The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-390

Application of a STUDENT WITH A DISABILITY, by his parents, 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 petitioners, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their son's private special education teacher support services (SETSS) delivered by Always a Step Ahead Inc. (Step Ahead) for the 2023-24 school year. The district cross-appeals asserting that the IHO erred in awarding funding for speech-language therapy and counseling services delivered by Step Ahead for the 2023-24 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law

§ 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail.

Briefly, a CSE convened on April 27, 2023 and finding the student eligible for special education as a student with a speech or language impairment, developed an IESP for the student with an implementation date of September 1, 2023 (Parent Ex. B).[1] At the time of the April 2023 CSE meeting, the student was attending a nonpublic preschool and was transitioning to kindergarten in September 2023 (school-age services) (id. at p. 1, Parent Ex. J at p. 1). For the 2023-24 school year, the April 2023 CSE recommended that the student receive five periods per week of direct, individual SETSS, one 30-minute session per week of group counseling, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) with all services to be provided in a separate location (Parent Ex. B at pp. 7-8).[2]

On May 20, 2024, the parent electronically signed a document on the letterhead of Step Ahead, and stated that she was "aware that the rate of the SETSS services [we]re $200 an hour and the related services provided to [her] child [we]re $250 an hour, and that if the [district] d[id] not pay for the services, [she] w[ould] be [] liable to pay for [] them" (Parent Ex. C at p. 1).[3] The document further noted 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: 04/27/2023" (id.).

In May and June 2024, SETSS, counseling, and speech-language therapy progress reports were issued on the religious nonpublic school's letterhead (Parent Exs. H-J).

A. Due Process Complaint Notice

In a due process complaint notice dated May 23, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (Parent Ex. A). The parents asserted that the last program developed by the district that the parents agreed with was the April 2023 IESP and argued that the student required that same program for the 2023-24 school year (id. at p. 1). The parents contended that they were unable to locate providers at the district standard rates for the 2023-24 school year and that the district did not provide any (id.). According to the parents, they were able to find providers to deliver "all required services" for the 2023-24 school year, but at rates higher than the standard district rates (id.). The parents requested a pendency hearing and an order directing the district to

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist among parents, practitioners, and the district.

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

fund five sessions of special education teacher instruction per week at an enhanced rate for the 2023-24 school year (id. at p. 2). The parents also requested other relief as was appropriate (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on July 22, 2024. In a decision dated July 30, 2024, the IHO found that the district failed to offer the student equitable services for the 2023-24 school year as it did not implement the student's April 2023 IESP (IHO Decision at p. 4). Turning to the appropriateness of the unilaterally-obtained services, the IHO applied a Burlington/Carter analysis and found that the parents met their burden of proving that the speech-language therapy and counseling services delivered by Step Ahead were appropriate but failed to meet their burden of proving the appropriateness of the SETSS delivered by Step Ahead (id. at pp. 5-7). Specifically, with respect to SETSS, the IHO found that the SETSS progress report was "unrealistic and unreliable" because in June 2024 it identified new goals to be completed within three months without 12-month services (id. at p. 6). The IHO further noted that the progress report was lacking information as to academic areas such that progress towards the student's existing goals could not be ascertained and that there was no basis for the new goals (id.). As to the session notes included as part of the attendance records, the IHO found that they were inconsistent as some were detailed yet others "contained as few as three words" and that even for the detailed notes there was a lot of overlap with the related services of speech-language therapy and counseling (id. at pp. 6-7). The IHO then declined to order compensatory OT services as the hearing record was devoid of any evidence of missed OT sessions (id. at p. 7). Turning to equitable considerations, the IHO noted that there was no evidence of the parents notifying the district of their intent to unilaterally obtain services and seek funding from the district and reduced the overall award by 10 percent on that basis (id. at pp. 7-8). Additionally, the IHO found that the parent signed the contract with Step Ahead on May 20, 2024 and that funding would only be awarded at the rate established in the contract as of that date (id. at p. 8). The IHO ordered the district to directly fund speech-language therapy provided by Step Ahead for the period from November 14, 2023 through May 19, 2024 at a reasonable market rate and for the period from May 20, 2024 through the end of the 2023-24 school year at a rate of $225 per hour and to directly fund counseling provided by Step Ahead for the period from December 7, 2023 through May 19, 2024 at a reasonable market rate and for the period from May 20, 2024 through the end of the 2023-24 school year at a rate of $225 per hour (id. at pp. 8-9).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in denying their request for funding of the unilaterally-obtained SETSS. The parents assert that the burden of proof should have laid entirely with the district as the parents were only seeking implementation of the district's recommended program. However, they also assert that the IHO erred in finding that the privately obtained SETSS were not appropriate. According to the parents, services were provided by "appropriately credentialed providers for each service for which funding is requested" and simply requests that the providers be paid for delivering the services recommended on the IESP. The parents then object to the IHO's findings regarding the SETSS progress report and attendance records. Turning to equitable considerations, the parents argue that the IHO erred in reducing the award and in not awarding the contracted for rate of $225 per hour for the awarded counseling and speech-language therapy services for the entire school year. According to the parents, they were

