



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-340

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 the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the cost of the speech-language therapy services delivered to her son by Always a Step Ahead, Inc. (Step Ahead) at specified rates for the 2023-24 school year. The district cross-appeals the IHO's determination that the parent's unilaterally obtained counseling services were appropriate and asserts that equitable considerations do not favor direct funding. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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[a]). 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 January 13, 2023 to develop an IEP for the student for the 2022-23 school year (Parent Ex. B at p. 1). The January 2023 CPSE found the student eligible for special education and related services as a preschool student with a disability and recommended that he

receive five hours per week of special education itinerant teacher (SEIT) services in a group of two, and two 30-minute sessions per week of speech-language therapy in a group of two (*id.* at pp. 1, 16).¹ The CPSE also recommended one 30-minute session per month of parent counseling and training (*id.* at p. 16). A CPSE convened on February 29, 2024 to develop an IEP for the student with an implementation date of March 4, 2024 (Parent Ex. C at pp. 4, 15).² The February 2024 CPSE continued to find the student eligible for special education and related services as a preschool student with a disability and recommended that the student receive five hours per week of SEIT services in a group of two, and two 30-minute sessions per week of counseling in a group of two (*id.* at pp. 1, 15). The CPSE also recommended one 30-minute session per month of parent counseling and training (*id.* at p. 15).

The hearing record reflects that the district provided SEIT services to the student (Parent Ex. A at p. 1).³ According to a progress report dated December 24, 2023 and session notes, from September 2023 through the end of February 2024, the student received two 30-minute sessions per week of speech-language therapy services from a provider from Step Ahead (Parent Ex. I at pp. 1-3). Session notes also indicate that the student received counseling services from a provider from Step Ahead from March 11, 2024 through May 22, 2024 (Parent Ex. H at pp. 5-8).^{4, 5}

On April 11, 2024, the parent electronically signed a document on the letterhead of Step Ahead, which was undated, and stated that she was "aware" of the rates charged by the company for services provided to the student "and that if the [district] d[id] not pay for the services, [she]

¹ 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]).

² The February 29, 2024 IEP lists an implementation date of February 29, 2024 and an implementation date of March 4, 2024 (compare Parent Ex. C at p. 4, with Parent Ex. C at p. 15).

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

⁴ The parent's exhibit list identified parent exhibit H as "Attendance Records," which is how the IHO referred to that document (IHO Decision at p. 6). The parent's request for review refers to parent exhibit H as "session notes" (Req. for Rev. ¶¶ 7, 21). In this decision, parent exhibit H will be referred to as session notes.

⁵ As noted by the IHO in her decision, the session notes log included the dates May 27, 2024, May 29, 2024, and June 3, 2024, however, those entries were otherwise blank (Parent Ex. H at pp. 8-9; see IHO Decision at p. 6 n.11). The IHO stated without citing to the hearing record that the dates were blank "indicating that they had not yet occurred as of the time the record was printed" (IHO Decision at p. 6 n.11). However, the impartial hearing was held on June 7, 2024, therefore only the June 3, 2024 service date fell within the five-day disclosure rule and there is no evidence in the hearing record to support the IHO's statement regarding when the parent's attorney prepared his disclosure documents.

w[ould] be liable to pay for them" (Parent Ex. D). The document further stated that the parent was "aware that the services being provided to [her] child [we]re consistent with those listed in [her] child's IEP/IESP dated: 02/29/2024" (id.).

