



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-341

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 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 costs of her daughter's unilaterally-obtained related services delivered by Always A Step Ahead, Inc. (Step Ahead) for the 2023-24 school year. The 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

In this case, the evidence in the hearing record concerning the student's educational history is sparse. Briefly, a CPSE convened on October 24, 2023, and developed a preschool-aged IEP for the student for the 2023-24 school year (see Parent Ex. B at p. 1). Finding the student eligible to receive special education as a preschool student with a disability, the October 2023 CPSE recommended that the student receive five 60-minute sessions per week of special education

itinerant teacher (SEIT) services in a group, two 30-minute sessions per week of occupational therapy (OT) in a group, and two 30-minute sessions per week of speech-language therapy in a group, all of which were to be delivered on a 10-month school year basis at a childcare location selected by the parent (id. at pp. 1, 13-14).¹

Evidence in the hearing record reflects that the student reportedly began receiving speech-language therapy services from Step Ahead on or about February 1, 2024 (see Parent Ex. H at p. 1; see generally Parent Ex. E).² The evidence also reflects that the student reportedly began receiving OT services from Step Ahead on or about February 15, 2024 (see Parent Exs. H at p. 1; I at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated March 28, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) "and/or equitable services" for the 2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the student's October 2023 individualized education services program (IESP) represented the last-agreed upon program developed for the student, which included recommendations for two 30-minute sessions per week of OT in a group and two 30-minute sessions per week of speech-language therapy in a group (id.).^{3, 4} The parent further indicated that she "dispute[d] any subsequent program the

¹ 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/sites/default/files/programs/special-education/special-education-itinerant-teacher-services-and-related-services-for-preschool-students-with-disabilities_0.pdf). A list of New York State approved special education programs, including SEIT programs, can be accessed at: <https://www.nysed.gov/special-education/approved-preschool-special-education-programs>.

² Step Ahead has not been approved by the Commissioner of Education as a company, a preschool program, or a provider with which districts may contract to provide special education services to preschool students with disabilities (see Educ. Law § 4410[9]; 8 NYCRR 200.1[nn]).

³ Based on the limited evidence, it appears that the student was parentally placed at a religious, nonpublic school for the 2023-24 school year at issue (see Parent Exs. A at p. 1; B at p. 1).

⁴ The parent's due process complaint notice incorrectly references that the October 2023 CPSE developed an IESP for the student, rather than an IEP (see Parent Ex. A at p. 1). However, as reflected by the student's October 2023 CPSE IEP, the student remained a preschool student during the 2023-24 school year (see Parent Ex. B at p. 1). State guidance explains that section 3602-c:

pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE.

("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-

[district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that, for the "full 2023-2024 school year," the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers to work at the district's "standard rates," and the district had not provided any for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency and to directly fund the costs of the student's related services (i.e., two 30-minute sessions per week of OT in a group and two 30-minute sessions per week of speech-language therapy in a group) at the "enhanced rate each charge[d] for their service" for the 2023-24 school year (Parent Ex. A at p. 2).

B. Impartial Hearing and Intervening Events

After a prehearing conference on May 13, 2024, on June 7, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-80). During the prehearing conference, the parent's attorney noted that the district had been providing the student's SEIT services and therefore, the "only services at issue" were the speech-language therapy and OT services (Tr. pp. 3, 5-6, 16; see IHO Ex. VI at p. 2). In addition, the district's attorney conceded that the district failed to offer the student a FAPE and that there were no equitable considerations that would warrant reduction or denial of relief (see Tr. pp. 6-7). However, the district's attorney stated the district's intent to contest the appropriateness of the providers selected by the parent, as well as the rates charged by those providers (see Tr. p. 7). In addition, the IHO asked whether pendency was an issue in this matter, noting that the parent had requested a pendency hearing (see Tr. p. 10). The parent's attorney noted that pendency was based on the student's "IEP," and further noted that the student "should be getting services funded" based on pendency and regardless of appropriateness (Tr. pp. 10-11). The parent's attorney confirmed that a pendency form had been submitted, but indicated it had not yet been signed by the district; the district's attorney indicated that he would "review the pendency form and sign it and submit it by the end of the day" (Tr. p. 11).⁵

c," Attachment 1 at p. 13, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidance-on-reimbursement-claims-for-the-cost-of-providing-special-education-services-to-parentally-placed-nonresident-students_0.pdf.

