The University of the State of New York

The State Education Department
State Review Officer
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No. 24-339

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 paraprofessional services delivered by Always a Step Ahead (Step Ahead) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which ordered the district to fund speech-language therapy and occupational therapy (OT) services delivered by Step Ahead for the 2023-24 school year. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

A CPSE convened on November 22, 2023, found the student eligible for special education as a preschool student with a disability and, according to the parent, recommended that the student receive two 30-minute sessions per week of individual OT (see Parent Exs. A at p. 1; B).[1, 2]

According to an untitled document identified by the parent as "[s]ession [n]otes" the student began receiving OT services on December 15, 2023 (Parent Ex. G at p. 1; see Parent Ex. E at p. 2).

A CPSE reconvened on January 3, 2024 and recommended that the student receive three 60-minute sessions per week of direct group (2:1) special education itinerant teacher (SEIT) services, two 60-minute sessions per week of indirect individual SEIT services, two 30-minute sessions per week of group (2:1) OT, one 30-minute session of group (2:1) speech-language therapy per week, and full-time individual crisis paraprofessional support services (see Parent Ex. I at pp. 1, 10).

On January 9, 2024, the parent electronically signed a document on Step Ahead's letterhead indicating that the student was receiving services consistent with those listed on the January 2024 and November 2023 IEPs (see Parent Ex. C).[3, 4] The document also stated that the parent was aware that hourly rates for services provided to the student were set at $200 for special education teacher support services (SETSS), $250 per hour for related services, and $75 for paraprofessional services (id.). The parent acknowledged that, should the district not pay for the services, the parent would be liable to pay for them (id.).

According to the "sessions notes" referenced above, on February 6, 2024, the student was informally assessed by a speech-language pathologist, and, on February 27, 2024, the received a session of speech-language therapy (Parent Ex. G at p. 2; see Parent Ex. E at p. 1).

A. Due Process Complaint Notice

In an amended due process complaint notice dated April 5, 2024, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for

[1] On the IEPs in the hearing record, the original CPSE meeting date of November 22, 2023 was crossed out and the date of the reconvene meeting, January 3, 2024, was added to the IEP summary page and to the first page of the IEP (Parent Exs. B at pp. 1, 3; I at pp. 1, 3). Although parent exhibit B was listed on the parent's exhibit list as the November 2023 IEP, review of the document reveals that it is the same as parent exhibit I, namely the IEP developed after the January 2024 CPSE reconvene meeting (compare Parent Ex. B, with Parent Ex. I).

[2] The student's eligibility for special education as a preschool student with a disability for the 2023-24 school year is not in dispute (see 34 CFR 200.1[mm]; 8 NYCRR 200.1[mm]).

[3] The document was e-signed with an Adobe "Final Audit Report" (Parent Ex. C at p. 2).

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

the 2023-24 school year (Parent Ex. H at p. 1).[5] The parent argued that, for the full 2023-24 school year, the student required the services as set forth in the January 2024 IEP (id.). The parent asserted that the district assigned the student a SEIT but no providers for the student's other services (id.). In addition, the parent contended she was unable to locate providers to work with the student at the district's standard rates for the 2023-24 school year and was only able to find providers to deliver the student services "at rates higher than standard [district] rates" (id.).

For relief, the parent requested an order requiring the district to continue the student's special education and related services under pendency and an order awarding the student two 30-minute individual sessions of OT per week, one 30-minute session of group speech-language therapy per week, and an individual paraprofessional five times for 360 minutes per week at enhanced rates for the entire 2023-24 school year (Parent Ex. H at p. 2). The parent also requested that the district be ordered to continue to provide the student with five hours of direct SEIT services and two hours of indirect SEIT services per week and, should the district fail to provide the SEIT services, an allowance for the parent to find her own provider at an enhanced rate to be funded by the district (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on February 29, 2024 and concluded on May 22, 2024, after four days of proceedings inclusive of prehearing and status conferences (see Tr. pp. 1-71). Although initiated by through her attorney, the parent did not participate in the proceedings. In a decision dated June 28, 2024, the IHO found that district failed to meet its burden to prove that it provided the student with a FAPE for the 2023-24 school year (IHO Decision at pp. 3, 6, 9, 11).