A. Due Process Complaint Notice and Subsequent Events

In an amended due process complaint notice dated April 15, 2024, the parent, through her attorney, alleged that the district failed to provide the student a free appropriate public education (FAPE) by failing to provide adequate special education and related services for the student for the 2023-24 school year (Parent Ex. A at p. 1).⁶ The parent indicated that she agreed with the programs recommended in the January 2023 IEP and the February 2024 IEP but had been unable to find providers willing to accept the district's standard rates to deliver the services; however, the parent asserted she found providers willing to provide the student with all required services for the 2023-24 school year at rates higher than the standard district rates (id.). The parent requested an award of funding for two 30-minute sessions per week of speech-language therapy and two 30-minute sessions per week of counseling at enhanced rates for the 2023-24 school year (id. at p. 2).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). The parties convened on June 7, 2024 for an impartial hearing (Tr. pp. 14-36).⁷ In a decision dated July 2, 2024, the IHO noted that the SEIT services listed in the student's IEPs were implemented by the district and were not in dispute (IHO Decision at p. 3). The IHO found that there was no "evidence to dispute the [p]arent's claim that the district failed to provide the mandated [speech-language therapy] or [counseling] services" as recommended by the January 2023 and February 2024 IEPs and that, accordingly, the district did not meet its burden to demonstrate that the student was "provided" a FAPE for the 2023-24 school year (id. at p. 11). Turning to the parent's unilaterally obtained speech-language therapy, the IHO first determined that the parent failed to establish a contractual obligation for those services and had "no standing to seek retrospective funding for those services" (id.). The IHO noted that the contract in evidence "only encompass[ed] the services recommended in the 2/29/24 IEP, which d[id]s not include [speech-language therapy]" (id.). The IHO also stated that there was "no contract in the record for this school year prior to April 2024" and that "[a]lthough the contract generally reference[d] an agreement for the entire school year, that d[id] not overcome the specific terms which state[d] that it concern[ed] the services listed in the 2/29/24 IEP" (id.). The IHO further found that there was no evidence that the parent had been billed for speech-language therapy services, nor was there any testimonial evidence regarding the parent's obligation to pay (id.). In summary, the IHO found that "while it [wa]s possible for a poorly written contract to include objective means for supplying missing terms, such as reference to a specific IEP or IESP, that did not cover the [speech-language therapy] here, as the IEP specifically referenced in the contract did not, in fact, recommend any [speech-language therapy] services" (id.). The IHO found that the parent "unilaterally obtained those services at her own financial risk, and without a contract for those services in the record, [the

⁶ The parent originally filed a due process complaint notice on February 9, 2024 (Parent Ex. K).

⁷ A prehearing conference was held on March 15, 2024, and a status conference was held on April 2, 2024 (Tr. pp. 1-13).

parent ha[d] no standing to seek the requested funding" (*id.*). Next, the IHO found that "even if there was a valid contract for [speech-language therapy] in the record, [the p]arent would not have met their burden in proving the appropriateness of the unilaterally obtained speech services" as the record did not show whether the services were provided in a group of two, there was "limited to no information in the record regarding what goals were worked on in the sessions or what progress was made" (*id.* at pp. 11-12). The IHO further found that "[t]he information in the progress report [wa]s not reliable and even on its face d[id] not provide objective evidence of progress" and that "there [wa]s no indication in the record if or how instruction was individualized or adapted to meet the student's unique needs" (*id.* at p. 12). The IHO then determined that even if there had "been evidence of a contractual obligation" the parent's claim for funding of speech-language therapy services "would still have failed on Prong 2" (*id.*).

The IHO then addressed the parent's request for direct funding of counseling services and found that the parent had established a valid financial obligation and that the services provided by Step Ahead were appropriate (IHO Decision at p. 12). The IHO then determined that there were "no equitable considerations that would reduce the award" (*id.*). As relief, the IHO ordered the district to provide direct payment to Step Ahead for up to one hour of counseling services per week provided to the student between March 1, 2024 and June 30, 2024, at a rate of \$250 per hour, upon receipt of corresponding service records and invoices (*id.* at p. 13).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in denying her request for direct funding of speech-language therapy services. Initially, the parent argues that a Burlington/Carter analysis should not apply to this matter. The parent further asserts that the IHO erred in finding the parent's privately obtained speech-language therapy services were inappropriate. The parent contends that the progress reports and session notes should be considered sufficient evidence of the speech-language therapy services the student received. As relief, the parent requests direct funding to Step Ahead for two 30-minute sessions per week of speech-language therapy services provided to her son at specified rates for the 2023-24 school year.

