



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-275

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

Appearances:

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

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

DECISION

I. Introduction

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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. For the 2022-23 school year the student attended first grade in a nonpublic school (Parent Ex. B at p. 1). The CSE convened on April 18, 2023, to formulate the student's individualized education services program (IESP) for the 2023-24 school year (see generally Parent Ex. B). The April 2023 CSE recommended the student receive two 30-minute sessions per week of individual speech-language therapy (id. at p. 7).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated February 12, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parent asserted that the district did not provide the services recommended in the April 2023 IESP and indicated she was unable to locate providers at the district's standard rates. According to the parent, she found providers for the student at rates higher than the district's rate. The parent requested a pendency hearing and an order directing the district to fund the student's speech-language therapy services at an enhanced rate for the entire 2023-24 school year (id.).

On May 6, 2024, the parent electronically signed a document on Step Ahead's letterhead indicating that she was "aware that the services being provided to [her] child [we]re consistent with those listed in [the April 2023 IESP]" (Parent Ex. C).¹ She also indicated that she was "aware that the rate of the related services provided to [her] child [we]re \$250 an hour" (id.).

B. Impartial Hearing Officer Decision

Following a status conference on April 16, 2024, for which the district did not appear, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 14, 2024 and concluded the same day (Tr. pp. 1-29).² In a decision dated May 17, 2024, the IHO found that pendency had been resolved between the parties on February 16, 2024; that the district conceded that it failed to provide the student with a FAPE for the 2023-24 school year; that the parent failed to meet her burden of proving the appropriateness of the unilaterally obtained services; and that, had the parent met her burden, a balancing of the equities would not favor the parent as she failed to provide the district with a ten-day notice (IHO Decision at pp. 3, 4, 7-12). The IHO denied the parent's request for funding of speech-language therapy provided by Step Ahead for the 2023-24 school year (id. at p. 12). The IHO ordered the district to provide the student with speech-language therapy for the remainder of the 2023-24 school year pursuant to the April 2023 IESP (id. at p. 14).

¹ Step Ahead is a private corporation and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² The IHO referred to a March 19, 2024 prehearing conference, for which the district also did not appear; however, there is no transcript or written summary of that prehearing conference.

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in applying the Burlington-Carter analysis to the facts of the matter. According to the parent, she is "simply request[ing] that the providers be paid for delivering services based on the IESP" and she met her burden by submitting the credentials of the Step Ahead providers. Regarding equitable considerations, the parent alleges that 10-day notice did not apply, as this is not a "tuition case" and the student was not being removed from a public school placement. Further, the parent asks that the district's inequitable conduct not be ignored in balancing equitable considerations and that any reduction is discretionary and that the IHO further erred in raising the issue on her own without the district making an argument. The parent requests direct funding to Step Ahead for speech-language therapy services delivered to the student during the 2023-24 school year at the rate of \$250 per hour.

In its answer and cross appeal, the district alleges that the parent failed to meet her burden of proving that the unilaterally obtained services at Step Ahead were appropriate for the student and argues that the equities warrant a denial of all relief because the parent failed to provide evidence of having presented the district with a ten day notice.³

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).⁴ "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]).

³ Although labeled as a cross-appeal, the district's cross-appeal does not challenge any portion of the IHO's decision and accordingly is not truly a cross-appeal. A respondent may cross-appeal from all or a portion of the decision of an IHO; however, a cross-appeal must "specify the reasons for challenging the impartial hearing officer's decision" (8 NYCRR 279.4[f]). As the district is not challenging any portion of the IHO's decision, the district has not submitted a proper cross-appeal.

⁴ 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]).

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.*).⁵ 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

A. Unilaterally Obtained Services

Prior to reaching the substance of the parties' arguments, some consideration must be given to the appropriate legal standard to be applied. In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement for the cost of the student's attendance there. The parent alleged that she unilaterally obtained private services from Step Ahead for the student and then commenced due process to obtain remuneration for the services provided by Step Ahead. Accordingly, the issue in this matter is whether the speech-language therapy services obtained by the parent from Step Ahead constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parent or, alternatively, should be directly paid by the district to Step Ahead, upon proof that the parent has paid for the services or is legally obligated to pay but does not have adequate funds to do so. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They

⁵ 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.

do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Accordingly, the parent's request for district funding of the privately obtained speech-language therapy services at issue here must be assessed under this framework.