⁵ The evidence in the hearing record includes a fully executed pendency implementation form, dated May 13, 2024, which indicates that the student's October 2023 IEP formed the basis for the pendency services, consisting of two 30-minute sessions per week of speech-language therapy in a group and two 30-minute sessions per week of OT in a group (see Pendency Impl. Form). The form did not indicate whether the services would be delivered by a district provider or a private provider (id.).

After the prehearing conference, the parent signed a document on May 15, 2024, on Step Ahead's letterhead indicating that she was "aware that the services being provided to [the student] [we]re consistent with those listed" in an "IEP/IESP dated 10/26/2020 [sic]" and that she was aware "related services" were provided to the student at a rate of \$250.00 per hour (Parent Ex. C at p. 1).

During the impartial hearing, when discussing the issues to be resolved and the parties' respective burdens of proof, the district's representative alleged that, with respect to equitable considerations, "there m[ight] be collusion between the placement and the provider agency" based on her review of the parent's disclosure (Tr. pp. 25-26). The district's representative confirmed that the district did not have any evidence to present with respect to a reasonable market rate for the services notwithstanding that the district intended to contest the rates charged by Step Ahead (see Tr. p. 26). When the IHO asked what legal standard applied to this matter, the district's representative proposed Burlington/Carter and the parent's attorney requested a "compensatory education" standard (Tr. pp. 24, 28). However, the parent's attorney opined that, if the IHO was considering the Burlington/Carter standard, the parent's evidence was sufficient to support a finding that the services were appropriate (see Tr. p. 28).

At the impartial hearing, a secretary from Step Ahead testified on the parent's case-in-chief (see Tr. pp. 39-70). The Step Ahead secretary testified that she compiled documents for case hearings (Tr. pp. 42, 66). She reported that in the instant case she compiled progress reports, session notes (attendance records), the parent rate agreement, provider certificates, and an IEP or IESP, as well as her affirmation (Tr. pp. 43-44).⁶ She stated that she put the documents in a folder but that she did not know what happened to them after that (Tr. p. 43). The secretary explained that the session notes reflected the dates and times that the provider saw the student and what happened during each session (Tr. p. 49). She confirmed that the session notes also included the name of the provider, how long the sessions were, and where the sessions occurred (Tr. p. 50). According to the secretary the session notes were inputted at the time of the session; however, she clarified that she was "not there to say when they put it in" (Tr. p. 51). She indicated that it was the providers' responsibility to input session notes into the system and not her responsibility as she "ha[d] nothing to do with th[e] session notes" (Tr. pp. 51-52). The Step Ahead secretary testified that to her knowledge the date on the first session note indicated the date that the student began receiving services (Tr. p. 54). She identified the names of the speech therapist and occupational therapist who provided services to the student but confirmed that her knowledge of the providers was based strictly on the session notes and certificates (Tr. p. 57). The secretary confirmed that she did not choose the providers for students or follow up to see if the services were actually being delivered by the chosen provider (Tr. p. 61). However, she testified that she knew the IEP was being implemented "because that's what's in the system" (Tr. pp. 61-62). The secretary testified that she did not have a role in preparing the parent rate agreement or presenting it to the parent (Tr. pp. 62-63). In addition, she had no knowledge of the content of the speech therapy progress report (Tr. pp. 63-64; see Tr. p. 34). She testified that she did not have any role in reviewing the student's IEP, or preparing or reviewing the parent's contract, progress reports, or session notes (Tr. p. 65). In addition, she did not have a role in establishing rates for the providers and had no knowledge of what constituted a market rate for either provider (Tr. p. 66).

⁶ The IHO did not accept the secretary's affirmation into evidence (Tr. pp. 30-33).

In response to questioning by the district's attorney, the Step Ahead secretary reported that she did not know if Yeshiva of Flatbush owned or operated Step Ahead (Tr. p. 66). She did not know why the OT progress report stated "Yeshiva of Flatbush" at the top and not "Always a Step Ahead" (Tr. p. 69; see Tr. p. 34). The Step Ahead secretary reported that the address listed on the progress report was for Step Ahead and not the Yeshiva of Flatbush (Tr. p. 69). The secretary indicated that Yeshiva of Flatbush had a different address (Tr. pp. 69-70). She did not know if either of the student's related service providers worked for Yeshiva of Flatbush (Tr. p. 70).

C. Impartial Hearing Officer Decision

In a decision dated July 3, 2024, the IHO, applying a Burlington/Carter analysis, found that the district conceded that it failed to provide the student with the services recommended in the October 2023 IEP (see IHO Decision at pp. 5-8). In addition, the IHO rejected the parent's contention that a "compensatory education analysis [wa]s appropriate" (id. at p. 8).