In an answer with cross-appeal, the district argues that the IHO correctly denied the parent's request for funding of privately obtained speech-language therapy and erred in awarding the parent direct funding for privately obtained counseling services. The district contends that there was no testimony to support the provision of services or the student's progress, the parent's contract does not list the services provided by Step Ahead and only lists one of the two IEPs developed for the 2023-24 school year. The district further asserts that, if the parent's unilaterally obtained services are found to be appropriate, equitable considerations do not favor full funding of the parent's requested relief. Specifically, the district contends that the parent did not sign a contract for services until April 11, 2024, which was seven months after the services had allegedly been provided and that it was not credible that Step Ahead was providing services from the beginning of the school year.

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 (or CPSE) 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 Andrew 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]).⁸

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

The district does not appeal from the IHO's finding that it failed to provide the mandated speech-language therapy and counseling services recommended in the January 2023 IEP and the February 2024 IEP (IHO Decision at p. 11). The district also has not appealed from the IHO's decision that it failed to meet "its burden in showing that [it] provided the student a FAPE for the 2023-24 school year (id.). Accordingly, the IHO's findings and determinations on these issues have become final and binding on the parties and will not be reviewed on appeal (see 34 CFR

⁸ 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" (Andrew F., 580 U.S. at 402).

300.514[a]; 8 NYCRR200.5[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]).

A. Unilaterally Obtained Services

On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally obtained speech-language therapy and counseling services delivered to the student by Step Ahead during the 2023-24 school year, and whether equitable considerations favor direct funding of the parent's 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 district developed a preschool IEP for the student and there is no disagreement as to the recommended SEIT services which are being implemented by another agency (see Tr. pp. 24-25, 26; Parent Ex. A at p. 1; Dist. Exs. 3, 4). However, the district failed to provide the student with the recommended speech-language therapy services recommended in the January 2023 IEP and with the recommended counseling services in the February 2024 IEP at the student's preschool program. In her April 15, 2024 amended due process complaint notice, the parent alleged that the district had not implemented the student's January 2023 IEP or the student's February 2024 IEP, and that the parent was unable to locate providers willing to accept the district's standard rates (Parent Ex. A at p. 1). As a result, the parent unilaterally obtained private speech-language therapy and counseling services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof (*id.* at pp. 1-2). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private speech-language therapy and counseling 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 IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).⁹

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

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

⁹ State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education services that the parent obtained from Step Ahead for the student (Educ. Law § 4404[1][c]).

Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

As there is no challenge regarding the delivery of the student's recommended SEIT services for the 2023-24 school year, the information in the hearing record relevant to addressing the parent's burden concerns the student's needs related to speech-language therapy and counseling, which are not in dispute (Parent Ex. A at p. 1).

According to the January 2023 IEP, the student presented with strengths in the areas of expressive language and was characterized as an auditory learner who learned best by listening to lessons (Parent Ex. B at p. 4). In the area of cognition, the student was able to sort objects by color and by function and could count in 1:1 correspondence up to 15 (id.). The January 2023 IEP indicated that the student had difficulty making inferences based on information from visual text, sequencing a series of four pictures, identifying a problem and solution, and finding more than one solution to a problem (id.). Regarding play skills, the student was able to sequence events in play and build a structure and develop a story around it (id.). However, the student was unable to play symbolically with toys and role play with others (id.). The January 2023 IEP reported that direct guidance, modeling and role play had been implemented to assist the student (id.).

The student was described as being "usually happy" and engaged but struggled socially (Parent Ex. B at p. 4). The January 2023 IEP indicated that the student had difficulty initiating and engaging in play and conversations with peers (id.). Additionally, the student was characterized as rigid in what he liked and how he wanted to do things; however, he was making strides in his pragmatic skills although he needed prompting (id.). According to the January 2023 IEP, the student could follow one and two-step related directions independently but was inconsistent with two-step unrelated directions (id.). The student could attend to stories read aloud by the clinician and answer simple "WH" questions, but had difficulty answering inferencing questions (id.). Regarding articulation skills, the student was working on the following sounds in conversational speech: /er/, /ear/, /air/, /l/, /sh/ (id.). The student was able to sequence three-step picture cards and provide a narrative about them, and his strengths were reported as being able to ask and answer questions about details in a book, retell familiar stories, and catch on to concepts very easily (id.). Parental concerns were noted in the area of play skills and that the student shut down when tasks seemed too difficult for him (id. at pp. 4-5).