In review of the appropriateness of the unilaterally obtained services, the federal standard is instructive. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; 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 (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in

determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student needs

A brief discussion of the student's needs, which are not in dispute, is warranted to address the issues on appeal. The student's April 2023 IESP related that on the Woodcock-Johnson, Fourth Edition (WJ IV) Tests of Achievement, the student obtained a reading cluster score of 93, which was in the average range and indicated "beginning 1st grade" reading abilities (Parent Ex. B at p. 1). The student was "generally" able to read at grade level but struggled with fluency (id.). On a "comprehension task," the student matched pictures to words (id.). When presented with short sentences to read and asked to provide a missing word based on context, the student could not read all the words but used context clues to complete the items (id.). When pictures were not provided, the student struggled to understand what he had read, "likely due to his focus on decoding the words" (id.).

According to the April 2023 IESP, the student's teacher reported that the student was "slowly" mastering letter sounds, CVC words, and blends but he lacked fluency and often lost focus, and his reading skills were "on a beginning [k]indergarten level, contrary to assessment results" (Parent Ex. B at p. 1). The IESP noted that on a "spelling task" the student obtained a spelling score of 94, which was on a "beginning" 1st grade level, in the average range (id. at p. 2). The student reversed some letters but not consistently (id.). The April 2023 IESP noted that according to the student's teacher, he wrote slowly, and his handwriting was messy (id.). The April 2023 IESP related that the student earned a "math cluster" score of 103, in the average range and on an "upper" 1st grade level (id.). On a "measure of calculation" the student completed single digit addition and subtraction independently within age and grade expectations, and completed most items mentally, using his fingers for larger numbers (id.). On word problems, the student demonstrated "good" comprehension and analytical abilities (id.). He identified most coins and their values, and "generally" knew whether problems called for addition or subtraction (id.). The April 2023 IESP noted that, according to teacher report, the student's math skills were at the pre-kindergarten to kindergarten level, and he needed individualized attention to complete assignments (id.).

Speaking to the student's oral language skills, the April 2023 IESP indicated that, based on teacher report, the student struggled to express his thoughts appropriately and "[did] not participate much in class" (Parent Ex. B at p. 2). He often needed repetition, had difficulty following directions, and seemed to "miss out" on some concepts being taught and often had difficulty answering questions and following multi-step directions (id.). The April 2023 IESP further

indicated that the student performed within the average range in "all areas measured," though his verbal comprehension was "relatively weaker," and he "often" had difficulty finding the right words to describe things or define words (id.). According to the April 2023 IESP, the student's nonverbal reasoning, working memory, and processing speed were all in the average range (id.). In addition, the IESP indicated the student "[wa]s capable of grade level work" (id.). Socially, the student tended to "keep to himself or interact with quiet boys," got along with peers, and had friends (id. at p. 3). The student liked running around and being outdoors (id.) The April 2023 IEP noted that according to the student's mother, he preferred to play rather than to do his homework, was not motivated, was very active, could be impulsive, and may be anxious (id.). In terms of the student's physical development, the IESP stated that his fine motor precision, fine motor integration, and fine manual control were all in the average range and occupational therapy was not recommended (id.). However, the student's mother expressed concern regarding the student's "poor handwriting, as well as impulsive and fidgety behavior" (id.).

