



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-008

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:

Law Offices of Adam Dayan, PLLC, attorneys for petitioner, by Amled Pérez, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, 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 the costs of the student's tuition at the York Preparatory School (York Prep) for the 2019-20 and 2020-21 school years. Respondent (the district) cross-appeals from the IHO's decision awarding the parent reimbursement for the costs of a privately obtained psychoeducational evaluation. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student in this case has primarily attended district public schools for his school-aged education from kindergarten through seventh grade (see Parent Ex. KK at pp. 1-2). According to a neuropsychological evaluation of the student conducted in March and April 2017 (March 2017 neuropsychological evaluation) when the student was nearing the conclusion of seventh grade in a district public school (2016-17 school year), the parent privately obtained the evaluation due to concerns with "attention and executive functioning, related to his diagnosed and well-documented Attention-Deficit/Hyperactivity Disorder [ADHD], as well as [concerns] with appropriate

academic progress within [the student's] present school setting" (*id.* at p. 1).¹ As reported in the March 2017 neuropsychological evaluation report, the student's seventh grade IEP reflected that the student was eligible for special education as a student with an other health impairment and included recommendations for the student to receive integrated co-teaching services (ICT) for instruction in mathematics, English language arts (ELA), philosophy, science, engineering, and "other classes as well" (*id.* at p. 2). The same evidence further reflects that the student's IEP included "daily" special education teacher support services (SETSS), counseling services (one 45-minute session per week of individual counseling and one 45-minute session per week of counseling in a small group), testing accommodations (frequent breaks, preferential seating, on-task focusing prompts, and a separate location with minimal distractions), and a multitude of strategies to address the student's management needs (*id.*).

According to the March 2017 neuropsychological evaluation report, the previous June 2016 evaluation included a "continued diagnosis of [an] ADHD, Combined presentation," as well as the following recommendations: "continued placement" in an ICT setting "with supports, extended time, preferential seating, short breaks as needed, a functional behavioral analysis [FBA] and behavioral intervention plan [BIP] to address issues with self-regulation, cognitive behavioral therapy [CBT] to address emotional and self-regulation concerns outside of school as well as counseling in school" (Parent Ex. KK at pp. 1-2). In addition, the June 2016 neuropsychological evaluation report included recommendations for the "provision of teacher notes ahead of class, frequent school-to-home communication, and ongoing medical follow-up to address medication management" (*id.* at p. 2). Overall, and when comparisons could be made between the March 2017 testing results and the June 2016 testing results, the evaluator indicated that the results of the March 2017 neuropsychological evaluation of the student were consistent with the results of the June 2016 neuropsychological evaluation of the student (*id.* at pp. 5-6, 9-10, 12). Given the March 2017 neuropsychological testing results, the evaluator determined that the student demonstrated areas of strength in "basic reading skills such as sight word reading and decoding, spelling, and math calculation skills" (*id.* at p. 12). Comparatively, the student demonstrated "slightly weaker" skills in the areas of "math word problem solving, reading comprehension, and reading fluency," and according to the evaluator, the student's academic areas "most affected by his executive functioning difficulties include[d] writing composition and math fluency skills" (*id.*). The evaluator also opined that because the student's "promotion [wa]s in doubt" at that time, the student required a "more specialized academic placement within a small, more supportive environment for him to make appropriate gains" (*id.*). More specifically, the evaluator recommended a "placement within a smaller (i.e., student-to-teacher class ratio), highly-structured, supportive, and full-time special education classroom that [wa]s housed within a small, nurturing, and highly specialized school environment" (*id.* at p. 13). The evaluator also recommended that the student "should continue to receive both individual and small group counseling on his IEP," as well as family counseling with his parent; and multiple classroom accommodations (i.e., preferential seating, testing accommodations) (*id.* at pp. 14-16). The evaluator also noted that the student should attend

¹ The March 2017 neuropsychological evaluation report noted that the student was prescribed medication for his ADHD, which the student was diagnosed as having when he was six years old (*see* Parent Ex. KK at p. 1). In addition, the evaluation report indicated that a previous neuropsychological evaluation of the student took place in June 2016 (conducted at a different facility, the "Child Neurology department") (*id.* at p. 2). The hearing record does not include a copy of the June 2016 neuropsychological evaluation (*see generally* Tr. pp. 1-665; Parent Exs. A-Z; AA-NN; Dist. Exs. 3-5; 8-14; IHO Exs. I-XII).

a "structured summer program that c[ould] effectively address his inattention and executive functioning needs when school [wa]s not in session" (id. at p. 16).

After finishing seventh grade at a district public school, the student attended a nonpublic school at district expense for the 2017-18 and 2018-19 school years (see Tr. pp. 451-53; Parent Exs. A at pp. 1-2; I at pp. 2-3; IHO Ex. I at pp. 1-2). In November and December 2018 when the student was attending an eighth grade classroom at the nonpublic school, the parent obtained a psychoeducational evaluation (January 2019 psychoeducational evaluation) of the student from the same evaluator who conducted the March 2017 neuropsychological evaluation of the student (compare Parent Ex. I at pp. 2-3, with Parent Ex. KK at p. 1).^{2, 3} The evaluator indicated in the report that the parent sought the "updated assessment . . . in order to re-examine [the student's] cognitive, academic, and social-emotional-behavioral strengths and weaknesses and to aid in appropriate educational and treatment planning" (Parent Ex. I at p. 2).

According to the January 2019 psychoeducational evaluation report, when the student began attending the nonpublic school he "was placed in a self-contained class of approximately [five to six] students per class," and the student was "mandated to continue to receive counseling services" (Parent Ex. I at p. 3). At the time of the psychoeducational evaluation, the student was enrolled in an eighth grade classroom at the same nonpublic school, which was described as a "private special education school environment for students with learning differences" (id.).⁴ The evaluator reported that the student's first quarter report card for eighth grade reflected the following course averages: Algebra I, 76; Introduction to Languages, 78; Music 1, 94; English, 85; American Studies II, 84; and Earth Science, 80 (id.). The evaluator also reported that, based on teacher comments, the student was described as having "high potential, but that he easily los[t] focus, bec[a]me[] distracted, rushe[d] through his work and ma[d]e[] careless errors, and lack[ed] effective problem-solving strategies" (id.).

Similar to the comparisons made between the student's March 2017 neuropsychological evaluation testing results and the results of the June 2016 neuropsychological evaluation, the evaluator found that the student's December 2018 psychoeducational evaluation testing results

² While not explained in the hearing record, chronologically and based upon the evidence in the hearing record, the student should have been attending eighth grade during the 2017-18 school year, rather than the 2018-19 school year, as the evaluator noted in the December 2018 psychoeducational evaluation report (compare Parent Ex. A at p. 1, with Parent Ex. KK at p. 1, and Parent Ex. I at pp. 2-3).

³ Throughout the hearing record, the January 2019 psychoeducational evaluation was, at times, referred to as a neuropsychological evaluation (see, e.g., Tr. p. 145; Parent Ex. A at pp. 6, 9; IHO Decision at p. 18). However, the evaluation report itself clearly identifies the assessment as a psychoeducational evaluation (see Parent Ex. I at p. 2). For the purpose of clarity, the January 2019 psychoeducational evaluation will be referred to as such within the body of this decision.

⁴ In the January 2019 psychoeducational evaluation report, the evaluator indicated that, according to the parent, the student "made progress since his transition" to the nonpublic school, but he continued to "present as argumentative" and had "difficulty finishing his homework and waking up for school in the morning, which often necessitate[d] added support and numerous reminders from [the parent] to keep him on track" (Parent Ex. I at p. 3). The parent was also concerned that the student's "current placement [was] not academically challenging enough for him and question[ed] whether the peers in his class [wer]e appropriate, both cognitively and socially" (id.).

were, overall, consistent with—or improved from—those testing results in the June 2016 neuropsychological evaluation or the March 2017 neuropsychological evaluation (see Parent Ex. I at pp. 5-9). Based on the December 2018 testing results, the evaluator recommended that, while the student made "positive strides . . . behaviorally" at the nonpublic school he was attending, the student required a "different placement for high school" (id. at p. 10). More specifically, the evaluator recommended a "small (i.e., no more than 10-12 students), structured, and supportive (due to his executive functioning difficulties and learning challenges), but more academically enriching and appropriately challenging mainstream class setting (given his strong cognitive and academic potential)," which should be "housed within a small school environment" (id.). The evaluator also recommended "daily, pointed, evidence-based support in select subject areas with which he struggle[d], as well as homework assistance" (id. at pp. 10-11). According to the evaluator, the "meetings should be both on skills development in academic arenas (sic) of need (i.e., writing, vocabulary building) and practice on developing his executive functioning skills (e.g., organization, planning, initiation, self-monitoring)" (id. at p. 11). The evaluator noted that the student should "continue to receive both individual and small group counseling on his IEP," as well as family counseling with his parent (id.). Finally, the evaluator repeated, verbatim, the recommendations for multiple classroom accommodations set forth in the March 2017 neuropsychological evaluation as her recommendations in the January 2019 psychoeducational evaluation report, and recommended the same "summer program" for the student (compare Parent Ex. I at pp. 11-13, with Parent Ex. KK at pp. 13-15).

By letter dated June 13, 2019, the parent notified the district of her intentions to unilaterally place the student in a 12-month school year program for the 2019-20 school year at a yet-to-be-determined nonpublic school at district expense (see Parent Ex. B at pp. 1-2).

On June 24, 2019, the parent executed an enrollment contract for the student's attendance at York Prep and for his participation in the Jump Start program for the 2019-20 school year (ninth grade) (see Parent Ex. C at pp. 1, 4; see generally Parent Ex. D [reflecting the parent's payments toward the student's 2019-20 tuition costs at York Prep]).⁵ For the 2019-20 school year, the student attended York Prep beginning on or about September 20, 2019 (see Tr. pp. 363-64; see generally Parent Exs. G-H).

By letter dated December 16, 2019, the parent provided the district with a copy of the January 2019 psychoeducational evaluation report (see Parent Ex. I at pp. 1, 18).

On May 21, 2020, the parent executed an enrollment contract for the student's attendance at York Prep and for his participation in the Jump Start program for the 2020-21 school year (10th grade) (see Parent Ex. P at pp. 1-2, 4; see generally Parent Ex. Q [reflecting the parent's payments toward the student's 2020-21 tuition costs at York Prep]).

By letter dated June 17, 2020, the parent notified the district of her intentions to unilaterally place the student in a 12-month school year program at York Prep for the 2020-21 school year at district expense (see Parent Ex. O at p. 1).

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

In a "Summer School Course Report," dated June 19, 2020, the director of York Prep's summer school confirmed that the student had received 25 hours of tutoring in "World History" and described, therein, the information covered during the tutoring sessions (Parent Ex. DD at p. 1). The hearing record reflects that, at the impartial hearing, the director of the Jump Start program at York Prep testified that the student had failed the first two quarters (or the first full semester) of "World History" (Tr. pp. 360-61; see Parent Exs. M at p. 1; Y at p. 1; Dist. Ex. 3). The parent also testified at the impartial hearing that the student had to "take a 25-hour class in order to be able to make up for his class that he failed" in the 2019-20 school year, which cost the parent an additional \$2500.00 (Tr. pp. 428-29, 446-47; see Parent Ex. EE-FF).

