



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-387

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

### **Appearances:**

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

## **DECISION**

### **I. Introduction**

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

### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3,

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

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

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

### III. Facts and Procedural History

Given the limited issues on appeal and the sparse hearing record underlying the impartial hearing in this matter, a detailed recitation of the student's educational history is not possible. Briefly, a CSE convened on May 30, 2023 and found the student eligible for special education as a student with a speech or language impairment (Parent Ex. B).<sup>1</sup> The CSE developed an IESP for the student with a recommendation that the student receive five periods per week of special education teacher support services (SETSS) as a direct, group service to be provided in the student's general education classroom, two 30-minute sessions per week of individual speech-language therapy services, two 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of group counseling services to be provided in the student's general education classroom (*id.* at pp. 10-11).<sup>2, 3</sup>

For the 2023-24 school year, the student was parentally placed in either a pre-kindergarten or kindergarten class at a religious, nonpublic school (Parent Exs. H at p. 1; I at p. 1). According to session notes kept by private providers, the student began receiving SETSS on September 7, 2023, speech-language therapy services on September 13, 2023, and OT services on January 4, 2024 (Parent Ex. G at pp. 1, 13).

On December 26, 2023, 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 provided to [her] child [wa]s \$200 an hour and the rate of the related services [was] \$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).

A CSE convened on April 4, 2024, found the student continued to be eligible for special education as a student with a speech or language impairment, and developed an IESP for the student including recommendations for five periods per week of SETSS as a direct, group service to be provided in a separate location, two 30-minute sessions per week of individual speech-language therapy services, two 30-minute sessions per week of individual OT, and one 30-minute session per week of group counseling services (Dist. Ex. 3 at pp. 1, 7-8).

In May 2024, SETSS and speech-language therapy progress reports were issued on the religious nonpublic school's letterhead (Parent Exs. H at p. 1; I at p. 1).

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<sup>1</sup> 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]).

<sup>2</sup> 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.

<sup>3</sup> One session of OT was to be provided to the student in his general education classroom and the other session of OT was to be delivered in a separate location, the therapy room (Parent Ex. B at pp. 10-11).

### **A. Due Process Complaint Notice and Subsequent Facts**

In a due process complaint notice dated May 23, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parent indicated that the May 2023 IESP was the last agreed-upon educational program developed for the student and that she agreed with the student's educational program (*id.* at p. 1). The parent asserted she was unable to locate service providers on her own at the district's standard rates for the 2023-24 school year and that the district failed to provide the student with a provider for the recommended services (*id.*). The parent claimed that she found providers willing to provide the student "with all required services" for the 2023-24 school year but at rates higher than the standard district rates (*id.*). The parent sought an order requiring the district to continue the student's services under pendency and an award of funding for SETSS delivered by a private company during the 2023-24 school year at "enhanced rates" and directing the district to issue a related service authorization (RSA) or directly fund related services for providers of the parent's choosing at the rate the providers charge (*id.* at p. 2).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on July 9, 2024 (Tr. pp. 1-48). In a decision dated July 29, 2024, the IHO found that the district failed to meet its burden during the hearing and that it was undisputed that the district failed to implement the May 2023 IESP for the 2023-24 school year as it did not make providers available to the student (IHO Decision at p. 5). The IHO then analyzed the parent's requested relief using a Burlington/Carter standard and found that the parent met her burden of proving that the speech-language therapy services delivered to the student during the 2023-24 school year were appropriate, but the parent did not meet her burden of proving the appropriateness of SETSS, OT, or counseling services (*id.* at pp. 6-8). Turning to equitable considerations, the IHO found that the parent did not provide the district with a ten-day notice of her intent to unilaterally obtain services for the student and reduced the awarded speech-language therapy services by ten percent on that basis (*id.* at pp. 8). In addition, the IHO noted that the parent signed a contract on December 26, 2023 and, therefore, there was no evidence of a financial obligation prior to that time (*id.*). As relief, the IHO directed the district to fund speech-language therapy services delivered by the parent's selected agency from September 7, 2023 through December 25, 2023 at a reasonable market rate, and from December 26, 2023 through the end of the 2023-24 school year at a rate of \$225 per hour (*id.* at p. 9).

### **IV. Appeal for State-Level Review**

The parent appeals, alleging that the IHO erred in denying her request for funding of the unilaterally-obtained SETSS and OT services. The parent asserts that the burden of proof should have laid entirely with the district as the parent was only seeking implementation of the district's recommended program, but also asserts that the IHO erred in finding that the privately obtained SETSS and OT services were inappropriate. According to the parent, services were provided by "appropriately credentialed providers for each service for which funding is requested." The parent then objects to the IHO's findings regarding the SETSS progress report and session notes. Turning to equitable considerations, the parent argues that the IHO erred in not awarding the contracted for rate of \$250 per hour for the awarded speech-language therapy services.

According to the parent, she was not required to provide ten-day notice of her unilateral placement and there was no requirement that any contract with the agency be in writing. As relief, the parent requests direct funding for five periods per week of SETSS at a rate of \$200 per hour and two 30-minute sessions per week of OT at a rate of \$250 per hour, as well as an increase in the rate awarded for speech-language therapy services from \$225 per hour to \$250 per hour.

The district submits an answer to the request for review with a cross-appeal of the IHO's award of speech-language therapy services. The district contends that the parent failed to meet her burden of proving the appropriateness of the unilaterally obtained services and that equitable considerations weigh against granting any relief.<sup>4</sup>

## 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]).<sup>5</sup> "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.*).<sup>6</sup> Thus, under State law an eligible New

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<sup>4</sup> The parent did not submit an answer to the district's cross-appeal.

<sup>5</sup> 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]).

<sup>6</sup> 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

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**

At the outset, the parties have not appealed from the IHO's finding that the district failed to implement the student's educational program during the 2023-24 school year and, therefore, that determination is final and binding on the parties and will not be further discussed (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 primary issue to be resolved on appeal is the appropriateness of the unilaterally obtained services delivered to the student by Step Ahead during the 2023-24 school year.

### **A. Unilateral Placement**

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement. Instead, the parent 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, she 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

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

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]).<sup>7</sup> 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).

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

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<sup>7</sup> 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 Always a Step Ahead (Educ. Law § 4404[1][c]).

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

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

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

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

### **1. Student's Needs**

Although not in dispute, a discussion of the student's needs provides context to resolve the issue on appeal, namely whether the unilaterally obtained services of SETSS, OT, and speech-language therapy were appropriate to meet the student's needs.

According to the May 2023 IESP, the student had made progress since the beginning of the year with learning and following classroom routines and coping with unexpected changes, and his ability to attend to a task for at least five minutes was emerging (Parent Ex. B at p. 1). The student's teacher reported that his language and communication skills were age-appropriate (id.). More specifically, the student understood verbal directives; responded to questions using sentences; asked and answered simple "wh" and "yes/no" questions; repeated back four-word sentences; sequenced three events in chronological order; "mostly t[old] a story so that the details and sequence of events ma[d]e sense"; and identified similarities and differences and the use of objects (id.).

With regard to academics, the May 2023 IESP indicated that the student could: recognize the letters in his name as well "those letters in other students' names"; visually track from left to right; identify direction and position and quantities up to six; count manipulatives up to twelve or



thirteen; match one-to-one correspondence; and identify primary colors and shapes (Parent Ex. B at p. 1).

The student's teacher reported, to the May 2023 CSE, that the student was impulsive and needed reminders; he had outbursts; needed prompting before completing a task; had difficulty retaining concepts; and was still developing the ability to identify letter sounds, complete patterns, and identify rhyming words (Parent Ex. B at p. 2).

The May 2023 IESP reported, from a February 2023 IEP, that the student presented with receptive and expressive language delays, and noted that the student had difficulty following 2-step related and unrelated directions involving one to two concepts during a structured activity and during play; answering "wh" questions based on an auditory story; understanding and responding to higher level "wh" questions; had a limited vocabulary range across all categories; and had difficulty naming categories and items within those categories (Parent Ex. B at p. 2).<sup>8</sup> Additionally, the IESP indicated that the student had difficulty: naming two items that belong together and stating why they belong together; identifying an item that doesn't belong in a category and why it did not belong; naming an item described by the clinician; as well as with critical thinking skills such as predicting "what is going to happen next" and making inferences based on pictures and during book reading (id.). With regards to articulation, the IESP described that the student at times "swallow[ed] his words and his sentences sound[ed] jumbled" and noted that it may be due to lingual weaknesses as a result of thumb sucking (id.).

The May 2023 IESP reported the results from an administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5), as reported in a November 30, 2021 IEP, that the student scored in the low average range on his Full Scale IQ (83) (Parent Ex. B at p. 2; see Dist. Ex. 6).<sup>9</sup> The IESP further reported that the student scored in the low average range in verbal IQ (82) and nonverbal IQ (86) and in the borderline impaired range in fluid reasoning and quantitative reasoning skills (id.).

With regard to social development, the student's teacher described him as "a 'very funny kid, who likes to get the last word in,'" "strong willed and self-directed," and she opined that he was "very creative, like[d] to build," was very verbal, and was learning how to work together with others (Parent Ex. B at p. 3). The IESP further noted that the student's ability to share the teacher's attention with adults and peers was emerging; however, he was easily engaged with peers and participated in group play and played cooperatively with peers (id.). The teacher further opined that the student's ability to relate to adults and peers was below average, he tended to frustrate easily, his ability to share and take turns was still developing, and he needed a strong person to work with him (id.). The IESP indicated that school-based counseling was being initiated to help the student develop coping skills and to learn how to interact appropriately with peers and adults (id.).

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<sup>8</sup> The February 2023 IEP was not included in the hearing record (see Parent Exs. A-I; Dist. Exs. 1-8).

<sup>9</sup> The November 2021 IEP was not included in the hearing record; however, the October 2021 psychological evaluation report was included as a part of the hearing record (Dist. Ex. 6).

The May 2023 IESP present level of physical development indicated that the student was able to fully dress, undress and feed himself independently, and noted that his fine motor skills were appropriate (Parent Ex. B at p. 3). Additionally, the student was able to hold a pencil with a grip, draw a straight line, use scissors and his ability to copy a simple design was emerging (id.). The teacher further reported that the student often bit his shirt and that OT primarily addressed sensory issues (id.).

In contrast to the above, the May 2023 IESP reported, from the February 2023 IEP, that the student presented with some delays in his motor skills; had difficulty grasping writing utensils and generally scribbled on his paper; could not draw a straight line and had difficulty tracing shapes; and had difficulty manipulating scissors and following lines as he cut (Parent Ex. B at p. 4). The IEP further reported, from the earlier IEP, that the student had age-appropriate gross motor skills, could complete interlocking puzzles, string beads, and push pegs into a board (id.). Additionally, it was noted that the February 2023 IEP reported the student as being sensitive to loud noises and often drooled and experienced hypersalivation while speaking (id.).

In addition, and as noted previously, the May 2023 CSE recommended that the student receive five periods per week of SETSS as a direct, group service to be provided in the student's general education classroom, two 30-minute sessions per week of individual speech-language therapy services, two 30-minute sessions per week of individual OT, and one 30-minute session per week of group counseling services to be provided in the student's general education classroom (Parent Ex. B at pp. 10-11).

As noted above, the CSE convened in April 2024 for a review of the student's educational programming; however, review of the April 2024 IESP shows that the student's present levels of performance and annual goals appeared to be mostly copied from the earlier IESP and it is unclear if there was any additional information reviewed or relied on by the April 2024 CSE (compare Dist. Ex. 3 at pp. 1-7, with Parent Ex. B at pp. 1-10). Additionally, the April 2024 CSE continued the same frequency and duration for the recommendations for SETSS and related services; however, the location for all services was changed to separate location (compare Dist. Ex. 3 at pp. 7-8, with Parent Ex. B at pp. 10-11).

## **2. Unilaterally Obtained Services**

The hearing record indicated that for the 2023-24 school year, or portions thereof, the parent obtained SETSS, speech-language therapy, and OT services from Step Ahead (Parent Exs. C; G-I). Documents submitted, in support for the parent's claim that the unilaterally obtained services were appropriate, include a document on Step Ahead's letter head electronically signed by the parent on December 26, 2023, attendance records, provider certifications, a speech-language therapy progress report dated May 12, 2024 bearing a printed signature of the speech-language therapist who completed the report, and an unsigned SETSS progress report dated May 21, 2024 (Parent Exs. C; E; G-I).

With regard to SETSS, the hearing record shows that the student began receiving SETSS services approximately five times per week for 60 minutes per session on or about September 7, 2023 through May 31, 2024 (Parent Ex. I at p. 1; see Parent Ex. G). According to an end of 2023-24 SETSS progress report, the student was in kindergarten and was then on a kindergarten grade

level in math, reading, and writing (Parent Ex. I at p. 1). In math, the progress report indicated that the student excelled in matching numbers to their values, naming digits 1-20, and describing objects using size and weight, and was able to use modeling materials to create scaled models. (id.). The progress report further indicated that the student struggled with counting to 100 by ones and tens, writing numbers 0-20, comparing groups of objects for greater than and less than, using positional names (1st through 10th), and responding to "how many are there" using objects (id.). In writing, the progress report indicated that the student could name familiar topics and narrate events in a sequence; however, he had difficulty stating an opinion or answering questions through recalling information (id.). In reading, the student demonstrated organization of print features and could decode some single syllable words; however, he needed to improve following words from left to right and top to bottom (id.). Finally, the teacher reported that the student enjoyed building with blocks and Legos, looking at picture books, describing picture activities, following picture schedules, and predicting future actions (id. at p. 2). She further described the student as outgoing but impulsive and opined that he had difficulty forming friendships due to his weak attention span (id.).

The SETSS progress report included annual goals designed to improve the student's ability to count to 100 by ones; write numbers 0-20 with correct formation, use positional names (1st through 10th), respond accurately to "how many are there" using objects, state an opinion about a familiar topic or personal experience, and answer questions through recalling information (Parent Ex. I at pp. 1-2). The progress report does not contain information regarding the student's reading weaknesses, nor does it provide annual goals in reading (Parent Ex. I at pp. 1-2). Additionally, neither the SETSS progress report nor the attendance records provided in the hearing record, provide any details regarding the materials, strategies, or specially designed instruction used to address the student's academic needs (Parent Exs. I; G). Further, the attendance records lack detailed session notes by which to determine what if any specially designed instruction was provided or how the student's academic needs were addressed (Parent Ex. G).

Turning to speech-language, the student began receiving individual speech-language therapy services approximately two times per week for 30 minutes per session on or about September 12, 2023, through May 30, 2024 (Parent Ex. H at p. 1; see Parent Ex. G). According to a May 2024 speech-language progress report the student continued to present with receptive and expressive language delays (Parent Ex. H at p. 1). Specifically, the progress report indicated that the student required "continuous support" to follow 2-step related and unrelated directions involving up to three concepts, as well as support to respond to "wh" questions during listening comprehension tasks (id.). Additionally, the progress report indicated that the student was able to respond to higher level "wh", inferencing, and prediction questions during a shared book reading given verbal cues and prompts (id.). The report described the student as impulsive and as requiring maximal to moderate verbal cues and redirection to help him sit down, attend to, and complete activities (id.). Additionally, the student used three to five descriptives to describe common objects given support; identified and named words that rhyme; and demonstrated sound/letter correspondence with minimal support (id.). The progress report indicated that the student presented with a rapid rate of speech in which he collapsed syllables in words and described his speech as sounding "jumbled" (id.).

With regard to the student's progress towards his speech-language therapy goals, the May 2024 speech and language progress report indicated that the student had made minimal progress

in meeting the goals contained in the May 2023 IESP (Parent Ex. H at p. 2). Specifically, the progress report indicated that the student was able to answer "wh", inferencing, and prediction question during a shared book reading with 70% accuracy given minimal to moderate verbal cues; respond to "wh" questions when listening to auditory stories with 70% accuracy given minimal to moderate verbal and visual cues; follow 2-step related and unrelated directions involving concepts with 70% accuracy given minimal to moderate prompts; and name three descriptives to describe common items during a structured play activity with 70% accuracy given minimal to moderate cues (*id.*). Criteria to measure whether these four annual goals were achieved, as described in the May 2023 IESP, was set at 80% accuracy in three out of five consecutive trials (Parent Ex. B at pp. 7-8).

The May 2024 speech-language progress report contained approximately five annual goals designed to improve the student's ability to answer higher level "wh" questions and inferencing questions during a shared book reading; to describe common objects based on their category, function, parts, appearance and/or location; to follow 2-step related and unrelated directions; to listen to stories read aloud and answer age appropriate "wh" questions based on the story; and to identify and name rhyming words (Parent Ex. H at p. 2).

While the speech-language progress report does not contain details regarding the materials, strategies or specially designed instruction techniques used to address the student's speech-language deficits, the attendance record does provide such detail including data that could be used for measuring progress on annual goals (Parent Ex. G; see Parent H).

Turning next to OT services, the hearing record indicated that the student began receiving OT services on or about January 4, 2024, for approximately 60 minutes per session; however, it appears OT services were provided sporadically through the remainder of the 2023-24 school year totaling approximately 10 sessions (Parent Ex. G at pp. 13-30). Additionally, the hearing record does not contain an OT progress report; however, summaries of session notes contained in the attendance records indicated that the occupational therapist worked on sensory input, vestibular and proprioceptive input, visual scanning; strengthening hand muscles and upper extremities, and prewriting skills (*id.* at pp. 13-30). Review of the annual goals contained in the May 2023 IESP showed that the CSE determined that the student needed to improve his ability to use an age-appropriate grasp pattern, tolerate various forms of proprioceptive input, and improve his attention span and sitting tolerance (Parent Ex. B at pp. 8-9).