The IHO characterized the relief sought by the parent as compensatory education, set forth legal standards related thereto, and noted that the district offered no evidence in support of its burden to prove an appropriate compensatory education award (IHO Decision at pp. 7-10). The IHO noted that the district had no objection to an award of OT, speech-language therapy, and paraprofessional services and objected only to the requested rate (id. at p. 9). The IHO found that the OT and speech-language therapy services procured by the parent were appropriate as both providers were licensed and were guided by the January 2024 IEP and review of the session notes demonstrated that the services were tailored to the student and reasonably calculated to enable the student to receive educational benefits (IHO Decision at p. 9). However, the IHO declined to award a bank of compensatory education for the requested crisis paraprofessional services, finding that the hearing record did not show that the student received paraprofessional services and that the parent did not identify a specific remedy that she sought in connection with that service (id. at p. 9 n.4).

Turning to equities, the IHO found that there was no evidence that the parent did not fully cooperate with the IEP process and found that the balance of equities favored the parent's request for relief (IHO Decision at p. 9). However, the IHO held that hearing record lacked sufficient

[5] The initial due process complaint notice was dated January 25, 2024 (see Parent Ex. A). On February 14, 2024, the district signed an agreement providing that the student was entitled to pendency based on the November 2023 IEP that consisted of two 30-minute sessions per week of individual OT (Pend. Impl. Form).

evidence to demonstrate the reasonableness of the rate sought by the parent for the services delivered by Step Ahead (id. at p. 10). The IHO noted that the parent's agreement with Step Ahead, although dated September 1, 2023, was not signed by the parent until January 2024 and the witness from Step Ahead did not have independent knowledge of the agreement and did not know the hourly compensation for the providers, the agency's pricing policies, or whether the providers were employees or independent contractors (id.). Based on this, the IHO found that the witness was not credible and that she was called to testify on issues about which she had "very little knowledge" (id.).

For relief, the IHO ordered the district to directly fund two 30-minute sessions of individual OT per week and one 30-minute session of group speech-language therapy for the 10-month 2023-24 school year, to be provided by a qualified independent provider of the parent's choosing at the rate consistent with rates paid by the district's implementation unit for similar services within the last six-month period prior to the date of the decision (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in failing to order pendency based on the January 2024 IEP and in denying her request for district funding of paraprofessional services from Step Ahead for the 2023-24 school year. The parent asserts that a Burlington/Carter analysis should not apply because the parent obtained the services that the district was supposed to have delivered and that, therefore, the burden of production and persuasion should remain entirely with the district. However, the parent contends that, even under the Burlington/Carter standard, her requested relief should be granted. The parent asserts that the providers from Step Ahead were appropriately credentialed, they completed sessions notes identifying the student's need and the manner in which the services addressed those needs, and they delivered services consistent with the student's IEP.[6] The parent asserts that the IHO erred by not awarding individual crisis paraprofessional services, arguing that the contract demonstrated that Step Ahead provided such services consistent with the student's IEP and that no further evidence was presented because a paraprofessional does not require the same credentials as other providers and, given the nature of the service and why it's needed, "there was nothing needed to show 'appropriateness.'" Regarding equitable considerations, the parent argues that there is nothing in the record to demonstrate inequitable conduct by the parent and that the evidence demonstrates she incurred a financial obligation for the unilaterally obtained services.

The parent requests funding for an individual crisis paraprofessional delivered by Step Ahead beginning on January 8, 2024 at the rate of $75 per hour and an order for pendency services per the January 2024 IEP as of the date of the filing of the original due process complaint notice.