A. Due Process Complaint Notice

By due process complaint notice dated July 2, 2020 (July 2020 due process complaint notice), the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see IHO Ex. I at p. 1). Generally, the parent indicated that the student's ADHD, and his "significant attention and executive functioning weaknesses," impeded his ability to make academic and social/emotional progress and put the student "at risk of regression during vacations and summer breaks" (id. at p. 5). The parent asserted that because the student required a 12-month school year program, the district was obligated to recommend a placement no later than "June 17, 2020" and to "ensure [the student] had an appropriate program and placement for the 2020-21 school year in effect by July 2, 2020" (id. at p. 5, citing Jose P. v. Ambach, 669 F.2d 865, 867 [2d Cir. 1982] and the "Standard Operating Procedures Manual: The Referral, Evaluation, and Placement of School-Age Students with Disabilities"). The parent further asserted that the district failed to convene a CSE meeting or develop an IEP for the student for the 2020-21 school year, and thus, failed to offer the student a FAPE (id. at pp. 5-6). The parent indicated that, due to the district's failure to develop an IEP for the student, she unilaterally placed the student at York Prep for the 2020-21 school year (id. at p. 6). As relief, the parent requested an order directing the district to reimburse the parent for any expenses she paid for the costs of the student's tuition at York Prep, and to directly fund or prospectively pay for any outstanding tuition costs at York Prep for the 2020-21 school year (id. at p. 7). In addition, the parent requested an order directing the district to provide the student with round-trip transportation to York Prep or to otherwise fund or directly pay the costs of privately obtained transportation (id.).

B. Facts and Events Post-Dating the Due Process Complaint Notice

In a letter to a district CSE chairperson dated August 18, 2020, the parent forwarded a copy of a letter from the evaluator who conducted the student's March 2017 neuropsychological evaluation and the January 2019 psychoeducational evaluation, dated August 13, 2020 (see Parent Ex. L at pp. 1-2). The parent asked the CSE to consider the recommendation from the evaluator when developing an IEP for the student for the 2020-21 school year (id. at p. 1). The evaluator's letter indicated that the student had a "history" of ADHD and was currently attending York Prep where he "receive[d] specialized learning and executive functioning support through the Jump Start program" (id. at p. 2). The evaluator reiterated that her recommendation in 2018 was that, in addition to his program at York Prep, the student "receive daily, pointed, evidence-based learning and executive functioning remediation in select subject areas with which he struggles, as well as homework assistance" (id.). Further, the evaluator had "suggested" that the student "receive

supplemental programming to assist him with promoting effective techniques to help with self-monitoring and self-management" (id.). At the time of the August 2020 letter, the evaluator was "continuing to recommend that [the student] receive supplemental executive functioning intervention and learning support after school, at a rate of 5 hours per week, to specifically assist with homework management, assignment completion, and rehabilitation of his metacognitive skills" (id.).

On August 19, 2020, a CSE convened to conduct the student's annual review and developed an IEP for the 2020-21 school year (10th grade) (see Parent Ex. AA at pp. 1, 15; see generally Parent Ex. CC; Dist. Exs. 8-14 [reflecting CSE meeting notices scheduling the meeting and emails exchanged concerning contact information]). Finding the student eligible to receive special education as a student with an other health-impairment, the August 2020 CSE recommended ICT services for instruction in ELA, mathematics, social studies, and sciences; three sessions per week of SETSS for support in ELA; one 45-minute session per week of individual counseling; and one 45-minute session per week of counseling in a group (see Parent Ex. AA at pp. 10-11).⁶ In addition, the August 2020 IEP included strategies to address the student's management needs, including: chunking of material and pacing guides, structured routines to minimize distractions, frequent prompting for redirection and refocusing, breaks as needed when stressed or overwhelmed, assistance with thinking through the short and long-term consequences of his actions, and verbal praise (id. at p. 4). The August 2020 IEP also included annual goals, measurable postsecondary goals, testing accommodations, and a coordinated set of transition activities for the student (id. at pp. 5-10, 12-13).⁷

In an email to the parent dated August 20, 2020, the district forwarded a copy of the August 2020 IEP, and the parent acknowledged receipt of the IEP in an email of the same date (see Dist. Ex. 12 at pp. 1, 3).

In a prior written notice to the parent dated September 10, 2020, the district summarized the special education and related services recommended for the student for the 2020-21 school year (see Dist. Ex. 4 at pp. 1-2).⁸ In a school location letter dated September 20, 2020, the district

⁶ The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

⁷ The August 2020 IEP reflected that the student was receiving "clinical therapy outside of school" to support his "emotional concerns" and that he took "medication at home to further address such areas" (Parent Ex. AA at pp. 3, 16).

⁸ The prior written notice indicated that the August 2020 CSE relied upon the student's June 2016 neuropsychological evaluation report; a psychological evaluation report, dated November 12, 2018 (i.e., the January 2019 psychoeducational evaluation); and a student report card, dated July 18, 2020, in the decision-making process when developing the 2020-21 IEP (see Dist. Ex. 4 at p. 2). The hearing record does not include a report card for the student dated July 18, 2020; instead, the hearing record includes what appears to be a final report card for the student for the 2019-20 school year, dated June 9, 2020, as well as a quarterly progress report, dated November 13, 2019, for the same school year (see Dist. Ex. 3; Parent Ex. M). Thus, it appears that the report card reflected in the prior written notice refers to the student's June 9, 2020 report card. In addition, the August 2020 IEP reflected the following evaluative information within the present levels of performance section: a year-end report card, dated June 6, 2020; and some of the testing results from the December 2018 psychoeducational evaluation (see Parent Ex. AA at p. 2). According to information within the August 2020 IEP,

identified the district public school to which the student was assigned in order to implement the 2020-21 IEP (see Dist. Ex. 5 at p. 1).

For the 2020-21 school year, the student attended York Prep (see generally Parent Exs. T-U).

C. Amended Due Process Complaint Notice

In an amended due process complaint notice dated September 16, 2020 (amended due process complaint notice), the parent alleged that the district failed to offer the student a FAPE for the 2019-20 and the 2020-21 school years (see Parent Ex. A at p. 1). Generally, the parent indicated that the student's ADHD, and his "significant attention and executive functioning weaknesses," impeded his ability to make academic and social/emotional progress and put the student "at risk of regression during vacations and summer breaks" (id. at p. 5). The parent further indicated that the student required a "small classroom with 10 [to] 12 students with a structured and supportive environment to address his executive functioning issues" (id.). In addition, the parent noted that "[e]ducators should be familiar with [the student's] learning style and placement with well-behaved peers with similar academic functioning levels [wa]s essential to ensure [the student's] educational progress" (id.). Due to the student's difficulty completing schoolwork and homework, as well as to provide the student with an opportunity to "practice/develop his executive functioning skills," the parent indicated that the student required "after school support" (id.). The parent also noted that the student required counseling, psychotherapy, and classroom and testing accommodations (id. at pp. 5-6).

With respect to the 2019-20 school year, the parent more specifically asserted that the district failed to convene a CSE meeting prior to the start of the school year in July 2019 (see Parent Ex. A at p. 6). The parent also asserted that, in a letter dated June 13, 2019, she informed the district that the student had last been evaluated in "May 2017" and that she was considering placing the student in a nonpublic school (id.). Next, the parent indicated that because the district failed to "timely and properly assess [the student's] academic and social emotional skills, [she] secured [a psychoeducational] evaluation" and provided the district with a copy of the evaluation report in December 2019 (id.). The parent alleged that a CSE failed to convene a meeting to review and consider the psychoeducational evaluation of the student and failed to develop an IEP for the student (id.).

Turning to the 2020-21 school year, the parent repeated much of the same information and allegations from the July 2020 due process complaint notice (compare Parent Ex. A at p. 7, with IHO Ex. I at pp. 5-6). In addition, the parent raised concerns with the scheduling of the August 2020 CSE meeting and the inability of the student's York Prep teachers and providers to attend the CSE meeting (see Parent Ex. A at pp. 7-8). The parent alleged that the August 2020 CSE ignored and failed to consider a letter composed by the private evaluator, who recommended five hours per week of after school support or tutoring for the student (id. at p. 8). In addition, the parent asserted that she did not receive a copy of the August 2020 IEP and could not review the student's annual goals; therefore, "it was difficult . . . to determine whether the recommended placement

the "only updated document available on th[at] day during the meeting was the school's report card," and the "present IEP w[ould] be updated upon receipt of undated evaluations" (id.).

would appropriately meet [the student's] needs" (id.). The parent also noted that, despite her attempts, she was unable to schedule a tour of the assigned public school site (id.).

To remedy the district's failure to offer the student a FAPE for the 2019-20 and 2020-21 school years, the parent requested the following as relief: an order directing the district to reimburse the parent for any expenses she paid for the costs of the student's tuition at York Prep for the 2019-20 and 2020-21 school years, and to directly fund or prospectively pay for any outstanding tuition costs at York Prep for both school years (see Parent Ex. A at p. 9). In addition, the parent requested an order directing the district to directly fund the costs of after school academic support, at a rate to be determined by the IHO, and for no less than five hours per week (id.). The parent also requested an order directing the district to reimburse her for the "expenses incurred in securing an extended school year program for [the student] for the 2019-2020 and 2020-2021 school years" (id.). Additionally, the parent requested an order directing the district to reimburse or directly fund the costs of the student's psychoeducational evaluation, and to provide the student with round-trip transportation to York Prep or to otherwise fund or directly pay the costs of privately obtained transportation (id. at p. 10).

D. Facts and Events Post-Dating the Amended Due Process Complaint Notice

In an email to the district dated November 24, 2020, the parent forwarded a letter to the CSE chairperson (see Parent Exs. GG at pp. 4-5; JJ at p. 1). In the letter attached to the email, the parent informed the CSE chairperson that she had made "multiple attempts in the past two months to contact the school via telephone" to arrange a visit or tour (Parent Ex. JJ at p. 1). The parent's letter detailed her inquiries to the district, including that she received "information that the school had moved from its original location" and that the school address on the school location letter differed from the address listed on the school website (id.). Since the parent was unable to speak with anyone at the assigned public school site, she advised the district that she could not "make an informed opinion" regarding its "suitability" for the student (id.). The parent indicated that if the CSE could "clarify [her] concerns, allow [her] to visit the school or otherwise find out the necessary information about the school's curriculum, size, [and] services," she could "consider the possibility of enrolling" the student; however, "[i]n the meantime, [she] w[ould] continue his enrollment" at York Prep until she could determine whether the assigned public school site was appropriate for the 2020-21 school year (id. at pp. 1-2).

On November 28, 2020, the CSE chairperson responded to the parent's email, apologizing for the parent's inability to contact the student's assigned public school site and linking her email to the principal of the assigned public school site, as well as an additional individual, so that the parent could reach out to them with questions about the assigned public school site (Parent Ex. GG at p. 4). The parent responded to the CSE chairperson and asked whether the assigned public school site had "moved"; the CSE chairperson then responded that she did "believe the school [had] moved" (id. at p. 3). In an email to the parent dated November 30, 2020, the parent coordinator at the assigned public school site—who was the second individual the CSE chairperson identified in her previous email to the parent—responded to the parent's inquiry about the school's location (id. at pp. 2-3). The parent coordinator confirmed that the assigned public school site had not moved locations, but explained that, due to the pandemic, "all students [wer]e remote, and [the] school campus ha[d] been closed for months due to repairs" (id. at p. 2). The parent coordinator asked the parent how she could assist her, and in response, the parent indicated that

she had "questions about the school" (*id.*). The parent coordinator linked the IEP coordinator at the assigned public school site to her response to the parent's email, and the IEP coordinator then emailed the parent with her contact information for any questions the parent may have had about the special education program at the assigned public school site (*id.* at pp. 1-2).