Initially, while the parent argues that she "simply requested that the providers be paid for delivering the services based on the IESP" (Req. for Rev. at ¶ 21), there is little actual evidence in the hearing record to support this contention. The parent signed a document on Step Ahead's letterhead in which she indicated she was aware of the rates being charged for services provided to the student and that she was "aware that the services being provided to my child [we]re consistent with those listed in [the May 2023 IESP]" (Parent Ex. C). However, this is not consistent with the information available in the hearing record. The May 2023 CSE recommended that the student receive five periods per week of direct, group SETSS, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and one 30-minute session per week of group counseling services (Parent Ex. B at pp. 10-11). In contrast, as noted above, the hearing record only shows that the student received SETSS and speech-language therapy at or around the recommended duration and frequency, with the evidence

showing a minimal amount of OT was provided to the student during the 2023-24 school year and the hearing record lacked any indication of counseling services being provided to the student (Parent Ex. G). In addition, while the May 2023 CSE recommended that the student receive group SETSS in the student's classroom (Parent Ex. B at p. 10), the hearing record appears to indicate that the service was provided as an individual session outside of the student's classroom with the attendance records frequently indicating that it was provided as tutoring (see Parent Ex. G).<sup>10</sup>

In addition, the parent submitted evidence showing that the people identified in the student's attendance records were licensed professionals or certified teachers (Parent Exs. E; G). The SETSS provider who was identified as delivering services to the student was issued an early childhood education, birth to grade 2 professional certificate as well as a students with disabilities, birth to grade 2 professional certificate (Parent Ex. E at p. 3). Additionally, the speech-language pathologist and the occupational therapist who were identified in the attendance records held licenses in their related fields (id. at p. 1, 5). However, other than the attendance records and unsigned progress reports, there is nothing in the hearing record indicating that the identified individuals delivered services to the student. According to a written statement made by the secretary for Step Ahead, the provider certifications, student attendance records, and progress reports were taken from Step Ahead's files that were kept for this student in the ordinary course of business (Parent Ex. D). During her testimony, she indicated that she had never observed sessions for the student, never spoke to the student's parents, and her work was all "really the computer work" nothing to do with how services were implemented (Tr. pp. 27-28). Additionally, while she indicated that she prepared the evidence that was submitted by Step Ahead for this matter and that the documents were kept for the student "in the ordinary course of business" and that the "[t]he provider wrote [the progress report]" (Tr. pp. 28, 31; Parent Ex. D), she does not explain how the progress reports or attendance records were submitted to Step Ahead or how Step Ahead would keep track of who completed them (Tr. pp. 1-48; Parent Exs. A-I; Dist. Exs. 1-6).<sup>11</sup>

Based on the above, the evidence in the hearing record does not, under the totality of the circumstances, lead me to the conclusion that the unilaterally obtained services were appropriate, in that there is insufficient evidence that the services were specially designed to address the student's identified needs, particularly as to the student's academic, OT, and counseling needs, and particularly given the lack of evidence explaining how services were delivered to the student during the course of the 2023-24 school year. Accordingly, the parent failed to meet her burden to prove that the services she privately obtained from Step Ahead provided specially designed instruction that was reasonably calculated to enable the student to receive an educational benefit under the totality of the circumstances.

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<sup>10</sup> The attendance records included a box for indicating location; however, the box indicates "SCHOOL" for every session and does not indicate if it was delivered in the student's classroom or in a separate location (Parent Ex. G).

<sup>11</sup> The May 2024 speech-language therapy and SETSS progress reports were completed on letterhead identifying the name of the student's nonpublic school, but with the address for Step Ahead (Tr. pp. 30-32; Parent Exs. H at p. 1; I at p. 1).

## **VII. Conclusion**

Having determined that the parent failed to show that the unilaterally obtained services delivered to the student by Step Ahead were appropriate, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my findings herein.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated July 29, 2024 is modified, by reversing that portion which found that the parent met her burden of proving the appropriateness of the speech-language therapy services delivered to the student and awarded the parent district funding for speech-language therapy services.

**Dated:**           **Albany, New York**  
                          **October 11, 2024**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**