



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-194

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 Natan Shmueli, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Big N Little: Stars of Israel Program (Stars of Israel) for the 2019-20 school year. The appeal must be sustained.

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

During third grade, the student attended a district elementary school and received integrated co-teaching (ICT) services (Tr. p. 95). According to a district special education teacher, the student's teacher at that time determined that the student "was making sufficient progress and didn't need that level of support anymore" (Tr. pp. 55, 95-96). She continued that at some point, the "team" recommended that the student receive special education teacher support services (SETSS), which she described as "less restrictive" than the ICT program, because the student was making progress (Tr. p. 96). At the start of the 2018-19 school year, the student attended a fourth-grade general education classroom and received SETSS, along with speech-language therapy and occupational therapy (OT) (Tr. pp. 96; Parent Ex. H at p.1). The student presented with strong decoding skills and mathematic computational skills, but struggled with reading comprehension, making inferences, vocabulary, mathematic multistep word problem solving, written expression

and handwriting skills, as well as with actively participating in a small group (Parent Ex. H at pp. 2-3). In addition, the student demonstrated deficits in the areas of pragmatic language and communication; and this, along with his literal interpretation of language, sometimes inhibited his ability to socialize appropriately (id. at p. 4). The student presented with delays in graphomotor skills, visual-motor and attending skills (id. at p. 5).

A CSE convened on December 11, 2018 to develop the student's IEP for the remainder of the 2018-19 school year and the beginning of the 2019-20 school year (Parent Ex. H at pp. 1-17). Having determined that the student was eligible for special education and related services as a student with a speech or language impairment, the CSE recommended a general education classroom with one period of SETSS per week in a group for direct mathematic instruction and four periods of SETSS per week in a group for direct English language arts (ELA) instruction to be provided in a "[s]eparate [l]ocation SETSS classroom" (id. at p. 11). In addition, the December 2018 CSE recommended two 30-minute sessions per week of OT in a group, two 30-minute sessions per week of speech-language therapy in a group, testing accommodations, an assistive technology evaluation, eight annual goals, and numerous supports to address the student's management needs (id. at pp. 5, 7-9, 11-12, 16).¹ At that time, the IEP reflected that the parent was "pleased with the progress [the student had made and continue[d] to make" (id. at p. 16).

The district issued the student's final district report card for the 2018-2019 school year on or about June 18, 2019, which will be discussed in greater detail below (see Parent Ex. J at pp. 1-2). According to the parent, she spoke with someone in the district administration in person at the end of the 2018-19 school year about the student's program but that, no changes were made (Tr. pp. 226-27).

On September 1, 2019, the parent executed a contract for the student's attendance at Stars of Israel for the 2019-20 (fifth grade) school year (Parent Ex. B at pp. 1-3).²

In a letter to the district, dated September 5, 2019, the parent stated that she had not received an appropriate IEP placement for the student's academic, social, and behavioral needs and was therefore unilaterally placing the student at Stars of Israel and intended to seek public funding of the costs of the student's tuition (Parent Ex. G at pp. 1-2).³

A. Due Process Complaint Notice

In a due process complaint notice dated June 11, 2020, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. A). The parent asserted that the December 2018 IEP "was inadequate and improper to meet the academic, social, and

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

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

³ Although the letter is dated September 5, 2019, the first page of the exhibit includes a facsimile cover page that includes a date of October 29, 2019 (Parent Ex. G at pp. 1-2). It is unclear from the hearing record when the letter was delivered to the district.

behavioral needs" of the student (id. at p. 1). The parent argued that, to make meaningful progress, the student required a 12:1+1 special class, counseling services, a behavioral intervention plan (BIP), and assistive technology (id. at p. 2).

The parent asserted that the student attended a district public school for the 2018-19 school year in a "large class of over thirty students" and that the IEP in place was insufficient to allow the student to make progress (Parent Ex. A at p. 2). The parent alleged that she "rejected the placement of the Student" for the 2019-20 school year (id.). The parent contended that she requested "an alternate placement for the Student from the [district], but did not receive it" (id.). The parent also indicated that the district failed to convene a CSE to hold an annual review meeting and develop an IEP (id.).

Regarding the unilateral placement, the parent asserted that the student received an appropriate education at the Stars of Israel Program for the 2019-20 school year (Parent Ex. A at p. 2). For relief, the parent sought district funding of the costs of the student's tuition at Stars of Israel (id.).⁴ The parent also requested that the district provide or fund counseling services and assistive technology for the student (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 2, 2020 and concluded on July 15, 2021, after eight days of proceedings (see Tr. pp. 1-253). In a decision dated August 20, 2021, the IHO found that the district offered the student a FAPE for the 2019-20 school year (IHO Decision).⁵

Regarding the December 2018 CSE, the IHO found that the committee was duly constituted and that the evaluative information available to the CSE was sufficient to develop the student's programming (IHO Decision at p. 11). The IHO also found no evidence to support a finding that the parent was unable to meaningfully participate at the December 2018 CSE meeting, notwithstanding that English was not the parent's "primary language" (id. at p. 12).

The IHO noted a discrepancy in the parties' views of the student's functioning, in that the December 2018 IEP and the district witness described the student as functioning at or near grade level, cooperative, and easily redirected, whereas the parent's witnesses described the student as functioning at least three years behind grade level and demonstrating behaviors that impacted his academics (IHO Decision at pp. 10-11). The IHO found that the district SETSS teacher "portray[ed] a more accurate description of the student[']s behaviors and abilities" (id. at p. 11). The IHO found it unlikely that a student with "severe behaviors" and "severe delays" would be removed from a general education class with ICT services "because it [wa]s too restrictive" and placed in a general education class with SETSS (id.). The IHO characterized the testimony of the parent's witnesses as "self-serving" and noted the lack of formal test results to support their view of the student's needs (id.). The IHO found the SETSS teacher's testimony that the student was making sufficient progress "in his current setting" and that he did not require a "more restrictive

⁴ The parent also requested "prospective tuition payment" for the student's tuition for the 2019-20 school year (Parent Ex. A at p. 2).

⁵ The IHO decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-15).

setting" credible (*id.*). The IHO further noted the SETSS teacher's testimony that the related services of speech-language therapy and OT could address the student's communication and handwriting needs and found that the IEP included "appropriate goals and objectives to improve the student[']s motor skills and writing" (*id.*). Overall, the IHO found that the district's version of the student's behaviors and abilities was more persuasive than the parent's and that the December 2018 IEP would allow the student to make meaningful progress (*id.* at pp. 11-12).

Having found that the district offered the student a FAPE, the IHO did not address the appropriateness of the parent's unilateral placement of the student at Stars of Israel for the 2019-20 school year or whether equitable considerations weighed in favor of the parent's requested relief (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year. Regarding the parent's ability to participate in the December 2018 CSE, the parent noted that the IHO dismissed this issue on the basis that the parent previously participated in CSE meetings without a translator but argues that the district's past failures should not excuse or justify the procedural violation in this instance. The parent also alleges that the district failed to provide translated documents or a prior written notice in her native language.

As for the IHO's determination that the district's view of the student's needs was more convincing, the parent argues that the district SETSS teacher did not observe the student in the general education classroom and that the test results on the December 2018 IEP did not align with assessments conducted by Stars of Israel. The parent further notes that testing results reported on the IEP were based on assessments conducted while or shortly after the student was attending a more supportive program with ICT services and points to the student's report card for the 2018-19 school year, as well as the narrative of the student's needs on the December 2018 IEP, which according to parent, present a different picture of the student. The parent also argues that the unilateral placement challenged the student and that testimony that the student exhibited behaviors when demands were placed on him explained why the district had a different view of the student's behaviors. The parent takes issue with the IHO's decision to credit the testimony of the district witness and argues that the IHO's assumption that the parent witnesses were self-serving was without basis. The parent notes that the district presented no evidence about why or when the student transferred from receiving ICT services to receiving SETSS and, citing testimony from the witnesses from the unilateral placement, argues that the student needed a full-time special class.

Next, the parent notes that the IHO focused on whether the December 2018 IEP was appropriate but alleges that, even if the IEP was appropriate, the district was required to review it on parent request and/or in December 2019 when the student was due for an annual review but failed to do so.

The parent argues that the IHO should have considered the appropriateness of the unilateral placement and ordered district funding of the costs of the student's attendance at Stars of Israel for the 2019-20 school year.

In an answer, the district denies the parent's material allegations and argues that the IHO's decision should be upheld in its entirety. In addition, the district argues that the parent raises issues

on appeal that were outside the scope of the impartial hearing. In particular, the district argues that the parent's due process complaint notice did not include allegations relating to the district's failure to convene a CSE in December 2019 or the parent's alleged request to have documents translated into her native language.

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]).⁶

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).

⁶ 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).

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

A. Preliminary Matters

1. Scope of the Impartial Hearing

Turning first to the district's arguments regarding the scope of the impartial hearing, generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, contrary to the district's position, review of the parent's June 2020 due process complaint notice shows that she sufficiently raised the question of the district's failure to convene a CSE to the conduct the student's annual review such that the district was on notice that it was among the issues to be addressed at the impartial hearing (see Parent Ex. A at p. 2 [alleging that "[t]he [district] failed to hold an annual meeting"]). However, there are no allegations in the due process complaint notice regarding a failure of the district to translate documents for the parent, the lack of a translator at the December 2018 CSE meeting, a lack of a prior written notice in the parent's native language, or the parent's ability to participate in the December 2018 CSE meeting (see Parent Ex. A). Further, the district did not agree to expand the scope of the impartial hearing to include any such issue and the parent did not seek the IHO's permission to amend the due process complaint notice. To the extent the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]), review of the hearing record also does not show that the district pursued the issue of the translation of documents or the parent's ability to participate in the December 2018 CSE meeting. Therefore, the IHO erred in addressing the issue of documents in the parent's native language as it related to her ability to participate in the December 2018 CSE meeting as it was outside the scope of the impartial hearing.

2. Compliance with Practice Regulations and Scope of Review

Next, it is necessary to discuss which issues are before me on appeal. State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Further, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Section 279.8 requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]).

Here, the parent's request for review is not very clear with regard to identifying the particular findings of the IHO that are being challenged. That is, under the heading "Statement of Issues," the request for review includes as follows:

1. The IHO improperly found that the [district] offered the Student a FAPE for the 2019-2020 school year.
2. The IHO improperly failed to address the appropriateness of the unilateral placement and the equities in this case.
3. The IHO failed to grant the Parent the relief she requested.

(Req. for Rev. at p. 1). These broad statements of error are not a clear or concise statement of the issues presented for review in that the parent fails to number discrete findings of the IHO with which she takes issue (i.e., a challenge to credibility findings, findings regarding the appropriateness of SETSS, etc.). Instead, the broad, conclusory statements above could be made in any of a myriad of unilateral placement cases that are brought each year against school districts across the United States. Thereafter, the request for review sets forth a "Brief Statement of Facts" and "Argument" under which are numbered paragraphs. In the "Argument" section, the request for review in several instances fails to identify the IHO's precise rulings, failures to rule, or refusals to rule presented for review, opting instead to list a mixture of factual allegations and allegations of district wrongdoing together, without, for the most part, describing how the IHO erred on specific issues. I have addressed those of the parent's arguments that are directed at the IHO's decision, notwithstanding the insufficient numbering of issues; however, I will not search the parent's pleading to identify issues that were not clearly stated.

With respect to assertions of IHO error, the parent alleges that:

The IHO essentially focused on whether the IEP developed on December 11, 2018 was appropriate and adequate for the Student. Even if it was appropriate and adequate as of December 11, 2018, the DOE was required to review it upon the parent's request, and to conduct an annual review by December 11, 2019, to determine if it remained appropriate and adequate, but the DOE failed to do so.

(Req. for Rev. ¶ 25; see also id. ¶ 29). Accordingly, the parent sufficiently alleges that the IHO erred in failing to address the district's obligations to reconvene upon the parent's request and to convene to conduct an annual review and those issues will be discussed below.

Much less clear are the parent's allegations of IHO error pertaining to her finding that the December 2018 CSE and IEP were appropriate. Even according a generous reading of the parent's request for review, she has not alleged error in the IHO's findings that the December 2018 CSE was duly constituted, that the CSE had sufficient reports and evaluations, that the IEP included appropriate goals and objectives to address the student's motor skills and writing, that the recommendation for placement in a general education class with SETSS was appropriate at the time of the December 2018 CSE meeting, or that the December 2018 IEP was designed to allow the student to make meaningful progress. Therefore, the IHO's determinations on these issues have become final and binding and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The only finding of the IHO's pertaining to the December 2018 CSE or IEP that the parent references in the request for review—and which was properly within the scope of the impartial hearing⁷—is related to the student's needs and the IHO's findings regarding the particular weight to accord the evidence thereof (see Req. for Rev. ¶¶ 15, 20-21), and it is to this issue that I now turn.

⁷ As noted above, the IHO's finding relating to the parent's ability to participate in the CSE without a translator was not among the issues presented in the parent's due process complaint notice and, therefore, was outside the scope of the impartial hearing.

B. The Student's Needs-December 2018

On appeal, the parent argues that the IHO erred in relying on the description of the student presented by the district witness and the December 2018 IEP. The parent supports this view by pointing to the unilateral placement's description of the student, as well as the student's report card at the end of the 2018-19 school year. Initially, in her due process complaint notice, the parent did not challenge the accuracy or sufficiency of the present levels of performance included in the December 2018 IEP (see Parent Ex. A). Moreover, retrospective evidence of the unilateral placement's understanding of the student's needs formed after the date on which the December 2018 CSE convened or evidence that the student did not make progress during the 2018-19 school year may not be relied upon to evaluate the appropriateness of the December 2018 IEP (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]). While the IHO weighed the retrospective evidence in her analysis, ultimately, she did not rely on it to find the IEP inappropriate and, therefore, did not commit reversible error (see IHO Decision at pp. 10-11). Further, the parent does not point to any non-retrospective evidence that would warrant a conclusion different than that reached by the IHO. Accordingly, the parent's argument about the student's needs does not set forth a basis for modifying the IHO's determinations. Nevertheless, the student's needs as identified in the December 2018 IEP are discussed to frame the remaining issues on appeal.

The December 2018 IEP indicated that the CSE considered the 2018 New York State grade three ELA test, the 2018 New York State grade three math test, and as of October 2018: the student's Fountas and Pinnell Reading Level, the Performance Series Scranton Universal Screener (Scranton) for reading and math, the Reading Application for Instruction (RAI), and the Math Application for Instruction (MAI) (Parent Ex. H at p. 1). In addition, the December 2018 CSE considered results of the October 2018 Acadience (old DIBELS) Grade 4 Reading Assessment, Words Read Correctly benchmark, Retell benchmarks, Retell quality benchmarks, and MAZE adjusted score benchmark (id.).

With respect to assessments, including but not limited to the Fountas and Pinnell and DIBELS, the IEP indicated that the student demonstrated strong decoding skills and was able to read grade level material (Parent Ex. H at p. 2). The student's SETSS teacher testified that the student's scores on the New York State third grade test indicated that he was "not more than a year behind" in his academic performance in reading (approaching grade level) and that he was at grade level in his mathematics performance (Tr. pp. 73-74). She noted that the New York State grade three test results were considered but not solely relied upon to make decisions (Tr. pp. 72-73; see Parent Ex. H at p. 1). The SETSS teacher stated that the Fountas and Pinnell "Level – N (beginning of 3rd Grade)" was "about a year below," and that the student struggled with non-literal information which was more than likely why he was "below grade level" (Tr. pp. 75-76). She noted that the Scranton was "given to all the students," it "would determine his area of specific need," and that the student was "not far below grade level" in reading, and "on grade level for math" (Tr. pp. 76-78). Further, the SETSS teacher reported that the RAI and the MAI were skill based, paper assessments that were given to grades three to six in the school; they were "benchmark data samples to get more information" and were "utilized for instruction" (Tr. pp. 78-79).

According to the IEP, the student's performance on the RAI was on grade level, and his MAI performance was approaching grade level (Parent Ex. H at p. 1). With respect to the Acadience Grade 4 Reading Assessment, the SETSS teacher explained that the student was above benchmark level for reading words accurately, at benchmark in the retell portion as well as the maze portion, and above benchmark for retell quality portion (Tr. pp. 79-80). The SETSS teacher reported that in the classroom, the student had obtained a 90 percent or higher on all weekly multiplication quizzes, and that he exhibited "very good computation skills" in that he could "add, subtract, and multiply in his head very quickly" (Tr. pp. 80-81). Additionally, she noted that in OT, the program Learning Without Tears was utilized to address the student's handwriting (Tr. pp. 81-82; see Parent Ex. H at p. 5).

The December 2018 IEP indicated that the student did not often initiate participation during whole group lessons, required extra time in order to prepare for lessons and to gather his materials, and that his organizational skills were still developing (Parent Ex. H at pp. 1-2). Due to the student's poor handwriting and spacing skills, the student needed extra time on tasks that required writing; however, even with the extra time, the student's handwriting was usually illegible and disorganized (id. at p. 2). Further, the IEP noted that the student struggled with being an active member in a small group and demonstrated below grade level organizational skills which hindered him being prepared and getting ready for lessons in a timely manner (id.).

With respect to reading, the December 2018 IEP noted that the student did not always attend to punctuation, sometimes read "very automatic with little phrasing and voice," and struggled with grade level vocabulary and higher-level comprehension skills (Parent Ex. H at p. 2). In addition, the IEP stated that the student struggled when making inferences, drawing conclusions, identifying the author's purpose, and identifying the main idea (id.). The student required prompting when supporting his ideas with text evidence and using the text to answer questions; he required assistance, chunking of text, close read strategies, and teacher support when identifying concepts that were non-literal and more sophisticated in nature (id.). The IEP indicated that the student struggled with explaining his thoughts clearly and using grade appropriate vocabulary, and that he benefited from direct explicit vocabulary instruction on content-based skills (id.). According to the IEP, the student also benefited from utilizing word attack strategies such as identifying context clues, prefixes, suffixes, and root words in order to understand grade level vocabulary, as well as pre-teaching of content-based vocabulary (id.). Although the student was observed to have good listening comprehension skills, the IEP noted that he required text to be chunked into smaller sections in order to maximize understanding, and he benefited from using a highlighter in order to identify important information in a text (id.). The IEP stated that the student required prompting to go back into the text to support his ideas, and he needed to be taught specific strategies to answer higher level comprehension questions with frequent reminders to use those strategies throughout lessons (id.). The IEP indicated that the student benefited from small group instruction, performed better in the "SETSS classroom," and often struggled to apply skills and strategies in the general education classroom that he was exposed to in the SETSS classroom (id.).

The December 2018 IEP noted that the student demonstrated great strength with math skills and performed grade level computation skills; but struggled with multi-step word problems and when vocabulary and questions were more complex or when he was asked to explain his answers (Parent Ex. H at p. 2). In addition, the IEP indicated that the student needed to break down the questions into small parts and review his steps to ensure he had not missed anything; noting that

the student's confidence in his math skills tended to hinder him working carefully as he often rushed through his work and calculations (id.). The student required reminders to go back and check his work and make sure he had all the necessary information (id.). The IEP stated that the student benefited from a math word wall and pre-teaching of new vocabulary as well as from marking up the word problems and highlighting the questions (id.). In addition, the IEP noted that the student benefited from breaking down the question and labeling the parts when answering a more complex word problem that required the student to explain his answer, and from verbally explaining his answer before writing it down as his handwriting was often difficult to read (id.).

The December 2018 IEP stated that the student struggled with graphomotor and expressive language skills which inhibited his writing abilities and progress (Parent Ex. H at p. 2). The student struggled with starting a writing activity, finding the appropriate words during writing activities, and struggled during many phases of the writing process often requiring a great deal of support, multiple check-ins, small group instruction, and one-to-one conferences throughout the writing process in order to make progress (id.). The IEP indicated that the student struggled to write grade level appropriate text, often producing simplistic and grammatically incorrect sentences, and required reminders to use proper conventions, grammar, and punctuation (id.). The IEP stated that the CSE determined that the student would benefit from an assistive technology evaluation to consider a typing device due to the student's ability to verbalize more than he physically wrote down and that the student would most likely have a better output and be able to make progress at a more consistent rate with his peers (id. at pp. 2, 5, 16).

Although the student made progress in the area of language comprehension and improved his ability to make simple inferences about photographs and short texts that he had read, the IEP indicated that the student's deficits still existed and he continued to require verbal cueing, prompting, and the use of graphic organizers and sentence starters (Parent Ex. H at p. 3). The student demonstrated difficulty with understanding the deeper or implied meaning of a text, often interpreted the language very literally and, when asked to elaborate on his responses to these types of questions, the student demonstrated great difficulty and would often refuse to elaborate (id.). The IEP noted that the student demonstrated deficits in the areas of receptive and expressive vocabulary and had difficulty comprehending and utilizing curriculum vocabulary words during speaking and writing tasks (id.). In addition, the IEP stated that, when close reading a text with the student, he often displayed difficulty understanding descriptive language; then when asked questions about the text, he had difficulty using the descriptive language to help him explain ideas and concepts in detail (id.). The IEP indicated that the student's vocabulary deficits also negatively impacted upon his ability to gain meaning from the texts he read as well as his ability to communicate his thoughts and ideas relating to these texts in a clear and detailed way (id.).

With respect to social development, the December 2018 IEP indicated that the student occasionally responded in a short, abrupt manner, which could come across as rude, and that this possibly inhibited the student from making social connections with his peers (Parent Ex. H at p. 2). In addition, the student sometimes initiated social interactions inappropriately (by bumping into peers, pushing their papers on their desks, touching their things, or invading their personal space), struggled with maintaining appropriate friendships with his same age peers, and stated that he preferred to work alone most of the time (id. at pp. 2, 4). The IEP stated that the student needed to verbalize his thoughts and feelings more clearly and, if a peer was bothering him, he needed to be able to properly verbalize that instead of resorting to kicking or pushing (id. at p. 4). The IEP noted that the student presented with deficits in the areas of pragmatic language and social

communication and demonstrated great difficulty understanding what to do in order to initiate and sustain interactions as well as form friendships with his peers in an appropriate way (id.). Further, the IEP stated that the student demonstrated difficulty making eye contact, understanding personal space, reading social cues, and understanding the perspectives of others and that within social situations, the student did not know how to modify his words and/or actions to fit the situation (id.). The IEP indicated that the student often spoke in a monotone voice with little inflection which was interpreted as "rudeness" or disinterest and the student was beginning to demonstrate some "thinking about others" behaviors within structured therapeutic activities but struggled outside of these familiar situations (id.). Within the general education class, the IEP noted that the student had a few "friends" in class that he got along with, but he struggled to maintain appropriate friendships and have positive interactions with his peers (id.). The IEP stated that the student needed to improve his pragmatic language skills, to develop his ability to think about others, to read social cues so that he was able to modify his words/actions to fit his social situations, to improve his ability to work cooperatively in a group with his peers, to maintain appropriate personal space, and to take turns with his classmates (id.).

In the area of physical development, the December 2018 IEP stated that the student presented with delays in the area of graphomotor skills including difficulty forming the letters using a uniform size writing on the lines, using consistent spacing between words, and adhering to the margins of the page (Parent Ex. H at p. 5). In addition, the student needed to continue working on improving visual motor and attending skills (id.). The IEP noted that even when the student was reminded, instructed, and given extra time, he was unable to slow down and write neatly and that his writing continued to be illegible despite much practice using Learning Without Tears writing program (id. at pp. 2, 5). The student demonstrated delays accurately tracking his place on the line and thus lost his place or skipped words during copying tasks and demonstrated delays in the area of visual perceptual skills as noted in his difficulty to complete tasks that had a spatial relation component (id. at p. 5). Although the student was able to demonstrate the ability to motor plan when participating in gross motor tasks, the IEP stated that he presented with low stamina and tired easily and, at times, demonstrated difficulty managing coordinated movements (id.). In addition, the student continued to be easily distracted by external stimulus, required refocusing to attend to his work, and presented with delays that were impacting his performance in the classroom (id.).

C. Obligation to Reconvene and/or Conduct an Annual Review

On appeal, the parent alleges that the IHO erred by not addressing the parent's allegations regarding the district's failure to convene the CSE upon her request or pursuant to the requirement that the CSE convene at least annually. As a general matter, the district has an obligation to review the IEP of a student with a disability periodically but at least annually, and the CSE, upon review, must revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). State regulations additionally provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). In guidance letters, the United States Department of Education indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the

parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]; Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). The United States Department of Education's Office of Special Education Programs has indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]).

The student's final district report card for the 2018-19 school year, dated June 18, 2019, indicated that in the last marking period the student's performance levels were "[w]ell [b]elow [s]tandards" to "[b]elow [s]tandards" for reading skills, writing skills, social studies, and history, and "[b]elow [s]tandards" in listening, speaking and language skills, and mathematics skills (Parent Ex. J at pp. 1-2). Review of the performance levels over the course of the school year shows that during fourth grade, the student did not exhibit progress in reading, writing, and listening, or speaking and language skills and that his social studies and history and mathematics performance levels declined (id. at p. 1). The student's performance levels ranged from "[p]roficient" to "[e]xceeding standards" in science, and he demonstrated proficient skills in physical education, health, visual arts, and technology (id. at pp. 1-2). With respect to academic and personal behaviors, the student demonstrated one proficient skill while all other skills were below standards (id.). Based on the foregoing, the student's last report card for the 2018-19 school year reflects little to no progress and even a decline in some of the student's performance levels during fourth grade.

The parent testified that the student did not do well during the 2018-19 school year (Tr. p. 225). She opined that this was because he was attending a general education class placement but needed a small class with more attention from his teachers (Tr. p. 226). According to the parent, she spoke in-person with someone in the district administration at the end of the 2018-19 school year about her concerns regarding the student's program (id.). The parent testified that the district did not give her any response, meaning that the district did not "change anything" in the student's "program" (Tr. p. 227). The district did not offer any evidence to rebut the parent's testimony.⁸ The parent alleged in the due process complaint notice that "[the student] was in a large class of over thirty students, and the IEP developed for the [s]tudent was insufficient to allow him to make meaningful academic progress in that placement and she requested "an alternate placement for the [s]tudent from the [district]" for the 2019-20 school year "but did not receive it" (Parent Ex. A at p. 2). The district did not offer any evidence or argument at the impartial hearing regarding the district's response to the parent's concerns and there is no evidence in the hearing record that the district responded to the parent's request for a change in the student's programming by either reconvening the CSE or by providing prior written notice of its refusal, including an explanation of the district's reason for finding a reconvene of the CSE was unnecessary (see Letter to Frumkin, 79 IDELR 233; Letter to Anonymous, 112 LRP 52263). To compound matters, there is no evidence in the hearing record that the district thereafter convened the CSE to conduct the student's

⁸ The district failed to appear at the June 16, 2021 hearing date on which the parent testified (see Tr. pp. 215-32). The IHO contacted the district representative on the record and the district representative responded to the IHO that he was delayed and that the hearing should proceed without him (see Tr. pp. 218-21, 229). The IHO noted that the district representative did not request an opportunity to cross-examine the witness and found that he "waived his right to do so" (Tr. p. 229).

statutorily mandated annual review in December 2019. Such an oversight in these circumstances, whether unintentional or strategic, is fatal to the district's case.

Accordingly, I find that the IHO erred in concluding that the district met its burden to prove that it offered the student a FAPE for the 2019-20 school year.

D. Unilateral Placement

Having found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2019-20 school year, the next issue to examine is whether the unilateral placement of the student at Stars of Israel was appropriate. The parent argues that the IHO should have considered the appropriateness of Stars of Israel and indicates that the evidence in the hearing record shows that it was an appropriate unilateral placement for the student, citing evidence that the school "created a comprehensive plan" for the student that was designed to enable him to make progress (Req. for Rev. ¶ 30). The district does not articulate a specific challenge to the unilateral placement but does argue (in the context of discussing the purportedly differing views of the student's needs) that the student's needs as described by the parent's witnesses were overstated and that the student's alleged behavioral issues seemed to manifest only since his enrollment at Stars of Israel, thereby casting doubt on the appropriateness of that placement.⁹

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

⁹ During the impartial hearing the district did not make any arguments regarding the appropriateness of Stars of Israel (see Tr. pp. 42-46, 245-50).

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. The Student's Needs-Stars of Israel

In its answer, the district argues that the parent's witnesses overstated the degree of the student's performance delays and misconstrued results of evaluations and assessments to support the view that the student had severe behavioral needs. To be sure, as summarized below, the parent's witnesses from Stars of Israel described the student during the 2019-20 school year as presenting with needs, that, comparatively speaking, could be considered more intensive than those set forth in the December 2018 IEP and described by SETSS teacher, as the summarized above. The problem with the district's argument is that, under the circumstances of this case—where the district elected not to submit any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs into the hearing record—the district has effectively abandoned any opportunity to assert at either the impartial hearing or on appeal its position regarding the student's special education needs and the extent to which the parent's unilateral placement either addressed or failed to address those needs. As a result, to the extent the parent's evidence of the appropriateness of the unilateral placement was not sufficiently comprehensive for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and not the parent, as has been held in the only case with similar facts rendered thus far in a tuition reimbursement case in this jurisdiction (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]; see also Application of the Dep't of Educ., Appeal No. 20-131; Application of the Dep't of Educ., Appeal No. 18-125; Application of a Student with a Disability, Appeal No. 180-049; Application of a Student with a Disability, Appeal No. 15-076; Application of a Student Suspected of Having a Disability, Appeal No. 15-038;

Application of a Student with a Disability, Appeal No. 14-033; Application of a Student with a Disability, Appeal No. 14-028; Application of a Student Suspected of Having a Disability, Appeal No. 14-003; Application of the Dep't of Educ., Appeal No. 13-198; Application of the Dep't of Educ., Appeal No. 13-072; Application of a Student with a Disability, Appeal No. 12-027). The district's failure to enter any evaluative information into the hearing record or create an IEP leading up to or during the 2019-20 school year effectively precludes it from arguing a credible alternate view of the student's needs or successfully rebutting the evidence proffered at the hearing by the parents in support of the appropriateness of the unilateral placement for the student.¹⁰

With respect to assessments, the Stars of Israel program supervisor (supervisor) testified that the school utilized informal assessment when they began to ascertain the student's grade level as well as the district's formal assessment and recent IEP (Tr. pp. 103, 139). The supervisor commented that because the student's IEP "was not that old," it gave additional background information and when combined with the school's informal assessment, they were able to ascertain the student's grade levels (Tr. p. 139). She testified that the Stars of Israel program utilized the Bader examination, which she described as specifically created for special education teachers, that provided a grade level in the beginning of the school year in decoding, reading comprehension, and oral and written response to passages (Tr. pp. 149-50). In addition, the supervisor noted that the Bader was completed in the beginning of the school years, which was the same time frame that the school conducted the functional behavioral assessment (FBA) (Tr. pp. 150-51). Therefore, both the academic assessment and the behavioral observation and assessment were conducted and the student's "plan was determined as a comprehensive whole to encompass all of his challenges" (Tr. p. 151). Further, the supervisor stated that "the formal Vineland assessment" was used to determine student delays in language, communication, and social skills, as well as behavior and how that impeded classroom performance (*id.*).

The October 2019 Stars of Israel behavior intervention plan (BIP) identified one of the student's behaviors as making self-disparaging statements/showing a lack of self-confidence due to his trouble retaining information from classroom lessons and difficulty with reading (Parent Ex. F at p. 6). Another behavior identified was that the student rushed through tasks and said, "I know"

¹⁰ In arguing the unilateral placement's view of the student's needs should not be relied upon, the district also rests on the IHO's finding that the testimony of parent's witnesses was self-serving (IHO Decision at p. 11), arguing that this credibility determination of the IHO should be afforded deference. Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], *aff'd*, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the IHO found the testimony of the parent's witnesses "somewhat 'self-serving'" but did not outright discount the testimony as not credible. Further, as the IHO did not reach the question of the district's failure to convene the CSE leading up to or during the 2019-20 school year or the appropriateness of the unilateral placement, the IHO did not consider the testimony of the parents' witnesses from the private school as weighed against the district's failure to present evidence of the student's needs in the form of evaluations or progress reports or for any time after the December 2018 CSE meeting (see IHO Decision at p. 11). Rather, the IHO weighed the testimony of the parent's witnesses against the description of the student's needs in the December 2018 IEP and as summarized by the SETSS teacher who worked with the student during the 2018-19 school year (see *id.*), which as discussed above was not a particularly relevant comparison given the prospective analysis that should have been applied in examining the December 2018 IEP. Accordingly, the district's argument that the testimony of the parent's witnesses should be disregarded is without merit.

even when he did not "know," to escape from the task and avoid embarrassment due to his difficulty learning and struggle to understand class work (id.). Further the behavior plan identified the student's off-task behaviors such as having trouble focusing and often doing other things during class time (id.).

In a January 2020 Stars of Israel treatment plan, the student's "[c]urrent problem areas" were identified as communication, social/emotional skills, maladaptive behaviors, cognitive skills, attention, and academic delays/progress in math and ELA (Parent Ex. F at pp. 8-11). With respect to communication, the student demonstrated great difficulty following along with classroom lessons and learning materials as part of a group and he struggled to focus adequately in order to grasp what was being taught (id. at p. 8). The plan indicated that, although the student seemed to have the cognitive abilities to learn concepts, his significant struggle with focusing caused him to completely miss what was being told to him, and even in an individual setting he generally could not repeat back what was said immediately afterwards (id.). In addition, the treatment plan noted that after reading grade-level texts, the student demonstrated difficulty answering "wh" questions or retelling the basic parts of what was read and noted that when the student did pay careful attention, he was able to learn new information and concepts (id.). The treatment plan indicated that the student's written communication skills were "very poor" and he lacked the technical skills to write out appropriate sentences (id.). The student's response was sometimes latent in conversation, and at times, he did not change his style of interaction whether conversing with peers or with adults (id.). In addition, the plan noted that the student did not initiate a request for help when he needed it or even when asked, rather he often denied his confusion and said that he understood when he truly did not (id.).

With respect to social/emotional skills, the January 2020 treatment plan indicated that the student was well liked by his peers but that he lacked social skills and did not always read social cues during interactions with others causing him to respond inappropriately at times (Parent Ex. F at p. 8). The plan noted that the student lacked focus when in conversation with others and at times he did not respond in conversation or was latent in his response (id.). Further, the plan indicated that the student lacked in self-confidence in the classroom, felt embarrassed when he needed individualized attention or instruction in the class, and that he often said he understood what was taught when his assessment scores demonstrated otherwise (id.).

The Stars of Israel treatment plan indicated that with respect to "maladaptive behaviors", the student often lost focus, was unable to pay attention for set intervals of time, and found other things to do during class (Parent Ex. F at p. 8). The plan indicated that the student put himself down in class when he felt embarrassed or self-conscious about his limited performance and that he could be inattentive and not initiate a request for help when needed (id.).

Regarding cognitive skills, the January 2020 treatment plan stated that the student demonstrated strengths in his ability to learn but that his struggles with focusing often caused him to not to grasp material or learn skills that he actually had the cognitive abilities to master (Parent Ex. F at pp. 8-9). The student was typically unable to repeat back what was taught to him immediately afterwards; however, when dual focus was properly established, and the student managed to pay attention, he demonstrated the ability to learn (id. at p. 9). The treatment plan noted that the student demonstrated strengths in his number sense and math computational abilities (id.). Further, any tasks that incorporated language required that the student focus and maintain focus for enough time to work through the task properly, and therefore he often was unable to

perform optimally (id.). In addition, the plan indicated that the student demonstrated "greater performance" when texts were read aloud to him, when he was assessed for listening comprehension, or when test questions were delivered to him orally (id.).

With respect to attention, the January 2020 treatment plan stated that focusing on materials was the student's greatest area of weakness whether the materials were delivered orally, in written form, or visually (Parent Ex. F at p. 9). The treatment plan noted that the student's struggle with focus was evident in full group instruction, in interactions with peers, and in individual learning settings (id.). In addition, the plan indicated that the student often ignored the accommodations made for him in class, was unwilling to listen to the teacher's instruction which was specialized for him, and indicated that he knew the information or understood it, but when he was asked basic questions on what was taught, he demonstrated a lack of understanding (id.). According to the plan, tasks which incorporated reading or writing were especially difficult for the student to focus on and even once he established focus, he needed constant redirection to maintain his focus (id.). Further, the student tended to find other things to keep him busy instead of following along with classroom lessons and materials, and he rushed through classroom tasks without taking the time to work through them carefully and check his work for accuracy (id.). The treatment plan noted that the student often did not listen to all the instructions given before beginning his work and would then be unable to properly complete the examples (id.).

Regarding academic delays/progress, the January 2020 treatment plan noted that the student was making slow progress in his academics, but also indicated that when the student maintained greater focus in class, he was able to learn more (Parent Ex. F at p. 9). Specifically, with respect to mathematics, the plan indicated that the student demonstrated strengths in his number sense and mathematical abilities and was able to complete examples and perform operations when focused (id.). In addition, the treatment plan stated that the student tended to work through math problems too quickly and made careless mistakes, and that he required multisensory techniques to engage in new materials (id.). Further, the plan noted that the student was taught through direct instruction in order for him to comprehend abstract concepts and that 3D manipulatives allowed him to take concrete, tangible concepts and apply them to abstract thinking (id.). With respect to ELA, the plan stated that the student had trouble maintaining focus while reading a text, often lost his place, and was unable to pick up from where he left off (id. at p. 10). Further, the student's ability to answer text-based questions depended on his level of focus during the reading assignment (id.). The plan noted that the student demonstrated serious difficulties with writing, and his great struggle with forming letters legibly created a barrier for him to perform on written tasks (id.).

The supervisor testified that the student entered Stars of Israel for the 2019-20 school year (fifth grade) with "great behavioral challenges," which at that point overrode his academic challenges and impacted his ability to be ready to learn as well as his ability to learn overall (Tr. p. 110). The supervisor reported that the student was extremely unfocused and distractible, extremely restless, and had a difficult time remaining seated for any significant period of time to allow him to retain information (Tr. pp. 110-11). She stated that the student presented with non-compliant behaviors as well as difficulty with how much time he took to respond to a task, to initiate a task, and to complete a task of any level of difficulty, even at his grade level of performance (Tr. p. 111). The supervisor continued that the student had a very difficult time recognizing what he knew and did not know, what he needed help with, and complying with the decorum of a classroom (id.). She commented that, when very clear expectations were told, retold,

and set out for him in a very structured way, he had trouble not just complying but with comprehending what they were, and bringing himself back to the present consistently when he lost focus (id.).

The supervisor noted that the student had a very difficult time socially, including with conversation skills, expressive language, and modulating his tone, stating that he spoke in a monotone kind of voice (Tr. p. 111). She testified that the student had trouble using his words rather than his hands and reverted to using his hands which often caused aggression; further, he invaded other people's personal space and demonstrated a lack of recognition of personal boundaries (Tr. pp. 111-12). The supervisor reported that the student presented with sensory seeking behaviors throughout the day, which caused him to touch students as he spoke to them and to use his hands in a way that made others uncomfortable around him rather than expressing his wants, needs, and intentions with words regardless of the setting (Tr. p. 112). According to the supervisor, the student had trouble with his own self-confidence as it pertained to academic instruction and his social environment, and those behaviors affected the student's ability across the board (id.).

Further, the supervisor testified that the student's language delays, his inability to focus and comprehend the instruction provided, as well as his inability to follow multiple steps within the environment affected his ability to perform, his abstract thinking skills, and his computation skills (Tr. pp. 112-13). The supervisor stated that the student demonstrated extremely poor writing skills and that his ability to take information, synthesize it, comprehend the question, and express himself, even using basic English language conventions, was below grade level (Tr. p. 113). She explained that the student's "graphomotor skills were practically illegible" and his ability to perform in the classroom using his visual motor skills (i.e. copying and notetaking) was "also really challenged" (id.). The supervisor testified that the student demonstrated challenges in reading, reading comprehension, expressive language, receptive language, and written expression, which were compounded by his behavioral challenges (Tr. pp. 113-14). She stated that when the student came into the Stars of Israel classroom, he had a very challenging time performing within the classroom setting and accessing academic material (Tr. p. 114).

The principal from Stars of Israel testified that he not only observed the student on a daily basis as the principal, but he had taught him when the teachers were not available (Tr. pp. 181, 183). Further, the principal noted that he coordinated the student's curriculum between the teachers, tracked progress in terms of grades, observed the student's behavior outside the classroom, and his interactions with other students as well (Tr. p. 183). He stated that he made it his business to be in the classroom just about every day and gave input within the classroom itself (Tr. pp. 183-84). The principal agreed that the student's behavioral challenges impacted his ability to learn (Tr. p. 184). Further, the principal opined that the student did not demonstrate the behaviors (including being very unfocused and easily distracted, difficulty sitting in one place, lack of compliance, difficulty understanding social boundaries and working with other students, touching other people's belongings, touching them physically in a way that made them feel uncomfortable, and low self-esteem) constantly, but rather when expectations and demands were placed on him (Tr. pp. 184-86). In addition, the principal stated that the student needed a lot of individual attention to refocus and noted that, if the student was challenged to do work outside of his comfort level, he became defiant about it, sometimes in a passive way, "simply shutting down and really not doing anything" or at other times acting out in terms of his behavior (Tr. pp. 187-88).

2. Specially Designed Instruction

Turning next to a discussion of how Stars of Israel addressed the student's needs, a description of the program states that it provided special education techniques to students with learning disabilities, behavioral issues, and attention deficit disorders within a self-contained environment in a day school (Parent Ex. B at p. 4). Specifically, the program provided small, structured classes, targeted teaching methods, and individualized curricula geared toward students' learning styles (*id.*). The program offered a modified general education curriculum, both secular and religious studies, and an interdisciplinary approach, and targeted students' needs through assistive technology (*id.* at pp. 4-5).¹¹ According to the program description, an individual learning plan was developed for each student, that combined direct instruction, small group work, and one-on-one tutoring (*id.* at p. 4). Additionally, the physical setting minimized distractions, promoted staying on task, and provided a low student to teacher ratio in all school activities (*id.*).

The Stars of Israel program's core curriculum included language arts, math, science, and social studies and students were provided with direct individualized teaching within the classroom setting or individualized tutorials (Parent Ex. B at p. 6). Classes ranged in size from 6 to 12 students and the students were grouped according to chronological age, functioning level, learning styles, and social/emotional skill level (*id.*). Teachers used a multisensory approach, integrating the use of all senses, and reinforcing meaningful learning (*id.*).¹² In addition, the Stars of Israel program offered social skills groups, counseling, speech-language therapy, and occupational therapy (OT) as well as transition planning (*id.* at pp. 9-10). The faculty and staff at Stars of Israel program include educational directors, master special education teachers, occupational therapists, physical therapists, speech-language therapists, counselors, behavioral consultants, rabbis, and social skills training experts (*id.* at p. 5).

For the 2019-20 school year, Stars of Israel had approximately 20 students in grades five through nine, with some of the classes grouped only by grade level and some of the classes grouped by ability (Tr. p. 107).¹³ The students in the classes exhibited skill delays in either one or multiple areas that included academic, language, communication, and/or behavior (*id.*). In addition, there were no greater than eight students in a class and the curriculum and materials aligned with the Common Core curriculum, modified and accommodated according to each individual student (Tr. p. 109). The Stars of Israel program also aligned with "the ABA methodology" in order to meet the needs of the students, and clear expectations were set out for each individual student, as well as for the group contingencies as a whole (Tr. pp. 107-08). The supervisor testified that the program collected data consistently on a platform called Rethink, which allowed for coordination

¹¹ According to the program description, each student had an individual iPad that was controlled by the teacher in each class as well as Apple TVs available in the classroom for students to present their work, and a learning management system that allowed the students to submit homework on their iPads (Parent Ex. B at p. 5).

¹² The Stars of Israel program description provided details regarding how the reading and language arts, math, science, social studies/current events instruction was implemented (Parent Ex. B at pp. 6-9).

¹³ The principal stated that the school switched to remote learning on March 16, 2020, the students daily class schedule remained the same, and the program used a system called Nuro, which monitored each student individually in terms of the amount of attention and focus they demonstrated, how much they participated, screen content and eye contact (Tr. pp. 194-96).

and communication among the team of related service providers, special education teachers, and administrators that were working alongside the student; the Stars of Israel program was data driven and provided incremental data-driven instruction (Tr. pp. 108, 153-154). Stars of Israel was "housed" in a general education school, which allowed students to receive social skills instruction and integrate socially, as well as generalize skills beyond the classroom (Tr. pp. 108, 134).

Turning next to whether the Stars of Israel program addressed the student's specific needs with specially designed instruction, a curriculum schedule included in the hearing record outlined by subject provided information regarding the instruction the student received during fifth grade (Parent Ex. B at pp. 12-20). The student's daily curriculum schedule included Hebrew, social integration at mealtimes twice per day, writing workshop, technology, social studies, science, mathematics, interactive activities, ELA, sports/social skills, and history (Parent Ex. D).

The Stars of Israel October 2019 BIP indicated strategies to address the student's self-disparaging statements and lack of confidence, such as receiving verbal praise for his efforts and his achievements, and reinforcement for speaking positively about himself, persevering with difficult academic tasks, and redirecting his thoughts and behaviors to reflect healthy self-confidence (Parent Ex. F at p. 6). Strategies developed to address off-task behaviors included providing instruction in an individual setting, establishing eye contact with the instructor and face to face position with the instructor, assessing the student for his understanding of instructions before he is assigned independent work, assigning academic technology-based tasks, providing reinforcement for focusing for set intervals of class time, demonstrating accurate understanding of instructions, and providing redirection when displaying off-task behaviors (*id.* at p. 6). Further, strategies developed to address the student's behavior of rushing through tasks and saying "I know" even when he did not know included establishing eye contact and dual focus before instructions were delivered, giving the student instructions individually when possible, and assessing for understanding, providing a visual outline of instructions when there were multiple steps to follow, and using visual and kinesthetic aids to enhance his ability to focus and learn (*id.* at pp. 6-7). In addition, to address these behaviors the student was reinforced for following along with his visual instructions and checking off each one as he understood the teacher's corresponding oral instructions, for working through tasks slowly and accurately, and for using his checklists to complete all necessary steps (*id.* at p. 7). The BIP reflected that the student received individual attention in class to help him focus and learn, redirection to tasks with cues and prompts, class work given in short increments, embedded breaks in his schedule, teaching through discreet trial training (DTT), task analysis, direct instruction, positive reinforcement in scheduled intervals, priming, and shaping (*id.*). Additional strategies used with the student included multimodal methods, coordination between the classroom teacher, program director, parents, therapists, and assistant to ensure all treatment goals were being worked on and reinforced, as well as reviewing charts and goals consistently (*id.*).

As noted above, the January 2020 Stars of Israel treatment plan identified the student's needs and in addition, included goals and objectives developed for the student (Parent Ex. F at pp. 8-13). The treatment plan included 10 mathematics annual goals, 10 ELA annual goals, and behavioral goals which included three expressive language objectives, four receptive language objectives, one receptive communication objective, one language speaker skills objective, one communication objective, three social objectives, one social/emotional objective, four social skills objectives, and three behavior objectives (*id.* at pp. 9-13). For example, one mathematics goal targeted the student's need to answer two-step equations and orally explain the steps he took to

solve the problem; one ELA goal targeted the student's need to maintain focus on reading a text; one expressive language objective targeted the student's need to initiate a request for help; one receptive language objective targeted the student's need to focus on instructions that were given and repeat them back to demonstrate understanding; one social objective targeted the student's need to speak about himself positively; one social skills goal targeted the student's need to use an appropriate tone of voice and another to participate in a conversation with peer; and one behavioral objective targeted the student's need to work carefully through tasks and ask for help when he did not understand (*id.*).

The Stars of Israel supervisor testified that in the 2019-20 school year, there were six students altogether in the student's classroom; there were two teachers at all times, one special education teacher and one assistant or general education teacher (Tr. p. 116). She indicated that the student was provided speech-language therapy as well as OT for the 2019-20 school year (Tr. pp. 126-27). The supervisor agreed that the program for the 2019-20 school year was designed to address the student's particular needs and challenges (Tr. p. 119). According to the supervisor, the program provided the student with a lot of modified coursework that began with a concrete level of introduction such as 3D manipulatives to increase his visualization for vocabulary words, for tasks provided, for lessons, and for background knowledge (Tr. pp. 121-22). She also reported that the program was able "to create the concrete [from] the abstract" and match it to the student visually, auditorily, and kinesthetically so that he engaged with it and actually performed and tested better within those areas (Tr. p. 122).

The supervisor noted that the school year began with an FBA to identify what was causing the student's behavioral challenges, and from that "moved" into a BIP and subsequent treatment plan (Tr. pp. 119-20). She stated that the team of providers entered "the plan and the individual, multiple broken-down, modified version of his IEP goals into [the] Rethink platform for electronic data collection" (Tr. p. 120). The supervisor explained that the plan drove the interventions and the modifications that were provided for the student; on an individualized level, the student received points throughout the day for his behavioral responses, which made him aware of his behaviors and response, as well as his progress in order to increase his motivation, attention, focus, and time and duration on the task at hand (*id.*).

According to the supervisor, the program provided modifications and accommodations in seating arrangements within the student's classroom, and the classroom accommodated multiple seating areas (Tr. p. 120). The supervisor indicated that the program had a technology component that drove the academic instruction and each student had their own iPad, which gave the student the opportunity to work on his material in any seating area that enabled him to rearrange and reinforce his learning process to keep him on task (Tr. p. 121). In addition to the seating arrangement, she reported that the student was provided with multiple cues (including visual-verbal cues upon initiation of task), reinforcement, peer and classroom teacher modeling, group contingencies, peer competitions, and external motivators to drive his internal motivation (Tr. pp. 123-24). The supervisor testified that they alternated "high-low preference tasks" and gave the student the ability to rotate not just the materials and not just the seating arrangements, but also the tasks by preferential levels (Tr. p. 124). She stated that for every lesson, staff accommodated and modified it in a "lower version both in the technological part of a lesson as well as in the academic construction," consistently tailoring it to the student's needs so that he reduced the level of frustration that he would meet within any kind of area that was above his academic performance or above his knowledge or ability (Tr. pp. 124-25). This, she reported, allowed the student to

reduce latency and increase his engagement in the task as well as increase his independent learning skills because he understood the way that the process occurred, and he understood what reinforcement was going to be provided for that process (Tr. p. 125).

The supervisor stated that staff provided the student with a lot of positive reinforcement such as points, which allowed him to earn things such as luncheons for the group, and that the criteria for earning those activities increased throughout the year (Tr. p. 122). In addition, she noted that individual criteria allowed the student to unlock points to play additional games on the iPad that were specifically designed to increase his academic instruction in a motivational manner; the student received the points at the end of the day, acknowledged it, responded to it, and utilized those points (Tr. pp. 122-23). The supervisor explained that there was a "very clear directive and very clear correlation between [the student's] academic performance, his social responses, and his reinforcement that he received" because the individual iPads were locked and monitored and unlocked by the principal based on the number of points the student received (Tr. p. 123).

Additionally, the supervisor stated that they accommodated the student's social behaviors and used visual and auditory cues so that the student was able to process the information (Tr. p. 125). She explained that this increased the student's self-awareness and increased his involvement while reducing the amount of time that he was off task, which impeded his learning and impeded his inability to reengage within the academic environment and with the materials (Tr. pp. 125-26). Further, the supervisor testified that they provided the student with multiple modifications and accommodations to prevent him from avoiding tasks, and to avoid embarrassment and his inability to focus (Tr. p. 126).

The Stars of Israel principal testified that to address the student's handwriting needs, the program used a voice text app that allowed him to speak and to write by using his voice (Tr. pp. 188-89). He noted that the student learned how to type using the typing apps and write very fluently through typing (Tr. p. 189). In addition, the principal stated that the student used technology which allowed him to create his own digital flash cards for studying, "organize his thoughts through a mind-mapping system," and create a slideshow (Tr. pp. 189-90). He reported that the student was very motivated to use technology and presented the slideshow to the rest of the class (Tr. p. 190). Further, the student knew what his homework was every single night as it was organized for him in a learning management system (Tr. p. 191). The principal stated that another "tool" which motivated the student used teamwork with friends to learn a particular subject and then compete with other teams (Tr. p. 191). He added that many other apps were available to the student and used, for example, to learn the research process, look up a word, read a book, read text, scaffold learning, complete worksheets; staff was able to track his progress and get into the student's "sweet spot of being challenged" while not making it so "difficult that he" got "frustrated" (Tr. pp. 191-94).

As discussed above, the evidence in the hearing record shows that the Stars of Israel program identified the student's needs and addressed those needs with specially designed instruction. As such, the parent met her burden to show that the unilateral placement of the student at Stars of Israel was appropriate for the 2019-20 school year.

3. Progress

While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

According to the student's Stars of Israel 2019-20 fifth grade report card, the student's overall grade in ELA was a B- at the end of school year (Parent Ex. F at p. 18). While most of the reading standards for informational text and literature improved during the school year, from emerging or developing to developing or proficient performance levels, some stayed the same (id.). Most of the student's ELA foundational skills, writing standards, speaking and listening standards, and language standards (written and spoken language) improved, generally from emerging to developing performance levels, with some skills at the proficient level (id. at p. 19). With respect to mathematics, the Star of Israel report card indicated that the student attained a B+ grade at the third reporting period (id.). The student mostly demonstrated improvement in mathematics from emerging to developing performance levels with several proficient performance levels noted in numbers and operations in base 10 (id. at pp. 19-20).¹⁴

The Stars of Israel January 2020 treatment plan included "Progress Since Last IEP" which indicated that the student managed to learn many math skills and concepts, and displayed strength in his mathematical abilities (Parent Ex. F at p. 11). The treatment plan indicated that when the student was focused, he learned and retained the skills that were taught, and often was able to recall and apply previously learned materials at a later time (id.). According to the plan, the student demonstrated increased social skills and his interactions were more appropriate, although he still occasionally displayed a latency in his response or demonstrated a lack of responsiveness (id.). In addition, the treatment plan noted that the student demonstrated greater ability to answer text-based questions especially when texts were read to him (id.).

The Star of Israel supervisor testified that based on her knowledge, the student made significant progress in the 2019-20 school year (Tr. p. 127). With respect to the student's behavioral progress, the supervisor indicated that he improved in his awareness of his behaviors and although he did not always know how to control them, he improved in self-awareness (id.). She noted that his academic and behavioral metacognition improved, as well as his ability to understand where he needed to look for cues and how he needed to respond to cues, and the amount of time and duration he was able to focus on tasks (Tr. pp. 127-28). Further, the supervisor reported that the student "improved within the time and duration that he was able to respond to tasks and remain on-task for longer periods of time by utilizing those accommodations" that were provided for him (Tr. p. 128). In addition, she noted that the student improved his learning habits, readiness

¹⁴ Review of a June 2020 "quarterly progress report" does not provide information regarding where the student started out and where he had progressed to throughout the school year, rather, it provides information regarding brief present levels of performance and goals (Parent Ex. F at pp. 14-17).

skills, ability to perform within the classroom in the area of visual motor skills and filling in blanks (id.).

The supervisor testified that the student made a full academic year of progress in the area of reading comprehension during fifth grade (Tr. p. 128). With respect to written responses to reading, she explained that the student "made a full grade level of progress" in his understanding of how to respond to a question using English language conventions to write a legible answer (Tr. p. 129). The supervisor noted that staff improved the student's legibility and graphomotor skills to the best of their ability, and they incorporated the skills and strategies that the team used in the classroom and beyond (id.). She stated that the student's vocabulary skills improved and that he improved a full grade level in being able to sustain conversations, initiate conversations, respond to the conversation within the classroom and in the social environment, understand expected and unexpected behaviors, and respond to the cues at a faster pace (Tr. pp. 129-30). The supervisor noted that the student learned how to highlight what he knew, what he did not know, how to look for context clues, how to deduct and infer basic concrete information from within the text (Tr. p. 130). She opined that with respect to problem-solving skills, the student began to comprehend questions, and he made progress in being able to take "a word problem, transfer it to a number problem, [and] transfer it to pictures to be able to cue himself in on a basic level" (id.). The supervisor reported that the student improved a full grade level with respect to computation skills and that he was able to focus not just on the questions being asked, but on the practice and procedure and the numerical values (Tr. pp. 130-31). She further stated that the organizational skills required to show those computation skills improved tremendously (id.). According to the supervisor, the student's graphomotor skills improved throughout the year so that he was able to understand his own writing, which had been a challenge at the beginning of the year (Tr. p. 131). The supervisor opined that the student utilized the supports that were provided to him and he made a full grade level of progress within the academic school year (id.). She testified that the student "began on a very poor level of [] ability" in academic, social, and behavioral areas but that "he made great strides" and improved a full grade level within the 2019-20 school year (Tr. pp. 131-32).

Overall, the evidence in the hearing record demonstrates that the student made progress during the 2019-20 school year while attending Stars of Israel. Based on all of the foregoing, the totality of the evidence supports a finding that Stars of Israel was an appropriate unilateral placement for the student for the 2019-20 school year.

As a final note, the IHO did not err in highlighting the seemingly conflicting viewpoints regarding the student's needs that were held by the district as compared to the parent and the Stars of Israel witnesses. The IHO was in the best position to render credibility determinations and was troubled by the notion of affording persuasive weight to the parents' witnesses, and I do not dismiss such concerns lightly. The distinction between the IHO's conclusions and the analysis herein falls to a question of timing and the lack of evaluation reports proffered by the district. That is, the IHO considered the conflicting views in her analysis of the December 2018 IEP, which was much less relevant in this case given the prospective analysis required for determining the appropriateness of the IEP. The problem with the IHO's assessment is that for the time period of the denial of a FAPE (the 2019-20 school year), the district failed to offer any evidence rebutting the view of the student's needs as described by the personnel at Stars of Israel. Absent any evaluative information from the district or a new IEP based on a CSE meeting that considered the parent's concern about

the student's lack of progress, the parent's evidence supporting the parents' viewpoint of the student's needs must prevail when considering whether Stars of Israel addressed those needs.

That said, I continue to have misgivings about the divergent views of the student's needs, and what in my view was an underdeveloped hearing record on this issue. Despite its position stated in this appeal that the student's purported behavioral issues seemed to manifest only since his enrollment at Stars of Israel, there is no indication that the district has arranged to conduct a classroom observation or an FBA of the student in that environment. Yet, there may be merit to the district's viewpoint that the student's behaviors have manifested since attending Stars of Israel, which raises concerns that the student could be reacting to the ABA instruction (i.e., a rebound effect). Such concerns must be addressed to ensure that the student is not adversely affected, even unintentionally. Ultimately, the district did not elicit this kind of information during the impartial hearing, so these misgivings will not affect the outcome of this matter, especially when a case like A.D. is the prevailing law.¹⁵ However, going forward I will order the district to conduct an evaluation of the student to include a psychoeducational evaluation, a classroom observation of the student, a social history, a speech-language evaluation, an OT evaluation, and an FBA, along with a BIP if warranted.¹⁶

E. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child

¹⁵ In the administrative proceedings underlying A.D., the CSE relied only on assessments conducted by the private school to formulate an IEP and it was determined that reliance on such assessments provided an inadequate information to justify that the student's special education programming was appropriate. The SRO in that proceeding went on to hold that the parents' reliance on the same inadequate information was not helpful in establishing that the private school was appropriate either. But the Court held that the fault of inadequate information in a hearing record about the student's needs fell on school district only and that evidence regarding the related services and progress was enough to justify reimbursement. This case is similar in significant ways to A.D., namely that the evaluative information proffered by the district is missing (rather than inadequate) and this time it was the IHO rather than the SRO who was not persuaded by the evaluative evidence presented by the parent's private school – the only evidence in the hearing record. I agree with the A.D. case insofar as the public school district should perform its obligations under the statute. But a problem with the A.D.'s statements about inadequate evaluative information is that it leaves little room when the administrative hearing officer is unconvinced and finds the parent's evidence troubling with no solid evidence from the district. My concern in this case is that when there are conflicting viewpoints regarding the student's presentation and needs, the risk of endorsing inappropriate program due to gaps in the hearing record increases significantly, which runs counter to the IDEA's primary objective of ensuring that disabled children receive appropriate special education programming.

¹⁶ Further, although the December 2018 IEP reflected many areas of the student's needs appear in the present level of educational performance, no formal assessments were noted in the IEP (see Parent Ex. H at p. 1).

available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

On appeal, the parent argues that she cooperated with the district, including by discussing the student's educational program with a school administrator and sending written notice to the CSE. The parent's 10-day notice letter to the district bears a date of September 5, 2019 (Parent Ex. G at p. 2). However, the first page of the exhibit includes a facsimile cover page that has the date of October 29, 2019 (id. at p. 1). There is no explanation in the hearing record for the October 29, 2019 date and it is unclear if the parent delivered her letter to the district prior to October 29, 2019. Had she not, the late notice would be an equitable consideration that might warrant a reduction in the amount of tuition awarded. Likewise, if the evidence bore out to establish that the parent sent correspondence pre-dated by several weeks compared to the timing of the actual delivery of the correspondence, it would be appropriate to weigh such circumstances in the consideration of equitable factors. Ultimately, however, the district never denied receiving the parent's letter and did not raise a question regarding the timing of the correspondence or its effect on the district's efforts to meet its obligations to the student. Indeed, the district did not make any arguments during the impartial hearing or on appeal regarding equitable considerations. Thus, without more, I decline to reduce the award of tuition reimbursement based on equitable considerations.

Finally, direct payment is an appropriate remedy where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011]). Here, as the parent has presented evidence of her contract with Stars of Israel for the student's attendance as well as her

inability to pay the costs of the student's tuition (see Tr. pp. 223-25; Parent Exs. B at pp. 1-3; I), it is an appropriate remedy to require the district to directly fund the student's tuition at Stars of Israel.

VII. Conclusion

In summary, the IHO erred in finding that the district met its burden to prove that it offered the student a FAPE for the 2019-20 school year. In addition, the evidence in the hearing record supports that Stars of Israel offered the student specially designed instruction to meet his unique needs as observed by the unilateral placement and that equitable considerations do not warrant a denial or reduction of the amount of tuition that the district shall be required to fund.¹⁷

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 20, 2021 is modified by reversing that portion which found that the district offered the student a FAPE for the 2019-20 school year;

IT IS FURTHER ORDERED that the district shall directly fund the costs of the student's tuition at Stars of Israel for the 2019-20 school year; and

IT IS FURTHER ORDERED that if it has not already done so since the 2019-20 school year, within 45 days of the date of this decision, the district shall conduct evaluations of the student, including a psychoeducational evaluation, a classroom observation, a social history, a speech-language evaluation, an OT evaluation, and an FBA, along with a BIP if the student presents with interfering behaviors that so warrant.

Dated: **Albany, New York**
 November 5, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

¹⁷ The parent clarified during the impartial hearing that she is not seek funding of the portion of the private schooling attributable to the student's religious instruction, and the district is not responsible for those costs (Tr. at pp. 244-45).