The University of the State of New York

The State Education Department
State Review Officer
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No. 19-110

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:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by Jesse Cole Cutler, Esq.

Howard Friedman, Special Assistant Corporation 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. Petitioners (the parents) appeal from that portion of the decision of an impartial hearing officer (IHO) which denied their request for reimbursement for the costs of placing their son at Imagine Better Impact (IBI) for a portion of the 2017-18 school year. The district cross-appeals from that portion of the IHO's decision that ordered it to reimburse the parents for their son's tuition costs at Fit Learning (FIT) for a portion of the 2017-18 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student was described as having a complex developmental history that included global hypotonia, pervasive delays in speech-language, motor, self-regulation, and reciprocal interaction skills, and diagnoses of an autism spectrum disorder with accompanying language and intellectual impairment, focal epilepsy, and a gene abnormality "that is associated with a broad spectrum of neurodevelopmental disorders" (Parent Ex. P at p. 1; see Parent Ex. C at p. 1). A private neuropsychologist first evaluated the student at age two and offered diagnoses of pervasive developmental delays and apraxia (Parent Ex. C at p. 1; see Tr. p. 22). At that time, the student began a program of "full-time [applied behavior analysis (ABA)] interventions and related

services" including occupational therapy (OT) and speech-language therapy (Parent Exs. C at p. 1; P at p. 1). The parent reported that the student was referred to the district's Committee on Preschool Special Education (CPSE) when he was three years old, at which time the CPSE recommended a continuation of ABA, speech-language therapy, and OT and provided him with "a full time 1:1 program" to address the student's needs (Parent Ex. P at pp. 1-2).[1]

According to the hearing record, the student was "held back" for an additional year of preschool services and transitioned to a "highly specialized non-public school" for kindergarten when he was six years old (Parent Exs. C at p. 1; P at p. 2). In a preliminary summary report from a psychoeducational reevaluation conducted in summer 2016 (August 2016 report), the neuropsychologist reported that "[d]espite initial areas of growth," over the years "numerous difficulties [were] noted with extremely limited educational progress" (Parent Ex. C at p. 1; see Parent Ex. P at p. 2). Additionally, "[d]uring that time various treatments and interventions" were implemented with the student both in and outside of school "including behavioral interventions, exploration of psychopharmacological treatments, tutoring and additional therapies" (Parent Ex. C at pp. 1-2).

The neuropsychologist attempted to reevaluate the student at the start of the 2015-16 school year; however, he reported "[i]t was clear" that the student's "behavioral and instructional control had not improved and formal testing could not be done in any valid manner" (Parent Ex. C at p. 2). At that time, the student presented with "ongoing difficulties with impulse control and significantly deficient frustration tolerance," and "his lack of basic academic skills, coupled with these behaviors and emotional reactions left him at a stand-still in terms of academic progress" (id.). Accordingly, "[r]ecommendations were made to increase behavioral supports and 1:1 intensive educational interventions" (id.). The parent reported that the student "aged out" of the nonpublic school at the end of the 2015-16 school year (Parent Ex. P at p. 2).

In June 2016, the neuropsychologist began conducting a reevaluation of the student (Parent Ex. C). The neuropsychologist reported that, during the June 2016 testing session held in his office, the student demonstrated minimal improvement in frustration tolerance and "clear deficits at the most basic academic levels" (id. at p. 2). According to the parent, she was never contacted by the district to develop the student's IEP for the 2016-17 school year, and during summer 2016 the student attended FIT (Parent Ex. P at p. 2; see Parent Ex. C at p. 2).[2] In July and August 2016, the neuropsychologist observed and conducted additional testing sessions with the student in that setting (Parent Ex. C at pp. 1-2). During the assessment sessions at FIT, the neuropsychologist reported that "[f]ormal testing was able to be started and scores gathered" (id. at p. 2). Although the August 2016 report indicated that the evaluation was "ongoing," the neuropsychologist stated that it was "apparent" that the student needed "a highly structured data-driven, behaviorally guided program which deliver[d] 1:1 direct instruction," to start "immediately, on a full-time basis" (id.

[1] While both parties appear on the student's behalf in this matter, references to "the parent" singular are to the student's mother, who testified at the impartial hearing (see Tr. pp. 51-57; Parent Ex. P).

[2] The Commissioner of Education has not approved FIT as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

at p. 3).[3] The student attended FIT for the remainder of the 2016-17 school year (Parent Exs. F; G; P at p. 2).

On June 19, 2017, the parents provided the district with a letter stating their intent to unilaterally place the student for the 12-month 2017-18 school year at FIT and to seek public funding for the placement (Parent Ex. B at p. 1). The parents stated that they were rejecting the IEP proposed "at the last IEP meeting" and that the district had failed to develop an IEP for the 2017-18 school year (id. at p. 2). The parents further advised the district that it had failed to recommend an appropriate "placement" that could "implement the IEP" or otherwise address the student's educational needs (id.).

The parent averred that the district contacted her on August 3, 2017 to report "that they were in the process of reviewing documentation and w[ould] be in contact to schedule an IEP meeting," although no CSE meeting was ever scheduled (Parent Ex. P at p. 2). According to the parent, as a result of the CSE's failure to convene and recommend a program and placement for the student, he attended FIT during summer and into fall 2017 (id.; see Parent Ex. F).[4]

According to the student's schedule for the 2017-18 school year, FIT provided support to the student "in the areas of early learning skills, component language skills, reading and mathematics" (Parent Ex. E at p. 1). During fall 2017, the student "began to demonstrate increased inappropriate behaviors, bec[ame] increasingly violent and act[ed] out in a physical fashion on several occasions" (Parent Ex. P at p. 2; see Tr. pp. 38-39, 53-54). The parent also reported that the student's "frustration tolerance decreased" outside of FIT and the parents became concerned for the safety of the student and others (Parent Ex. P at p. 3). According to the parent, the neuropsychologist reevaluated the student and recommended "a more behavioral approach to instruction" (id.). The student's last day of services at FIT was on November 29, 2017 and according to an invoice, on December 7, 2017, IBI conducted an evaluation of the student (Parent Exs. F; K at p. 1).[5]

The student began receiving instruction at IBI on or around January 2, 2018, which continued through June 30, 2018 (Parent Exs. J; K at pp. 1-12).[6] According to the director of IBI (director), the student received special education instruction for approximately three-to-five hours per day, five days per week (Parent Ex. J). The director reported that the student received a total

[3] According to the August 2016 report, the student's evaluation was "ongoing" due to the need to break down the assessments into "shorter, facilitated sessions" (Parent Ex. C at p. 2). The hearing record does not contain a final report from this evaluation.

[4] The student's attendance record from FIT indicates that the parents "terminated services on December 1, 2017" (Parent Ex. G).

[5] The Commissioner of Education has not approved IBI as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[6] According to an invoice, the student began receiving "Instruction/Behavioral Support" at IBI on December 11, 2017 (Parent Ex. K at p. 1). However, the affidavit of the director of IBI indicated that the student received services from January 2, 2018 through June 30, 2018 (Parent Ex. J). In their request for review, the parents are seeking reimbursement from January 2, 2018 through June 30, 2018 (Req. for Rev. at p. 6). For the purpose of clarity, the dates of service in this decision will reflect the period for which the parents seek reimbursement.

of 326.18 hours of instruction during the 2017-18 school year (id., see also Parent Ex. K at pp. 1-12).

A. Due Process Complaint Notice

In a due process complaint notice dated June 19, 2019, the parents requested an impartial hearing alleging that the district failed to convene a CSE or develop an IEP for the 2017-18 school year, thereby denying the student a FAPE and denying the parents the right to meaningfully participate in the development of an IEP (Parent Ex. A at pp. 1-2). The parents also "reserve[d] the right to raise any other procedural or substantive issues" relating to challenging the qualifications of any of the district's proposed supervisors, teachers, paraprofessionals or other service provider who may have been assigned to work with the student, and challenging the appropriateness of the district's recommended placement on the grounds that it could or would not maintain an appropriate student-to-staff ratio for the entire school day or provide the student with all of the related services mandated on his IEP (id. at p. 2). Next, the parents alleged that their unilateral placements of the student at FIT and IBI for the 2017-18 school year were appropriate (id.). Specifically, the parents argued that FIT and IBI were able to address the student's academic and social/emotional needs and were reasonably calculated to enable the student to receive educational benefit (id.). The parents further asserted that equitable considerations weighed in favor of an award of tuition reimbursement. (id.). For relief, the parents sought reimbursement for the costs of the student's attendance at FIT and IBI during the 2017-18 school year and transportation (id. at pp. 1-2).[7]

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 1, 2019, which concluded on September 18, 2019, after three days of proceedings (see Tr. pp. 1-63). In a decision dated September 24, 2019, the IHO found that the district failed to refute the parents' allegations set forth in their due process complaint notice and determined that the district failed to offer the student a FAPE for the 2017-18 school year (IHO Decision at pp. 9, 12). Next, the IHO found that the parents' unilateral placement of the student at FIT was appropriate (id. at pp. 11). However, the IHO determined that the student's program at IBI, which began January 2, 2018, was not "sufficiently evidenced in the record"(id. at pp. 11-12). In addition, the IHO found that the parents failed to provide notice to the district of the student's change in placement from FIT to IBI during the 2017-18 school year (id. at p. 11). Based on the foregoing, the IHO determined that the parents were entitled to reimbursement for the costs of the student's attendance at FIT through November 2017 (id. at pp. 11, 12).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in finding that IBI was not an appropriate unilateral placement for the student for the remainder of the 2017-18 school year. The parents allege that IBI provided the student with 1:1 ABA instruction in a highly structured and data driven environment that addressed his significant deficits in all areas, including academic, self-regulation, frustration tolerance, and behavioral control. The parents also assert that the student made progress

[7] The parents also alleged the district violated section 504 of the Rehabilitation Act of 1974 (section 504) (Parent Ex. A at p. 2).

at FIT and IBI which enabled him to transition to a less intensive program for the 2018-19 school year. Further, the parents contend that they provided the district with timely notice of their intention to unilaterally place the student at district expense in their letter dated June 19, 2017. As relief, the parents request funding for the costs of the student's center-based programming at IBI from January 2, 2018 through June 30, 2018.

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly determined that IBI was not an appropriate unilateral placement for the student. By way of cross-appeal, the district asserts that the IHO erred in finding that FIT was an appropriate unilateral placement for the student for the beginning of the 2017-18 school year through November 2017 and that the parents failed to demonstrate that the student received any educational benefit. The district argues that FIT was not capable of addressing the student's interfering behaviors and that no evidence of the student's "actual program, services or goals" was presented. For relief, the district requests that the IHO's decision be affirmed in part, reversed in part, and for the parents' appeal to be dismissed.

In an answer to the district's cross appeal, the parents respond with admissions and denials and request that the IHO's determination that FIT was an appropriate unilateral placement be upheld.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of

Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[8]

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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

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

VI. Discussion—Unilateral Placements

In this matter, the district did not overtly concede that it failed to offer the student a FAPE for the 2017-18 school year; rather the district indicated it would not present a case. In its cross-appeal, the district does not challenge the IHO's determination that the district denied the student a FAPE for the 2017-18 school year. As such, that determination has become final and binding on the parties (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]). Therefore, the only issues in dispute are whether the unilateral placements at FIT and IBI were appropriate for the student for the 2017-18 school year and, if so, whether equitable considerations weigh in favor of reimbursing the parents for the costs of the unilateral placements.

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). 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 (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is

appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

A. Student Needs

Since it was not necessary to elaborate on the student's needs with respect to the above unappealed finding that the district failed to offer the student a FAPE for the 2017-18 school year—and although the student's needs are not directly in dispute—a brief discussion here provides context for the disputed issues to be resolved, namely, whether the unilateral placements at FIT and IBI addressed the student's needs.

The neuropsychologist reported that the student "has always presented with a quite idiosyncratic presentation of deficits and challenges that, while juxtaposed with social interest and better capacity for reciprocity, are consistent with a diagnosis on the autism spectrum," and, as noted above, the student exhibited pervasive delays in speech-language, fine motor, reciprocal interaction, behavior, and self-regulation skills (Parent Exs. C at p. 1; P at p. 1).

The August 2016 report indicated that comparison of results from an administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) conducted "a few years ago" with then-current results from a partial administration of the WISC-Fifth Edition (WISC-V), showed that the student demonstrated "a similar, although more pronounced pattern of weaknesses" (Parent Ex. C at p. 2). According to the report, on the then-current administration of the WISC-V the student demonstrated low average (16th percentile) ability to figure out visual patterns (id. at pp. 2-3). He exhibited difficulty with visual spatial tasks (2nd percentile) and tasks requiring him to compare relationships in figure weights (5th percentile), as according to the

neuropsychologist, the student's "performance was negatively impacted by the complexity of the language-based task instructions" (id. at p. 3). The student's performance on a categorization task—finding the similarities between words—that was less dependent on complex language was solidly in the average range; however, he exhibited "significant deficits on more open-ended language tasks" including defining words (1st percentile) and answering open-ended "wh" comprehension questions (below the 1st percentile) (id.). The neuropsychologist reported that the student demonstrated significant deficits on more open-ended language tasks, including defining words (1st percentile) and answering open-ended "wh" comprehension questions (below the 1st percentile) (id.). The student's fund of learned information and processing speed on a visual scanning task yielded scores at the 2nd percentile, and his working memory was measured at below the 1st percentile overall, with only a slight improvement for visual, as opposed to orally presented information (id.).

The neuropsychologist reported that the student's academic abilities were "all well behind age and grade level, despite significant interventions" (Parent Ex. C at p. 3). Achievement testing conducted by the neuropsychologist indicated that, although the student had shown recent improvement in some "basic academics, [h]is single word, sentence and passage reading were all below the 1st percentile and between a [k]indergarten to beginning of 1st grade level" (id.).

Behaviorally, at the time of the August 2016 report, the student exhibited a lack of frustration tolerance, extreme emotional reactions, and difficulty with self-regulation, behaviors that "were all significantly impacting his availability for any kind of learning, and certainly within a classroom" (Tr. pp. 26-27). At the impartial hearing, the neuropsychologist testified that, having observed and evaluated the student from the age of two through the present, he concluded that the student was "probably one of the most complex children [he'd] seen" and that there were "a lot of moving targets . . . of need" (Tr. pp. 24-25, 31-32). Although over time the emphasis on the particular intervention used with the student had "shifted" (i.e. full-time, one-on-one ABA "versus language versus more special education"), the neuropsychologist testified that the student had not "responded traditionally to most of them" (Tr. pp. 25, 31-32). At the conclusion of the August 2016 preliminary evaluation, the neuropsychologist recommended a "highly structured data-driven, behaviorally guided program which delivers 1:1 direct instruction" (Parent Ex. C at p. 3). The neuropsychologist further indicated that the student needed "the 1:1 intensity to limit distractions" and "address his significant deficits in all requisite areas, from academics to self-regulation, frustration tolerance and behavioral control," and that it was "imperative" that the student receive this level of support "immediately, on a full-time basis to allow for progress and to prevent regression" (id.).

B. FIT

As relevant to this appeal, the student received services at FIT from July 2017 through November 29, 2017 (Parent Exs. F; G). General program information included in the hearing record indicates that FIT provided "supplementary educational services" that were "best described as [p]recision [t]eaching – [a] branch of [ABA]" to students ages 2 to 10 years old who had received various diagnoses including ADHD and language delays (Parent Ex. D at pp. 1-2, 4, 7). FIT students "receive[d] an assessment" and the results "determine[d] the number of hours per week required to achieve a desired goal" (id. at p. 1). From assessment results "an instructional book [wa]s assembled with scripted lessons for the learning coaches" (id.). FIT ha[d] developed "over 35 unique instructional lines in the areas of reading, writing, math, and language development"

(id.). The literature indicated that FIT "objectively defined mastery" of skills and "directly measur[ed] individual student performance" against that criteria on a daily basis (id. at pp. 1, 4). Service delivery methods included 1:1, small group, and class-based instruction (id. at p. 7). The neuropsychologist testified that FIT functioned as a "center" or an "alternative school" in that it had a model of curriculum, instruction, and venue that functioned outside of the home in a "more consolidated way" and filled the function of a school program with, when necessary, structure that allowed for 1:1 support (Tr. pp. 32-33).

Specific to the student's performance at FIT, the August 2016 report indicated that the psychoeducational reevaluation consisted of an office session, two testing sessions at FIT, and an observation at FIT (Parent Ex. C at pp. 1-2). When compared to the student's performance during the testing session in the office, the neuropsychologist reported that the testing sessions conducted at FIT—"using their behavioral approach with built in data-driven targeted interventions, reinforcements, breaks, and 1:1 direct delivery of said interventions with a trained special educator"—yielded "a significant and positive shift" in the student's ability to, for the first time in years, comply with directions and tolerate frustration to attempt tasks that were hard for him (id. at p. 2). According to the August 2016 report, only recently and after the student had been "immersed" in the FIT program was the student able to participate in the assessment of his progress (id. at p. 3). The neuropsychologist opined that "[t]he very recent mastery and generalizing of some of these basic skills observed demonstrate[d] his potential for progress with the appropriate interventions and intensity" (id.).

The neuropsychologist testified that the type of instruction the student received at FIT was "behaviorally-based, data-driven, direct instruction in anything from basic, skill-building academics to building fluency, all of which, simultaneously to various degrees, interact[ed] with and [were] dictated by a behavior plan that allowed for him to participate" (Tr. pp. 35-36). According to the student's 2017-18 FIT schedule, he received 2 hours of reading instruction, 2 hours of math instruction, and 1.5 hours of instruction in "[l]ogic" per day (Parent Ex. E at p. 5). FIT established 14 component learning and language skill, 11 reading, and 13 mathematic objectives with corresponding fluency criteria for the student (id. at pp. 1-5). For example, for component learning and language skills, objectives focused on the student's ability to: follow 1-step, 2-step, and multi-step instructions; label actions; name pictures understand names versus categories; identify categories; understand senses; understand the concept of concrete features; identify concrete features of pictures; distinguish same versus different; identify spatial relations; establish perspective taking; understand ordinal position; and sequence picture scenes (id. at pp. 1-2). For reading, objectives focused on the student's ability to: understand name versus sound; understand phonetic rules; match letters; name letters; identify consonant and vowel sounds; identify a letter name from a sound presented orally; segment and blend words according to phonetic rules; read isolated words; read passages; and spell phonetically (id. at p. 3). Math objectives included the student's ability to: count in sequence forwards and backwards; identify numbers; read number words; write numbers for number words; write words for numbers; understand the concept of place value; identify place value; understand concepts of addition and subtraction; recall addition and subtraction; identify coin names and values; count coin amounts; understand analogue and calendar time; and read analogue time (id. at pp. 4-5). Curriculum materials identified for use in achieving each objective included FIT-specific curriculum, language builder cards, Dibels graded reading passages, Haughton foundation skills for math, and Morningside math fact families (id.). The progress monitoring plan indicated that "[e]very

instructional interaction and practice timing [would] be timed, counted and charted," and that progress would be monitored daily (id. at p. 5). Additionally, weekly progress toward "more global goals" would be monitored through AimsWeb curriculum-based measurement probes (id.). The student's behavior protocol enabled him to earn breaks and snacks at specified time intervals for not engaging in aggressive behavior (id.). Further, the student could earn breaks while "at the table," through use of a sticker token board, contingent on his ability to achieve his personal best or the training target (id.).

Although evidence regarding the description of FIT that merely provides a generalized description of the program offered at the private school might not, on its own, be sufficient to establish how FIT appropriately addressed the student's unique needs (see Davis v. Wappingers Cent. Sch. Dist., 431 Fed. App'x 12, 16 [2d Cir. Jun. 3, 2011]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 525-26 [S.D.N.Y. 2011]), in addition to generalized assertions, the evidence above also contains the requisite showing that describes how FIT provided instruction that was specially designed to meet the student's unique needs by "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]; see also Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). Given the above, review of the hearing record does not support the district's assertion that the parents failed to present evidence about the program the student received at FIT.

Turning next to the district's assertion on appeal that FIT was not appropriate because it could not address the student's behavioral needs, the neuropsychologist testified that during the course of the 2016-17 school year he assessed the student and tracked his progress at FIT, and also looked over FIT's goals, recommendations, and focus, concluding that the student had benefited from the program "in terms of breaking through some basic academics and complying with [FIT's] support and program" (Tr. pp. 27-28). The parent stated that, based upon the progress the student had demonstrated during the 2016-17 school year, she "believed that FIT would continue to be an appropriate program" for the student for the 2017-18 school year (Parent Ex. P at p. 2).

However, the neuropsychologist testified that "there came a time" when the student's "behaviors were becoming more and more out of control and interfering" and that, although the "educational model of FIT was still appropriate in terms of the focus and the intensity and . . . ratio," the student "simultaneously needed . . . a much bigger, more intense structured approach to actual behavior" (Tr. pp. 28-29).[9] Therefore, "there were aspects of [FIT] that were appropriate, however, [the student's] behavioral needs were becoming . . . exacerbated and more paramount" (Tr. p. 35). According to the neuropsychologist, at that time the student "could not sit or tolerate instruction" due to his lack of self-regulation, behavioral acting out, tantrums, screaming, and crying, which at times could be "extremely frightening and dangerous" and could occur "anywhere" (Tr. pp. 38-39). The parent testified that the student was removed from FIT "immediately" because he was "acting in a pretty violent way" and "[FIT wasn't] willing to keep him at that point" (Tr. pp. 53-54).

[9] The neuropsychologist did not recall the frequency with which the student exhibited tantrum behavior during the time he attended FIT (Tr. p. 37).

The district points to no evidence in the hearing record to refute the neuropsychologist's or the parents' assertion that the student benefited from the program at FIT during the 2016-17 school year, such that the decision to continue his placement for the 2017-18 school year—in light of the district's failure to develop a program and offer a public school placement—was inappropriate (see Tr. pp. 30-31, 35-36, Parent Exs. C at pp. 2-3; P at pp. 2-3). Also, as described above, when it became apparent that FIT no longer met the student's behavioral needs, he stopped attending the program (Parent Exs. F; P at p. 3). In light of the above, the hearing record provides no basis to overturn the IHO's finding that FIT was an appropriate unilateral placement for the student for a portion of the 2017-18 school year.

C. IBI

For the reasons that follow, the hearing record supports the IHO's finding that the parents did not meet their burden of establishing that IBI was an appropriate unilateral placement for the student. As noted above, to qualify for reimbursement under the IDEA, a parent must demonstrate that the unilateral placement provides educational instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). State regulation defines specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]).

According to the neuropsychologist, due to the student's need for a "more intense structured approach to actual behavior" than he was receiving at FIT, he recommended "a more direct, primary ABA approach" to instruction, which he testified IBI provided (Tr. pp. 28-29; Parent Ex. J). The parent testified that, prior to enrolling the student at IBI, "different professionals had said that [IBI] was a program that would be able to support [the student's] needs at the time" and that she "had heard that it was a reputable one-on-one which could handle his behavioral challenges, which was the . . . biggest problem at that point" (Tr. pp. 55-56). At the time the student began attending IBI, the parent indicated that she believed the IBI director could "handle" the student and that it was a program similar in restrictiveness to FIT but with "less children around" (Tr. p. 54).

In an affidavit, the director of IBI indicated that IBI provided the student with "approximately 3-5 hours" of "special education instruction" per day, five days per week, totaling approximately 326 hours between January 2 and June 30, 2018 (Parent Ex. J). IBI invoices refer to the services the student received from December 11, 2017 through April 13, 2018 as "1:1 Instruction/Behavioral Support" (see Parent Ex. K at pp. 1-7). From April 16, 2018 through June 29, 2018, the invoices reflected that the student received "Special education instruction/SEIT" services (see id. at pp. 8-12).

The parent stated that at IBI the student "was provided with 1:1 instruction using [ABA] by New York State licensed and certified special education teachers" (Tr. pp. 54, 56; Parent Ex. P at p. 3). She further stated that the IBI "program was highly structured and data driven and addressed [the student's] significant deficits in all areas, including academic, self-regulation, frustration tolerance and behavioral control" (Parent Ex. P at p. 3). The parent believed that at IBI the student was provided with rewards and therapeutic breaks, and staff "tried to talk through [the student's] . . . behavior and frustration intolerance" (Tr. p. 56).

The neuropsychologist testified that "standard ABA" such as discrete trials, was not appropriate for the student, but that a "verbal behavior kind of approach"—that had the same level of analytics, monitoring, philosophy, and framework of delivery of services—and which IBI provided, was "the bare minimum" the student needed at that time (Tr. p. 30). As with his testimony about FIT, the neuropsychologist stated that the type of instruction the student received at IBI was "behaviorally-based, data-driven, direct instruction in anything from basic, skill-building academics to building fluency, all of which, simultaneously to various degrees, interact[ed] with and [were] dictated by a behavior plan that allowed for him to participate" (Tr. pp. 35-36).

Based on the foregoing, the IHO reasonably found that the parents had not met their burden to establish that IBI was an appropriate unilateral placement for the student. There is no evidence in the hearing record to support that the services the student received from IBI were specially designed to address the student's needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). While the parent and the neuropsychologist stated their understanding of what IBI offered the student, their testimony was vague and, at times, equivocal. In contrast to the evidence relevant to FIT, the hearing record relevant to IBI included no program description, goals, objectives, schedule, or behavior plan specific to the services provided by IBI. The only documentary evidence relating to IBI included in the hearing record are invoices (see Parent Ex. K). Further, the only information conveyed in the affidavit of the director of IBI was a calculation of the total number of hours of services which IBI purportedly delivered to the student, with no elaboration as to what those services entailed (Parent Ex. J). Nor is there any explanation of the service change in April 2018 from "1:1 Instruction/Behavioral Support" to "Special education instruction/SEIT" as reflected on the invoices from IBI (compare Parent Ex. J; with Parent Ex. K at pp. 1-7, 8-12). Without further evidence, a determination cannot be made regarding whether the services the student received at IBI addressed the student's needs (see Hardison, 773 F.3d 372, 387 [finding a unilateral placement inappropriate where the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress," and additionally stressing the importance of "objective evidence" in determining whether a parent's placement is appropriate]).

D. Progress

While not dispositive to the determination regarding whether the services the parents obtained were appropriate, the district is correct that the hearing record does not attribute the progress the student reportedly achieved during the 2017-18 school year to FIT or IBI specifically. For example, when the neuropsychologist was asked if the student gained an educational benefit from his attendance at both FIT and IBI, he replied "[w]ithout a doubt" due to "definite benefits" observed at both programs in the areas of academics, the fluency with which the student accessed information, and the "overall net-positive shift in terms of [his] behaviors" (Tr. pp. 30-31). The neuropsychologist recalled seeing progress reports from FIT but did not recall IBI written progress reports (Tr. p. 36).

Similarly, the parent indicated that the student's progress at both FIT and IBI eliminated his need for "such an intense level of instruction" for the 2018-19 school year (Parent Ex. P at p. 3). She testified that she received progress reports while the student was at FIT, and to her belief that she had an IBI progress report but was not sure (Tr. p. 56). The hearing record does not contain any progress reports from FIT or IBI (see IHO Exs. I-III; Parent Exs. A-P).

While evidence of progress at FIT and IBI would not by itself be sufficient to establish that the parents' unilateral placements were appropriate; progress is nevertheless a relevant factor that may be considered (see Gagliardo, 489 F.3d at 115; Stevens, 2010 WL 1005165, at *8-*9). Here, given the lack of detailed or objective evidence of the student's progress at either FIT or IBI, this consideration does not factor into the determination of appropriateness in this instance. Accordingly, after a thorough review of the hearing record, I find that the IHO properly found that FIT was appropriate and that IBI was not appropriate. In assessing the propriety of the student's unilateral placements I have considered the "totality of the circumstances" and have determined that the student's placement at FIT reasonably served the student's individual needs, providing educational instruction specially designed to meet the unique needs of the student (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

VII. Conclusion

In summary, the evidence in the hearing record reflects that the IHO correctly determined that the parents demonstrated the appropriateness of the student's unilateral placement at FIT, but failed to carry their burden of demonstrating the appropriateness of the student's unilateral placement at IBI. The necessary inquiry is at an end and there is no need to consider whether equitable factors weigh in favor of the parents' request for an award of reimbursement for IBI.[10]

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 30, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[10] In its cross-appeal, the district does not allege any equitable considerations that would warrant reduction or denial of the reimbursement of the costs of the student's tuition at FIT. In their appeal, the parents do assert that the IHO erred in finding that they were obligated to notify the district of the student's change in placement from FIT to IBI and for the student's need for a more behaviorally based program. The question of a parent's provision of sufficient notice to a district of a unilateral placement is an equitable consideration (see 20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]). As the hearing record does not support a finding that IBI was an appropriate unilateral placement, I find it unnecessary to reach this question.