In an answer with cross-appeal, the district argues that the IHO erred by granting any relief as the parent failed to meet her burden to prove that services obtained from Step Ahead were appropriate and equitable considerations did not support the parent's request for relief. Initially,

[6] The parent notes that she is not appealing the portion of the IHO decision that awarded funding for two 30-minute sessions of OT per week and one 30-minute session of speech-language therapy per week; however, in the event the district cross-appealed the award, the parent sets forth her position in her request for review that she presented sufficient evidence to demonstrate the appropriateness of the OT and speech-language therapy.

the district asserts that the IHO erred in treating the parent's requested relief as compensatory education and that the IHO should have followed the Burlington/Carter standard. The district contends that the IHO correctly found that the parent did not present evidence regarding the crisis paraprofessional and also alleges that the parent abandoned her claim for the crisis paraprofessional during the impartial hearing. Regarding speech-language therapy and OT, the district asserts that the parent failed to offer testimonial evidence from the providers or documentary evidence such as a progress report or assessments and that the sessions notes entered into evidence only demonstrated that, for the 2023-24 school, the student received fourteen OT sessions and two speech-language therapy sessions and were insufficient to establish that the services were appropriate.

Turning to equitable considerations, the district notes that the parent did not appeal the IHO's findings that the witness from Step Ahead was not credible, that the parent failed to establish the reasonableness of the rates requested, or that the parent was not entitled to an award of district funding of services provided by Step Ahead at the requested rates. The district argues that these findings should be found to be final and binding. In addition, the district asserts additional equitable considerations should have weighed against an award of funding, including that the parent failed to demonstrate she had a legal obligation to pay for the cost of the services and the parent failed to provide a 10-day notice of her intent to obtain unilateral services.

Regarding pendency, the district agrees that the January 2024 IEP is the basis of pendency and that the student is entitled to pendency retroactive to the date of the January 25, 2024 due process complaint notice. However, the district notes that pendency does not entitle a parent to services at specific rate.

V. Applicable Standards

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

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

advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

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

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

VI. Discussion

Initially, the district has not appealed the IHO's determination that the district failed to meet its burden to prove that it provided the student with a FAPE for the 2023-24 school year (IHO Decision at p. 9). Accordingly, this 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]).

On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained services delivered to the student by Step Ahead during the 2023-24 school year and what relief, if any, is appropriate.

A. Legal Standard

The district asserts that the IHO improperly treated the parent's requested relief as compensatory education; whereas the parent asserts that the Burlington/Carter model of analysis is not the correct standard for resolving the parties' dispute. Accordingly, the first issue to be addressed is the appropriate legal standard to be applied. In this matter, it is undisputed that the district failed to implement the student's mandated related services and paraprofessional services pursuant to the January 2024 IEP during the 2023-24 school year. As a result, as a self-help remedy, the parent unilaterally obtained private services from Step Ahead for the student without the consent of the school district officials, and then she commenced due process to obtain

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

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

To the extent the parent argues that the above framework should only apply to IEP disputes, and not to disputes solely related to implementation, such a claim is contrary to the IDEA. A district's delivery of a placement and/or services must be made in conformance with the CPSE's or CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *17 [E.D.N.Y. May 26, 2011], aff'd, 573 Fed. App'x 63 [2d Cir. 2014]).

The parent's claims involve a self-help remedy seeking public funding of related services that she privately obtained from Step Ahead. That is the hallmark of a Burlington/Carter style of claim and analysis, and such relief is permissible if the parent meets the evidentiary burden of showing that the private services she obtained were appropriate under the totality of the

circumstances. Accordingly, the IHO erred in treating the parent's requested relief as compensatory education.

B. Unilaterally-Obtained Services

Turning to a review of the appropriateness of the unilaterally-obtained services, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 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. Student Needs

A review of the student's needs, although not in dispute, is necessary to determine whether the unilaterally obtained services were appropriate for the student.

Based on the hearing record, the student's needs for the 2023-24 school year can best be gleaned from the student's January 2024 IEP (see Parent Ex. I). Initially, the January 2024 IEP laid out the results of numerous evaluations administered to the student on unknown dates. According to the IEP, on the Differential Ability Scales-II (DAS-II) the student attained a general conceptual ability standard score of 113, which fell within the above average range (id. at p. 3).[8] On the Behavior Assessment System for Children-Third Edition (BASC-3 PRS-P), the student attained ratings within the "at-risk" range on the hyperactivity and depression scales (id.). On the Childhood Autism Rating Scale-Second Edition (CARS2-ST) the student's raw score fell within the range of minimal-to-no symptoms of autism spectrum disorder (id.).