Turning to the parent's unilaterally-obtained services, the IHO initially noted that neither the OT nor the speech-language provider testified at the impartial hearing; instead, the parent presented a secretary from Step Ahead as the sole witness (see IHO Decision at pp. 8-9). The IHO found that the witness "had no substantive knowledge as to the providers, how they were selected, the rate charged by them, or how [Step Ahead] establish the rate" (id. at p. 9). The IHO also found that, aside from the documentary evidence, the hearing record was devoid of evidence "providing detail or clarity as to the services being provided" to the student (id.). Examining the documentary evidence, the IHO pointed to two progress reports, both of which "listed the name of the [student's religious, nonpublic school she] was attending at the top of each document, as opposed to [the Step Ahead] Agency" (id.). The IHO also noted that the parent did not appear at the impartial hearing or "otherwise testify as to the [s]tudent's needs and the services being provided" (id.). With respect to the parent's sole witness, the IHO found that the secretary's testimony was "brief and not instructive as to how the providers met" the student's individual needs; she did not testify about the "costs, expense, and overhead reflected in the rate charged" by Step Ahead, "nor could she in her administrative role"; she did not "address the market rate for OT and [speech-language] providers"; and she did not, and could not, testify about the student's progress (id.). The IHO further found that the parent "provided no information concerning what efforts she made to find a provider" (id.).

Next, the IHO reviewed the speech-language progress report in the hearing record, dated April 17, 2024 (see IHO Decision at p. 10, citing Parent Ex. E). The IHO initially noted that the progress report was "unsigned" and did not indicate when the student began receiving services (IHO Decision at p. 10). The IHO similarly reviewed the April 2024 OT progress report in the hearing record, and found that the provider described the student's needs, rather than reporting on her progress (id., citing Parent Ex. I). According to the IHO, the parent failed to present "probative evidence to show that the program put in place was appropriate" for the student, and therefore, the parent failed to sustain her burden of proof and the IHO denied her claims (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by denying her request for direct funding of the unilaterally-obtained OT and speech-language therapy services delivered by Step Ahead for the 2023-24 school year. Initially, the parent argues that the student was entitled to services under

Education Law § 4404(1) as a preschool student, and thus, the district bore the burden of proof and persuasion to establish that it offered the student an appropriate program. Alternatively, the parent argues that she is entitled to funding for the student's OT and speech-language therapy services because she was implementing the student's pendency services. Next, the parent asserts that this matter should not be subjected to a Burlington/Carter analysis; however, even if assessed under this standard, the parent contends that the unilaterally-obtained OT and speech-language therapy services were appropriate. With respect to the services allegedly delivered to the student by Step Ahead, the parent contends that she used appropriately credentialed and licensed providers. The parent also contends that the evidence establishes the student's needs, how the services were being delivered to the student, the student's progress, and updated annual goals. Finally, the parent asserts that, to the extent the district contends that equitable considerations exist with regard to the absence of a 10-day notice of unilateral placement, the validity of the contract, or the reasonableness of hourly rates, these arguments lack merit and must be rejected. As relief, the parent seeks an order directing the district to directly fund the costs of the OT and speech-language therapy services delivered to the student by Step Ahead during the 2023-24 school year at the contracted rates.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. The district argues that the parent failed to sustain her burden of proof with respect to establishing that the OT and speech-language therapy services delivered by Step Ahead were appropriate and that equitable considerations do not weigh in favor of the parent's requested relief.

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" (Andrew 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]).⁷

⁷ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education

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

On appeal, the crux of the dispute between the parties relates to the appropriateness of the parent's unilaterally-obtained OT and speech-language therapy services delivered to the student by Step Ahead during the 2023-24 school year.

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, at the impartial hearing, the parent's attorney indicated that the district was providing the recommended SEIT services; however, the district's representative confirmed that the district had not "implement[ed] the recommendations" in the student's October 2023 IEP (see Tr. pp. 3, 5-6, 16, 25-27). More specifically, the district failed to provide the student with the recommended OT and speech-language therapy services at the student's preschool program. In the March 2024 due process complaint notice, the parent alleged that the district had not implemented the student's October 2023 "IESP" 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 OT and speech-language therapy 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; see Parent Ex. C). Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the unilaterally-obtained OT and speech-language therapy 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

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).

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"].⁸

The parent's request for funding for the unilaterally-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).

With respect to the parent's assertion 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 or IESP (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]).

A. 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

⁸ 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 unilaterally-obtained from Step Ahead for the student (Educ. Law § 4404[1][c]).