Socially, the January 2023 IEP noted that the student was able to name the following emotions: happy, sad, excited, frustrated, and scared (Parent Ex. B at p. 5). The student could describe himself using characteristics and focus on an activity of his choosing for 10 minutes (id.). Needs listed for the student included that he did not initiate interactions with peers, refrain from a tantrum when angry, complete a teacher chosen activity for 10 minutes, and focus and persevere on a task that he perceived as difficult (id.). According to the January 2023 IEP, modeling, praise, and social lessons were implemented to support the student (id.). The student's strengths were listed as responding to the initiation of peers, waiting his turn, following directions, and adhering to the daily school routine (id.). Areas of concern to the parent included the student's focusing and interaction skills, and his participation in group activities (id.).

Regarding physical development, the student was noted to be "healthy" with no known allergies (Parent Ex. B at p. 5). The student's fine and gross motor skills presented as "near age appropriate," and there were no concerns in this area at that time (id.)

The January 2023 CPSE identified strategies to address the student's management needs such as: intervention of a SEIT and a speech-language pathologist, verbal and visual cues during instruction to address difficulty attending to tasks, picture schedule to assist with transitions, instruction in strategies for self-soothing and calming to self-regulate, opportunities for reciprocal play to facilitate purposeful interaction with peers and for turn taking to provide age appropriate social interactions, on-task focusing prompts via verbal reminders to stay on task, and verbal information paired with visual aids to increase comprehension (Parent Ex. B at p. 5).

The January 2023 CPSE determined that the student presented with delays in his pragmatic language, and social/emotional skills which impacted his ability to interact with his environment, peers and adults without the above noted support (Parent Ex. B at p. 6). These delays impeded the student's ability to engage in and complete age-appropriate activities including communicating his wants and needs and successfully negotiating expectations of others (id.). According to the January 2023 IEP, the student did not require positive behavioral interventions and/or supports or a behavioral intervention plan (BIP) (id.). The CPSE developed 18 annual goals to address the student's language, classroom functioning, coping, socialization, readiness, peer interaction, and focusing/persistence skills (id. at pp. 7-15). The CPSE recommended that the student receive five hours per week of SEIT services in a group of two, and two 30-minute sessions per week of speech-language therapy in a group of two (id. at pp. 1, 16).

According to the February 2024 IEP, the student presented with strengths in the areas of literacy skills and was characterized as a visual learner, who learned best through visual pictures (Parent Ex. C at p. 4). He enjoyed listening to stories, correctly responded to simple "WH" questions based on stories, and retold events of short familiar stories (id.). The IEP listed strengths for the student including that he could identify some common descriptive concepts such as big and tall, small/big, empty/full, and more/less, and answer and ask simple "WH" questions about a book (id.). The student could anticipate routines and act accordingly, followed daily school routines, participated in circle time, and maintained attention to an activity of his choosing for 5-7 minutes (id. at p. 5). With prompts the student was able to express his wants, needs, and opinions (id.). The IEP indicated that the student was unable to follow simple directions, two-step related questions, and multi-step directions (id. at p. 4).

Regarding speech-language development, according to the February 2024 IEP the student had delays in expressive, receptive, and pragmatic language skills (Parent Ex. C at p. 4). The February 2024 IEP also noted that the student had difficulty making inferences, sequencing a series of four pictures, identifying a problem and solving it, finding more than one solution to a problem (id.). The student had difficulty following directions and providing comments relative to topic or activity presented (id.). Further, the student's delayed pragmatic skills included difficulty maintaining a topic during an exchange, providing peers their own personal space, and expressing himself with peers during play (id.). Functional needs that were a concern to the parents were the student's play skills and his delays in pragmatic language skills (id.).

Socially, the February 2024 IEP indicated that the student could play symbolically, imitate adult behavior during play, and name the following emotions in pictures: happy, sad, excited, scared with prompts and cues, but did not use these terms during a frustrating moment (Parent Ex. C at pp. 4, 5). The student was unable to role play with a peer, use appropriate verbalization in play, initiate interactions with peers during play, or select a peer as a "preferred friend" (id.). Additionally, the student did not demonstrate appropriate reciprocal play or associative play skills,

or role play, share or wait his turn (id. at p. 4). He was described as having difficulty when he did not win and he would yell and tantrum if other children didn't play in the way he wanted (id.). The student was unable to cooperatively play with peers and refrain from tantrums when angry, or from hurting others when upset (id. at p. 5). The IEP stated that the student was not able to work in a small group of peers, cope with emotions such as disappointment, show empathy, refrain from throwing objects, or accept a consequence in response to negative behavior (id.). Social stories and lessons to address social skills deficits were implemented to help support the student (id. at pp. 4, 5).

Regarding physical development the student was noted to be "healthy" and had no known allergies (Parent Ex. C at p. 5). The student's fine and gross motor skills presented as "near age appropriate" and the parents did not have any concerns in this area at the time (id.).

The February 2024 CPSE identified strategies to address the student's management needs such as: intervention of a SEIT and counseling, instructions in strategies for self-soothing and calming to self-regulate, opportunities for reciprocal play to facilitate purposeful interaction with peers and for turn taking to provide age appropriate social interactions, use of manipulatives to build conceptual understanding, use of transitional objects to increase vocabulary and sequencing, verbal information paired with visual aids to increase comprehension, directions broken down into steps and repeated as needed, repetition and review of previously taught concepts to increase mastery levels, and teacher and peer praise to increase confidence (Parent Ex. C at p. 5).

The February 2024 CPSE also determined that the student presented with delays in his cognitive, language, motor and social/emotional skills which impacted his ability to interact with his environment, peers and adults without the above noted support (Parent Ex. C at p. 6). These delays impeded his ability to engage in and complete age-appropriate activities including communicating his wants and needs and successfully negotiating expectations of others (id.). The February 2024 CPSE found that the student required positive behavioral interventions, supports and other strategies to address behaviors that impeded the student's learning or that of others, but did not recommend a behavioral intervention plan for the student (id.). The February 2024 IEP included 16 annual IEP goals for the student to address his language, classroom functioning, coping, socialization, focus and attending, oral-motor, readiness, self-regulation, and articulation skills (id. at pp. 7-14). The CPSE recommended that the student receive five hours per week of group SEIT services, two 30-minute sessions per week of speech-language therapy in a small group (id. at p. 16).

2. Services from Step Ahead

Based on a review of the hearing record in this matter, the IHO erred in finding the parent's unilaterally obtained speech-language therapy services were not appropriate and correctly found that the parent's unilaterally obtained counseling services were appropriate. The documentary evidence offered by the parent included an undated contract with Step Ahead signed on April 11, 2024, a copy of the licensures of the speech-language pathologist and counseling provider who delivered services to the student, session notes, and a December 24, 2023 progress report (Parent Exs. D; F; H-I).

a. Speech-Language Therapy

Initially, I note that the IHO determined that the parent's unilaterally obtained speech-language therapy was not appropriate based upon a conclusion that the parent lacked a financial obligation (IHO Decision at pp. 11, 12). This was error, because the IHO impermissibly conflated the standards. The Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]). Thus, the IHO erred in concluding that the parent's unilaterally obtained speech-language therapy services were inappropriate based on the parent's financial obligation. The parties' dispute over whether the parent incurred a financial obligation is further discussed below.

The evidence shows that at the time the December 24, 2023 speech-language therapy progress report was prepared, the student was receiving two 30-minute sessions per week of speech-language therapy to address his delays in expressive, receptive, and pragmatic skills (Parent Ex. I at p. 1). The December 2023 progress report reflected that the provider was "following the recommendations on the IESP dated on 11/20/2022" (*id.*). According to the progress report, the student had difficulty following multi-step directions and providing comments relative to activity or topics presented to him (*id.*). Additionally, the student presented with delayed pragmatic skills including difficulty with maintaining topic during an exchange, providing peers with their own personal space, and expressing himself with peers during play time (*id.*). The progress report noted that the student was unable to make inferences based on information from visual text, sequence a series of four pictures, identify a problem and try to solve it independently, and find more than one solution to a problem (*id.*). The speech-language pathologist reported working on annual goals with the student including answering age-appropriate language skills by answering "wh" questions, and improving play skills with peers and adults using correct turn-taking skills and eye contact (*id.*). Other annual goals included engaging in a conversation with the clinician or a peer for five-to-six turns while staying on topic and relating appropriate and relevant comments, sequencing a three-story picture card in the correct order, identifying and labeling his personal feelings, and labeling the emotional perspective of characters when presented with social situations cards with "[m]oderate assistance required" (*id.*).

The speech-language pathologist reported that the student had made progress in his ability to engage with a peer one-on-one with support, use proper turn taking skills, and maintain a conversation up to three turns (Parent Ex. I at p. 2). The student reportedly still struggled during play time in the classroom, as he pulled blocks out of children's towers, roamed around the classroom, and was unsure how to initiate a conversation with his peers (*id.*). The speech-language pathologist reported that the student had "difficulty naming emotions, and providing examples where he feels happy or sad" (*id.*). The student was characterized as tending to view things in a

black and white manner and being unable to play symbolically with toys and role play with a peer (id.).

The December 2023 speech-language therapy progress report included six new annual goals for the student focusing on: answering "wh" questions about a story, improving pragmatic skills, engaging in conversation while staying on topic, sequencing four story picture cards, identifying and labeling his own feelings, and labeling the emotional perspective of others (Parent Ex. I at pp. 2-3).

The hearing record also includes what appears to be a fillable document, which the parent referred to on appeal as "session notes"; however, the document, itself, does not bear any title or reflect the origin of the document (Parent Ex. H). The session notes reflected the student's name; the speech-language pathologist's or counseling provider's name; the date of session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); areas to describe goals (all left blank); and areas for notes (id.). Overall, a review of the session notes shows that the student generally received one to two 30-minute sessions per week with the speech-language pathologist from September 21, 2023 through February 29, 2024 (id. at pp. 1-5).¹⁰ According to the session report, the student worked on skills such as comparing, contrasting, and categorizing items, answering "wh" questions, appropriately interacting with peers, using social stories, identifying emotions, sequencing stories, and using phonemic awareness and auditory processing skills (id.). Additionally, the session notes reflected the student's performance on the skill worked on that day; for example, that he described and labeled the emotion "sad" with 60 percent accuracy, and answered "wh" questions about a story with 90 percent accuracy (see id. at pp. 2, 5).

Among the reasons the IHO found the parent's unilaterally obtained speech-language therapy services to be inappropriate were that the hearing record did not indicate whether the student received services "in a group of two, as recommended," there was limited information about which of the student's goals were worked on during sessions or what progress was made, the progress report was unreliable as it did not "provide objective evidence of progress," and there was no indication of how the instruction was individualized to meet the student's needs (IHO Decision at pp. 11-12). However, a review of the hearing record does not support the IHO's findings. Initially, as noted above, with regard to the provision of services in a group, the parent was under no obligation to implement the district's IEP precisely as written when obtaining unilateral services (Carter, 510 U.S. at 13-14). Accordingly, the provision of individual rather than group speech-language therapy services does not, in this instance, make the service inappropriate for the student.

Next, while the session notes alone do not indicate a specific goal of the session, the December 2023 progress report identifies the annual goals the student worked toward, which, combined with the session notes that describe how the student performed on specific tasks during sessions, adequately provides evidence of specially designed instruction (Parent Exs. H at pp. 1-5; I at pp. 1-3). Further with respect to the IHO's concern that the hearing record lacked

¹⁰ It appears that Step Ahead delivered the student's speech-language therapy pursuant to his January 2023 IEP from September 2023 to the end of February 2024, when the CPSE convened and changed the student's recommended services to counseling, which he received from Step Ahead from March 11, 2024 to June 2024 (Parent Ex. A at p. 1; compare Parent Ex. B at p. 16, with Parent Ex. C at p. 15).

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

Therefore, the evidence in the hearing record supports the parent's contention that the unilaterally obtained speech-language therapy delivered by Step Ahead to the student was appropriate to address his unique needs.

b. Counseling Services

The district argues on appeal that the IHO incorrectly found that the counseling services delivered by Step Ahead were appropriate. Specifically, the district asserts that the parent failed to provide sufficient evidence, such as testimony, regarding how those services were implemented, including what student deficits were addressed, how they were specially designed to meet the student's needs, and whether the student made progress.

In support of the counseling services provided by Step Ahead, the hearing record included session notes, which indicated that the student began receiving counseling on March 11, 2024 (Parent Ex. H at p. 5). Overall, a review of the session notes showed that the student received approximately two 30-minute sessions per week of counseling from March 11, 2024 to June 3, 2024 (id. at pp. 5-9). Each date of service included a note describing the session; however, no notes were entered for the sessions dated May 27, 2024, May 29, 2024 or June 3, 2024 (id. at pp. 8-9).

According to the session notes, the counselor described the student's challenges and specific needs and then explained how she addressed them by using various activities (Parent Ex. H at pp. 6-8). For example, the student struggled or needed support with attention and focusing, sitting still, paying attention, and following instructions; he angered easily, had difficulty losing, and needed support with conflict resolution (id.). The counselor then documented use of hands on tools for redirection and positive reinforcement, activities promoting social awareness and impulse control, social stories, self-awareness techniques to recognize and regulate emotions, social skills instruction tailored to handling losing situations, building frustration tolerance through play therapy, practicing coping skills to manage emotions, and talk therapy interventions (id. at pp. 6-8). Although the hearing record did not include a counseling progress report, as indicated above, evidence of progress is not required for a determination that unilaterally obtained services were appropriate.

Based on the totality of the circumstances, the parent's unilaterally obtained speech-language therapy and counseling services were similar in frequency and duration to the speech-language therapy services recommended for the student in the January 2023 IEP and the counseling services recommended for the student in the February 2024 IEP, and the parent established that the individual speech-language therapy and counseling services the student received were appropriate for the 2023-24 school year. Although the IHO correctly applied the Burlington/Carter legal standard in evaluating the parent's requested relief, the IHO erred in determining that the parent failed to meet her burden of proof with regard to speech-language therapy services.

B. Equitable Considerations

Having found that the speech-language therapy and counseling services from Step Ahead were appropriate, I turn to consider equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

In this case, the IHO determined that there were "no equitable considerations that would reduce the award" for speech language services (IHO Decision at p. 12). The IHO concluded that the district had raised "the excessiveness of the requested enhanced rate" but failed to demonstrate the parent's rate was excessive (id.). In its cross-appeal, the district argues that the parent did not sign a contract with Step Ahead for services until April 11, 2024. The district argues that the contract does not state if the contract is for speech-language therapy and for counseling services, that there was no information in the contract about the type and frequency of services for the student, and no reference to the January 2023 IEP (Answer with Cr.-Appeal ¶¶ 14, 15).¹¹ In addition, the district argues that the parent did not sign a contract with Step Ahead until after she filed her initial due process complaint notice.

¹¹ The contract with Step Ahead does not mention the January 2023 IEP and instead specifies the February 2024 IEP (Parent Ex. D at p. 1).

On the issue of a lack of a financial obligation, the IHO stated:

Furthermore, there is no evidence that Parent has been billed for those [speech language therapy] services, nor is there any testimonial evidence regarding the Parent's obligation to pay. Moreover, there are no invoices in the record, nor is there evidence that Parent has paid any amount toward those services. So, while it is possible for a poorly written contract to include objective means for supplying missing terms, such as reference to a specific IEP or IESP, that did not cover the [speech language therapy] here, as the IEP specifically referenced in the contract did not, in fact, recommend any [speech language therapy] services. Parent unilaterally obtained those services at her own financial risk, and without a contract for those services in the record, Parent has no standing to seek the requested funding

(IHO Decision at p. 11). The IHO's reasoning on this point is sound. The letter stating the parent's obligation for private services was signed by the parent on April 11, 2024 after this proceeding had been commenced but, by its terms, the letter stated the parent's intention to be bound to pay the costs of services delivered by Step Ahead for the 2023-24 school year at specified rates and specifically listed the services as those listed in the February 2024 IEP (Parent Ex. D). The disclosure of exhibits is from the secretary of Step Ahead, which appears in practice to be the driving force behind the litigation. The parent herself did not testify, appear at the impartial hearing in this case, or otherwise offer evidence of a liability to Step Ahead for the speech language therapy.

The U.S. District Court for the Southern district Court recently summarized the law as it has developed thus far on this point.

The assembled case law thus can be synthesized as follows. There is a wide recognition in this District that, although the IDEA references only the remedy of reimbursement, § 1415(i)(2)(C)(iii) empowers courts, where “appropriate,” to order direct payment, to the service providers, of tuition and fees for related services for a child whom the educational agency had denied a FAPE. There is not, however, consensus as to the boundaries of judicial discretion under that provision, including whether a parent must show financial hardship from paying, or a durable legal obligation to pay, before a court may order direct payment in lieu of imposing a reimbursement obligation on the State. And, as yet, although several courts have tacitly assumed the existence of such authority, there does not appear to be case law identifying a statutory basis for an IHO or SRO to order direct payment.

(Moonsammy v. Banks, 2024 WL 4277521, at *10 [S.D.N.Y. Sept. 23, 2024]at *10 (S.D.N.Y. Sept. 23, 2024). This is not a case in which the parent's ability to pay is at issue, rather this case involves whether the parent either has already paid or would even be required to pay for

the speech language services.¹² The IDEA would not permit an entity other than the parent, such as Step Ahead, to file a due process complaint notice in the administrative forum to seek the costs of private services (34 CFR 300.507[a][1]).¹³ The IHO appeared to have reservations on this point regarding speech language therapy and raised it with the parent's attorney during the impartial hearing (Tr. pp. 30-32), but the statements of the parent's attorney are not evidence and the parent thereafter rested. The IHO accepted the terms of the contract as written regarding the parent's obligation to pay for services rendered in accordance with the February 2024 IEP and I would be hard pressed to find that the IHO erred in concluding that the contract covered other IEP services in addition to those listed. There is insufficient basis to reject the IHO's findings declining to fund speech language services from Step Ahead.¹⁴

Lastly, to the extent the district continues to assert that the rate charged by Step Ahead for counseling services was excessive, among the factors that may warrant a reduction based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d. Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable

¹² In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

¹³ Under the IDEA and State law, a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 531 [2007]). The IDEA defines parent to include a "natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent)," a guardian, a person acting in place of a parent with whom the child lives or an individual legally responsible for the child's welfare, or a surrogate parent (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 300.519[a]; see 8 NYCRR 200.1[ii]). Pursuant to regulation, where more than one individual is qualified to act as the parent, the biological or adoptive parent of the student is presumed to be the parent unless they do not have legal authority to make educational decisions on behalf of the student or a judicial decree identifies a specific person to act as the parent or make educational decisions (34 CFR 300.30[b][1]-[2]; 8 NYCRR 200.1[ii][3]). In contrast, a private entity lacks standing under the IDEA to maintain a claim against a school district in its own right, as the statute was intended to provide a private right of action only to disabled children and their parents (see Lawrence Twp. Bd. of Educ. v. New Jersey, 417 F.3d 368, 371-72 [3d Cir. 2005]; Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]; see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]).

¹⁴ It may well be that Step Ahead can recover some costs for the services from the district if the issue is brought with sufficient evidence in the appropriate forum.

considerations]). An excessive cost argument focuses on whether the rate charged for a service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Here, the district has not offered any evidence to demonstrate that the rates were unreasonably excessive and thus there is no evidentiary record upon which to reduce or deny the funding award for unilateral speech-language therapy and counseling services due to excessive costs by Step Ahead.

Based on the foregoing, there is insufficient basis for reducing or denying the parent's request for direct funding counseling services and the district shall be required to fund the costs of up to two 30-minute sessions per week of counseling services from March 11, 2024 through June 30, 2024 delivered by Step Ahead during the 2023-24 school year.

VII. Conclusion

In summary, the IHO correctly determined that the evidence in the hearing record supported an award of funding for the parent's unilaterally obtained counseling services but erred in determining that the parent did not meet her burden of demonstrating the appropriateness of her unilaterally obtained speech-language therapy services. However, the hearing record further supports the IHO's findings relevant to equitable considerations and that the parent did not incur an obligation to pay Step Ahead for speech language services. Accordingly the IHO's denial of relief in the form of district funding for speech-language therapy services delivered by Step Ahead during the 2023-24 school year will not be disturbed.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
October 7, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**