The January 2024 IEP indicated that on the Brigance Diagnostic Inventory of Early Development III, the student's score fell in the above average range in the academic/cognitive domain, at a five-year, two-month age level (Parent Ex. I at p. 3). In addition, the student's development fell within the average range in the language domain, at a four-year, ten-month age level (id.). In the fine motor domain, the student's development fell in the slightly below average range, at a four year and four-month age level (id.). Next, the January 2024 IEP indicated that the student's gross motor skills were approximately 16 percent delayed, with a level of function of four years (id.). In the self-help domain, the student's development was approximately 34 percent delayed, at an age level of three years, two months (id.). In the area of social/emotional development, the student's development was approximately 43 percent delayed, with an age level of function of two years and nine months (id.).

The January 2024 IEP noted that on the Preschool Language Scales-Fifth Edition (PLS-5) the student achieved a total language score of 92, which was indicative of average performance (Parent Ex. I at p. 3). The IEP stated that the student's articulation and intelligibility were within normal limits (id.). Although the student's expressive language skills were at or above her age level, she exhibited deficits in her ability to use her language meaningfully to relate to others as a result of delayed pragmatic language skills (id.).

Next the January 2024 IEP indicated that according to the Sensory Processing Measure, Second Edition, home form (SPM-2-HF), the student scored "typically in all areas" (Parent Ex. I at p. 3). Based on observation, the student's score indicated "moderate under responsiveness to vestibular input" and "difficulty shifting attention from self-directed to adult-directed verbal

[8] The administered tests (DAS-II, BASC-3 PRS-P, CARS2-ST) are referred to by their acronyms in the IEP (Parent Ex. I at p. 3).

requests and activities" (id.). According to the Peabody Developmental Motor Scales-Second Edition (PDMS-2) and clinical observation, the student exhibited average overall fine motor skills, scoring in the 50th percentile for both grasping and visual motor skills (id.).

With regard to the student's academic achievement and functional performance, the January 2024 IEP noted that the student was able to give her first and last name, age, and birthday (Parent Ex. I at p. 3). She was able to recite the alphabet in English and Hebrew, identify all upper and lowercase letters, and use visual discrimination to determine differences in groups of pictures (id.). The student was also able to determine if words had the same beginning and ending sounds, orient a book towards herself, flip through the pages in the appropriate direction, and comment on illustrations (id. at p. 4). The student was able to write her name, rote count to 25, identify numbers 1-10, identify "more," sort by attribute, and solve a simple word problem using a picture (id.). The student was able to verbally label shapes and colors (id.).

According to the January 2024 IEP, the student's teachers reported that she needed one to one assistance to interact socially with her classmates as she was "overwhelmed" by her peers, and unable to play cooperatively with them (Parent Ex. I at p. 4). The student exhibited anxiety and poor emotional regulation, fixated on topics, and had difficulty following classroom routines due to variability in her attention and mood (id.). The student's weak skills in "social pragmatic language and emotional regulation" negatively affected her ability to succeed and be a more active participant and learner in her classroom (id.).

The IEP described the student as "very bright, inquisitive, precocious, and curious," as she enjoyed exploring educational materials and engaging in conversations with adults (Parent Ex. I at p. 4). The student's parents and teachers were concerned about her inability to participate in "reciprocal pragmatic play," her emotional outbursts, and anxiety, which inhibited her ability to make friends and engage in the classroom (id.). In terms of social development, the IEP indicated that the student did not initiate or respond appropriately to social interactions with peers during the course of an evaluation and did not engage in cooperative play (id.). The student had difficulty with self-advocating and engaged in soothing sensory behaviors like rocking gently with her hands over her ears when peers approached unexpectedly (id.). According to the IEP, the student's teachers reported that she had difficulty with transitions and her mother reported that the student's "daily tantrums" escalated "quickly," but that at times she could be soothed by music, a sand timer, and a stress ball (id. at p. 5). The student's tantrums in school were disruptive, and she required one to one support to regain composure (id.).