not required to provide 10-day notice of their unilateral placement and there was no requirement that any contract with the agency be in writing. As relief, the parents request direct funding for the SETSS, speech-language therapy, and counseling services delivered to the student by Step Ahead for the 2023-24 school year at the rates specified in the parents' agreement with Step Ahead.

The district submits an answer to the request for review with a cross-appeal of the IHO's award of speech-language therapy and counseling services. The district contends that the parents failed to meet their burden of proving the appropriateness of the unilaterally-obtained services and that equitable considerations weigh against granting any relief. In addition, the district asserts that the IHO did not have subject matter jurisdiction over the parents' due process complaint notice and therefore the parents' claims should be dismissed.

V. Applicable Standards

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

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5] Thus, under State law an eligible New

[4] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students

York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Preliminary Matters - Subject Matter Jurisdiction

As an initial matter, I will address the district's cross-appeal that the IHO and SRO lack subject matter jurisdiction in this case. Although the district did not raise the argument during the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

Turning to the district's argument as it is now presented on appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint notice with respect to a rate for services for implementation of an IESP (Answer & Cr.-Appeal ¶¶ 6-8).

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other

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with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the student's individual needs who attends a nonpublic school (Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services and the State Education Department made a "carve-out" of jurisdiction for this issue explicit by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Answer & Cr.-Appeal at ¶ 7).

Initially, § 4404 of the Education Law concerning appeal procedures for students with disabilities, consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not

intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2023-24 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, as the number of due process cases involving the dual enrollment statute statewide have drastically increased within certain regions of this school district in the last several years, it is understood that public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.). Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees,

> officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).

The district acknowledges the limitation on applicability of the amendments to the State regulation relating to the date of the due process complaint notice but contends that the amendments "merely codify NYSED's preexisting position on implementation claims" (Answer & Cr.-Appeal ¶ 7 n. 1).

Consistent with the district's position, State guidance issued in August 2024 noted that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).

However, acknowledging that the question has received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter regardless of the guidance document. Accordingly, the district's cross-appeal seeking dismissal of the appeal on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims and the present appeal must be denied.

B. Unilateral Placement

Prior to reaching the merits of the parties' dispute, neither party has appealed from the IHO's findings that the district did not implement the student's April 2023 IESP and therefore failed to offer the student equitable services for the 2023-24 school year or the IHO's determination not to award compensatory OT services for any services missed during the 2023-24 school year (see IHO Decision at pp. 4, 7). Accordingly, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The remaining issue presented on appeal is whether the services provided to the student by Step Ahead during the 2023-24 school year were appropriate to address his needs. The parents contend that the IHO did not apply the correct legal standard because the parent agreed with the

educational program as set forth in the student's April 2023 IESP and was not attempting to implement a different program for the student. According to the parent, a Burlington/Carter analysis should not apply when a parent is attempting to implement the same program as called for in an IESP and in this instance, according to the parent, she "utilized the services of an Agency using appropriately credentialed providers for SETSS" and "simply requested that the providers be paid for delivering the services based on the IESP."

In this matter, the student has been parentally placed in a nonpublic school and the parents do not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parents alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, they unilaterally-obtained private services from Step Ahead for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[6] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

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 (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]).

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

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

Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

Under the above framework, the parents argue that, contrary to the IHO's determination, they sustained their burden to establish that the unilaterally-obtained SETSS delivered by Step Ahead were appropriate, because the SETSS provider was "credentialed," and that the Step Ahead attendance records and progress report demonstrated that the SETSS were appropriate to address the student's needs. Conversely, the district contends that the IHO erred in finding the unilaterally-obtained speech-language therapy and counseling services appropriate asserting that the parents failed in their burden.

1. Student Needs

Although not in dispute, a description of the student's special education needs provides context for the issues to be decided on appeal.

At the time the CSE developed the April 2023 IESP, the student was four years old, bilingual, and attending a nonpublic preschool where he received OT, speech-language therapy, and counseling (Parent Ex. B at pp. 1, 2). Teacher reports reflected in the IESP indicated that the student's cognitive skills were "felt to be average," and results of a May 2022 administration of a preschool cognitive assessment yielded results in the low average range (id.). The IESP indicated that the student had difficulty with rhyming, making associations, understanding opposites, and

understanding questions (id.). Further, the student needed to develop inferential thinking skills, comprehension, vocabulary, and receptive and expressive language skills (id. at p. 2). According to the IESP the student had shown improvement acquiring readiness skills, and he identified letters, shapes, and colors (id. at p. 1). The IESP reflected reports and observations that the student exhibited impulsivity, worked independently with reminders and refocusing, and had difficulty focusing when he was bored (id. at pp. 1, 2). Additionally, the IESP indicated that the student's impulsivity interfered with his learning and peer interactions, and he needed to improve his ability to transition between tasks (id. at p. 2).

Socially, the April 2023 IESP indicated that the student at times became "over-excited and touch[ed] other students when in a group," and that he related to peers but sometimes pushed or grabbed what he wanted from them (Parent Ex. B at p. 2). According to the IESP the student liked to be the center of attention, and participated in play with peers and group activities (id.). The student received counseling to improve self-regulation, focusing, and social skills (id.). Regarding physical development, the IESP indicated that the student's gross motor and daily living skills were age appropriate (id. at pp. 1, 3). The IESP reflected reports that the student did not hold his pencil correctly, and needed OT to increase attention span, fine motor coordination, and sensory processing skills (id. at pp. 2, 3).

The CSE identified supports and strategies to address the student's management needs that included refocusing, praise and positive reinforcement, repetition and explanation of directions/questions, visual aids, manipulatives, short breaks when needed, and tasks broken down into smaller components (Parent Ex. B at p. 3). Annual goals for the student included improving his acceptance of peers receiving attention, social judgement skills, receptive and expressive language skills, fine motor coordination, and sensory processing skills, and his ability to complete tasks with focus, appropriately gain adult attention, transition easily from preferred to less preferred tasks, produce specific speech sounds in a variety of contexts, hear/identify sounds in words, write numbers up to 10, and count up to 20 objects with 1:1 correspondence (id. at pp. 4-7). The CSE recommended the student receive five periods of individual SETSS per week, two 30-minute sessions per week of individual OT, one 30-minute session each per week of individual and group speech-language therapy, and one 30-minute session per week of counseling in a group (id. at pp. 7-8).

2. Unilaterally-Obtained Services

Turning to the services delivered to the student during the 2023-24 school year, the hearing record includes documentation produced by Step Ahead consisting of a document bearing Step Ahead letterhead signed by the parent acknowledging that she was aware Step Ahead was providing services to the student pursuant to the April 2023 IESP, providers' certificates, attendance records, and progress reports for counseling, speech-language therapy, and special education, as well as a letter signed by the Step Ahead secretary indicating that those documents were taken from Step Ahead's files (Parent Exs. C-E; G-J). The secretary from Step Ahead testified during the hearing; however, she was not familiar with the student, did not know what grade he was in, did not know "offhand" what services he was receiving, and had never spoken to the student's providers or the parents about the student (Tr. pp. 14, 15, 21-22). Further, the secretary had not observed any of the student's sessions, did not know where his services were provided, and whether he had missed any sessions (Tr. p. 22).

The hearing record includes what appears to be a fillable document, which the parent submitted into evidence and identified as "Attendance Records"; however, the document, itself, does not bear any title or reflect the origin of the document (see Parent Ex. G). The attendance records reflect the student's name; the SETSS, speech-language therapy, and counseling providers' names; the dates of sessions, as well as the "time in" and "time out" for each date; the location of the service (i.e., "school"); and areas for notes (id.).[7]

Overall, a review of the attendance records shows that the student generally received 60-minute sessions with the SETSS provider, who holds a students with disabilities birth – grade 2 professional certificate, from September 7, 2023 through May 30, 2024 (Parent Exs. E at p. 2; G at pp. 1-26). According to the attendance records, the student worked on improving interpersonal and social skills, handwriting, journal writing, identifying letters and letter sounds, counting, matching, rhyming, attending and keeping his hands to himself, following rules and instructions, understanding CVC words, recognizing numbers up to 20, using problem solving skills, and understanding quantities (see Parent Ex. G). The SETSS provider used supports and strategies with the student including explicit instruction in nonverbal communication, prompts, role-play, visual aids, redirection, repetition, deep breathing, picture cards, hand grip, games/puzzles, songs, hands-on materials, letter tracing, and picture to word match (see, e.g. id. at pp. 2-3, 5-6, 8, 10, 15-17, 21, 23, 25).

In a report dated June 4, 2024, the SETSS provider indicated that the student was then-currently "on grade level K for math, reading, and writing" (Parent Ex. J at p. 1). According to the report, in reading the student participated in conversations and described familiar things in detail, but struggled to follow words from left to right and name all alphabet letters (id.). In writing, the student narrated events in a sequence but had difficulty stating an opinion and answering questions requiring recall of information (id.). In math, the student struggled counting to 100 by ones and tens, writing numbers 0-20, matching numbers to their values, and adding/subtracting within 10 (id.). Goals for the student to achieve "[b]y the end of the next three months" included following words left to right when reading, naming all the letters of the alphabet, stating an opinion about a familiar topic, answering questions through recall of relevant information, supplying information about a familiar topic, using emergent writing skills to express thoughts on paper, counting to 100 by ones accurately, writing numbers from 0-20 independently, matching numbers to their values, and adding/subtracting within 10 using manipulatives (id. at pp. 1-2).

According to the attendance records, the student's speech-language therapy provider, who holds a speech and language disabilities initial certificate, began delivering speech-language therapy to the student on November 14, 2023 (Parent Exs. E at p. 1; G at p. 5). According to the attendance records, the student worked on skills such as answering "wh" questions, naming body parts, following directions, expanding expressive language, sorting items into categories, identifying common objects and vocabulary, and sequencing (see Parent Ex. G at pp. 5-8, 10-20, 22-26). During speech-language therapy sessions, the provider reported using visual and verbal cues, coloring activities, "loaded picture scene," carrier phrases, manipulatives, games, picture

[7] The hearing record does not include any evidence describing the student's school day at his religious, nonpublic school, such as the length of his day or a class schedule (see generally Tr. pp. 1-37; Parent Exs. A-J; Dist. Exs. 1, 3, 5).

cards, prompting, sequencing cards, redirection, stories read aloud (see, e.g., id. at pp. 5-7, 10-13, 15, 17-18, 22, 24-25).

The speech-language provider prepared a progress report, dated May 15, 2024, that indicated the student received two 30-minute sessions per week (Parent Ex. I at p. 1). According to the report, the student exhibited receptive language delays characterized by difficulty comprehending wh-questions about pictures or stories, following two or more step directions, and understanding time and sequence concepts (id.). The student also exhibited expressive language delays, including reliance on nonverbal communication to express wants and needs, difficulty requesting and labeling objects and actions, and use of one to two word utterances (id.). Additionally, the student had difficulty making inferences about pictures, understanding "expanded utterances" and producing the unvoiced /th/ sound in isolation, syllables, words, phrases, sentences, and spontaneous speech (id.). The speech-language provider reported that then-current annual goals were for the student to demonstrate understanding of wh-questions, expanded sentences, and time/sequence concepts; follow two or more step directions; make inferences; use words for pragmatic purposes; and produce the unvoiced /th/ sound in all speech forms (id. at pp. 1-2). The progress report reflected that the student had been "making limited progress" toward his goal to answer "wh" questions, he demonstrated the ability to expand his utterance length and request objects with maximum support, and made some progress toward his goal to produce the unvoiced /th/ sound (id. at p. 2). New goals for the student were to comprehend "wh" questions based on pictures/stories; follow two-step unrelated directions; use words for requesting, labeling, and asking for help; and producing the unvoiced /th/ sound (id.). The speech-language provider recommended that the student continue to receive two 30-minute sessions per week of services (id.).

The attendance records reflect that a licensed social worker began delivering counseling to the student on December 7, 2023 (Parent Exs. E at p. 3; G at p. 7). According to the attendance records, the social worker worked on improving the student's use of coping strategies when he experienced intense emotions, ability to label feelings/emotions, storytelling skills, appropriately express emotions, exhibit appropriate behavior, develop play skills, and improve self-expression (see Parent Ex. G at pp. 7-9, 11, 13-14, 16-21, 23-26). To address these skills, the attendance records reflected the social worker used deep breathing, "pictorial cards," drawing, feeling and emotion cards, whiteboard, games, toys, social stories, sand tray, coloring, activity sheet, and puppets (see, e.g., id. at pp. 8, 10-11, 14, 17, 19-21, 24, 26).

On May 14, 2024 the social worker prepared a counseling progress report that indicated the student received one 30-minute session per week (Parent Ex. H at p. 1). The social worker identified the student's social/emotional needs, including that at times he pushed and grabbed items from peers, was impulsive, had difficulty sharing, and exhibited difficulty with self-regulation, focusing, and transitioning (id.). The progress report included current annual goals to improve the student's social judgment and ability to gain attention in a safe, appropriate way (id. at pp. 1-2). According to the progress report, the student was working toward identifying his feelings and emotions and addressing challenging behavior (id. at p. 2). The social worker reported that during sessions, she and the student discussed events that occurred to help him understand reactions to his behavior, and used social stories, toys, and "tools" (id.). New annual goals for the student included that he label his emotions, label instances of real or imagined stress/anxiety, and learn

three new coping strategies (id.). The social worker recommended that the student receive two 30-minute sessions per week of counseling (id.).

Based on the totality of the circumstances, the hearing record contains sufficient information to show that the unilaterally-obtained SETSS, speech-language therapy, and counseling services provided the student with specially designed instruction to meet his needs during 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 SETSS.

C. Equitable Considerations

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

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

Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO reduced the awarded relief by 10 percent based on the parents' failure to provide the district with a 10-day notice (IHO Decision at p. 8). As noted by the IHO, the hearing record does not include notice of the parents' intent to obtain unilateral services and to seek funding from the district for the cost of those services. The parents assert that they were not required to provide 10-day notice because it was an equitable services matter and the student had not been removed from a public school placement and the district did not present evidence that it provided the parents with the procedural safeguards notice.

The IDEA provides that an award of reimbursement may not be reduced or denied if the parent did not receive a procedural safeguards notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504). Ultimately, there was no argument or allegation during the impartial hearing regarding either the lack of 10-day notice or a lack of procedural safeguards notice or prior written notice. The IHO should utilize the prehearing conference procedures to discuss with the parties whether such issues are germane to the matter before him so that the parties are on notice and the hearing record is properly developed (see 8 NYCRR 200.5[j][3][xi]). While the hearing record does not include a 10-day notice from the parents, given the lack of discussion during the impartial hearing and the undeveloped state of the hearing record, it would be imprudent to reduce the award of district funding for the unilaterally-obtained services based solely on the absence of a 10-day notice. This is particularly so, as the district has not responded to the parents' assertion that the lack of a procedural safeguards notice warrants a finding that a 10-day notice was not required (see Req. for Rev at ¶21; Answer with Cr.-Appeal at ¶¶15, 16).

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

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "everything that might be thought desirable by 'loving parents.'" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered

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

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

As noted above, the hearing record includes a document on Step Ahead's letterhead indicating that it was electronically signed by the parent on May 20, 2024 (Parent Ex. C). The document indicated that the parent was "aware that the rate of the SETSS [we]re $200 an hour," the related services were $250 per hour, and that if the district did not pay, the parents would be liable (id.). While the document itself does not provide much in the way of details, it is sufficient to show that the parents had incurred a financial obligation to Step Ahead as it does contain an acknowledgment that the parents would be obligated to pay for any SETSS provided to the student in the amount of $200 an hour and related services in the amount of $250 an hour, absent district funding (Parent Ex. C). Based on the foregoing, the evidence in the hearing record does not support finding that the parents did not incur a financial obligation to pay for services delivered by Step Ahead and, accordingly, a reduction of the award of funding is not warranted on this ground.

Finally, the attendance records submitted by the parents indicate that the student received SETSS from September 7, 2023 through to May 30, 2024, speech-language therapy from November 14, 2023 through to May 30, 2024, and counseling services from December 7, 2024 through to May 30, 2024 (see generally Parent Ex. G). The impartial hearing in this matter was held on July 22, 2024, after the conclusion of the 2023-24 school year (Tr. pp. 1-37). Accordingly, the parents had the opportunity to have submitted attendance records for the entirety of the 2023-24 school year but elected not to do so. Therefore, any award shall be limited to direct funding for the SETSS and related services that the hearing record shows were actually provided to the student (Parent Ex. G).

VII. Conclusion

Having found that the evidence in the hearing record supports a determination that the IHO erred by denying funding for the SETSS unilaterally-obtained by the parents and that equitable

considerations do not weigh against the parents' request for relief, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find they are unnecessary to address in light of my above determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 30, 2024, is modified by reversing those portions which found that the SETSS which were unilaterally-obtained by the parents and provided by Step Ahead to the student for the 2023-24 school year were not appropriate;

IT IS FURTHER ORDERED that the district shall fund the costs of up to five hours per week of SETSS delivered to the student by Step Ahead during the 2023-24 school year between September 7, 2023 and May 30, 2024 at the rate of $200 per hour, up to two 30-minute sessions per week of speech-language therapy delivered to the student by Step Ahead during the 2023-24 school year between November 14, 2023 and May 30, 2024 at the rate of $250 per hour, and up to one 30-minute session per week of counseling services delivered to the student by Step Ahead during the 2023-24 school year between December 7, 2023 and May 30, 2024 at the rate of $250 per hour, upon presentation of proof of services delivered during those time periods and invoices for such services.

Dated: **Albany, New York**
October 30, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER