The University of the State of New York

The State Education Department
State Review Officer
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No. 22-061

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

Appearances:
White & Case, LLP, attorneys for petitioners, by Michael E. Hamburger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Aaron School for the 2021-22 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for the 2021-22 school year. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

As reported by the student's parents , the student was diagnosed with hypotonia at 6-months of age and received services through the Early Intervention program (Parent Ex. 11 at p. 3). At five years old, he received a diagnosis of speech apraxia (id.). Subsequently, he was diagnosed with a speech sound disorder and a specific learning disorder with impairments in reading, written expression, and mathematics (id.).

The parents enrolled the student at the Aaron School in November 2012 and were awarded funding of the student's placement at the Aaron School for the 2012-13 school year as part of a prior administrative proceeding (Parent Ex. 5).

According to the hearing record, the student continued to attend the Aaron School at district expense for the 2013-14 through the 2020-21 school years pursuant to settlement agreements (see Parent Exs. 4; 7; 8; 15; 25; 29; 33).[1]

A CSE convened on December 15, 2020 to review the student's program and finding the student remained eligible for special education as a student with a speech-language impairment, developed a program with an implementation date of January 7, 2021 (Dist. Ex. 9). The CSE recommended that the student be placed in a 12:1+1 special class in a community school for 35 periods per week and receive related services, including one 30-minute session of group counseling services per week, one 30-minute session of group occupational therapy (OT) per week, one 30-minute session of individual speech-language therapy services per week, and four 30-minute sessions of group speech-language therapy services per week (id. at pp. 18-19).

In a December 20, 2020 email to the district school psychologist, who was also the district representative at the December 2020 CSE, the parents acknowledged receipt of the CSE's recommendations but indicated that they believed the evaluation relied on by that CSE was out of date and requested a new neuropsychological evaluation of the student (Dist. Ex. 15; see Dist. Ex. 10).

On February 11, 2021, the district sent the parents a prior written notice describing the program recommended by the December 2020 CSE and a school location letter identifying the school that would provide the student with the recommended program (Dist. Exs. 12; 13).

In a February 16, 2021 prior written notice, the district responded to the parents' request for a reevaluation of the student made by email in December 2020 (Parent Ex. 6 at p. 2). The notice indicated that the district determined that a neuropsychological assessment of the student was necessary as part of the reevaluation (id.).

The neuropsychological evaluation was conducted on April 6 and 14, 2021 (Parent Ex. 11 at p. 1). The evaluation provided a history of the student's prior diagnoses and noted the student's behavioral presentation and neuropsychological profile were consistent with attention deficit-hyperactivity disorder (ADHD) and an unspecified neurodevelopmental disorder (id. at pp. 3, 9-

[1] The hearing record does not include the stipulation of settlement for the 2019-20 school year. The parents' due process complaint notice indicated a number of exhibits were attached to it labeled as exhibits with letter markings, including the stipulations of settlement for the 2019-20 and 2020-21 school years marked as "Exhibit AA" (Due Proc. Compl. Not. At pp. 7, 9 n. 27, 32); however, the due process complaint notice submitted with the hearing record did not include any exhibits attached. The stipulation of settlement included with the hearing record for the 2020-21 school year includes a cover page marked as "AA" as identified in the due process complaint notice; however, it does not include the stipulation of settlement for the 2019-20 school year (Parent Ex. 4). Review of the hearing record shows that many of the parents' exhibits include cover pages with letter markings; however, the parents' exhibits admitted into the hearing record are identified by number (see Parent Exs. 1-45). The district exhibits, as well as five exhibits introduced during a hearing related to pendency, were also identified using numbers (Dist. Exs. 1-26; Pendency Hearing Exs. 1-5).

10). The report indicated that the student's intellectual functioning was "within the very low range" (id. at p. 10). The evaluator opined the student would benefit from a highly structured, small, nurturing classroom in a small learning environment tailored to non-aggressive students in order to maximize his learning potential (id.).A CSE convened on May 17, 2021 and reviewed the results of the April 2021 neuropsychological evaluation (Parent Ex. 16 at pp. 1, 29). The May 2021 CSE found the student remained eligible for special education as a student with a speech-language impairment (id. at p. 1). The CSE recommended that the student attend a 12:1+1 special class for five periods per week in each of math, English-language arts (ELA), social studies, and sciences (id. at pp. 24-25). Further, the CSE recommended related services of one 40-minute session of group counseling services per week, one 40-minute session of group occupational therapy (OT) per week, two 40-minute sessions of individual speech-language therapy per week, and two 40-minute sessions of group speech-language therapy per week (id. at p. 25). The CSE further recommended that the student's educational program be provided at a district non-specialized school (id. at p. 28).

The parents sent an email to the district on May 21, 2021, confirming receipt of the student's May 2021 IEP (Parent Ex. 14 at p. 2).[2] In this email, the parents expressed concern that the IEP indicated that the student's disability classification was other-health impairment and asserted that they believed the student's classification should be speech-language impairment (id. at pp. 2-3). The district's school psychologist responded to the parents on May 24, 2021, advising them that the district would change the student's classification (id. at p. 2).[3] The parents signed off on the change without requiring a new CSE meeting (Dist. Ex. 22).

In a May 26, 2021 email to the parents, the district provided the parents with a prior written notice and a school location letter; the email specifically identified the same school as had been identified in the February 2021 school location letter and provided a telephone number for the school (Parent Ex. 18 at p. 2).

In a May 31, 2021 email to the district, the parents acknowledged receipt of an updated IEP with the student's classification changed to speech-language impairment, requested that the district provide prior written notice reflecting this change, and further requested assistance in informing the assigned school of the parents' desire to arrange for a visit (Parent Ex. 18 at p. 2).

On June 1, 2021, the district sent the parents a prior written notice, noting the student's change in classification to speech-language impairment, and describing the program recommended by the May 2021 CSE and a school location letter identifying the school that would provide the student with the recommended program—the same school as was identified in the February 11, 2021 school location letter (Dist. Exs. 13; 25; 26).

The parents were put in touch with the parent coordinator at the assigned school and the parent coordinator informed the parents that they could get an overview of the school by accessing

[2] Earlier on May 21, 2021, the district school psychologist indicated in an email to the parent that she had attached a copy of the student's IEP and a link for procedural safeguards (Parent Ex. 14 at p. 3).

[3] The May 24, 2021 email also provided the parent with a waiver of meeting to amend the IEP and requested that the parent sign and return the document in order to update the IEP (Parent Ex. 14 at p. 2).

a virtual tour on the school's website and that the parents' request for a visit would be forwarded to the school's assistant principal (Parent Ex. 24 at p. 3). The parents responded that they had reviewed the information available on the school's website and took the virtual tour and found that there was "plenty of information about the school in general and less specific info about special education classes" (id.).

The parents reached out to the parent coordinator again in an August 19, 2018 email, in which the parents repeated their specific requests regarding a visit to the assigned school (Parent Ex. 24 at p. 2).

The parents, through counsel, sent the district a letter, dated August 30, 2021, informing the district that the parents did not believe the district offered the student a free appropriate public education (FAPE) for the 2021-22 school year and that the parents intended to continue the student's enrollment at the Aaron School and seek reimbursement for the cost of tuition from the district (Parent Ex. 32).

On September 13, 2021, the parents executed a contract for the student's enrollment at the Aaron School for the 2021-22 school year (Parent Ex. 38).

A. Due Process Complaint Notice

By due process complaint notice dated October 14, 2021, the parents asserted that the district failed to offer a FAPE to the student for the 2021-22 school year (Due Proc. Compl. Not. at pp. 2, 9-13, 19).[4] The parents reviewed the student's educational history going back to the 2012-13 school year, focusing on the settlements between the district and the parents for placement of the student at the Aaron School (id. at p. 2-9).

Turning to the 2021-22 school year, the parents reviewed the communications that took place between the parents and district regarding the assigned public school (Due Proc. Compl. Not. at pp. 9-11). According to the parents, after receiving the proposed school placement, the parent attempted to contact the proposed school multiple times without success (id. at pp. 12-13). Because the parents did not hear back, the parents asserted that they were forced to assume that the proposed school either rejected the student's placement or could not "offer the service specified in his IEP" (id. at p. 11). The parents' objections focused on the district's failure to respond to their request to visit the assigned school; the parents asserted they were denied "the basic opportunity to be informed and involved in [the student's] placement at the [assigned public school] (id. at p. 13). According to the parents, the 2021-22 IEP was "procedurally deficient"; however, in explaining the procedural deficiencies, the parents only pointed to their inability to speak to someone at the proposed school or to visit the school (id.).

The parents asserted that the Aaron School was an appropriate placement for the student and that the equities favored the parents (Due Proc. Compl. Not. at pp. 16-20). The parents

[4] Neither party entered the due process complaint notice into the hearing record (see Tr. pp. 24-31). Although the due process complaint notice received as part of the hearing record included multiple cover sheets, the cover sheets are not cited in this decision and the due process complaint notice is cited to the pages as numbered.

requested that the district pay the full cost of the 22 student's tuition at the Aaron School for the 2021-22 school year (id. at p. 21).[5]

B. Impartial Hearing Officer Decision

After a preliminary conference took place on November 3, 2021, the parties convened for a hearing on pendency on November 9, 2021 (Tr. pp. 1-15). In an interim decision on pendency dated November 18, 2021, the IHO directed the district to provide pendency for the student at the Aaron School retroactive to the start of the 2021-22 school year (Nov. 18, 2021 Interim IHO Decision at pp. 6).

The hearing resumed on November 19, 2021; at that time, the district made an application for information regarding the prior stipulations be stricken from the hearing record (Tr. pp. 16-22). The IHO entered an interim order on December 6, 2021 denying the district's request to strike the parties' prior settlement documents from the hearing record (Dec. 6, 2021 Interim IHO Decision at p. 2).

The parties proceeded to an impartial hearing, which began on December 15, 2021 and concluded on February 8, 2022 after two days of proceedings (Tr. pp. 22-203). In a final decision dated April 11, 2022, the IHO found that the district denied the student a FAPE for the 2021-22 school year (IHO Decision at pp. 8-9).

The IHO held that the district "did not even try to address the burden of proof to show that the IEP and program offered were appropriate for the student" and instead, "the district's witnesses testified only to their unsubstantiated position that the public school could implement the IEP" (IHO Decision at p. 8). Therefore, the IHO found that the district failed to show the IEP offered the student a FAPE (id.).

Regarding the parents' alleged procedural violations, the IHO determined that "the district failed to put on any case whatsoever" (IHO Decision at p. 9). Specifically, the IHO held that the district "failed to allow the parents to visit the school or meet with school personnel" (id.). The IHO determined the parents were unable to contact the school despite multiple attempts and the IHO found that this was a procedural violation "that significantly impeded the parents' right to participate in the decision-making process" (id.).

The IHO then moved to determine whether the unilateral placement, the Aaron School, was appropriate (IHO Decision at pp. 9-10). The IHO noted that the parents had the burden to establish the unilateral placement was appropriate for the student and failed to meet this burden (id. at p. 10). The IHO held that the "parent[s] failed to produce a witness from the private school and provided no documentary evidence that the private school was appropriate" (id.).

[5] The parents also requested a pendency order directing the student be placed at the Aaron School during the pendency of the proceeding (Due Proc. Compl. Not. at p. 19).

Lastly, the IHO found that the parents cooperated with the district as they provided timely 10-day notice, reports to the district, and attended and participated in the CSE meetings (IHO Decisions at p. 11).

Based on his above findings, the IHO denied the parents' request for reimbursement of the cost of tuition at the Aaron School (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parents appeal.[6] The parents assert that they disagree with the IHO's decision that the Aaron School was not an appropriate placement for the student and that the parents failed to meet their burden of proof on this issue. The parents contend that they provided sufficient documentary evidence and testimony that establishes that the Aaron School was tailored to meet the student's unique needs.

Additionally, the parents argue that the IHO failed to perform the proper analysis required of him in evaluating the unilateral placement. According to the parents, the "IHO did not assess a single line of testimony" presented by the parents regarding the student's progress at the Aaron School. Additionally, the parents assert that the IHO did not review the numerous reports in the hearing record. The parents contend the IHO failed to consider the totality of the circumstances to determine whether the unilateral placement was appropriate. Finally, the parents allege that the IHO decision implies that the parent was required to produce witnesses from the school and it ignored the documentary evidence presented.[7]

The parents request that the IHO decision be overturned in part to find that the unilateral placement at the Aaron School was an appropriate placement for the student for the 2021-22 school year and that the parents be awarded reimbursement for the full cost of the student's tuition for the 2021-22 school year.

