the provider offered structured support and effective strategies to enhance comprehension and written expression (id. at p. 7). Each note referenced the student's age and three referred to the provider as "the special education teacher" (id. at pp. 7-8). Thus, the IHO's findings were supported by the evidence.

The progress report from Step Ahead described the student's needs and offered goals for the student; however, it did not specify what the provider was doing with the student to work toward those goals (see Parent Ex. I).

The testimony from the Step Ahead secretary did not offer more clarification regarding what the SETSS provider specifically worked on with the student (see Tr. pp. 12-22). Specifically, the Step Ahead secretary testified that she did not speak to providers or the supervisors of the providers who deliver services to the students (Tr. pp. 12, 20-21). She confirmed that the SETSS provider completed the information reflected in the session notes—a statement which the IHO did not find to be credible—and that to her knowledge, the progress report in the hearing record was the most "up to date" progress report for the student (Tr. pp. 16, 21, 22; IHO Decision at pp. 4-5).[13]

Based on the overall lack of reliable evidence in the hearing record that adequately described how the SETSS teacher was addressing the student's needs, there is insufficient basis to overturn the IHO's finding that the parent failed to establish that the privately obtained services from Step Ahead were appropriate . The documents presented by the parent were unpersuasive and support the IHO's conclusions based on the limited evidence and lack of detail. As such, I decline to overturn the IHO's finding that the parent failed to demonstrate the services provided by Step Ahead were appropriate to meet the student's special education needs.

B. Equitable Considerations

Although it is unnecessary to address the issue of equitable considerations after reaching the conclusion that the parent failed to demonstrate the services provided by Step Ahead were appropriate; however, I will briefly address the issue for the sake of thoroughness.

The Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (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]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]). Thus, the IHO's proposed reduction on that ground was error.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect

[13] The secretary signed an affirmation dated March 25, 2024, which indicated that the student's educational records were kept in the ordinary course of business by Step Ahead (Parent Ex. D).

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "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]). As the First Circuit

Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [1985] [noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247[2009] [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

Regarding proof of financial risk, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

Here, at the hearing the district argued that there was no evidence that the parent was financially obligated to pay for the SETSS because there was no contract and the IHO held that the parent failed to demonstrate a financial obligation to pay Step Ahead (Tr. p. 23; IHO Decision at p. 5-6).[14]

The IHO is correct that the evidence in the hearing record does not demonstrate the parent has financial obligation to pay Step Ahead for SETSS. The hearing record indicates that during the impartial hearing the parent asserted that she submitted the wrong contract with the disclosure and withdrew that document (Tr. p. 5-6). Although, the parent's attorney wished to amend the disclosure, the district objected because it would violate the five-day rule and the IHO declined to admit the evidence over the district's objection (Tr. pp. 5-6). The IHO's determination was not an abuse of discretion. Federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). The parent was able to then attempt to prove financial obligation during the hearing by potentially calling the parent as a witness, but as noted above the parent did not attend the hearing and did not testify.[15]

[14] I note that both parties raised a question about the lack of a 10-day notice in the hearing record on upon appeal. Although, there is no 10-day notice in the hearing record, the district did not argue that the parent's failure to submit that letter was a bar to funding at the hearing (Tr. pp. 9-10, 22-24). Further, the IHO did not find that the failure to file the 10-day notice was a bar to funding (IHO Decision at p. 5-6). As such, I decline to address the issue as it is not necessary to render a determination on equitable considerations in this case and the issue was raised for the first time on appeal.

[15] I note that the United States Department of Education has opined, interpreting similar language in the

Moreover, the Step Ahead secretary did not offer sufficient testimony to demonstrate an obligation on behalf of the parent.[16] As such, the hearing record does not support a finding that the parent had a financial obligation to pay for SETSS by Step Ahead.[17]

Regarding the district's assertion that the IHO erred by ordering the CSE to reconvene, the argument is without merit, and I decline to overturn the IHO. The district incorrectly implies that should the parent fail to request equitable services, that this would absolve the district of any duties to the student. This assertion is incorrect. Even if dual enrollment services are not requested, mere inaction by the parent does not establish that the parent made clear her intention to keep the student enrolled in the nonpublic despite needing special education services and would thus not be required to make a FAPE available in the public school ("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 12, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf). In that instance, the district is not able to treat the student as if she has been declassified and instead should show documentation of efforts that were made to discern the parents' intentions regarding the student's need for special education services. Moreover, there is no evidence in the record before me that the CSE has convened since November 2021. Accordingly, the IHO decision to order the CSE to reconvene and consider the student's current special education needs was appropriate an appropriate use of her discretionary authority to direct equitable relief.

VII. Conclusion

The parent failed to meet her burden to prove that the unilaterally obtained services provided by Step Ahead were appropriate. Furthermore, there is no reason to overturn the IHO's

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regulations to the predecessor statute to the IDEA, "that names of witnesses to be called and the general thrust of their testimony should be disclosed" (Letter to Bell, 211 IDELR 166 [OSEP 1979]). State regulations also expressly contemplate the "exchange of witness lists" (8 NYCRR 200.5[j][3][xvii]). It is not clear whether the parent, had she attended the hearing, would have been called to testify, whether her name and thrust of her testimony had been disclosed in accordance with the five-day rule, whether the district would have objected, or how the IHO would have ruled.

[16] I am not convinced that the testimony from the secretary of Step Ahead alone could be sufficient to support the liability of the parent under an oral contract, even if it had been more thorough.

[17] Regarding the document the parent attached to the request for review as additional evidence, in general, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). As noted above the IHO did not abuse her discretion by declining to allow the document into evidence and there is no justifiable reason on appeal to unwind the IHO's discretionary determination by accepting it as additional evidence after the fact.

determination regarding equitable considerations. Additionally, I decline to overturn the IHO's decision directing the CSE to reconvene.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 26, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER