



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 19-035

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

### **Appearances:**

Kule-Korgood & Associates, PC, attorneys for petitioners, by Eric Small, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Yaldeinu School (Yaldeinu) for the 2018-19 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**

According to parent report, the student was delayed in meeting developmental milestones related to speech-language and motor development (see Tr. p. 152). The student qualified for and received services through Early Intervention including speech-language, occupational and physical therapies (Tr. pp. 152-54).<sup>1</sup> He also received 20 hours per week of applied behavior analysis (ABA) services (Tr. p. 153; see Tr. p. 15). The student later transitioned to the Committee

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<sup>1</sup> The student's father testified that at age 15 months the student was diagnosed by a developmental pediatrician as having a pervasive developmental disorder – not otherwise specified (PDD-NOS) (Tr. p. 153).

on Preschool Special Education (CPSE) where he continued to receive ABA and related services (Tr. p. 154). At age five the student received a diagnosis of Fragile X Syndrome (Parent Ex. C).

The hearing record does not indicate where the student attended school for kindergarten and first grade. However, for second grade (2017-18 school year) the student was enrolled in Yaldeinu through an agreement with the district (Parent Ex. A at p. 2).

On February 8, 2018, a CSE convened to determine the student's eligibility for special education services and to create his IEP for the 2018-19 school year (IHO Ex. I). Attendees at the meeting included the district representative (who also signed the attendance sheet as a related services prover/special education teacher), a school psychologist, one of the student's parents, and via telephone, the student's classroom teacher and speech-language pathologist along with an occupational therapist (IHO Ex. I at p. 20; see Tr. p. 156; Parent Ex. G at p. 1). Finding the student eligible for special education as a student with autism, the February 2018 CSE recommended the student attend a 6:1+1 special class in a district specialized school and receive four 30-minute sessions of individual speech-language therapy, one 30-minute session of group speech-language therapy, four 30-minute sessions of individual occupational therapy and two 30-minute sessions of individual physical therapy (IHO Exhibit I at pp. 13, 17, 18). Additionally, the CSE recommended the student receive extended school year services consisting of the same program and related services (id. at p. 15). The CSE also recommended the provision of parent counseling and training (id.).

In a prior written notice dated June 12, 2018 the district informed the parent of the CSE's recommendation for the student for the 2018-19 school year (Parent Ex. B).<sup>2</sup> The prior written notice stated that the student's "learning differences c[ould] be best addressed in a small class setting in a specialized school that provides a more specific learning environment, modifications, and more educational support and individualized attention" (id. at p. 2).<sup>3</sup>

By letter dated June 19, 2018 the parents advised the district that they had reviewed the February 2018 IEP and determined that it was not appropriate to meet the student's needs (Parent Ex. D at p. 1). Specifically, the parents indicated that the recommended 6:1+1 special class could not provide the student with the individualized attention, instruction and support that he required throughout the school day (id.) In addition, the parents asserted that the student's present levels of performance, management needs, and annual goals detailed in the IEP did not sufficiently describe or address the student's needs and suggested that the CSE did not have enough information regarding "the full range" of the student's needs (id.). The parents also expressed concern that the proposed IEP did not reflect the student's need for a sensory gym or sensory diet, as well as their

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<sup>2</sup> The prior written notice identified the assessments and materials used to determine the student's eligibility for special education services and to develop his IEP for the 2018-19 school year (Parent Ex. B at p. 2). These included a March 2017 classroom observation, a December 2017 occupational therapy progress report, a December 2017 speech-language progress report, and a January 2018 teacher report (Parent Ex. B at p. 2). Although the reports were not entered into evidence, at least portions of the teacher, speech-language, and OT reports are reflected in the February 2018 IEP.

<sup>3</sup> The parents reported that they received a school location letter also dated June 12, 2018; however, this letter is not in the hearing record (Parent Ex. D at p. 1).

concern that they were advised by CSE staff to ask the "proposed placement" if it could provide ABA instruction and sensory supports, services the parents understood should be indicated on the IEP (id.). In addition, the parents noted that although the IEP indicated that the student did not require a behavior plan or individual supports to address his behavior, they received a behavioral intervention plan (BIP) from the CSE (id.). According to the parents, the BIP, however, did not sufficiently address the "full scope of [the student's] needs" (id.). The parents advised the district that they had not had time to visit the assigned school and could not enroll the student there without first seeing it to determine if it was appropriate for the student (id.). The parents indicated that while they were willing to consider the district's proposed placement once they visited the school, until then they intended to enroll the student at Yaldeinu for the start of the 2018-19 school year (id. at pp. 1-2). The parents further indicated that if their concerns were not addressed they would request an impartial hearing for public funding of the student's placement at Yaldeinu (id. at p. 2).

In a second letter, dated August 8, 2018, the parents advised the district that they had visited the particular school site to which the district assigned the student and found it to be inappropriate for the student (Parent Ex. E at p. 1). The parents asserted that the assigned school site could not implement the student's IEP nor could it provide the student with the 1:1 instruction, support, and small school setting that he required (id.). The parents alleged that there was "no specific social skills instruction" at the assigned school "despite social skills being one of [the student's] greatest areas of need" (id. at pp. 1-2). In addition, the parents expressed concern that the assigned school site did not have an appropriate behavioral program in place to address the student's behavior and opined that this was inappropriate because the student also was not provided with a paraprofessional to address his "significant behavior needs" (id. at p. 2). The parents expressed further concern that without the appropriate support the student would be unable to function and make progress (id.). The parents opined that the student would not receive the supports he needed at the assigned school, including the sensory support he needed to remain regulated throughout the day and benefit from instruction (id.). In addition, the parents expressed concern about the proposed school site noting that there was no sensory gym, the students at the school all ate lunch together, and related services were "very often provided together with dividers separating speech therapy, occupational therapy and physical therapy" (id.). The parents opined that the student would be unable to focus in such an environment, especially given his sensory deficits and the lack of paraprofessional support (id.). The parents advised the district that the student would continue at Yaldeinu and if the parents' concerns were not addressed they would "pursue an impartial hearing in the near future for public funding" (id.).

During the 2018-19 school year, the student attended an ungraded class at Yaldeinu composed of seven boys, one teacher and seven 1:1 instructors (Tr. pp. 7, 18-19, 86).<sup>4</sup>

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated December 3, 2018, the parents requested an impartial hearing, asserting the district denied the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A). The parents asserted, amongst other things,

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<sup>4</sup> Yaldeinu is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

that the February 2018 IEP contained: 1) inaccurate present levels of performance, thus providing for an inaccurate baseline with which to measure any progress; 2) goals that were insufficient, inappropriate, vague and unmeasurable; 3) insufficient individualized instruction, support, and small school environment that the student required; 4) insufficient supports and strategies to address the student's social, behavioral, language or educational needs, including the lack of a provision for a paraprofessional (id. at pp. 3-4).<sup>5</sup> For relief, the parents requested tuition reimbursement (or direct payment) for the cost of the student's education at Yaldeinu for the 2018-19 school year (id. at p. 4).

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

An impartial hearing was convened on February 11, 2019 (Tr. pp. 1-183). At the onset of the impartial hearing, the district rested its case without placing any documents into evidence or calling any witnesses (Tr. p. 12).<sup>6, 7</sup> In a decision dated March 28, 2019, the IHO found that the district failed to demonstrate that it offered the student a FAPE for the 2018 19 school year (IHO Decision at pp. 6, 12). In so doing, the IHO noted that the district did not make an opening statement or "put on a case," but instead limited its participation at the hearing to cross-examining witnesses and submitting a closing statement (id. at p. 6). The IHO also found that the "bare statements" on the issue of FAPE contained in "two sentences" in the district's closing statement, including the district's assertion that the disputed IEP "reflect[ed] [the student's strengths and weaknesses and the necessary and appropriate services that he needs to succeed" were "not sufficient to carry [the district's] burden" (id.).

The IHO also found that the parents' unilateral placement at Yaldeinu was not appropriate, and, equitable considerations would have favored the parent's request for reimbursement (and for direct prospective payment) had Yaldeinu been found to be an appropriate unilateral placement for the student (IHO Decision at pp. 11, 12). With respect to the IHO's determination that Yaldeinu was not an appropriate unilateral placement for the student, she found that it was not possible to assess the student's progress because the only documentation of the student's academic skills, social/emotional/behavioral levels, and daily living skills was anecdotal, and the testimony of staff witnesses from Yaldeinu was not from the individuals who provided direct instruction or direct service to the student (IHO Decision at p. 11). With respect to the unilateral placement, the IHO determined that "[t]here [were] no scores on standardized instruments or reports of objective assessments submitted in this impartial hearing" (id.). Additionally, the IHO found that the hearing record did not demonstrate whether the teachers and other staff at the private school had sufficient teaching qualifications (id.). The IHO found that the hearing record failed to demonstrate that the student received regular individual OT or speech-language therapy (id.). The IHO noted that none of the student's teachers or related service providers testified at the impartial hearing, and no objective assessments were placed into evidence; although there was testimony that assessments

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<sup>5</sup> While the parents asserted other claims, due to the limited nature of the appeal before me, a full recitation of every factual assertion is not necessary.

<sup>6</sup> I commend the IHO for ordering the district to place, at a minimum, the contested IEP into the record as an IHO exhibit (Tr. p. 11; see IHO Ex. I).

<sup>7</sup> The district did, however, place a closing brief into the hearing record (see Dist. Ex. 1).

existed (id.). Given the absence from the hearing record of any private assessments of the student, testimony from the student's direct teachers or providers, objective and quantifiable, as opposed to anecdotal, evidence of the student's progress or evidence demonstrating the qualifications of the student's teachers or providers the IHO concluded that, based on the totality of the circumstances, the parents had not demonstrated the unilateral placement was appropriate for the student (id.).

With regard to equitable considerations, the IHO found that the parents had paid \$750 toward the \$105,000 of the tuition costs at Yaldeinu, that equitable factors favored the parents, and she determined that the parents lacked the financial resources to front the remainder of the costs of the student's tuition at Yaldeinu (IHO Decision at p. 12). But for their failure to establish that Yaldeinu was appropriate, the IHO found that the parents would have prevailed on their request for relief (id.).

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

The parents appeal, asserting the IHO erred in finding that the hearing record did not support a finding that their choice of unilateral placement for the student's 2018-19 school year was appropriate. The parents assert that the hearing record amply supports a finding that the unilateral placement was appropriate. In doing so, they argue that the IHO erred by ignoring testimony and documentary evidence concerning the frequency and duration of the provision of related services; testimony and documentary evidence concerning the student's class schedule; unrefuted testimonial evidence that the unilateral placement conducted and utilized assessments to create the student's program and goals; and unrefuted testimony regarding the unilateral placement's application of behavior systems, and collection of behavioral data. In addition, IHO improperly found that no one from the unilateral placement who testified about the student, worked directly with the student. Moreover, the parents claim that the IHO improperly placed a requirement upon the parents to demonstrate, contrary to legal authority, that the unilateral placement employed certified special education teachers, and also used an improper legal standard to determine that the parents had failed to demonstrate that the student made progress at the unilateral placement.

The parents also assert that the IHO improperly held the parents' failure to provide the IEP developed for the student by the unilateral placement against them by ignoring testimony that the unilateral placement developed an individual curriculum for the student that included academic, social, and related service programs to address the student's needs.

In its answer, the district generally responds to the parent's allegations with admissions, denials, or various combinations of the same and argues in favor of the IHO's determination that Yaldeinu was not an appropriate unilateral placement for the student for the 2018-19 school year. The district does not cross appeal the IHO's determinations that it failed to offer the student a FAPE for the 2018-19 school year, that equitable factors would have favored the parents' request for tuition reimbursement, or that direct funding would have been an appropriate form of relief had the parents prevailed.<sup>8</sup>

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<sup>8</sup> An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

## 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]).<sup>9</sup>

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

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

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<sup>9</sup> 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).



## VI. Discussion

### A. The Student's Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the disputed issue -- namely, whether the student's unilateral placement at Yaldeinu was appropriate.

As an initial matter, I note that the hearing record does not contain evidence concerning the student's needs or his placement and program at Yaldeinu during the 2017-18 school year, which would potentially help identify the student's needs as of the February 2018 CSE meeting. Moreover, no documentary evidence concerning the student's needs at the time of the February 2018 CSE meeting was admitted into evidence other than the contested February 2018 IEP which was only proffered by the district upon the request of the IHO. Indeed, the district did not make an opening statement or present any witnesses or other documentary evidence during the hearing and limited its participation to cross-examination of the parents' witnesses and submission of a closing statement. One Court in this jurisdiction has addressed whether a unilateral placement was appropriate under circumstances in which the student's needs remained inadequately developed or were described inaccurately by private school personnel (A.D. v. Bd. of Educ. of City Sch. Dist. of New York, 690 F. Supp. 2d 193, 206 [S.D.N.Y. 2010]). In A.D., the Court discussed how New York has placed the burden of production and persuasion on parents to establish that the unilateral placement was appropriate (690 F. Supp. 2d at 206). However, the Court held that, when analyzing whether the unilateral placement addresses the student's needs, the district, rather than the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance (id. at pp. 207-08; see Application of the Bd. of Educ., Appeal No. 08-056).<sup>10</sup>

In this case, the district failed to provide any evaluative information during the impartial hearing, and the parents challenged the adequacy of the district's evaluative information and the present levels of performance contained in the disputed IEP (see Parent Ex. A). The parents, who bear the burden to demonstrate the appropriateness of the unilateral placement, do not however bear the burden to provide the evaluative information that is used to create an IEP, as the unilateral placement does not have a duty to create an IEP or conduct evaluations of the student in furtherance of either the unilateral placement's or the district's efforts to create an IEP (Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006] citing Carter, 510 U.S. at 14). To further frustrate the decision-making process in this case, the progress reports that were provided by the parents post-date the development of the 2018-19 IEP, and therefore, cannot be used here to

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<sup>10</sup> The one possible distinction between A.D. and this case is that in A.D. it was evident that the school district relied on assessments conducted by the parentally-selected unilateral placement to formulate its proposals in the student's public school IEP, but it is not clear who provided the materials that the CSE relied upon to formulate the IEP in this case. It is uncertain if the public school's reliance on privately obtained evaluation material was essential to the A.D. Court's holding that the parent's unilateral placement was appropriate (A.D., 690 F. Supp. 2d at 208 [noting that "insofar as the CSE elected to utilize and rely upon the reports and assessments produced by [private school] during the 2006-07 school year, the defendants' reliance on such materials weighs in favor, not against, [the private school's] appropriateness"]).

determine the student's needs as of the beginning of the 2018-19 school year (see Parent Exs. F; G; H).

However, testimonial evidence presented at the hearing by several Yaldeinu staff members who were all part of the student's educational team, provides useful evidence of the student's present levels of performance as of July 2018 (see Tr. pp. 35-145)<sup>11</sup>. Specifically, the board-certified behavior analyst (BCBA) at Yaldeinu testified that in the beginning of the 2018-19 school year, the student was interested in interacting with his peers; however, he did not know how to engage them appropriately or he could not maintain his attention or focus long enough to engage with them as he tended to get distracted and wander off (Tr. pp. 35-36)<sup>12</sup>. The BCBA described that, at the beginning of the school year the student exhibited tantrums and aggressive behaviors more frequently, with higher intensity and longer duration (Tr. p. 39). More specifically, she reported that the student would engage in "tantrum-like" behavior more than once per day for approximately five to 30 minutes in duration (Tr. p. 53-54). According to the Yaldeinu educational director (director), at the start of the school year, the student had difficulty sustaining attention and focus in a group, keeping his hands quiet, sustaining a small conversation, and had been engaging in name calling (Tr. pp. 73-74)<sup>13</sup>. The director explained that the student had a "harder time sitting and focusing," not touching friends, and tracking eye gaze (Tr. p. 93). The Yaldeinu occupational therapy supervisor (OT supervisor) testified that in July 2018 the student was very frequently dysregulated and engaged in "a lot of physical pushing, pulling and even physical aggressive behaviors," and that his self-regulation abilities were "very minimal" (Tr. p. 127).

With regard to academics, the Yaldeinu director testified that in reading the student had a strong decoding ability, but his comprehension skills were significantly delayed (Tr. p. 68). She noted that the student could answer "wh" questions except "why"; however, he could not generate questions (Tr. p. 68). Additionally, the director testified that in July 2018 the student could not retell a sequence, including the setting, and he had difficulty making text-to-self connections, specifically with regard to emotion (Tr. p. 68). The director testified that prior to the 2018-19 school year the student was reading at a Fountas and Pinnell level D (kindergarten) level (Tr. p. 87). In terms of writing, the director reported that in July 2018, the student could write his first name (Tr. p. 90). In addition, she reported that the student could encode simple C-V-C words, but he could not spell using consonant diagraphs or initial and final consonant blends (Tr. p. 68).

With regard to mathematics, the director testified that the student understood addition concepts and "some skills within addition," and that he could sort money and state the value, but he could not count money (Tr. p. 70). She further described the student as having difficulty performing addition concepts with understanding and opined that it was "more like rote," and

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<sup>11</sup> According to the hearing record, the student was enrolled in Yaldeinu's 12-month program which runs from July 2018 to June 2019 (Tr. pp.17, 67-68; Parent Ex. K at p. 1).

<sup>12</sup> The BCBA testified that she observed the student at least weekly and would personally work with the student when making any type of behavioral change or change in the rate of reinforcement during 1:1 instruction (Tr. pp. 18, 40).

<sup>13</sup> The educational director testified that she would observe the student multiple times per week in the classroom (Tr. p. 63).

further indicated that the student did better with concrete materials (*id.*). The director reported that the student could tell time but did not understand a schedule of the day's activities, and he could not compute word problems related to telling time (*id.*). Finally, the director stated that the student's math skills (addition, money, telling time) were "within first grade" with some scattered skills, and that his problem-solving skills were "further along" (Tr. p. 89).

With regard to speech and language, the director testified that at the beginning of the school year the focus was on increasing the student's vocabulary; he did not understand the concept of sequences, could not generate questions; had difficulty understanding the main idea and difficulty with visualization (Tr. p. 76). In pragmatics, the director indicated that the student had difficulty with eye gaze tracking, conversational turn-taking and topic maintenance (Tr. pp. 76-77).

The OT supervisor testified that in July 2018, the student's graphomotor skills were limited to writing uppercase letters, he was beginning to fasten buttons on a model or button board, and his utensil use was sporadic; however, he would attempt to use utensils with cueing (Tr. p. 128-29).

As accurately noted by the IHO, the hearing record does not include any documentary evidence, such as evaluations, assessments, or progress reports detailing the student's needs at the time of the February 2018 CSE meeting, other than the 2018-19 IEP contested by the parents for, among other things, containing inaccurate present levels of performance. However, under the circumstances of this case— where the district elected to not submit any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs—the district has effectively abandoned any opportunity to challenge the accuracy or sufficiency of the description of the student's needs during these due process proceedings. Accordingly, to the extent that the information in the hearing record is not sufficiently accurate or complete for the purposes of determining the student's needs, the responsibility for such evidentiary deficiency, as previously discussed, has been held to lie with the district and not the parent (*see* A.D., 690 F. Supp. 2d 193 at 208). In any event, the parents' witnesses did testify concerning their observations and appraisals of the student's needs at the time he entered Yaldeinu for the 2018-19 school year. Thus, for purposes of determining the appropriateness of Yaldeinu as a unilateral placement, I find that the testimonial evidence provided by the parents' witnesses in this case was not so deficient in identifying the student's unique individual needs that the parents' request for reimbursement must be denied on that basis. Accordingly, the IHO's determination that the parents' failed to provide adequate assessments of the student must be reversed.

## **B. The Unilateral Placement**

In this case, the sole remaining substantive issue to be determined is whether the parents' unilateral placement of the student at Yaldeinu during the 2018-19 school year was appropriate. The parents assert that the IHO erred in determining that the hearing record did not support a finding that Yaldeinu was appropriate. For the reasons that follow, the evidence in the hearing record supports a finding that Yaldeinu provided the student with instruction specially designed to meet his unique needs and that the student made progress during the 2018-19 school year while at Yaldeinu. Therefore, the IHO erred in finding that Yaldeinu was not an appropriate unilateral placement for the student.

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., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

## 1. Specially Designed Instruction

As previously discussed, the testimonial evidence in the hearing record indicates that the student demonstrates deficits and delays in his academics, as well as in his pragmatic, speech- and language, fine motor, oculomotor, social/ emotional and ADL skills. According to the BCBA, Yaldeinu is a special education school with approximately 70 students in 12 ungraded classrooms (Tr. p. 17).<sup>14</sup> Each classroom at the school is staffed by a special education teacher and 1:1 "instructors," and the students receive related services of OT, PT and speech (Tr. p. 17). The BCBA reported that the school uses a "consultative model" where "individualize[d] programming is created for each student, and the therapists and educators provide training and counseling support to classroom staff" (*id.*). She explained that the consultative model allows the students to be "immersed in a therapeutic environment throughout the day" (*id.*). The BCBA explained that prior to the start of the school year, teachers and instructors are trained in behavior analytic principles and they receive ongoing training throughout the school year (Tr. p. 19). The Yaldeinu director testified that teachers are responsible for supervising and training the 1:1 "instructors" and ensuring that the students' programs are run with fidelity (Tr. pp. 64-65).<sup>15</sup> The hearing record indicated that two 1:1 "instructors" rotate working with the student throughout his day to ensure generalization of skills and provide instruction, along with sensory and behavioral support and prompting and reinforcement when the classroom teacher is running a small group (Tr. pp. 48-49, 64-65).

The director specified that the student's individualized educational curriculum was based on his performance on several assessments, as well as any programs he had the prior school year (Tr. p. 67, 85-86). The director explained that the student was assessed using the "Vineland," "VB Mapp" and "an Orton-Gillingham based assessment," from which a curriculum and goals were developed by the student's educational team (Tr. pp. 65-66). According to the hearing record, the

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<sup>14</sup> The director explained that the classes are not graded because "every child functions so uniquely and individually within every single program" (Tr. p. 86).

<sup>15</sup> In this case, I disagree with the IHO that the parent failed to show that the staff was sufficiently qualified to provide appropriate special education to the student. The issue of staff qualifications at Yaldeinu was not well argued in the district's closing brief, in which the district merely recites the fact that instructors held bachelor's degrees, a fact that could just as easily support the parent's position (Dist. Ex. 1 at p. 1). Furthermore, the thrust of the district's argument was that the district had "concerns about whether Yaldeinu is the most appropriate environment for [the student]" (*id.* at p. 4 [emphasis added]), and that the needs as described by the private school staff "could be addressed in the 6:1:1 environment in the public school setting" (*id.*) According to the BCBA, the student's classroom teacher held a master's degree in special education (Tr. p. 19). Her role was to provide training to the 1:1 instructors and oversee the instruction that took place (Tr. p. 34). The BCBA reported that the student's instructors held bachelor's degrees although she was unsure of the field that the degrees were in (Tr. pp. 34, 101). The Yaldeinu director explained that "the 1:1 instructor [wa]s the face person to [the student's] program" (Tr. p. 63). She indicated that the instructors were responsible for teaching the student academics, implementing his behavior plan, and collecting data (Tr. p. 63). In addition to the duties detailed above, the director reported that the teacher was responsible for serving as a liaison between the instructors and the director and related services providers, running small group instruction, holding team meetings and parent meetings, report writing, and goal setting (Tr. p. 64). The test for the parents' private placement is whether it is appropriate, not whether it is perfect or "most appropriate" as the district argued before the IHO (*C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 837 [2d Cir. 2014]), and while the evidence regarding the qualifications of the Yaldeinu personnel may not have been perfect, it is not so problematic that the parents' request for reimbursement must be denied.

student's ELA needs were addressed using multiple programs that specifically targeted his encoding skills at the word level, then generalizing those skills within phrases and sentences; and a comprehension program designed to target his ability to answer "wh" questions, retell stories, generate questions, activate his prior knowledge and make connections within texts (Tr. pp. 68-70). In math, the student was taught addition using the concrete, representational, abstract (CRA) model, along with addition strategies to teach the student how to figure out problems (Tr. p. 71; Parent Ex I at p. 2). With regard to the student's social skills, the director testified that Yaldeinu uses the program "Social Thinking" as a curriculum guide within the classroom, small group instruction, speech sessions, and to develop goals that are embedded into programs worked on and reinforced across all settings (Tr. p. 74; see Parent Ex. I at p. 2). The director described Social Thinking as a program that "connects behavior, emotions and consequences so that children can learn to behave appropriately, to get the consequences they desire" (Tr. p. 75). The student's speech and language needs were addressed through instruction by a speech-language pathologist in addition to 1:1 programs (Tr. p. 77). As the student worked on the 1:1 programs they were generalized to the group setting and reinforced throughout his day (Tr. p. 77).

The director emphasized the student's need for a sensory diet, opining that the student made significant progress because of the "heavy emphasis on OT and how much it is interspersed throughout his day" (Tr. p. 80). She reported that Yaldeinu has two sensory gyms that provide a variety of specialized equipment that the student had access to throughout his day (Tr. pp. 82-83, 102). The OT supervisor testified that the sensory gym provided for, but was not limited to, gross motor activities, proprioceptive input, balance equipment, and sensory equipment (Tr p. 126). She explained that Yaldeinu provided four sensory groups that were embedded into the student's day, along with three 1:1 OT sessions provided by an occupational therapist, and a sensory diet that was completed multiple times per day (Tr. pp. 120-21). The OT supervisor testified that the four group sessions consisted of a deep pressure massage group and stations designed to provide students with proprioceptive input and stimulation to increase alertness for learning; a cardio movement music group that focused on cardiovascular health and incorporated motor planning motions and movements to promote coordination; a mind and body group that facilitated the students' ability to work on teams while following motor instructions; and a reflex integration group designed to improve neurological maturity (Tr. pp. 123-26). The OT supervisor noted the importance of having sensory equipment available to the student (Tr. pp. 127-128) She explained that the student became dysregulated easily and frequently, that he would seek out sensory input to keep himself regulated, and that sensory feedback was very important to him (Tr. p. 127). The OT supervisor opined that use of the sensory strategies helped to decrease the student's anxiety (id.). With regard to the student's graphomotor and ADL skills, the OT supervisor testified that the student participated in an "intense sensory diet [] up to five times a day, and more if necessary" and that decreasing the student's dysregulation allowed the student to begin to develop graphomotor and ADL skills (Tr. p. 130).

At Yaldeinu, the student's behavior was addressed under the supervision of a BCBA whose role it was to complete functional behavior assessments, create behavior plans and train staff on the behavior plans and principles of behavior analysis (Tr. p. 16). The BCBA detailed the "many different principles" of applied behavioral analysis (ABA) that were used with the student including a differential reinforcement of other (DRO) behavior protocol where the student was reinforced if an undesired behavior was not displayed; task analysis; errorless teaching; a prompting hierarchy and various prompting strategies (Tr. pp. 20-22). She opined that the student

required ABA techniques and strategies to maintain his level of focus and attention, which then increased his ability to learn new academic skills, and to address his behavioral needs (Tr. p. 22). The BCBA explained that the student required a behavior plan and supports due to his high level of distractibility, impulsivity, and anxiety, and more specifically in order to redirect him back to task and support him when his behavior escalated (Tr. p. 24). According to the BCBA, the student's behaviors ranged from a small hit or pinch and crying ,and whining, to tantrum-like behavior (i.e., flopping to the floor, hitting, kicking, pulling hair, scratching and biting) (Tr. pp. 18, 25). According to the BCBA, the student's behavior was addressed by a behavior plan which included antecedent proactive strategies, frequent sensory breaks, and function-based responding, and a specific protocol was in place for aggressive behaviors (Tr. pp. 25-26). The BCBA explained that data was collected twice per day on behaviors staff was looking to increase, as well as on harmful and maladaptive behaviors (Tr. p. 26).

In assessing the instruction provided to the student at Yaldeinu, the IHO identified the lack of evidence in the hearing record concerning the licensing or credentials of the student's teachers and service providers as a factor weighing against a finding that Yaldeinu was an appropriate unilateral placement. While acknowledging that private school teachers do not have to be state certified, the IHO also stated that "they should have qualifications to teach" and "speech-language pathologists and occupational therapists must be licensed" in New York State (IHO Decision at p. 10). Although the information in the hearing record concerning the qualifications, credentials and practical experience of the student's teachers and service providers at Yaldeinu may have been less than optimal, it is well settled that the legal standards by which unilateral placements are judged expressly allow for flexibility and consideration of the totality of the circumstances rather than rigidly proscribed criteria (see Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65 ["No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits . . . [and] . . . 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"]) Accordingly, unilateral placements generally "need not meet state education standards or requirements" to be considered appropriate to address a student's needs, and furthermore, as noted by the IHO, nonpublic or private schools need not employ certified special education teachers or have their own IEP for the student (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14). In addition, a failure to furnish every special service necessary for the student, including related services, will not render a unilateral placement inappropriate if the placement as a whole is reasonably calculated to enable the student to receive educational benefits (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014]). As discussed in detail above, there is information included in the hearing record that Yaldeinu addressed the student' academic, pragmatic, speech- and language, fine motor, oculomotor, social/ emotional and ADL needs through specialized instruction and services that were reasonably calculated to provide the student with educational benefits.

## **2. Progress**

A review of the hearing record reveals that the student also made progress while attending Yaldeinu during the 2018-19 school year. A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not

dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). With respect to the student's progress at Yaldineu, the parent stated that the student had become ore conversational, he came home calm and happy, he could talk a little bit more about his day, he remembered things and made associations, and his response to questions was more on point (Tr. pp. 166-67). According to the BCBA, the student was maintaining appropriate behavior for longer intervals; with prompting the student could engage in a turn-taking type activity with a peer; his ability to remain focused increased; his self-awareness was improving; he was identifying when he needed a break or proprioceptive input; and the frequency, duration and intensity of his tantrum-like behavior had decreased (Tr. pp. 36-39, 54).

The Yaldeinu director testified that the student had made progress in "every domain"; specifically, in social and behavior skills, sensory regulation and academics (Tr. p. 83). She reported that by February 2019, the student's reading level had increased from level D (kindergarten/early first grade) to level E/F (first grade) and he had mastered the ability to spell words with consonant diagraphs and initial and final consonant blends; answer basic "wh" questions including "why"; retell the sequence of a story including the setting; and make connections within text including connecting with emotions (i.e. "I felt like that when...") (Tr. pp. 69, 87).

In math, the director reported that student improved in his ability to compute addition facts using concrete and representational materials, count money, count by ones and skip count by fives, understand the concept of time, tell time on a two-dimensional object, tell time of day activities and compute word problems for time elapse (Tr. pp. 72-73).

The director reported that the student's social skills improved in that his ability to sit and attend, without touching, had increased and his ability to gain peers' attention by calling their names and to answer when his name was called had also increased (Tr. p. 75). In addition, the director noted an increase in the student's ability to read and track eye gaze within a conversation, take turns within a conversation and add to a group discussion, along with a significant decrease in the student's name-calling in a group setting (Tr. pp. 75-76, 78).<sup>16</sup>

With regard to speech and language, the director indicated that the student increased his vocabulary and moved on to concepts (Tr. p. 76). She reported that the student had a greater ability to tell daily and monthly time sequences and was beginning to understand that there was a "before" and "after" and to retell things in sequence (Tr. pp. 77-78). The director further reported that the

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<sup>16</sup> It is unclear to me whether the witness was referring to a decrease in calling other students by insulting names or calling out the names of other students in a repetitive manner, but a decrease in either weighs in favor of a finding of progress.



student increased his ability to visualize and retell personal narratives and to identify a subject and predicate within a sentence (Tr. p. 78). In addition to the director's testimony, a December 2018 speech therapy report indicated that the student had made progress with his sequencing skills, was continuing to learn to visualize objects and their parts, was working on identifying the main idea in a sentence or picture and had improved his ability to tell a personal narrative (Parent Ex. G at p. 1). Additionally, the report indicated that the student had improved in his ability to generate "who" and "what doing" questions after reading simple sentences; gained an understanding of the significance of eye gaze in himself and other; and his ability to take turns in a conversation and stay of topic using the process of association had improved with verbal and visual cues (id. at p. 2).

According to the OT supervisor, the student improved in his ability to employ self-regulation strategies (when cued) in order to calm himself down and was attempting to use the strategies on his own (Tr. p. 128). The OT supervisor noted a decrease in both intensity and duration of the student's episodes of dysregulation (id.). With respect to graphomotor skills, the OT supervisor reported that the student was able to write upper and lowercase letters, whereas at the end of the previous school year he could only write uppercase letters (Tr. pp. 128-29). In terms of ADLs, the OT supervisor testified that the student improved in his ability to fasten buttons of various sizes on himself, and his utensil grasp became more appropriate and his use of utensils became consistent (Tr. p. 129). According to the January 2019 OT mid-year report, the student was progressing nicely in many areas of skilled development (Parent Ex. H at p. 1). The occupational therapist noted that the student was engaging in less hand flapping, bouncing up and down and "other related body postures when provided with adequate sensory and proprioceptive input throughout the day" (id.). She further noted that with adequate input, the student's impulsive hitting and biting behaviors were significantly diminished (id.). The OT mid-year report indicated that the student was making slow and steady progress in body awareness, core strength and postural control; and that he benefitted from consistent strengthening of his core musculature; citing noticeable improvement (id. at p. 2). The occupational therapist also reported that the student had mastered areas within the self-care domain such as "opening and closing" various size buttons, independently attaching the two ends of a zipper, zipping up and down, and fastening snaps (id.).

The IHO found that it was not possible to assess the student's progress at Yaldeinu "because the only documentation of his academic skills, social/emotional/behavioral levels, and daily living skills is anecdotal by staff that does not provide direct instruction or provide direct service to him" (IHO Decision at p. 11). She also noted that no one who directly instructed or provided services to the student testified at the hearing, no objective assessments from Yaldeinu were submitted although testimony from Yaldeinu staff members referenced their existence and no IEP or BIP from Yaldeinu was placed in evidence (id.). As an initial matter, it bears noting that all of the staff members from Yaldeinu who testified at the impartial hearing were familiar with the student and knowledgeable with respect to his performance throughout the school year. The BCBA testified that she had known the student through the school for two years and observed him at least on a weekly basis (Tr. p. 18). As noted above, she testified that she personally worked with the student, not providing individual sessions like speech-language therapy or OT, rather during times staff was making behavioral changes, for example to the student's rate of reinforcement (Tr. p. 40). The Yaldeinu director testified that her role included guiding the teachers and instructors through the assessment process, goal setting, program writing, setting up a curriculum book, modeling/teaching/observing programs, and reviewing data (Tr. pp. 62-63). She indicated that she was familiar with the student and observed him multiple times per week in the

classroom (Tr. p. 63). The director testified that along with the BCBA, classroom teacher, and related service providers she was responsible for creating the student's individual educational curriculum for the 2018-19 school year (Tr. p. 66). The OT supervisor testified that she supervised the student's treating occupational therapist, whom she met with on a weekly basis to discuss the students on her caseload (Tr. pp. 120-21).

Moreover, the hearing record includes some uncontroverted evidence from Yaldeinu, in the form of both the Yaldeinu staff testimony and progress reports, showing the student made progress with respect to improved behavior and communication, peer interactions, self-regulation, reading, math and speech-language skills. While the IHO correctly found that the lack of objective data in the form of evaluations and assessments makes it more difficult to accurately determine the extent of the student's progress (see R.H. v. Bd. of Educ. Saugerties Cent. Sch. Dist., 2018 WL 2304740, at \*6, \*7 [N.D.N.Y. May 21, 2018] [finding insufficient evidence of the student's progress at the unilateral placement where the hearing record did not include objective evidence, such as report cards, progress notes, work samples, standardized assessments, or progress towards written goals]), under the particular circumstances of this case, the progress reports and testimony from Yaldeinu staff sufficiently detail the student's areas of improvement for purposes of evaluating the appropriateness of Yaldeinu as a unilateral placement (see generally Application of the Bd. of Educ., Appeal No. 18-049).

Overall, based on the foregoing, the hearing record supports finding that Yaldeinu offered specially designed instruction to address the student's identified unique needs as discussed above, and that the student demonstrated progress while attending Yaldeinu for the 2018-19 school year; therefore, Yaldeinu constituted an appropriate unilateral placement for the student for the 2018-19 school year.

Finally, I note that many of the IHO's factual findings marshaling the evidence were accurate, but I differ with respect to the legal conclusion to be drawn from those facts. For instance, it is true that the testimonial evidence to support the parents' requested relief was offered by witnesses from Yaldeinu who were not the student's primary or "direct" instructors (IHO Decision at p. 10). But the witnesses overall demonstrated sufficient familiarity with the student to support the parents' reimbursement arguments. While it might be ideal to call only a student's direct instructors and special education providers as witnesses during an impartial hearing in a reimbursement case, there is no binding authority holding parents to such a requirement that the witnesses be direct providers, especially when the other available witnesses, such as supervisory personnel, demonstrate sufficient familiarity with the student and are capable of describing how the special education and related services that the private school provided to the student was tailored to address the student's unique needs in light of his circumstances. The witnesses presented by the parents in this case adequately met that standard.

## **VII. Conclusion**

Based on the foregoing, I find that the parents have met their burden to demonstrate that their unilateral placement of the student at Yaldeinu for the 2018-19 school year was appropriate (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370; see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Further, as the district did not appeal the IHO's determination that had

they prevailed the parents adequately demonstrated the need for direct tuition payment, I will order the district to make direct payment to Yaldeinu.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the decision of the IHO dated March 28, 2019 is modified by reversing that portion which determined that the parents failed to establish that the Yaldeinu School was an appropriate unilateral placement for the student's 2018-19 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for their out-of-pocket tuition expenses for the student paid to the Yaldeinu School for the 2018-19 school year; and

**IT IS FURTHER ORDERED** that the district shall directly pay the Yaldeinu School the outstanding balance due of the \$105,000 for the cost of the student's tuition for the 2018-19 school year.

**Dated:** Albany, New York  
June 7, 2019

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