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., 459 F.3d at 364; 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. 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). 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

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the parent's unilaterally-obtained OT and speech-language therapy services from Step Ahead were appropriate to meet the student's needs.

According to the October 2023 IEP, the student presented with concerns related to cognition, expressive and receptive language, social/emotional development, fine motor development, and classroom functioning (see Parent Ex. B at p. 3). With regard to intelligence, the IEP indicated that the student's "[v]erbal IQ of 77 [fell] in the [b]orderline [i]mpaired range," her "[n]onverbal IQ of 83 [fell] in the [l]ow [a]verage range," and her "[f]ull [s]cale IQ of 79 [wa]s classified in the [b]orderline [i]mpaired range of intelligence" (id.).⁹ The IEP further indicated that, "[u]sing the Brigance Diagnostic Inventory and the H.E.L.P as assessment tools," the student scored in the poor range in the cognitive domain (id.).¹⁰ The IEP identified specific preacademic skills that the student could and could not perform. For example, the IEP reflected that the student was able to match like objects, name some common objects, act out requested motions, repeat several short phrases, consistently understand actions in pictures, understand simple spatial concepts, and consistently follow two-step directives without gestural cues (id. at p. 4). In addition, the student could verbally identify some body parts and articles of clothing (id.). In contrast, the IEP stated the student had difficulty sorting by color, shape, and size; did not point to or identify any primary colors; had difficulty understanding "'Wh'" questions; and did not answer yes or no questions correctly (id. at pp. 3-4). In addition, the student was unable to describe the attributes of objects and had difficulty describing their use and function, was unable to recall details from or retell the main idea of a story she was told, and was unable to describe the actions of the characters or predict what would happen next when provided with a scene (id. at p. 4). According to the IEP, the student displayed delayed quantitative skills (id.). At that time, the student was able to rote count to three, but unable to count using one-to-one correspondence or give two objects when prompted (id.). The student did not answer questions pertaining to her personal data (id.).

In terms of speech and language development, the October 2023 IEP reported that the student presented with auditory and language processing delays (see Parent Ex. B at p. 3). The IEP indicated that the student did not understand complex pronouns, negatives in sentences, or directives involving post-noun elaboration (id. at p. 4). It further noted that the student did not evidence the ability to make inferences from given information, did not understand picture analogies, and did not follow through with many directives expected for her age level (id.). In terms of expressive language, the IEP noted the student had difficulty expressing herself and characterized her speech as "very unclear" and "indecipherable" (id.). During testing, the student did not use words for pragmatic functions, such as requesting repetition, requesting assistance, or using words to get attention, nor did she combine three to four words or produce basic sentences (id.). According to the IEP, the parent and teacher reported that the student relied on "'showing'" instead of using words (id.). The student did not use grammatical parts that were expected for her age level (id.). According to the IEP, the parent was concerned with her speech-language development, including the student's limited vocabulary and difficulty answering questions (id. at p. 5). The student had a hard time formulating sentences and tended to repeat the last word in response to questions (id.).

With regard to classroom functioning, the October 2023 IEP indicated that the student did not sit well at lesson time, touched things during lessons and moved around, did not follow class

⁹ The hearing record is devoid of any evidence indicating when or how the student's scores were obtained (see generally Tr. pp. 1-80; Parent Exs. A-C; E-I; IHO Exs. I-VI).

¹⁰ Although not identified in the hearing record, the H.E.L.P. is presumed to be the Hawaii Early Learning Profile.

routines or directions well, and required prompting and redirection to follow through (*see* Parent Ex. B at pp. 3, 5). The student did not offer information or answer questions pertaining to the lesson, and her teachers had difficulty gauging what concepts she was picking up on (*id.* at p. 5). The IEP described the student as "fidgety" and noted delays in her ability to focus and attend (*id.*). It further indicated the student had difficulty following the routine and structure of the classroom and did not follow through on teacher assigned tasks (*id.*). In addition, the student had difficulty with transitions and new activities (*id.*).