Thereafter, in a letter to the district CSE chairperson dated December 14, 2020, the parent informed the district that she made contact with the IEP coordinator at the assigned public school site on December 10, 2020 (*see* Parent Ex. II at p. 1). Based upon the parent's conversation with the IEP coordinator, the parent determined that the assigned public school site was not appropriate for the student (*id.*). Having been provided with information concerning the overall size of the assigned public school site, the number of students in the regular education classes (approximately 25) and "core special education classes" (approximately 15), the absence of a music program, the organization of core classes based on the "school" as opposed to a student's individualized needs, and the fact that the "high school students [wer]e operating entirely online at present"—without any additional information concerning when, or if, the school would resume "in-person or hybrid learning"—the parent found the assigned public school site would not meet the student's need for a "small, structured instructional environment with regular individualized assistance to stay focused, complete assigned tasks, monitor and regulate his behavior, and achieve his academic goals" (*id.*). The parent further noted that the student required "specialized learning and executive-functioning support programs that [wer]e not available" at the assigned public school site (*id.*). As a result, the parent indicated that the student would remain enrolled at York Prep until the district could "provide a suitable placement that w[ould] address [his] specific needs" for the 2020-21 school year (*id.* at p. 2).

E. Impartial Hearing Officer Decision

On December 16, 2020, an IHO was appointed (*see* IHO Decision at p. 2). Initially, the IHO held two "status conferences" in January 2021; at the second status conference conducted on January 15, 2021, the IHO granted permission for the parent's amended due process complaint notice (*id.*). Following the conclusion of the resolution period, the parties and the IHO met over the course of four impartial hearing dates from February 25, 2021, through April 20, 2021, during which time the IHO allowed the parties to pursue settlement of the matter (*id.*).

On May 5, 2021, the parties proceeded to the impartial hearing on the merits of the matter (*see* Tr. p. 83). After a total of 15 days of proceedings, the impartial hearing concluded on October 13, 2021 (*see* Tr. pp. 1-665). In a decision dated December 22, 2021, the IHO found that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years (*see* IHO Decision at pp. 8, 12-15, 18). With respect to the district's failure to offer the student a FAPE for the 2019-20 school year, the IHO's rationale rested solely on the fact that the district did not defend this school year or present a case (*id.* at p. 8).

With respect to the 2020-21 school year, the IHO initially concluded that, contrary to the parent's assertion, the student was not entitled to receive a 12-month school year program (*see* IHO Decision at p. 12). The IHO reviewed the bases under which a student might be eligible to receive a 12-month school year program, and described those students set forth in State regulation, 8 NYCRR 200.6(k), noting, for example, if a student had "highly intensive management needs and require[d] a high degree of individualized attention and intervention" (*id.*). Under the facts of this

case, however, the IHO found that the student "would only qualify for [12-]month services if it were necessary to prevent substantial regression" (*id.*). The IHO concluded that the hearing record did not contain "any evidence of the likelihood of substantial regression," and therefore, the student was not entitled to a 12-month school year program (*id.*). Next, the IHO found that, contrary to the parent's contention, the evidence in the hearing record demonstrated that she received a copy of the August 2020 IEP (*id.* at p. 13, citing Tr. p. 432 and Parent Ex. X [reflecting the parent's affidavit]).

The IHO then addressed the parent's contentions concerning the August 2020 IEP, the absence of York Prep staff at the August 2020 CSE meeting, and the alleged failure to consider the private evaluator's recommendation for five hours per week of tutoring services in developing the August 2020 IEP (*see* IHO Decision at pp. 13-15). Turning first to the absence of York Prep staff at the CSE meeting, the IHO found that although staff were invited to participate, no one from York Prep attended the August 2020 CSE meeting (*id.* at p. 13). According to the IHO, the parent testified that York Prep staff were not available for CSE meetings during the summer, and she "expected there to be a reconvene with the school" (*id.*). However, the IHO reasoned that since the district "needed to finalize an IEP before the start of the school year in September," it was "difficult to imagine how a meeting could have been possible prior to the start of the school year" if York Prep staff were not available during the summer (*id.*). The IHO also indicated that the district school psychologist testified that the parent had not indicated a desire to invite the private evaluator to the CSE meeting (*id.*).⁹

As for the August 2020 IEP, the IHO reviewed the recommendations for ICT services, individual and group counseling, management needs, and annual goals, as well as the student's final grades for the 2019-20 school year at York Prep (*see* IHO Decision at p. 14). The IHO noted the parent's request for five hours per week of tutoring "because at York Prep [the student] had Jump Start in the beginning of the day and at the end of the day" (*id.*). According to the IHO, although the private evaluator recommended five hours per week of tutoring, she "had not had any contact with the [s]tudent since 2018" (*id.*).

Finding that the recommendations in the August 2020 IEP were "appropriate"—notwithstanding that the York Prep staff did not participate—the IHO indicated that the parent had not pointed to "any specific information that the York Prep staff would have provided that would have changed the information or the recommendations on the IEP" (IHO Decision at pp. 14-15). In addition, the IHO found that "[n]o one from York Prep testified with respect to the [s]tudent's needs for the 2020-2021 school [year] that were different from what was set forth in the IEP," and moreover, the student "did not require the specific services that York Prep had been providing or that were recommended by [the private evaluator] who had not seen the [s]tudent since 2018" (*id.* at p. 15). The IHO also found that the district offered the student a "program which included special education services throughout the day in the ICT class, which was a different type of program than he had been receiving at York Prep," and furthermore, that the student would have been provided the "executive functioning services" throughout the day in the ICT class (*id.*). As

⁹ While acknowledging that the parent did not assert any other violations regarding the composition of the August 2020 CSE, the IHO pointed out that since the York Prep staff could not attend, the district should have ensured the participation of a regular education teacher at the meeting (*see* IHO Decision at p. 13, citing 8 NYCRR 200.3[a][1][ii]).

a final point, the IHO found that the management needs in the August 2020 IEP, as well as the counseling services, addressed the student's "executive functioning and other needs" (id.).

Finally with respect to the 2020-21 school year, the IHO turned to the parent's contention that she could not visit or tour the assigned public school site (see IHO Decision at p. 15). According to the IHO, the evidence in the hearing record revealed that the contact person listed on the district's school location letter, who would provide "assistance in arranging a visit" of the assigned public school site, did not "work at the [assigned public school] site" (id.). However, the hearing record also included evidence that had the parent "called the site to arrange for a visit, they would have been directed to someone who help[ed] and answer[ed] questions for parents" (id.). The IHO noted that the "site was not available to begin classes even remotely during the 2020-2021 school year until mid-September" (id., citing Tr. p. 274).¹⁰ The IHO also noted that the parent informed the district, by letter dated November 23, 2020, that she could not visit the assigned public school site because the "number provided was incorrect" and she had no other contact number (see IHO Decision at p. 15). As a result, the IHO concluded that the district only had "remote services" in place "well after the start of the school year " and the hearing record failed to contain evidence that the district had a "placement" for the student at the start of the school year or that the parent had an opportunity to visit the assigned public school site,—which culminated in the finding that the district failed to offer the student a FAPE for the 2020-21 school year (id.).

With respect to whether York Prep was an appropriate unilateral placement for the student for the 2019-20 school year, the IHO concluded that it was not appropriate because York Prep did not offer or provide the student with counseling "at the beginning" of the 2019-20 school year (IHO Decision at pp. 8-10). More specifically, the IHO found that, based on the recommendation for individual and group counseling in the January 2019 psychoeducational evaluation to address the student's "executive functioning issues, which included self-regulation difficulties and difficulties with frustration," as well as to help the student "develop good coping skills," the absence of this related service at York Prep caused the student to struggle with his transition to the school and impeded his ability to "derive a benefit from his education from the beginning of the school year" (id. at pp. 10-11). The IHO pointed to the student's grades in English and his failing grades in World History during the first two quarters as evidence of the student's inability to "derive full benefit from his education," noting further that "counseling was a key ingredient of a program to support the [s]tudent's frustration and self-regulation" (id. at pp. 11-12).¹¹ The IHO further noted that although the student did not demonstrate a "large assortment of needs," counseling was one of those needs, and York Prep's failure to provide the service rendered the student's unilateral placement inappropriate for the 2019-20 school year (id.).

As the final criterion for an award of tuition reimbursement for the 2019-20 school year, the IHO briefly addressed equitable considerations (see IHO Decision at p. 12). Here, the IHO

¹⁰ A witness at the impartial hearing testified that, similar to all district public schools in September 2020, the student's assigned public school site opened for remote instruction on or about September 21, 2020 (see Tr. p. 274).

¹¹ According to the evidence in the hearing record, the student failed the history class for first two semesters at York Prep during the 2019-20 school year because he did not regularly hand in all of his assignments and struggled with test-taking (see Tr. pp. 358-59).

found that the parent provided the district with a 10-day notice by letter dated June 13, 2019, and that no equitable considerations weighed against the parent's request for an award of tuition reimbursement (id.). However, having found that York Prep was not appropriate, the IHO denied the parent's request for tuition reimbursement (id.).

With respect to whether York Prep was an appropriate unilateral placement for the 2020-21 school year, the IHO initially indicated that there was "little evidence submitted regarding the program offered" to the student for the 2020-21 school year, and any evidence related to the student's program at York Prep for the 2019-20 school year was "specific to that year" (IHO Decision at p. 16). Upon reviewing the affidavit by the student's Jump Start teacher for the 2019-20 school year, the IHO gleaned information that she characterized as generally applicable to the York Prep program and was, therefore, relevant to the 2020-21 school year, to wit, that the "learning specialist met with students twice daily in a group and twice weekly for 1:1 meetings" (id., citing Parent Ex. MM at p. 2). The IHO determined that, although the hearing record included evidence concerning the "specific strategies and goals they worked on" with the student during the 2019-20 school year—pointing, again, to the affidavit by the student's 2019-20 Jump Start teacher—the hearing record failed to include any similar evidence regarding the 2020-21 school year (id., citing Parent Ex. MM at pp. 3-4). In addition, the student did not have the same Jump Start teacher for the 2020-21 school year, and the student's Jump Start teacher for the 2020-21 school year was not presented as a witness, notwithstanding that the parent listed this teacher as a witness and the IHO offered the parent multiple impartial hearing dates in order to produce this teacher as a witness (see id. at pp. 16-17). Instead, the parent elected to present a different witness, who, according to the IHO, did not "testify regarding the strategies and supports provided" to the student for the 2020-21 school year; rather, the individual testified about the student's "tracking for that year (as well as for the 2019-2020 school year)" (id. at p. 17).

Finding that the hearing record lacked evidence regarding the "strategies" used with the student during the 2020-21 school year, the IHO concluded that York Prep was not an appropriate unilateral placement for the student for the 2020-21 school year (IHO Decision at p. 17). The IHO noted that the student required a "variety of strategies and supports in reading and writing," as well as counseling, and the hearing record failed to include evidence that the student received those supports or services (id.).

As the final criterion for an award of tuition reimbursement for the 2020-21 school year, the IHO briefly addressed equitable considerations (see IHO Decision at p. 17). Here, the IHO found that the parent provided the district with a 10-day notice by letter dated June 17, 2020; thereafter, the "district remedied the allegation in that notice, and held an IEP meeting" (id.). The IHO also found that, after the August 2020 CSE meeting and development of the student's IEP, the parent "did not send any subsequent [10-]day notice . . . prior to enrolling the [s]tudent at York Prep" (id.). According to the IHO, the parent sent a letter, dated December 14, 2020—"well after the [s]tudent had been at York Prep for several months"—and, while not relevant to the parent's request for tuition reimbursement for the 2020-21 school year because the IHO had already found that York Prep was not an appropriate unilateral placement—the IHO nonetheless indicated that "[t]his equitable concern might be relevant regarding the amount of tuition awarded" (id.). However, having found that York Prep was not appropriate, the IHO denied the parent's request for tuition reimbursement (id.).

In light of the foregoing, the IHO ordered the district to fund the parent's January 2019 psychoeducational evaluation (\$3500.00) because the district "did not defend its evaluation" (IHO Decision at p. 18). The IHO also found that the parent was not entitled to reimbursement for the costs of the student's "summer" program at York Prep, during summer 2020, because there was "no basis for funding this program, as [the IHO] d[id] not award funding" for the 2020-21 school year and because the parent did not include this "request" in the due process complaint notice (*id.*).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by finding that York Prep was not an appropriate unilateral placement for the student for the 2019-20 and 2020-21 school years. The parent also argues that the IHO erred by finding that, for the 2020-21 school year, equitable considerations—that is, the absence of a 10-day notice—would prevent the parent from obtaining an award of tuition reimbursement. Next, the parent contends that the IHO erred by finding that the parent was not entitled to reimbursement for the costs of the summer program at York Prep for the 2020-21 school year. Finally, the parent asserts that the IHO erred by finding that the student was not entitled to five hours per week of tutoring services. As relief, the parent seeks to overturn the IHO's findings on these issues and an order directing the district to reimburse or fund the costs of the student's tuition at York Prep for the 2019-20 and 2020-21 school year; find that equitable considerations weighed in favor of the parent's request for tuition reimbursement or funding for both school years; find that the parent was entitled to reimbursement for the costs of the student's summer program at York Prep; and find that the student was entitled to receive five hours per week of afterschool tutoring, to be prospectively funded by the district, for the 2020-21 school year.¹²

In an answer, the district responds to the parent's allegations and generally argues to uphold those portions of the IHO's decision now challenged by the parent on appeal. The district also asserts that the parent's request for review fails to comply with practice regulations, and as a result, it must be dismissed on this basis. As a cross-appeal, the district argues that the IHO erred by awarding the parent reimbursement for the costs of the January 2019 psychoeducational evaluation as an independent educational evaluation (IEE). The district also argues that, if York Prep is found to be an appropriate unilateral placement for the student, equitable considerations warrant a reduction of the amount of tuition reimbursement awarded for the 2020-21 school year. As relief, the district seeks to reverse the IHO's decision awarding the parent reimbursement for the January 2019 psychoeducational evaluation and to uphold the remainder of the IHO's decision.¹³

In a reply to the district's answer and cross-appeal, the parent responds to the district's affirmative defenses and allegations in the cross-appeal. Overall, the parent further argues in support of the issues raised in the request for review and to dismiss the district's cross-appeal.

¹² The parent attached additional documentary evidence to the memorandum of law for consideration on appeal (see generally Parent Mem. of Law Exs. OO-SS).

¹³ Since the district, as the aggrieved party, has not challenged the IHO's findings that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years, these determinations have become final and binding on the parties 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]).

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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 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).

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (*id.* at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a

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

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

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

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

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. Compliance with Practice Regulations

The district contends that the parent's request for review should be dismissed as it fails to comply with Part 279 of the State regulations. Specifically, the district asserts that the statements of IHO error in the request for review express no more than "[m]ere disagreement" with the IHO's findings, but do not "clearly 'specify the reasons for challenging' the [IHO's] decision," as required by State regulations (Answer & Cr. App. ¶ 15, citing 8 NYCRR 279.4; 279.6). The district also contends that any "arguments raised and discussed solely" in the parent's memorandum of law must be rejected because a memorandum of law is not a "substitute for a pleading" (Answer & Cr.

App. ¶ 15, citing 8 NYCRR 279.4; 279.6 and Application of a Student with a Disability, Appeal No. 19-121).¹⁴

With respect to the content of a request for review, 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]). In addition, section 279.4(a) provides that the request for review "must conform to the form requirements in section 279.8 of this Part" (*id.*).

In describing content requirements, section 279.8 of the State regulations 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][1]-[3]). State regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]).

Generally, 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 the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; *see 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]). However, "judgments rendered solely on the basis of easily corrected procedural

¹⁴ Aside from this conclusory assertion, the district does not identify or otherwise point to any issues raised in the parent's memorandum of law that were not already raised or identified in the request for review (*see* Answer & Cr. App. ¶ 15). Upon review, the parent's memorandum of law—consistent with State regulation—only includes arguments in support of the issues identified for appeal in the request for review (8 NYCRR 279.8[d]). Therefore, the district's assertion concerning the parent's memorandum of law is wholly without merit and will not be further addressed.

errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In this case, a review of the parent's request for review does not support the district's contentions. For example, the parent enumerated five distinct issues presented for review in clear and concise statements, as well as the basis for overturning the IHO's findings on each issue identified (see Req. for Rev. ¶¶ 1-5). The parent complied with the stated regulations by setting forth issues presented for review in separately numbered paragraphs and by highlighting each issue under a heading in bold and capitalized text (id.). While the parent does not elaborately state the reasons for overturning the IHO's findings in the request for review, the parent's memorandum of law sufficiently and properly includes arguments in support of overturning each of the IHO's findings presented for appeal in the request for review, with appropriate citations to the evidence in the hearing record (see generally Parent Mem. of Law). Additionally, the district does not assert any prejudice in its ability to either prepare an answer responding to the parent's allegations or in its ability to do so in a timely manner. To the contrary, the district formulated an answer responsive to the specific issues raised in the parent's request for review. Consequently, there is no basis upon which to dismiss the parent's request for review for the failure to comply with practice regulations.

2. Additional Documentary Evidence

The parent attached additional evidence—consisting of three separate affidavits and a letter from a psychiatrist—to the memorandum of law submitted in support of the request for review (see generally Parent Mem. of Law Exs. OO-RR).¹⁵ Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Upon review, all three of the affidavits proffered by the parent appear to be testimonial evidence provided via affidavit in lieu of direct testimony (see generally Parent Mem. of Law Exs. OO; QQ-RR). One affidavit is by the witness the parent was unable to produce during the impartial hearing, but who the IHO made significant efforts to accommodate on several different impartial hearing dates (compare IHO Decision at pp. 16-17, with Parent Mem. of Law Ex. RR). The two remaining affidavits and the psychiatrist's letter include information concerning services allegedly

¹⁵ The parent also attached another document, identified as exhibit "SS," to support the assertion that the district accepted the amended due process complaint notice in or around January 2021, and that contrary to the IHO's finding, the parent properly raised a request for reimbursement or funding for the summer 2020 program (compare Parent Mem. of Law Ex. SS, with IHO Decision at p. 18). However, a review of the hearing record demonstrates that the amended due process complaint notice was entered into the hearing record as evidence, and moreover, the IHO issued findings related to the allegations found within the amended due process complaint notice (see IHO Decision at pp. 8-12; see generally Parent Ex. A [representing the amended due process complaint notice, dated September 16, 2020]). Therefore, it is unclear why the parent now seeks to present evidence that the district accepted the amended due process complaint notice. Consequently, the additional documentary evidence identified as exhibit "SS" is unnecessary and will not be accepted.

provided to the student during the 2019-20 and 2020-21 school year, which appear to directly address the IHO's underlying rationales for finding that York Prep was not an appropriate unilateral placement for the student for the 2019-20 and 2020-21 school years and which ultimately resulted in the IHO denying the parent's request for tuition reimbursement or funding for those school years (see generally Parent Mem. of Law Ex. OO-QQ). The parent offers no explanation as to why either the affiants or the treating psychiatrist—or the documents now proffered on appeal—were unavailable at the time of the impartial hearing or are now otherwise necessary to render a decision in this matter (see generally Req. for Rev.; Parent Mem. of Law). Therefore, I decline to exercise my discretion and will not now accept the parent's additional documentary evidence for consideration on appeal.

B. Unilateral Placement—York Prep

Overall, the student's needs in this case are not in dispute and, as reflected by the evidence in the hearing record, have largely remained consistent amid various evaluations (see Parent Exs. I at pp. 2-3, 5-9; KK at pp. 2-3, 5-6, 9-10, 12). As noted in the January 2019 psychoeducational evaluation report, the student's seventh grade teachers consistently described him, at that time, as having "high potential," but that he "easily lost focus" and became "distracted," he often rushed through work and made "careless errors," and he lacked "effective problem-solving strategies" (Parent Ex. I at pp. 3, 5). At least one teacher further described the student as having a tendency to "interrupt a lot" and to become "very silly and distracting"—but thereafter indicated that, socially, he had a "sense of maturity that the other students d[idn']t have" and that he often took a "leadership role in many of the classes and ha[d] many friends at school" (id. at p. 5). The same teacher reported that the assistance the student received with "organization skills and executive functioning" helped him with his work (id.). According to the evaluator, the student's "pattern of performance during th[e] evaluation continue[d] to suggest significant difficulties with executive functioning, and his grades at school and teacher commentary on report cards indicate[d] that these [wer]e his primary areas of weakness that [wer]e impeding upon his ability to achieve" (id. at p. 10). Consequently, the evaluator indicated that the student continued to meet the diagnostic criteria for an ADHD, combined presentation (id.).

Based upon the cognitive assessments administered as part of the January 2019 psychoeducational evaluation, the student's overall functioning fell within the high average range, however the evaluator noted that "variability continued to be seen across [the student's] performances across indices, suggesting that his cognitive profile [wa]s better understood when more closely evaluating each domain area" (Parent Ex. I at p. 9). Evaluation results reflected that the student "performed best on tasks of nonverbal fluid reasoning" (extremely high average); his performance in working memory skills, while noted to have "declined," fell within the high average range"; and his performance in processing speed, verbal comprehension, and visual spatial processing all fell within the average range (id. at pp. 9, 14). Academically, the evaluator found that the student's "performances across subjects continue[d] to present with variability, but [that the student] show[ed] good potential for learning" (id. at p. 9). The evaluator noted that "[g]enerally speaking, [the student's] total reading, written expression, and math performances largely me[t] the [a]verage range"; however, the evaluator further noted that the student "continue[d] to demonstrate difficulty with his ability to compose sentences and develop essays, and he struggle[d] under time demands" (id. at pp. 9-10, 15).

In light of the student's identified needs, the evaluator found it was "imperative" that the student receive "all of the necessary opportunities, remediation, and supports for his executive functioning deficits, particularly as they appl[ied] to his academic achievement," which were "further detailed" as recommendations in the evaluation report (Parent Ex. I at p. 10). One such recommendation, without elaboration, was that the student "continue to receive both individual and small group counseling on his IEP" (*id.* at pp. 10-11).¹⁶ At the impartial hearing, the evaluator explained that she recommended individual and group counseling for the student to "address the executive functioning issues that he was having, which also included some self-regulation difficulties and difficulties with frustration, so really to give him some good coping tools" (Tr. pp. 303-04). The evaluator testified that, for this student, his executive functioning issues presented as "difficulties with areas of attention and also with regard to planning and organization, difficulties with managing his work, with initiating, [and] with self-monitoring" (Tr. pp. 304-05). In terms of the student needing "academic remediation," the evaluator testified that, "with regard to areas like written expression"—for example, when "constructing an essay or constructing any sort of written report"—these activities required a "certain amount of planning and organizing" and the student had "vulnerabilities in that area" (Tr. p. 305). Therefore, the evaluator recommended academic remediation be addressed with the student "as it tie[d] into his executive functioning weaknesses" (Tr. p. 305).

With this as backdrop and as explained more fully below, the IHO's findings that York Prep was not appropriate for the student due, in part, to the absence of counseling services for both the 2019-20 and 2020-21 school years, must be vacated.

1. 2019-20 School Year

The parent argues that the IHO erred by finding that York Prep was not appropriate for the student for the 2019-20 school year because York Prep did not provide the student with counseling services and York Prep did not address the student's executive functioning, self-regulation, frustration, and coping skills throughout the school year. In opposition, the district contends that the IHO properly concluded that York Prep was not an appropriate unilateral placement because the program was not specially designed to address the student's unique needs. More specifically, the district asserts that the hearing record lacked evidence demonstrating how York Prep addressed the student's needs in the area of executive functioning absent counseling services.