2. Services from Step Ahead

With regard to services from Step Ahead, the IHO found that the hearing record did not contain sufficient evidence of how the speech-language therapy services provided by Step Ahead were specially designed to meet the student's needs (IHO Dec. at pp. 8-12). The hearing record includes a fillable document identified as "attendance records," which reflects the speech-language service provider's name, dates of sessions, times in and times out, and location of the services, with spaces to describe goals, and "notes" (see Parent Ex. G).⁶ In addition, the hearing record includes a document that shows the speech-language provider held an initial certificate as a teacher of students with speech and language disabilities (see Parent Ex. E).⁷

The Step Ahead attendance records included logs of the speech-language therapy sessions delivered to the student between January 22, 2024 and April 3, 2024 (see Parent Ex. G).⁸ A review of the attendance records shows that the provider included brief notes on what occurred with the student during speech-language therapy sessions (id.). For example, the document reflected that on January 22, 2024, the student "worked on" reading comprehension, identifying the main idea of a story, and expressive and receptive language skills, which was consistent with student's needs

⁶ The hearing record also includes an affirmation from the Step Ahead secretary that noted that "the documents submitted by [Step Ahead] for the... student's case, which include[d] the parent contract, provider's certification, attendance records, progress reports and rate list of approved cases, were taken from [Step Ahead's] files ... [kept] for this student in the ordinary course of its business" (see Parent Ex. D). Although noted in the Step Ahead document, neither progress notes nor a rate list of approved cases were included in the hearing record.

⁷ According to State guidance, in order to engage in the private practice of speech-language pathology, the provider would also be required to have a license in speech-language pathology (see "What Credential is Required to Provide Speech Services in New York State?" Office of Professions, available at <https://www.op.nysed.gov/professions/speech-language-pathology/practice-settings-credentials/what-credential-required-provide-speech-services-new-york-state>).

⁸ The hearing took place on May 14, 2024, and there is no information in the hearing record as to services delivered to the student between April 3, 2024 and May 14, 2024 or if the student continued to receive services from Step Ahead at that point in the school year.

and the annual goals as identified in the April 2023 IESP (compare Parent Ex. G at p. 1, with Parent Ex. B at pp. 1, 4). On January 24, 2024, the speech-language therapy session "focused on vocabulary development," a "language game to enhance receptive and expressive language skills" and "sequencing a story using sentences and pictures," which was also consistent with student's needs and annual goals as detailed in the April 2023 IESP (compare Parent Ex. G at p. 1, with Parent Ex. B at pp. 4-5). The attendance record further shows that speech-language therapy sessions also focused on improving the student's encoding and decoding skills, spelling, reading comprehension, ability to put words in alphabetical order, ability to sequence sentences and pictures to create stories, expressive and receptive language skills, vocabulary, ability to sequence a story, identification of parts of speech, and following directions, all skills that were consistent with the student's needs identified in the April 2023 IESP (compare Parent Ex. G, with Parent Ex. B at pp. 2-6).

While it would be preferable to have the testimony of the speech-language provider at the impartial hearing, there is nonetheless sufficient evidence to show that the student received speech-language services from Step Ahead and that such services addressed the student's specific needs related to improving language, spelling, and narrative skills during the 2023-24 school year consistent with student's needs and the annual goals as identified in the April 2023 IESP. In light of the foregoing and contrary to the IHO's determination, the evidence in the hearing record supports a finding that the parent sustained her burden to prove that the unilaterally-obtained speech-language therapy services delivered by Step Ahead were appropriate to meet the student's needs.

Further, although the parent proved the appropriateness of the services to the extent that the attendance records show services were provided to the student during the 2023-24 school year, as noted by the IHO, the hearing record only shows that services were delivered to the student for a portion of the school year. In fact, the hearing record only shows that the student received 10.5 hours of speech-language therapy services during the 2023-24 school year (Parent Ex. G) and the parent is only entitled to receive funding for services that she has shown were actually provided to the student during the 2023-24 school year.

B. Equitable Considerations

Having found that the speech-language therapy services provided by Step Ahead were appropriate, the inquiry now turns to consider the final criterion for a reimbursement award, which is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442,

461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA").

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

Here, the parent appeals the IHO's alternate finding that equitable considerations did not favor an award of funding for the unilaterally-obtained services because the parent failed to provide 10-day notice to the district. The parent asserts that she was not required to provide 10-day notice because it was an equitable services matter and the student had not been removed from a public-school placement (Req. for Rev. ¶ 21). The district asserts that a hearing officer retains the fundamental discretion to reduce or bar reimbursement if the parent failed to provide the requisite notice.

Consistent with the IHO's finding, the evidence in the hearing record reflects that the parent did not submit a 10-day notice to the district. In addition, the evidence indicates that although the private agency began delivering speech-language therapy services to the student on January 22, 2024, the parent failed to notify the district until she filed her due process complaint notice on February 12, 2024, that she had retained Step Ahead to deliver speech-language services to the student and intended to seek public funding from the district.⁹

Initially, the public school placement in this instance was the services recommended in the April 2023 IESP, two 30-minute sessions per week of speech-language therapy (Parent Ex. B). Accordingly, when the parent engaged in self-help obtaining related services for the student herself and seeking funding for those services from the district, the parent removed the student from the

⁹ As noted above, the parent did not sign a contract with Step Ahead to provide services to the student until May 6, 2024, after all of the documented services were provided to the student (compare Parent Ex. C at p. 1, with Parent Ex. G).

public-school placement and was required to provide the district with the required 10-business day notice prior to engaging in this self-help remedy. Ultimately, however, there was no argument or allegation during the impartial hearing regarding either the lack of a 10-day notice or a lack of procedural safeguards notice or prior written notice. The IHO should utilize the prehearing conference procedures to discuss with the parties whether such issues are germane to the matter before her so that the parties are on notice and the hearing record is properly developed (see 8 NYCRR 200.5[j][3][xi]). While the hearing record does not include a 10-day notice from the parent, given the lack of discussion during the impartial hearing and the undeveloped state of the hearing record, I decline to uphold the IHO's complete denial of an award of district funding for the unilaterally-obtained services based solely on equitable grounds. However, I find that based on the parent's failure to provide the district with a 10-day notice, and the parent's delay in notifying the district of her concerns with the student's IESP not being implemented until February 12, 2024 when she filed the due process complaint notice, the balancing of the equities supports limiting the parent's award for SETSS and related services provided to the student by Step Ahead to ten business days after parent's filing of the due process complaint notice on February 12, 2024, which is February 26, 2024. Therefore, I am limiting the award of funding from February 26, 2024 through April 3, 2024, the last date contained in the attendance records documenting that the speech-language provider provided services to the student (Parent Ex. G at pp. 2-3).

Because the hearing record is so sparse, the attendance records are the only evidence in the hearing record regarding when the speech-language therapist provided services to the student. There is no affidavit from the speech-language therapist, the parent, or a school administrator attesting that the speech-language therapist provided services to the student twice per week for 30-minutes pursuant to the April 2023 IESP. The attendance records reflect that the speech-language therapist did not always meet twice a week with the student, sometimes skipping an entire week before providing services to the student (Parent Ex. G at pp. 1-3). As such, in balancing the equities, the award of funding for speech-language therapy services will be limited to the dates and times contained in the attendance records from February 26, 2024 through April 3, 2024. Specifically, I limit tuition reimbursement to February 26, 2024 for one half-hour; March 6, 2024 for an hour; March 18, 2024 for an hour; March 20, 2024 for an hour; March 27, 2024 for one half-hour, April 1, 2024 for one half-hour and April 3, 2024 for one half-hour, for a total of five hours at the enhanced rate of \$250 per hour reflected in the parent's contract with Step Ahead, representing a total award of \$1,250 (see Parent Exs. C, G).

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's conclusion that the speech-language services delivered by Step Ahead to the student during the 2023-24 school year were not appropriate, and that equitable considerations weigh in favor of a partial reduction of the parent's requested relief, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO’s decision, dated May 17, 2024, is modified by reversing the determination that the speech-language therapy services delivered by Step Ahead were not appropriate to meet the student's needs; and

IT IS FURTHER ORDERED that the IHO’s decision, dated May 17, 2024 is modified by reversing the determination that the parent's requested relief should be denied on the basis of equitable considerations; and

IT IS FURTHER ORDERED that the district shall directly fund the costs of the student's speech-language services, delivered by Step Ahead in the total amount of \$1,250 for services delivered between February 26, 2024 and April 3, 2024.

Dated: **Albany, New York**
 August 16, 2024

STEVEN KROLAK
STATE REVIEW OFFICER