Turning to social development, the October 2023 IEP indicated that the student's socialization skills fell in the "[m]oderately [l]ow range as measured by the Vineland Adaptive Behavior Scales—Third Edition (Vineland-3) (Parent Ex. B at p. 5). According to the IEP, the student had difficulty interacting appropriately with peers and did not always pick up on social cues (*id.*). Her friendship-seeking behaviors were poor in that she did not show sufficient interest in interacting with peers, would not initiate an activity with peers, and had difficulty maintaining an activity with peers (*id.* at pp. 3, 5). In addition, she required significant prompting and hand-over-hand support from her teacher to join a peer-initiated activity (*id.* at p. 5). During circle time the student tended to wander aimlessly around the classroom and would not sing along or participate unless the teacher prompted and encouraged her (*id.*). According to the IEP, the student needed constant reassurance and repetition as she was unsure of herself (*id.*). The student did not approach her teacher when she was bothered by something, and she had difficulty verbally expressing her wants, needs, feelings, and emotions (*id.*). The IEP described the student as "somewhat passive" when interacting with peers and noted that she had difficulty sticking up for herself when interacting with aggressive children (*id.*).

Next, the October 2023 IEP described the student's physical development (*see* Parent Ex. B at pp. 5-6). The IEP noted concerns with the student's grasp and visual motor skills (*id.* at p. 6). The IEP also noted that the student had difficulty holding a crayon, was unable to copy vertical and horizontal strokes or replicate a circle or a square, and had difficulty tracing and copying forms (*id.* at p. 5). The student also had difficulty holding scissors correctly and was unable to cut along a thick line without assistance (*id.*). The IEP indicated that the student was able to build a seven-block tower, but unable to copy simple block designs without assistance; she was also unable to assemble a non-interlocking puzzle without assistance (*id.*). The student had difficulty manipulating shapes into a shape sorter and completing arts and crafts projects (*id.*). In terms of gross motor skills, the IEP indicated that the student demonstrated an appropriate gait pattern when walking; she negotiated a staircase appropriately but did not consistently use alternating feet; and she was able to slowly run down the hallway and jump, but was unable to hop or stand on each leg for several seconds (*id.* at pp. 5-6). In terms of self-help skills, the student was unable to dress or undress herself without assistance, had difficulty eating appropriately with a spoon or fork, and could not wash her face and hands independently (*id.* at p. 6). According to the IEP the student scored in the "[b]elow [a]verage range" in fine motor development and adaptive behavior, and within the "[a]verage range" in gross motor development (*id.*). The student played appropriately on low playground equipment (*id.*).

In light of the student's needs, the October 2023 CSE developed annual goals with corresponding short-term objectives that targeted the student's ability to attend to and participate in academic activities; demonstrate understanding of basic concepts; improve social/emotional skills; improve peer interactions; increase receptive and expressive language skills; increase

speech intelligibility; and demonstrate age-appropriate fine motor skills, sensory processing, and visual perceptual skills (id. at pp. 8-12).

As noted previously and as relevant to the appeal, to address the student's needs the October 2023 CSE recommended that the student receive two 30-minute sessions per week of OT in a group and two 30-minute sessions per week of speech-language therapy in a group, all of which were to be delivered on a 10-month school year basis at a childcare location selected by the parent (see Parent Ex. B at pp. 1, 13-14).

2. OT and Speech-Language Therapy Services from Step Ahead

Initially, it must be noted that, upon review of the testimony by the parent's sole witness—namely, a secretary from Step Ahead—the IHO properly determined that she failed to provide any substantive knowledge as to the student's providers or how they were selected; her testimony was not instructive as to how the providers met the individual needs of the student; and that, given her administrative position, she was not able to testify as to the student's progress (compare Tr. pp. 39-70, with IHO Decision at p. 9). Therefore, consistent with the IHO's determination, her testimony had little, if any, probative value relevant to assessing whether the OT and speech-language therapy services delivered by Step Ahead were appropriate.

However, in addition to the testimonial evidence, the hearing record includes documentary evidence (see generally Parent Exs. A-C; E-I; IHO Exs. I-VI). For example, the parent entered what appears to be a fillable document, which the parent listed as exhibit "H" and identified as "Attendance Records" on her exhibit list; however, the document, itself, does not bear any title or otherwise reflect the origin of the document (see generally Parent Ex. H). At the impartial hearing, the secretary from Step Ahead identified parent exhibit "H" as "session notes" (Tr. p. 49).¹¹ The session notes reflect the student's name; the speech-language therapy and OT provider's names; the date of each session, as well as reporting the "time in" and "time out" for each date; the location of the service (i.e., "school"); an area to describe goals (all left blank); and an area for notes by the providers (Parent Ex. H at pp. 1-7).