With respect to physical development, the IEP reported that the student was unable to replicate a step design using cubes from memory, drop pellets into a bottle within a time limit, trace a line without deviation, or color at least three-quarters between two lines (Parent Ex. I at p. 5). The student's muscle tone fell within the range of "low normal" and she exhibited decreased core strength, which affected her ability to shift weight and engage in dynamic gross motor play (id.). The January 2024 IEP noted that the student was "under responsive to vestibular inputs and visually distracted" (id.).

The January 2024 IEP identified the strategies and resources needed to address the student's management needs including verbal and visual cuing, positive reinforcement, repetition, chunking and simplification of directives, small group instruction, verbal preparation and modeling, and

staff support to help her focus (Parent Ex. I at p. 5). The January 2024 IEP featured six annual goals and numerous short-term objectives to address the student's needs in the areas of following rules and transitions, social/emotional development, play skills, speech-language skills, and OT (id. at pp. 7-9).

2. Services from Step Ahead

During the impartial hearing, a secretary from Step Ahead testified; however, the witness did not have any personal knowledge of the services provided to the student by Step Ahead (see generally Tr. pp. 54-63). The parent did not testify or present testimony from any of the student's providers. As for documentary evidence of services provided to the student by Step Ahead during the 2023-24 school year, the hearing record includes the letter signed by the parent stating her awareness of her financial obligation for services, a copy of the certification/licensure of two providers, and "session notes" (Parent Exs. C; E; G).

The session notes reflect the student's name, therapists' names, dates of sessions (between December 15, 2023 and March 14, 2024), time of sessions, and location (school), with areas to describe goals (all left blank), and notes (Parent Ex. G; see Tr. pp. 60-61).

With respect to OT, the sessions notes include entries for 14 sessions (Parent Ex. G). The session notes do not state the annual goals targeted during each session but show that the occupational therapist worked with the student on fine motor skills, sensory processing, vestibular and proprioceptive input to promote regulation and body awareness, copying and cutting lines and shapes, hand strengthening and visual perceptual skills, regulating sensory input, and upper extremity strength (Parent Ex. G at pp. 1-3; see Parent Ex. E at p. 2). The OT session notes stated that the student had difficulty staying focused due to distractions in the room (Parent Ex. G at p. 1). The OT sessions included vestibular and proprioceptive input using equipment in the sensory gym (id.). The student was able to stay regulated while navigating a three-piece obstacle course given verbal prompts (id.). The student was able to copy a vertical and horizontal line, a circle, and a rounded square, and cut out the circle and square and along the lines (id.). The student required "setup" in order to cut properly, and she used an "awkward upper extremity positioning" while cutting (id.). The student worked on a matching activity, tabletop games, therapy ball, bubbles, weight bearing exercises on open palms, coloring, and puzzles (id. at p. 2). The occupational therapist used a brushing and vibration protocol to provide the student with "tactile input" (id. at p. 3).

With respect to speech-language therapy, the session notes reflect that the student was informally assessed by a speech-language pathologist on February 6, 2024, and then received one session of speech-language therapy on February 27, 2024 (Parent Ex. G at p. 2; see Parent Ex. E at p. 1). The speech-language pathologist indicated that during her informal assessment of the student she was easily distracted, and the speech-language pathologist provided her with redirection and prompting (id.). She further indicated that the student was able to initiate conversation, although it was sometimes out of context (id.). During the one therapy session on February 27, 2024, the speech-language pathologist worked with the student on improving her social language skills by identifying emotions in a picture and engaging in a turn taking activity (Parent Ex. G at p. 2). The student was able to label, describe, and provide an example for each emotion (id.). The student was able to engage in a turn taking activity with the therapist (id.). The

student engaged in "minimal" eye contact, and although she was cooperative, she was easily distracted (id.). It is unclear from the hearing record if the student ever received additional sessions of speech-language therapy or what the course of the therapy, beyond one session, may have entailed.

In arguing that the IHO erred in finding no evidence of delivery of paraprofessional services, the parent points to the agreement with Step Ahead. The agreement noted that the rate for a paraprofessional was $75 an hour (Parent Ex. C at p. 1). However, while the document generally described the parent's awareness of rates charged and her legal responsibility to pay for services from Step Ahead; it does not demonstrate what services were delivered – case in point being that the document also lists the rate for SETSS services and there is no dispute between the parties that Step Ahead did not provide the student with SETSS during the 2023-24 school year (id.). The only other evidence in the hearing record of the student receiving paraprofessional services is in a March 14, 2024 session note from the occupational therapist, which states that the student was using the "sensory gym with para," who was showing the student "calming and sensory techniques" for her to practice (Parent Ex. G at p. 3). There is no information in the record as to the paraprofessional's identify, her qualifications, how often she provided services to the student, or what those services entailed.

Overall, the totality of the evidence does not support a finding that the parent met her burden under Burlington/Carter for any of the unilaterally obtained services. Although the parent argues that she attempted to implement the program recommended for the student in the January 2024 IEP, the parent must still come forward with evidence that describes the services and the delivery thereof. Thus, although the hearing record includes some information about how the OT services from Step Ahead addressed the student's sensory processing and fine motor skills, there is insufficient evidence regarding what the student received for paraprofessional services and speech-language therapy and how those services addressed the student's difficulties with transitions, play skills, or pragmatic language (see Parent Ex. G). Although parents need not show that a unilateral placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65), the program as a whole must still be "reasonably calculated to enable the child to receive educational benefits" (Carter, 510 U.S. at 11, 13-14, quoting Rowley, 458 U.S. at 203-04). Given the evidence presented, there is insufficient reason to overturn the IHO's decision that the parent failed to meet her burden to demonstrate that the unilaterally obtained services provided by Step Ahead were appropriate for the student during the 2023-24 school year.[9]

[9] Given this determination, it is unnecessary to determine whether equitable considerations would have supported the parent's requested relief. However, I note that the parent did not appeal the IHO's determination that the secretary from Step Ahead was not credible regarding the contract with Step Ahead and this determination by the IHO is final and binding on the parties (see Req. for Rev.; see also IHO Decision at p. 10). Moreover, as the district argues in its cross appeal, there is no evidence in the hearing record that the parent provided notice to the district of her intent to unilaterally obtain private services at district expense. 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]). Based on the lack of credible evidence regarding the terms

As a final matter, with regard to the parent's appeal relating to pendency, it appears that the parties now agree that the student's pendency is based on the January 2024 IEP retroactive to the date of the January 25, 2024 due process complaint notice. Since, there is no dispute, it is unnecessary to further discuss the student's pendency entitlement.

VII. Conclusion

The IHO erred in addressing the relief sought as compensatory education as in ordering the district to fund compensatory OT and speech-language therapy services. Applying the Burlington/Carter standard due to the parent's decision to unilaterally obtain private services without the consent of school district officials, review of the hearing record shows that, under the totality of the circumstances, the parent failed to sustain her burden to demonstrate that the unilaterally obtained services were appropriate to meet the student's special education needs. Therefore, the necessary inquiry is at an end and there is no need to reach whether equitable considerations weighed in favor of the parent's requested relief.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated June 28, 2024 IHO decision is modified by reversing that portion which ordered the district to directly fund compensatory OT and speech-language therapy services provided during the 2023-24 school year by providers of the parent's choosing; and

IT IS FURTHER ORDERED that, based upon the parties' agreement, the student's pendency placement consists of the services set forth in the January 3, 2024 IEP effective January 25, 2024, the date of the parent's due process complaint notice through the date of this decision.

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

JUSTYN P. BATES
STATE REVIEW OFFICER

of the contract and the lack of a 10-day notice, equitable considerations would not have favored the parent's request for reimbursement had she met her burden of proof by demonstrating the unilaterally obtained services were appropriate for the student to obtain educational benefit.