While not defined in State regulations, counseling services are listed as an example of a related service, which are defined, in part, as "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]). Federal regulations identify counseling services as a related service, and define counseling services as "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel" (34 CFR 300.34[c][2]). The evidence in the hearing record demonstrates that, while the student did not receive individual or small group counseling services as may be typically conceptualized according to these definitions, the student's York Prep program—which included

¹⁶ In contrast, the evaluator also recommended that the student "and his mother should also continue to attend cognitive-behavioral oriented psychotherapy sessions so that his executive functioning issues (e.g., impulse control, self-monitoring skills, problem-solving) c[ould] further be appropriately addressed and so that he c[ould] have a safe venue to process his frustration and learn better coping strategies" (Parent Ex. I at p. 11).

the Jump Start program—provided him with the supportive services he required to address his identified needs in the areas of executive functioning, self-regulation, frustration, and coping skills.

According to the evidence in the hearing record, when the parent enrolled the student at York Prep for the 2019-20 school year, the student was also enrolled in the Jump Start program (see Parent Ex. C at p. 1). The evidence reflects that Jump Start supported students by addressing their learning needs (see Parent Ex. E at p. 2).¹⁷ Generally, Jump Start teachers are "State-certified special education teacher[s] or certified in a remedial specialty like literacy" (*id.*). A Jump Start teacher "typically has a caseload of about [11] students," and the teacher "meets with each student individually twice a week for one period during a non-academic subject such as art, music, drama or physical education" (*id.*). During the individual Jump Start sessions, the teacher "provides skills-based instruction to address the student's deficits" (*id.*). The evidence further reflects that the Jump Start teacher "meets with his or her students in a group both before and after school," and the group sessions "focus[] largely on executive functioning skills related to homework, organization, and test taking, but the teacher also addresses skills-based problems when necessary" (*id.*). Therefore, a student in the Jump Start program met with a Jump Start teacher "12 times a week" (*id.*).

Consistent with the programmatic description of the Jump Start program, the director of the Jump Start program (director) described the three components of the program as consisting of the morning small group sessions (35-minute period), the final period quiet study time (45-minute period), and the twice-weekly individual sessions (40-minutes per session) (see Parent Ex. Y ¶¶ 1, 17[a]-[c]). According to the director, the daily morning sessions were a time for students to "get organized for the day," receive assistance with "any concerns they had regarding the previous night's homework," and to "continue to review for tests or quizzes" (*id.* ¶ 17[a]). The director indicated that the final period of the day was a "very structured quiet study time in which [students wer]e focused on organizing assignments," ensuring that their "planners [were] filled out accurately," verifying assignments, beginning homework, and "studying in a quiet structured environment" with the availability of individual assistance (*id.* ¶ 17[b]). The director also noted that content area teachers were available to meet with students at the final period of the day sessions (*id.* ¶ 17[b]).

In addition to describing the components of the Jump Start program, the director testified about the modifications used by the York Prep classroom teachers for instruction within the classroom (see Parent Ex. Y ¶ 28). Here, the director testified that the classroom teachers "often incorporate[d] various special education strategies into their instruction," including the "chunking of material, repetition, checking in for understanding, refocusing and redirection" (*id.*). The classroom teachers also provided students with accommodations, such as "extended time and 'quiet

¹⁷ The description of the York Prep program for the 2019-20 school year reflected that, in addition to the Jump Start program, York Prep used a "tracking system to create an environment by which students [wer]e grouped according to their ability" (Parent Ex. E at p. 1). The director of the Jump Start program explained that, generally the lowest level, or the "four track [wa]s the most scaffolded and move[d] at a slower pace" and the academic "content [wa]s chunked and broken down more extensively" (Parent Ex. Y ¶¶ 2, 6, 8-10). In contrast, she explained that the highest-level track, or an "Honors class [wa]s the least scaffolded and move[d] at a faster pace" (*id.* ¶ 9). Given this tracking system, a student could move between different tracks during the school year and could be placed or grouped in a slower-paced track depending on a specific academic need or difficulty (see Parent Exs. E at p. 1; Y ¶ 10).

rooms' for test-taking; language exemptions; and the use of laptop computers in the classrooms" (id.). The director also testified that "all York Prep classes tailor[ed] the instructional content and the methods of presentation to the needs of the students" (id. ¶ 39). For this student in particular, the teachers used the following modifications during the 2019-20 school year: "[s]mall group or individualized work in subjects, like English, where [the student] needed more support"; scaffolding and chunking of material; repetition of key concepts; breaking down multistep directions for longer assignments and projects; breaking down the writing process into smaller steps; providing directions both verbally and in writing; providing redirection and refocusing as needed for attention issues; 1:1 instruction in writing; use of graphic organizers; student-centered discussions to focus and engage him; and implementing consistent routines to establish patterns and create predictability (id. ¶ 40).

At the impartial hearing, the student's Jump Start teacher for the 2019-20 school year also provided testimony, and confirmed that he met with his Jump Start students twice daily as part of a group and twice weekly for one-to-one meetings (see Parent MM ¶¶ 3, 5, 10 [referring to his title at York Prep as a "Learning Specialist"]). The Jump Start teacher testified that in his Jump Start sessions with this student, he worked on "executive functioning, organization, and skills-based instruction to address learning deficits in a one-to-one setting" (id. ¶ 24). He further testified that his Jump Start sessions with the student were "tailored to meet [his] needs such as organization, chunking of assignments, reteaching of subject-based concepts for clarification, time management, prioritization, and planning of short-term and long-term assignments" (id.). According to the Jump Start teacher, the student "showed improvement in executive functioning abilities (planning, organization) and needed less redirection"; the student "submitted his assignments and projects timelier"; and the student "increased his self-regulation" (id.).

With respect to the student's academic classes at York Prep, the Jump Start teacher testified that he was "placed in classes based on his learning profile, his current skill levels, and his academic, social and behavior needs" (Parent Ex. MM ¶ 16). In addition, he testified that "instruction was individualized for [the student] using methodologies and materials appropriate to his level of function, his learning needs, and his specific goals" (id.). The Jump Start teacher explained that these modifications included small group instruction with individualized support, 1:1 instruction attending to the fundamentals of the writing process, scaffolding and chunking of information, repetition and reteaching of concepts, adjusted pacing of instruction, verbal and written directions, redirection and refocusing, the use of teacher-made materials to supplement textbooks and to support differentiation of instruction, the use of graphic organizers, student-centered discussion, the use of organizational guides, and the establishment of routines (id. ¶ 17).

Thereafter, the Jump Start teacher described the student's work in individual classes during the 2019-20 school year (see Parent Ex. MM ¶¶ 19-23). For example, in English the student worked on "skills such as reading comprehension, critical thinking, written expression, grammar, and vocabulary"; in science, the student worked on "critical thinking skills related to the scientific method, planning experiments, reviewing lab report contents, note-taking, study skills, and test preparation" (id. ¶¶ 19, 21). Similarly, in math the student "studied Algebra, including linear and nonlinear patterns using tables, graphs, and equations, and solving algebraic equations" (id. ¶ 20). The student improved in "solving multi-step problems, showing computations in writing, needing less redirection and refocusing, and in his self-regulation" (id.). Next, the Jump Start teacher indicated that, in history, the student improved in the areas of "following directions, including

multi-step directions, and in needing less redirecting and refocusing" (*id.* ¶ 22). Finally, in his foreign language class, the student's class "covered language skills, including reading and writing Mandarin Chinese characters, as well as vocabulary, grammar, and pronunciation" (*id.* ¶ 23).

Overall, the Jump Start teacher testified that the student made progress in multiple areas of academic instruction, social skill development, and behavior regulation during the 2019-20 school year, and specifically noted that the student began to organize his ideas more effectively with the use of graphic organizers, completed his assignments in a timelier manner, exhibited greater effort and better attention to instructions, improved his ability to solve multistep problems, required less redirection and focusing, increased his self-regulation, improved his study habits and test preparation skills, and improved his executive function abilities (planning and organization) (*see* Parent Ex. MM ¶¶ 18-24, 26). The Jump Start teacher also noted that the student "moved up" two academic tracks in math and one academic track in science during the 2019-20 school year (*id.* ¶¶ 20-21). Similarly, the director testified that, during the 2019-20 school year, the student made progress in the areas of writing, work completion and timeliness, learning skills, impulse control, and executive functioning skills (*see* Parent Ex. Y ¶¶ 42-49).

In addition to the support services provided to the student within the Jump Start program and, more generally, within the program at York Prep, the evidence in the hearing record also shows that the student received the support of a school counselor at York Prep during the 2019-20 school year. As reflected in the 2019-20 York Prep school description, the school employed "two experienced psychologically qualified personnel" on a full-time basis, acknowledging that, at times, "emotional fragility" may accompany "learning issues" (Parent Ex. E at p. 1). The Jump Start teacher testified that, initially, the student "demonstrated anxiety due to his transition to a new school environment" (Parent Ex. MM ¶ 15). At that time, the student "struggled with meeting expectations, as well as managing the work requirements" (*id.*). The Jump Start teacher noted that the student also "struggled with impulsivity," and "frequently called out, requiring repeated refocusing and redirection" (*id.*). Similarly, the dean of the 9th and 10th grade students at York Prep (dean) testified that the student had a difficult time during the 2019-20 school year, noting further that he remembered "setting [the student] up" with the school counselor "pretty early in the year" (Tr. pp. 580, 608-10). The dean testified that meeting with the school counselor regularly had helped the student (Tr. pp. 609-10). Additionally, the dean explained that the school counselors "check[ed] in with everybody at the beginning of the [school] year, especially [the] new 9th graders," and that while York Prep did not "typically mandate counseling," "we said that he needed to have some regular meetings" (Tr. pp. 610-11).

In addition, the director testified that the counselors at York Prep "always me[et] with all of the new students," and that, for the ninth grade students, the counselors "br[o]k[e] them up" and worked with the students in small "mentoring groups" for a few weeks throughout the year (Tr. pp. 355-56). The director acknowledged, however, that the "mentoring class" was programmatic, and available to all students at York Prep (Tr. p. 356). The director also testified that the student met "more formally in the beginning of the school year" with a specific counselor, who remained available to the student "as needed" (Tr. pp. 356-57). The director acknowledged that the student was not meeting with this specific counselor on a "formal, individual basis from week to week," and he "was not part of a group counseling session that met . . . throughout the school year on a weekly basis" (Tr. pp. 357-58).

In addition to the foregoing, the evidence reflects that, within the student's August 2020 IEP, the CSE noted that the student was then-currently receiving "clinical therapy via zoom meetings" outside of school that "further supported him with [his] present emotional concerns" (Parent Ex. AA at pp. 3, 16; see Tr. p. 467). At the impartial hearing, the district school psychologist who attended the August 2020 CSE meeting testified that the parent asked about "counseling services outside of school" and the CSE provided her with "an organization that she could reach" out to for more information (Tr. pp. 135, 153; see Parent Ex. AA at p. 16).

Based on the foregoing, the evidence in the hearing record does not support the IHO's determination that York Prep was not an appropriate unilateral placement for the student for the 2019-20 school year based on the lack of counseling provided (IHO Decision at pp. 8-12). Parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365). Here, to the extent the recommendations for counseling services set forth in the January 2019 psychoeducational evaluation were based on the student's executive functioning needs (Tr. pp. 303-04; Parent Ex. I at pp. 10-11), the evidence in the hearing record supports a finding that York Prep and Jump Start sufficiently provided the student with individualized support in this area of need, as well as to support the student's transition to the new school environment. To the extent the IHO relied on the student's grades to conclude that the lack of counseling was negatively affecting the student's ability to derive benefit from the program at York Prep (IHO Decision at pp. 10-11), a student's progress, while a relevant factor, is not dispositive of the appropriateness of a unilateral placement (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27). Moreover, other evidence in the hearing record supports a finding that the student made progress during the 2019-20 school year, including with executive functioning skills such as planning and organization, completing assignments, and study skills (see Parent Exs. Y ¶¶ 42-49; MM ¶¶ 18-24, 26). Overall, the totality of the circumstances indicates that York Prep reasonably addressed the student's individual needs.

2. 2020-21 School Year

The parent argues that the IHO erred by finding that York Prep was not appropriate for the 2020-21 school year because the hearing record lacked sufficient evidence concerning the strategies used with the student and because York Prep did not provide the student with counseling services or supports in reading and writing. In opposition, the district contends that York Prep was not an appropriate unilateral placement because the program was not specially designed to address the student's unique needs. More specifically, the district asserts that the hearing record lacked evidence demonstrating how York Prep addressed the student's needs in the area of executive functioning absent counseling services and was devoid of evidence regarding strategies used in his Jump Start program during the 2020-21 school year to address his needs.

Turning first to the parent's argument that the IHO erred by finding that York Prep was not an appropriate unilateral placement because York Prep did not provide the student with counseling services, the hearing record contains essentially the same evidence demonstrating how York Prep provided the student with support services that addressed his needs in the areas of executive functioning during the 2020-21 school year, as had been provided to the student—and as outlined above—during the 2019-20 school year. For example, the student was enrolled in the Jump Start

program at York Prep for the 2020-21 school year (see Parent Ex. P at pp. 1-2). The evidence in the hearing record reveals that the York Prep program and the Jump Start program operated in the same manner during the 2020-21 school year as the programs had operated in the 2019-20 school year, by providing the student with daily before school and afterschool sessions, as well as twice-weekly individual sessions (compare Parent Ex. R at pp. 1-2, with Parent Ex. E at pp. 1-2). The evidence in the hearing record also demonstrates that, during the 2020-21 school year, York Prep had the same "psychologically qualified personnel" available to students as had been employed during the 2019-20 school year, with school counselors available during the school year (see Tr. p. 610; compare Parent Ex. R at p. 1, with Parent Ex. E at p. 1). Additionally, the director testified that York Prep had a counselor available for the "high school group" and that the counselors were available as needed (see Tr. pp. 356-57).

In addition, a review of the evidence in the hearing record reveals that the director's testimony describing the three components of the Jump Start program—and what took place within the individual and group sessions—applied to how the program operated for the student in both the 2019-20 and 2020-21 school year (see Parent Ex. Y ¶¶ 17[a]-[c]; 18). The evidence in the hearing record further reveals that, during the 2020-21 school year, all of the student's York Prep classes used the same methodologies as outlined for the 2019-20 school year (id. ¶ 53). More specifically, the director testified that the student's York Prep classes used the following methodologies: multisensory teaching approach, scaffolding, differentiated group and independent work, structured writing instruction, opportunities to meet 1:1 with teachers, repeated instructions and routines, redirection and visual cues, and chunking of material (id.). The director also testified that, when necessary, "additional modification of material and presentation might be added" to address the student's needs (id. ¶ 54). For example, the student "initially needed additional individualization in math instruction, so [York Prep] added approaches such as step by step math strategies, model math skills and guided practice, extended time on assessments, differentiated partner work, and mnemonic devices" to assist the student (id.).

Thereafter, the director described the student's work in individual classes during the 2020-21 school year (see Parent Ex. Y ¶¶ 55-59). For example, in English the student participated in "in-depth discussion and analysis of the historical, cultural and literary importance of novels, short stories, essays, and poems from around the world" (id. ¶ 55). The director testified that the student "made progress in sharing and expressing his ideas"; he became "much more open to hearing other perspectives"; and he was "more responsive to implementing feedback from the teacher, specifically during individualized writing conferences" (id.). In addition, the director testified that the student "made huge progress in time management, particularly in completing and submitting daily homework assignments" (id.). Similarly, in math the student had advanced "two tracks," and studied geometry (id. ¶ 56). The student worked on the following skill areas: "problem-solving concepts related to shapes, lines, and angles, among other topics," such as "mathematical proofs and spatial reasoning" (id.). The student demonstrated "greater effort on his assignments, as well as improved study- and test-preparation skills, and better time management" (id.). Turning to history, the director testified that the student "practice[ed] critical thinking and analytical skills through multimedia materials" (id. ¶ 57). During the 2020-21 school year, the student "strengthened his ability to make inferences from text and to clarify his ideas verbally" in history class (id.). The director also testified that the student improved his ability to "develop ideas in writing (essay organization) and developed test-preparation skills," and further made progress in "completing assignments on time" (id.). Next, the director indicated that, in science, the student

made progress in "completing assignments on time and taking tests" (*id.* ¶ 58). Finally, in his foreign language class, the student's class "develop[ed] pronunciation and intonation patterns, and engag[ed] in role-played conversations" (*id.* ¶ 59). The student "improved his consistency in completing assignments in a timely manner" (*id.*).

With respect to the Jump Start program for the 2020-21 school year, the director testified that the student "continue[d] to work on strengthening executive functioning skills (time management, organization, prioritizing), as well as his writing abilities and test prep/study skills" (Parent Ex. Y ¶ 60). According to the director, the student's Jump Start teacher "addresse[d] what [the student] need[ed] at the time in any of his classes, but also focuse[d] on particular areas of deficiency" (*id.*). For example, in writing "there was an increased focus on skills such as developing a thesis statement independently, understanding the structure of an essay, writing topic sentences that introduce[d] the main idea of a paragraph, and writing with correct grammar," as well as "writing with more detail and analysis" (*id.*). In addition, the student's Jump Start teacher worked on organization with the student, such as "writing down all assignments, filing papers appropriately and with less prompting, better organizing his digital work on Google Drive (e.g. naming and dating assignments and keeping folders for each subject)" (*id.*).

With respect to the student's classes at York Prep during the 2020-21 school year, the director testified that he was "grouped in small classes with comparably functioning peers," which allowed for "more individualized attention and support from teachers" (Parent Ex. Y ¶ 61). The director also testified that, during the 2020-21 school year, the student "made progress and ha[d] begun to internalize many of the strategies that ha[d] been taught to him, allowing him to work more independently" (*id.* ¶ 62). Finally, in addition to the progress she reported in the student's academic classes, the director testified that the student made progress in the "areas of self-advocacy, time management, organization, and writing" (*id.*).

In light of the foregoing, the hearing record contains sufficient evidence to find that York Prep, together with the Jump Start program, provided the student with support services to address his executive functioning needs for the 2020-21 school year, such that the failure to provide counseling services does not weigh against a determination that the parent's unilateral placement was appropriate.

But this does not end the inquiry with regard to whether York Prep was an appropriate unilateral placement, as the IHO also found that the hearing record failed to contain sufficient evidence that the student was provided with needed supports in reading and writing. In so finding, the IHO appeared to draw a conclusion—based on her own interpretation of the student's testing results obtained from the January 2019 psychoeducational evaluation—that the student had a "relative deficit in reading comprehension" during the 2019-20 school year and therefore, his "placement in track four at York Prep" for ninth grade English provided the student with "needed assistance in reading comprehension, writing and vocabulary" (IHO Decision at pp. 8-10).¹⁸ The

¹⁸ With respect to the 2019-20 school year, the IHO noted that the January 2019 psychoeducational evaluation found the student's "reading skills were in the high average range," his "[r]eading comprehension skills were [in the] average range," and "[a]ll other reading scores were between the 8.2 and greater than the 12.9 grade equivalents in the average to high average ranges" (IHO Decision at p. 9, citing Parent Ex. I at p. 15). However, the IHO then identified that, in the area of vocabulary, cognitive testing reported in the January 2019

IHO did not make a similar finding or draw a similar conclusion about the student's reading comprehension skills when analyzing the unilateral placement for the 2020-21 school year, but concluded that the student was not provided supports in reading and writing (*id.* at pp. 16-17).

When reviewing the hearing record, the evidence reflects a somewhat divergent picture of the student's needs in the area of reading when comparing the results of informal screening assessments versus standardized assessments. For example, the evidence in the hearing record indicates that, based on York Prep's administration of a screening assessment—"Star Reading Enterprise Assessment"—to the student at the start of the 2019-20 school year, his reading grade equivalent score was a "4.9," his instructional reading level was a "4.5," and his scaled score was "553," which, according to the assessment guidelines, placed the student in the category of needing "Urgent Intervention" (Parent Ex. N at p. 1). York Prep administered the same assessment to the student in September 2020, which demonstrated that the student's reading grade equivalent score improved to a "7.1," his instructional reading level improved to a "7.3," and his scaled score improved to "1105," which, according to the assessment guidelines, placed the student right between the categories of needing "Intervention" and "On Watch" (compare Parent Ex. V, with Parent Ex. N at p. 1). Thus, it appears that the student's placement in track four for ninth grade English, together with the supports provided to the student through the Jump Start program, enabled the student to make progress.

The evaluator who conducted both the March 2017 neuropsychological evaluation and the January 2019 psychoeducational evaluation of the student found that the student's reading comprehension skills fell within the average to high average range based on the percentile ranks obtained (see Parent Exs. I at p. 15; KK at p. 20). In the March 2017 neuropsychological evaluation report, the evaluator—who administered the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to assess the student's academic achievement—indicated that, while the student's "more complex reading skills, such as reading comprehension and fluency . . . were somewhat weaker, falling within the Average range," his overall reading skills fell "generally at or above expected levels" (Parent Ex. KK at p. 9). The evaluator did not make any specific recommendations to address the student's reading comprehension or overall reading skills within the report (*id.* at pp. 13-16, 20). In the January 2019 psychoeducational evaluation report, the same evaluator—who readministered the WIAT-III to assess the student's academic achievement—indicated that, overall, the student's "reading skills currently f[e]ll within the High Average range" (Parent Ex. I at pp. 7, 20).¹⁹ At that time, the student's "reading comprehension skills were also

psychoeducational evaluation reflected that the student had a "deficit in verbal knowledge," as his "ability to orally define words of increasing level of difficulty" was found to be in the "low average range" (IHO Decision at p. 9, citing Parent Ex. I at pp. 6, 14). Given this information, the IHO went on to find that—in contrast to the testing results obtained in the January 2019 psychoeducational evaluation report demonstrating that the student had reading comprehension skills in the average range—the student had a "relative deficit in reading comprehension which may have been a result of difficulties with vocabulary as well as attention" (IHO Decision at p. 9).

¹⁹ At the impartial hearing, the director testified that while the January 2019 psychoeducational evaluation report was at least one piece of information reviewed by the dean when making the student's track placements for the 2019-20 school year, she opined that the student was most likely placed in track four for ninth grade English due, in part, to his grade equivalent score of "6.7" in reading comprehension—even though the grade equivalent fell within the "Average" range and the student's percentile rank for the very same subtest fell within the "High

Average" (*id.* at p. 7). Similar to the previous evaluation report, the evaluator did not include any specific recommendations to address the student's reading comprehension or overall reading skills within the report (*id.* at pp. 10-13). Thus, while the IHO's independent interpretation of the student's testing results led to her conclusion that the student required supports in reading comprehension, the standardized testing results found in both the March 2017 neuropsychological evaluation and the subsequent January 2019 psychoeducational evaluation report belie the IHO's conclusion.²⁰

The director testified that the student's "educational needs at the beginning of the [2020-21] school year were essentially the same as in [the 2019-20 school year] in terms of the educational and social-emotional needs that had to be addressed" (Parent Ex. Y ¶ 51). More specifically, the director testified that the student "still required small classes, individualized support, and tailored instruction," noting further that although the student "made progress in developing independent skills and completing his assignments, he still needed extensive remediation in reading and writing" (*id.*). The hearing record reflects that, given the student's needs in the 2019-20 school year and the administration of "information assessments," York Prep placed the student in "all track 4 classes" for English, math, history, and science (*id.* ¶ 35; *see* Tr. p. 591). The evidence further reflects that as a result of the student's performance in math and science during the 2019-20 school year, his respective teachers recommended that he move from "track four to track three" for the following school year (Parent Ex. Y ¶¶ 44-45; *see* Tr. p. 601). The hearing record does not reflect that the student was similarly advanced from track four in either English or history, but instead, reflects that he "remain[ed] on the 4th track" for English and history during the 2020-21 school year (Tr. p. 601; *see generally* Parent Ex. Y). Thus, contrary to the IHO's conclusions, similar to the 2019-20 school year, the student's "placement in track four at York Prep" for 10th grade English provided the student with the "needed assistance in reading comprehension, writing and vocabulary" (IHO Decision at pp. 8-10). Additionally, the hearing record reflects that, throughout 10th grade English at York Prep, the student achieved a first semester average of 82 and a second semester average of 83 (*see* Parent Ex. LL).

While the hearing record may have been more developed with respect to the program at York Prep and Jump Start for the 2019-20 school year—given the testimony of the student's Jump Start teacher for that year, which was not similarly presented for the 2020-21 school year—the evidence in the hearing record is sufficient to support a finding that, based on the totality of

Average" range—and to his grade equivalent score of "6.2" in sentence composition (reflecting a percentile rank of "89" and falling within the "Low Average" range) (Tr. pp. 396-404; Parent Ex. I at p. 15).

²⁰ The August 2020 IEP reflected the parent's concern with what she characterized as "weak" reading comprehension skills, which the parent believed to cause the student "difficulties with mathematical problem solving skills, social studies, and science when reading" (Parent Ex. AA at p. 3). According to the IEP notation, the parent had indicated that "she ha[d] inquired about this concern with his teacher to see if it [wa]s a type of learning disability in reading, but his teachers expressed that it [wa]s not so much a disability or an inability in this area, but it [wa]s more symptoms of ADHD that [wer]e currently impacting on optimal performance" (*id.*). The IEP also reflected that the student had been "described as very impulsive, giving up easily—d[id] not have the 'patience' to take his time to reread and carefully work on activities" (*id.*). The August 2020 IEP also reflected that the student's "writing was described as disorganized" (*id.*).

circumstances, the unilateral placement addressed the student's reading and writing needs, and provided the student with supports for his executive functioning deficits.

C. Equitable Considerations—2020-21 School Year

Having found that York Prep was an appropriate unilateral placement for the student for the 2020-21 school year, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice 10 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). Parents of students enrolled in private school are not exempted from 10-day notice requirements (S.W. v New York City Dep't of Educ., 646 F. Supp. 2d 346, 361-63 [S.D.N.Y. 2009]).

In the decision, the IHO did not squarely address whether equitable considerations weighed in favor of the parent's request to be reimbursed for the costs of the student's tuition at York Prep

because the IHO found York Prep was not an appropriate unilateral placement (see IHO Decision at p. 17). Instead, the IHO indicated that, had York Prep been deemed an appropriate unilateral placement, the parent's failure to submit a 10-day notice after the August 2020 CSE meeting and prior to enrolling the student at York Prep might be relevant to any amount of tuition reimbursement awarded (id.). In reviewing the chronology of events for the 2020-21 school year, the IHO pointed to the parent's letter, dated December 14, 2020, and noted that it was sent months after the student had been at York Prep (id.).

On appeal, the parent contends that the IHO erred by finding that equitable considerations would prevent an award of tuition reimbursement, as the filing of a second 10-day notice was "inconsistent with [the] IDEA." In response, the district contends that the IHO did not make a finding regarding equitable considerations, and thus, the parent is not now aggrieved. Alternatively, the district asserts in its cross-appeal that, if it is determined that the district failed to offer the student a FAPE for the 2020-21 school year, equitable considerations do not preclude an award of tuition reimbursement but rather, warrant a reduction in the amount of tuition reimbursement awarded.

Thus, the crux of the equitable considerations' dispute is whether the parent was required to provide a 10-day notice subsequent to the August 2020 CSE meeting in order to be reimbursed for the costs of the student's attendance at York Prep for the 2020-21 school year, and if so, whether the parent's failure to comply with this requirement results in a reduction of the amount of tuition reimbursement awarded.

The Second Circuit has recently reiterated that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" and that "if parents unreasonably reject the school district's proposed changes to the IEP, or are otherwise uncooperative, courts and hearing officers are fully empowered to deny them reimbursement" (Bd. of Educ. of Yorktown Cent. Sch. Dist. v C.S., 990 F.3d 152, 171 [2d Cir. 2021]).

Here, it is undisputed that the parent submitted a 10-day notice—dated June 17, 2020— notifying the district of her intentions to unilaterally place the student at York Prep for the 2020-21 school year at district expense because the district had failed to convene a CSE meeting or develop an IEP for the 2020-21 school year (12-month school year program) (see Parent Ex. O at pp. 1-2). At the time of the June 2020 letter, it does not appear that the district had convened a CSE to engage in educational planning for the student at least for the entirety of the 2019-20 school year leading up to the 2020-21 school year (see Parent Ex. B at p. 2). The parent thereafter filed the July 2020 due process complaint notice (see IHO Ex. I at p. 1). The due process complaint notice alleged that the district denied the student a FAPE due to the district's failure to develop an IEP for the 12-month school year (id. at pp. 5-6). Thereafter, a CSE convened in August 2020 and developed an IEP for the student, recommending a 10-month program (see generally Parent Ex. AA). Although the district sent the parent a copy of the August 2020 IEP on August 20, 2020—the day after the CSE meeting—the district did not provide the parent with a prior written notice and school location letter, dated September 10, 2020, until approximately mid-September 2020 (see Dist. Exs. 4 at p. 1; 5 at p. 1; 12 at pp. 3-4). After the August 2020 CSE meeting, the parent did not submit another 10-day notice to the district (see generally Tr. pp. 1-665; Parent Exs. A-Z;

AA-NN; Dist. Exs. 3-5; 8-14; IHO Exs. I-XII); instead, the parent filed her September 2020 amended due process complaint notice, which stated her reasons for rejecting the August 2020 IEP and the assigned public school site (see Parent Ex. A at pp. 1, 6-9).

Given the timing of the September 2020 notices and the parent's difficulties communicating with the assigned public school site thereafter (see Parent Ex. GG; II; JJ)—which circumstance formed the basis for the IHO's finding that the district denied the student a FAPE (see IHO Decision at p. 15)—it is unclear what changes the district might have made to its recommended programming which would have addressed the parent's concerns at this point.²¹ Thus, under the circumstances of this case and as a matter within my discretion, I decline to deny or reduce the tuition reimbursement award based on the parent's failure to provide a 10-day notice letter following the August 2020 IEP.

D. Other Relief

1. Funding for Summer Class

The parent asserts that the IHO erred by failing to award funding for the student's summer program at York Prep for the 2020-21 school year because, contrary to the IHO's finding, the parent requested this relief in the amended due process complaint notice. The parent asserts an entitlement to funding for the student's summer program at York Prep for the 2020-21 school year because, according to the parent, the student required a 12-month school year program to prevent regression. The district argues that the IHO properly denied the parent's request for funding for the summer program. The district asserts that York Prep only offers a 10-month school year program and the student's "participation in this single summer class was not necessary to address any special education needs or to avoid substantial regression." Rather, the district contends, the student was required to complete the "make-up course" for failing the first semester of World History at York Prep during the 2019-20 school year.

Consistent with the parent's contention, the IHO's basis for denying her request to be reimbursed for the costs of the student's summer program for the 2020-21 school year—that is, that the parent did not request this as relief in the due process complaint notice—was error. While the parent did not initially seek reimbursement for the costs of a summer program at York Prep in the July 2020 due process complaint notice, the parent's amended due process complaint notice included a request for this relief for both the 2019-20 and 2020-21 school years (compare IHO Ex. I at pp. 6-7, with Parent Ex. A at p. 9). Consequently, the IHO's decision denying the parent's

²¹ As noted above, the district has not appealed the IHO's finding that it denied the student a FAPE for the 2020-21 school year based on the availability of the assigned public school or the parent's ability to visit the school. The district argues that, had the parent provided 10-day notice after the August 2020 CSE meeting, it would have had "an opportunity to remedy any alleged deficiencies in their proposed program for the Student" (Answer & Cr.-Appeal ¶ 25). However, the district does not identify what alleged deficiencies could have been addressed had the parent provided another 10-day notice. The district's argument that the lack of a 10-day notice letter should warrant a reduction in tuition would be more convincing if the IHO's determination on the district's offer of a FAPE had instead rested on a problem with the IEP itself that the district could have addressed by reconvening the CSE.

request to be reimbursed for the costs of the student's summer program solely on this basis must be vacated.

Initially, even if the evidence showed that the student received 12-month services at York Prep, the parent would not be entitled to the costs thereof. The IHO made specific findings with respect to the parent's contention that the student required a 12-month school year program for the 2020-21 school year in the decision, which the parent does not specifically identify as an issue on appeal in the request for review (compare IHO Decision at p. 12, with Req. for Rev. ¶¶ 1-5). As noted above, generally, "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]). In addition, as neither party has appealed the IHO's finding that the student was not entitled to a 12-month school year program, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, even if the evidence showed that the student received a 12-month school year program at York Prep, I would be unlikely to order the district to fund such services in excess of a FAPE (L.K., 674 Fed. App'x at 101 [finding that "parents are not entitled to reimbursement for services provided in excess of a FAPE"]).

Further, the evidence in the hearing record demonstrates that York Prep neither offered, nor did the student participate in, any special service or program that operated for at least 30 school days during the months of July and August 2019 or during July and August 2020 (see generally Tr. pp. 1-665; Parent Exs. A-Z; AA-NN; Dist. Exs. 3-5; 8-14; IHO Exs. I-XII).²² Evidence in the hearing record demonstrates that York Prep was a 10-month school year program (see Tr. pp. 365-66). The summer program for which the parent seeks reimbursement was, as argued by the district and as reflected by the evidence in the hearing record, a two-week, make-up class that the student had to complete in order to recover the credits he did not otherwise receive because he had failed the first semester of Modern World History in fall 2019 at York Prep (see Tr. pp. 333-35; Parent Exs. DD at p. 1; EE; Dist. Ex. 3). The evidence demonstrates that the student completed the two-week make-up class by either mid- or late-June 2020.

At the impartial hearing, the student's Jump Start teacher for the 2019-20 school year explained that the student would have completed the make-up class for Modern World History by the "end of June"—or during "those first couple of weeks at the end of the school year when school let[] out" and thus, the class did not continue into July and August—and that, based on conversations with the student's Jump Start teacher for the 2020-21 school year in September 2020, they saw "regression" because "there had been some noticeable gaps and sort of a sliding of his

²² The IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE for the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). State regulations require districts to consider 12-month special services and/or programs for students to prevent substantial regression" (8 NYCRR 200.6[k][1]). State regulation defines a 12-month school year program (i.e., 12-month special service and/or program) as a "special education service and/or program provided on a year-round basis, for students determined to be eligible in accordance with sections 200.6(k)(1) and 200.16(i)(3)(v) of this Part whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression" (8 NYCRR 200.1[eee]). State regulation further mandates, in part, that a 12-month "special service and/or program shall operate for at least 30 school days during the months of July and August" (id.).

progress . . . [from] the previous year" (Tr. pp. 422-24; but see Parent Ex. DD [reflecting a "Summer School Course Report," dated June 19, 2020, and reporting on the student's completion of the two-week summer course for Modern World History at that time]). Thus, the evidence does not support a finding that the two-week course was intended to or did succeed in preventing regression.

Finally, the parent is not otherwise entitled to district funding of the costs of the two-week course because, although as discussed above the hearing record supports a finding that York Prep with Jump Start provided the student with specially designed instruction to meet his unique needs during the 10-month portion of the 2019-20 and 2020-21 school years, the same cannot be said for the two-week class (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]). For example, there is no evidence that the summer class was consistent with the recommendations of the private evaluator in the March 2017 and January 2019 evaluations that the student attend a "structured summer program" to address his attention and executive functioning needs (Tr. pp. 295-98; Parent Exs. I at p. 13; KK at p. 16). Nor is there evidence that the teacher who conducted the class was a special education teacher. Based on the foregoing, there is no support in the hearing record for an award of tuition funding for the two-week program.

2. Prospective Funding for Tutoring Services

The parent argues that the IHO erred by finding that the student was not entitled to five hours per week of tutoring for the 2020-21 school year. The parent also argues that, although the IHO found the tutoring services to be appropriate, the IHO did not reach a determination regarding whether to award the prospective funding sought for the services. In addition, the parent contends that the district had the opportunity to rebut the appropriateness of the tutoring services as a support to the student, but failed to do so.

In response, the district argues that the parent is not entitled to prospective funding for five hours per week of tutoring services because the hearing record failed to contain evidence that the parent assumed any financial risk for said services or had located or secured a provider for those services. The district asserts that, contrary to the parent's contentions, she is not seeking funding for private services already secured or provided to the student, but instead, seeks prospective funding for compensatory educational services to make up for gaps in the student's unilateral placement at York Prep. As such, the district asserts that the IHO properly denied the parent's request for funding.

According to the private evaluator's affidavit, she spoke to the parent in August 2020 to discuss the student's progress to date (see Parent Ex. K ¶ 16). Prior to speaking with the parent in August 2020, the evidence in the hearing record reflects that the private evaluator's last contact with the parent was in January 2019 to discuss the results of the student's psychoeducational evaluation completed in November and December 2018—which was the last time the private evaluator had any contact with the student, himself (id. at ¶ 9; see Tr. p. 299). In the August 13, 2020 letter, the private evaluator noted that, as part of the January 2019 psychoeducational evaluation, she had recommended that the student receive "daily, pointed, evidence-based learning and executive functioning remediation in select subject areas with which he struggle[d], as well as

homework assistance" (Parent Ex. L at p. 2).²³ In addition, the private evaluator indicated that she had "further suggested that [the student] receive supplemental programming to assist him with promoting effective techniques to help with self-monitoring and self-management" (*id.*). At that time, the private evaluator indicated that she was "continuing to recommend that [the student] receive supplemental executive functioning intervention and learning support after school, at a rate of 5 hours per week, to specifically assist with homework management, assignment completion, and rehabilitation of his metacognitive skills" (*id.*).

Turning back to the private evaluator's affidavit, this evidence reflects that the private evaluator "issued a letter clarifying that the daily remediation support [she] had recommended should be provided in the form of 5 hours per week of after-school support" and that she "updated the recommendation" because the parent "reported difficulty in assisting [the student] to complete homework due to difficulty of the subject areas" (Parent Ex. K ¶ 16).

At the impartial hearing, the parent testified that, prior to the August 2020 CSE meeting, she provided the CSE with a letter from the private evaluator, dated August 13, 2020, within which the evaluator recommended five hours per week of afterschool tutoring for the student (*see* Tr. p. 435).²⁴ The parent explained that the student required afterschool supports specifically on Fridays because "Monday through Thursday, he had Jump Start in the beginning of the day and at the end of the day to help him, . . . , to make sure that he underst[ood] what he's doing, and that he underst[ood] the work, and that he kn[ew] how to do the work" (Tr. p. 436). However, on Fridays, the student did not have that support "in the evening" and it was "difficult for him to stay focused during the homework the whole time" (*id.*). When asked if the August 2020 CSE discussed the student's need for afterschool supports, the parent testified that the CSE "said they were not able to recommend that" because the student "already ha[d] afterschool" (Tr. pp. 436-37).

In her decision, the IHO analyzed the parent's contention that the August 2020 CSE failed to consider the private evaluator's recommendation for five hours per week of afterschool tutoring in the context of the August 2020 CSE process and whether the district offered the student a FAPE for the 2020-21 school year (*see* IHO Decision at pp. 12-15). In particular, the IHO noted that the parent requested, and the private evaluator recommended, five hours per week of afterschool tutoring services (*id.* at p. 14). Immediately thereafter in the following paragraph, the IHO wrote: "I find that the recommendation was appropriate" (*id.*). Within the same paragraph, the IHO noted that neither the "information or recommendations" in the student's August 2020 IEP would have changed had York Prep attended and participated in the August 2020 CSE meeting, and moreover, that the student "did not require the specific services that York Prep had been providing or that were recommended by [the private evaluator] who had not seen the [s]tudent since 2018" (*id.* at pp. 14-15).

²³ According to the parent's letter, dated August 18, 2020, forwarding the private evaluator's letter to the district, the parent indicated that she "recently went to a scheduled IEP meeting that did not take place as the CSE office was closed" (Parent Ex. L at p. 1).

²⁴ To be clear, the private evaluator did not include a recommendation for five hours per week of afterschool supports or tutoring in either the March 2017 neuropsychological evaluation report or in the January 2019 psychoeducational evaluation report (*see* Parent Exs. I at pp. 10-13; KK at pp. 13-16).

On appeal, the parent interprets the IHO's decision as finding that the private evaluator's recommendation for five hours per week of afterschool tutoring to be an appropriate recommendation (see Req. for Rev. ¶ 5[b]; Parent Mem. of Law at p. 15). In addition, the parent argues the student is entitled to five hours per week of afterschool tutoring because the district failed to address the parent's request for afterschool tutoring services in the prior written notice sent after the August 2020 CSE meeting and in its response to the due process complaint notice (see Parent Mem. of Law at pp. 14-15). With respect to the IHO's decision, even if the proximity of the IHO's statement in the decision acknowledging the private evaluator's recommendation to the statement immediately following in the next paragraph about the appropriateness of the recommendation could lend support to the parent's interpretation, the IHO clearly found that the student did not require the "services . . . recommended by [the private evaluator] who had not seen the [s]tudent since 2018"—which, based on the evidence in the hearing record, can only refer to the private evaluator's recommendation for five hours per week of afterschool tutoring (IHO Decision at pp. 14-15).

Moreover, the parent's request for district funding of future tutoring services to make-up for past harms amounts to a request for compensatory education. However, the parent unilaterally placed the student as her self-help remedy to address the denial of FAPE for the same time period. Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with Doe v. E. Lyme, 790 F.3d 440, 456-57 [2d Cir. 2015] [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050). However, if permitted, it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement.

A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement

furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). However, for the outside services to represent a portion of the unilateral placement, the parent must undergo the financial risk associated with unilateral placements (see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] ["Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test"] [first emphasis added] [internal quotations marks and footnotes omitted]; see also Carter, 510 U.S. at 14). To the extent a parent cannot afford to front the costs of the services, the district may be required to directly fund the services, but only if it is shown that the parent was legally obligated to pay for the services but, due to a lack of financial resources, had not made payments (see Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school 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]).

Here, to the extent that the parent continues to seek five hours per week of afterschool tutoring services for the student, an analysis of the student's entitlement to such services relates more directly to the issue of whether York Prep was an appropriate unilateral placement for the student or whether the parent cobbled services together, in addition to York Prep, such that the parent was entitled to either prospective funding or reimbursement for such services. However, as the district argues, the student did not receive afterschool tutoring services and there is no evidence in the hearing record that the parent attempted, but failed, to obtain such services during the 2020-21 school year when the student attended York Prep (see generally Tr. pp. 1-665; Parent Exs. A-Z; AA-NN; Dist. Exs. 3-5; 8-14; IHO Exs. I-XII). Consequently, there is no reason to disturb the IHO's decision on this issue.

3. Reimbursement for January 2019 Psychoeducational Evaluation

The district argues that the IHO erred by awarding the parent reimbursement for the costs of the January 2019 psychoeducational evaluation as an IEE because the parent never expressed any disagreement with a district evaluation or requested that the district conduct an IEE at public expense. The parent contends that the evidence in the hearing record reflects that no evaluation was provided to the parent, and therefore, the parent could not object.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE

is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense].²⁵

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation, "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

At the impartial hearing, the private evaluator who conducted the January 2019 psychoeducational evaluation testified that the parent sought the updated information because she was concerned about the student's "placement" at the nonpublic school he was attending for the 2017-18 and 2018-19 school years (Tr. p. 317). The evaluator explained that neuropsychological evaluations were typically "done about every three years" and the student's January 2019 psychoeducational evaluation was completed the year after the March 2017 neuropsychological evaluation to "just to update areas of academic achievement to see if he was making progress in those areas" and to administer a "social-emotional screen" (id.).

The district's only argument pertaining to the IEE was that the parents did not express disagreement with a district evaluation; however, within the amended due process complaint notice, the parent noted that she informed the district in her 10-day notice, dated June 13, 2019, that the student had "last" been evaluated in "May 2017" (presumably referring to the March 2017 neuropsychological evaluation that she provided to the district in or around May 2017) and asserted that the district failed to timely and properly assess the student's "academic and social emotional skills" (Parent Ex. A at p. 6; see Parent Ex. B at p. 2 [indicating in the 10-day notice, dated June 13, 2019, that the parent sent the district the March 2017 neuropsychological evaluation in May 2017]). In addition, the parent alleged that, due to the district's failure to evaluate the student, the parent had secured the January 2019 psychoeducational evaluation of the student (Parent Ex. A at p. 6). During the impartial hearing, the district presented no evidence of evaluations conducted by the district. As noted above, a parent's expression of disagreement with a district's failure to evaluate a student in all areas of suspected disability may form the basis for a

²⁵ Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

request for an IEE (Letter to Baus, 65 IDELR 81). The parent did not explicitly request district funding of the January 2019 psychoeducational evaluation until her September 2020 amended due process complaint notice (Parent Ex. A at p. 10); however, in arguing that the IHO erred in ordering district funding of the IEE, the district has not focused on the parent's lack of an earlier request for the public funding of the IEE.²⁶ Having found that the evidence in the hearing record shows that the parents expressed their disagreement with the district's evaluation of the student, the district has not alleged any other error on the part of the IHO in ordering the district to reimburse the parent for the costs of the January 2019 psychoeducational evaluation.

VII. Conclusion

In summary, a review of the evidence in the hearing record demonstrates that, contrary to the IHO's decision, the parent sustained her burden to establish that York Prep was an appropriate unilateral placement for the student for the 2019-20 and 2020-21 school years and that equitable considerations support an award of tuition reimbursement. With respect to the district's cross-appeal, the evidence in the hearing record supports the IHO's decision ordering the district to fund the costs of the privately obtained January 2019 psychoeducational evaluation.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated December 22, 2021, is modified by reversing that portion which found that York Prep was not an appropriate unilateral placement for the 2019-20 and 2020-21 school years; and,

IT IS FURTHER ORDERED that the district shall fully reimburse the parent for the costs of the student's attendance at York Prep for the 2019-20 and 2020-21 school years.

Dated: **Albany, New York**
 March 4, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER

²⁶ In past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094). This is not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]), and, in most instances it is likely that a parent would be in a better position to elicit an agreement from the district to fund an IEE if the IEE was requested outside of the more formal context of an impartial hearing. However, here, where the parents requested the IEE in the due process complaint notice, it was incumbent on the district to respond, yet there is no evidence in the hearing record that the district took advantage of the resolution process to agree to fund the IEE (see 34 CFR 300.510[a]) or set out to defend its evaluation of the student during the impartial hearing.