Overall, a review of the session notes shows that, between February 1, 2024 and April 9, 2024, the speech-language pathologist from Step Ahead delivered approximately 18 30-minute sessions of speech-language therapy to the student at school (see Parent Ex. H at pp. 1-6; see also Parent Ex. F at p. 1).¹² According to the session notes, the speech-language pathologist worked with the student on her ability to identify and label colors, shapes, and animals; label and categorize picture cards; describe objects by function; produce the "/p/ sound in initial, medial, and final positions," as well as animals sounds; produce two to three word utterances; follow one- and two-step directions; answer "wh" questions; engage in turn-taking; attend for three to five minutes; distinguish between same and different; and make appropriate picture associations (Parent Ex. H at pp. 1-6). The majority of session notes indicated that the student was easily distracted during therapy, and many notes indicated that she required prompting and redirection (id.).

¹¹ For the sake of clarity, parent exhibit "H" will be referred to as session notes within this decision.

¹² The evidence in the hearing record established that the Step Ahead speech-language provider was registered as a licensed speech-language pathologist in New York State (see Parent Ex. F at p. 1).

In addition to the session notes described above, the parent entered an April 2024 speech-language progress report into the hearing record as evidence (see generally Parent Ex. E). A review of the progress report reveals that it included the name of the student's religious, nonpublic school, but that the address on the document was that of Step Ahead (compare Parent Ex. E at p. 1, with Parent Ex. A at p. 1, and Parent Ex. C at p. 1).

The April 2024 speech-language progress report indicated that the student "receive[d] speech-language therapy twice a week for 30 minutes individually although her mandate allow[ed] her for a group up to [two]" (Parent Ex. E at p. 1). The progress report characterized the student as "a sweet and friendly girl," but noted that she was "often easily distracted during the session, [and] thus requir[ed] prompting, redirection, and repetition" (id.). It was also noted that the student often responded "'I don't know'" to simple questions and demonstrated difficulty labeling picture cards, as opposed to identifying pictures when given a choice or asked to point to a given picture (id.). The progress note indicated the student's goals "focused on improving her receptive and expressive language skills, labeling, increasing her vocabulary, answering simple 'wh' questions, increasing utterance length, as well as improving her turn[-]taking skills, attention and focus" (id.).

According to the April 2024 speech-language progress report, the student had "made some progress" with regard to her goals, specifically noting that she could "identify 10 colors" (Parent Ex. E at p. 2). However, the student had "difficulty when asked to label a given picture card or describe a picture, label shapes and animals, and produce appropriate animal sounds" (id.). The progress report noted that, when "engaging in a play activity," the student could attend for a "few minutes but then bec[ame] distracted" and lost focus (id.). It further noted that the student's distractibility made progress difficult (id.). According to the progress report, the student's new annual goals recommended by the speech-language provider continued to target the student's receptive language and focusing skills, expressive language skills, and the development of age-appropriate cognitive skills (id. at pp. 2-3).

Turning to the parent's unilaterally-obtained OT services, the hearing record shows the student's Step Ahead provider was licensed to practice as an occupational therapist in New York State (see Parent Ex. F at p. 2). The session notes in the hearing record reporting on the student's speech-language therapy services also reported on the student's OT services; according to the session notes, the student received OT services from Step Ahead between February 24, 2024 and May 15, 2024 (see Parent Ex. H at pp. 1-7). According to the session notes, the occupational therapist provided the student with approximately 27 30-minute OT sessions at her school (id.). As reflected in the session notes, OT focused on the student's fine motor skills, including tracing, coloring, and cutting; bilateral hand skills, such as lacing beads, and manipulating resistive theraputty and play doh; and visual skills, including scanning, near point copying, and orienting puzzle pieces (id.). The therapist also worked on skills designed to develop the student's three-digit grasp, hand strength and endurance, sensory processing, and her ability to bear weight on her hands (id.).

In addition to the session notes, the hearing record also included an April 2024 OT progress report, which, similar to the April 2024 speech-language progress report, referenced the name of the student's religious, nonpublic school but with Step Ahead's address (compare Parent Ex. I at p. 1, with Parent Ex. E at p. 1, and Parent Ex. A at p. 1, and Parent Ex. C at p. 1). The progress report reflected that the student received OT services two times per week individually (see Parent Ex. I at p. 1). The progress report indicated that the student enjoyed going to therapy and

transitioned nicely to and from the therapy room (id.). The progress report described the student as "willing and happy to participate in given tasks," and noted that she "trie[d] her best to complete them" (id.). According to the progress report, the student participated in "fine motor tasks that include[d] grasping[and]manipulation skills and visual motor tasks" (id.). The student also engaged in "sensory motor tasks such as manipulating theraputty, kinetic sand, and play doh" (id.). In addition, she liked to "participate in various arts and crafts activities that include[d] dot markers, coloring/cutting/glueing, and painting" (id.). The OT progress report indicated that the student "require[d] verbal[and]visual prompting and demonstration prior to engaging in various tasks," as well as hand-over-hand assistance at times for fine motor tasks and activities of daily living (id.). According to the progress report, an "emphasis [wa]s placed on repetition of tasks" as a means of improving the student's "performance skills for daily tasks for optimal class performance" (id.). The progress report further indicated that faded prompting was the "goal in order to achieve eventual independence" (id.).

The April 2024 OT progress report indicated that, with respect to her then-current annual goals, the student required maximum assistance in order to make progress; at that time, the student's goals targeted her fine motor, sensory processing, and visual perceptual skills (see Parent Ex. I at pp. 1-2). To assess the student's progress, the report indicated that it was based on "clinical observation" (id. at p. 2). According to the progress report, the student was able to hold a marker using a pronated digital grasp (id.). The student required assistance to complete tasks that required bilateral hand use, such as buttoning buttons or lacing beads (id.). With respect to visual motor skills, the student needed verbal prompts to orient puzzle pieces in a noninterlocking puzzle (id.). With respect to prewriting skills, the OT progress report indicated the student required verbal prompts to identify shapes, was working on imitating vertical and horizontal lines, and was unable to independently copy shapes (id.). It was also noted that the student tended to scribble outside the lines instead of coloring within the lines (id.). The OT progress report indicated that the student manipulated theraputty using bilateral hands with rest breaks (id.). The student required verbal prompts and encouragement throughout a task in order to maintain attention and complete the tasks within the allotted time (id.). The progress report included new annual goals that targeted the student's grasping and manipulation skills, sensory processing skills, and visual motor skills (id. at pp. 2-3).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

In the decision, the IHO, when determining whether the parent's unilaterally-obtained OT and speech-language therapy services, focused her analysis on the progress reports in the hearing record and whether the student made progress (see IHO Decision at pp. 8-10). For example, the IHO expressed concern that the April 2024 speech-language progress report did not indicate when the provider from Step Ahead began delivering services to the student (see id. at p. 10). However, while the progress report may not indicate the first date of speech-language therapy services, the session notes—as indicated above—showed that the student began receiving speech-language therapy on or about February 1, 2024, which the Step Ahead secretary's testimony confirmed was

the first day of services (see Tr. pp. 53-54; Parent Ex. H at p. 1). The IHO expressed similar concerns with regard to the April 2024 OT progress report, namely, that it failed to indicate when OT services from Step Ahead began (see IHO Decision at p. 10). However, while the while the OT progress report may not indicate the first date of services, the session notes—as indicated above—showed that the student began receiving OT services from Step Ahead on or about February 15, 2024 (see Parent Ex. H at p. 1). With respect to the April 2024 OT progress report, the IHO found that it described the student's needs, rather than her progress (see IHO Decision at p. 10).

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

Based on the foregoing, while it would be preferable to have the testimony of the speech-language pathologist and occupational therapist at the impartial hearing, there is nonetheless sufficient evidence to show that the student received speech-language therapy and OT from Step Ahead and that such services addressed the student's specific needs during the 2023-24 school year. The IHO noted the progress reports listed the name of the religious nonpublic school at the top of the document and seemed to question the veracity or authenticity of the documents (see IHO Decision at pp. 9-10); however, during the hearing, the district did not initially object to the session notes, progress reports, and documents demonstrating the providers' licensure as presented by the parent (see Tr. pp. 30-35).¹³ Further, the district offered no evidence or testimony to contradict or rebut the documentary evidence produce by the parent or present any information obtained pursuant to its subpoena of Step Ahead (see Tr. pp. 28-30, 33, 35, 71; IHO Ex. IV).

Accordingly, as the parent's evidence was presented without successful objection or rebuttal, the IHO's dismissal of the documentary evidence based on the lack of witness testimony is unwarranted. Overall, taking into account the totality of the circumstances, a review of the evidence in the hearing record, limited as it is, supports a finding that the parent met her burden to prove that the student's OT and speech-language services from Step Ahead providers during the

¹³ The district's representative did move to strike the documents in evidence based on a lack of authentication by a witness, but the IHO denied the request because the documents were already in evidence and hearsay was permissible in the proceeding; however, the IHO indicated that she would afford the documents the appropriate weight (Tr. pp. 57-59). On appeal, the district does not allege that the IHO erred in denying the district's motion to strike the documentary evidence.

2023-24 school year were specially designed to meet the student's needs (see Parent Exs. E-F; H-I).

B. Equitable Considerations

Having found that the parent had failed to sustain her burden to establish the appropriateness of the student's unilaterally-obtained OT and speech-language therapy services, the IHO did not address equitable considerations in the decision. On appeal, both parties raise arguments on this point. The parent contends that she is free from wrongdoing, the district's abdication of its obligations must be considered when weighing the equities, and the parent—while not required to have a contract in writing—entered into agreements financially obligating her to pay for the unilaterally-obtained services in this matter. The district's arguments focus on the validity of the parent's agreement with Step Ahead and whether she is financially obligated to pay for the unilaterally-obtained services. The district asserts that, although the parent executed an agreement with Step Ahead, she only did so after the student began receiving services and approximately two months after filing the due process complaint notice. In addition, the district points to the parent's agreement with Step Ahead, noting that it is "bare bones and does not specify anything." For example, the district notes that the agreement reflects that Step Ahead charges \$250.00 for related services but does not specify what that term means; the agreement provides no information about the type or frequency of services for the student; and the agreement does not reflect a start date or reference the student's October 2023 IEP.

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

With regard to whether the parent's agreement with Step Ahead financially obligates for payment of the unilaterally-obtained services, in Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to

be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "everything that might be thought desirable by 'loving parents.'" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [1985] [noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247[2009] [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

Regarding proof of financial risk, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]).

Consistent with the district's contentions, a review of the parent's agreement with Step Ahead raises some concerns. First and foremost, although the agreement notes that the parent was "aware that the services being provided to [the student] are \$250 an hour" and that she would be liable for payment if the district did not pay for the services, the agreement further indicates that the parent was aware that the student would be provided with services consistent with those in the student's "IEP/IESP dated: 10/26/2020" for the 2023-24 school year (Parent Ex. C). In this matter, the parent alleged that the district failed to implement the student's October 24, 2023 "IESP"; the student's IEP in evidence is dated October 24, 2023 (compare Parent Ex. A at p. 1, with Parent Ex. B at p. 1). The hearing record does not include an IEP or IESP dated October 26, 2020, as referenced in the parent's agreement with Step Ahead (see Parent Ex. C; see generally Tr. pp. 1-80; Parent Exs. A-B; E-I; IHO Exs. I-VI). Nor does the hearing record include any explanation regarding the information contained in the parent's agreement with Step Ahead, as the parent did not testify and the Step Ahead secretary testified that she had nothing to do with the preparation of the agreement or its presentation to the parent (see Tr. pp. 62-63).

In New York, while a party may agree to be bound to a contract even where a material term is left open or where the contract includes a typographical error, "there must be sufficient evidence" regarding the parties intent and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]; True v. True, 63 A.D.3d 1145, 1147 [2d Dep't 2009]). Given that the parent's agreement with Step Ahead is considered to be the best representation of the parties' intentions, it is difficult, if not impossible, to know whether the parent is financially obligated to pay for the OT and speech-language therapy services purportedly delivered by Step Ahead consistent with the recommendations in the October 2023 IEP, as the agreement does not reflect the services or the IEP the parties intended to implement. Moreover, while performance of the terms of the contract may have constituted an objective means for identifying the missing terms (see E.M., 758 F.3d at 458 n.21), here the agency did not deliver the student services for the purported full term of the contract (i.e., "the entire 2023-2024 school year") and there is no evidence of invoices for the services. Rather, the evidence reflects that the student began receiving OT and speech-language therapy services at her religious, nonpublic school in February 2024, approximately five months after the beginning of the school year (Parent Ex. H at p. 1). Moreover, the evidence shows that the services began three months prior to the parent executing the agreement with Step Ahead, and the Step Ahead secretary had no knowledge of whether either the OT provider or the speech-language therapy provider worked for the student's religious, nonpublic school (see Tr. pp. 69-70; Parent Exs. C; H at p. 1).

Therefore, there is insufficient evidence in the hearing record to support a finding that the parent incurred a financial obligation for the speech-language therapy and OT services delivered to the student that would support an award of reimbursement or direct funding relief for the 2023-24 school year.

VII. Conclusion

Contrary to the IHO's decision, the evidence in the hearing record shows that the parent met her burden to prove that the unilaterally obtained speech-language therapy and OT delivered by Step Ahead were appropriate. However, there is no reliable evidence of the parent's financial obligation to pay Step Ahead for the services provided to the student. Accordingly, the IHO's denial of relief in the form of district funding for speech-language therapy and OT services delivered by Step Ahead during the 2023-24 school year will not be disturbed.

THE APPEAL IS DISMISSED.

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

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**