The district answers the parents' request for review and cross-appeals from the IHO's determination that it did not offer the student a FAPE. The district argues that the IHO properly determined the parents failed to prove that the unilateral placement was appropriate. The district notes that the parents had the burden of proving the unilateral placement was appropriate and the parents failed to provide any evidence from the Aaron School regarding the student's program or how it met the student's needs. The district acknowledges that the parents presented documentary evidence of progress; however, it contends that the parents did not present any evidence explaining the Aaron School's program and how it specifically addressed the needs of the student. Moreover, the district argues that the progress reports included in the hearing record were from a different school year not at issue in this proceeding. Further, the district asserts the student's father's testimony on the issue of the student's education at the Aaron School was vague and did not

[6] The parent initially served a request for review on May 20, 2022; however, that request for review was rejected by the Office of State Review (see May 27, 2022 Letter from OSR). The parent re-filed the request for review on June 9, 2022.

[7] The parent contends that the IHO's statement "that private school with transportation" was not an appropriate placement for the student improperly indicated that the parent was seeking transportation costs.

describe how the student's program at the Aaron School addressed the student's deficits. Therefore, the district contends the IHO was correct to find that the Aaron School was not an appropriate placement for the student for the 2021-22 school year.

The district cross-appeals from the IHO's finding that the district failed to offer the student a FAPE for the 2021-22 school year. Initially, the district contends that the IHO's finding it failed to "put on 'any case whatsoever'" was a "plain error." The district notes that it presented two witnesses and many documents to support its assertion that it offered the student a FAPE. The district asserts that the IEPs created for the student were appropriate based on the information before the CSE and it recommended a school placement that would have been able to implement the student's IEP on the first day of school. As such, the district asserts the IHO's finding that the district failed to meet its burden should be overturned.

Moreover, the district contends that the IHO erred by finding the parents' inability to visit the school location was a procedural violation that significantly impeded the parents' right to participate in the decision-making process. The district asserts that this "finding is erroneous because applicable law does not guarantee the Parents the opportunity to visit the recommended placement." The district argues that there is no obligation for the district to provide parents with an opportunity to visit a recommended placement. The district requests that the cross-appeal be sustained and the IHO's findings regarding its offer of a FAPE be overturned.

In an answer to the district's cross appeal, the parents argue that the IHO found that the procedural violation regarding the parents' ability to visit the assigned school was a denial of FAPE and that the IHO's finding should be affirmed.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional

advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[8]

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

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

VI. Discussion

A. Assigned Public School Site

As described above, the sole ground raised by the parents in their due process complaint notice to assert that the district denied the student a FAPE stem from the assigned public-school site; specifically, the parents asserted they could not know if the assigned public school could implement the IEP because they were unable to speak with or visit the school (Due Proc. Compl. Not. at pp. 9-13). The IHO agreed with the parents and found that, because the district failed to present evidence to support its position, the parents' inability to obtain information they had requested regarding the assigned public school was a procedural violation that rose to a denial of FAPE (IHO Decision at p. 9). The district cross appeals from this finding arguing that the inability to visit an assigned public school does not constitute a procedural violation, and even if it did, it does not rise to the level of a denial of FAPE.

Prior to reaching the merits of the parties dispute, the IHO statements that the district did not "put on any case whatsoever" and did not "even try to address the burden of proof" must first be addressed (see IHO Decision at pp. 8-9). Review of the hearing record shows that the IHO's statements are wholly unsupported. The district presented 26 exhibits and the testimony of two witnesses to support its assertion that it had offered the student a FAPE (Tr. pp. 81-141; Dist. Exs. 1-26). While the IHO may have been noting that the district did not present evidence regarding the recommendations made by the CSE, those issues were not in dispute. The due process

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

complaint notice makes only one generic statement that the 2021-22 IEP was "procedurally deficient" (Due Proc. Compl. Not. at p. 15). However, at the start of the impartial hearing, counsel for the parents clarified that the alleged procedural deficiencies all related to the parents inability to visit the assigned school to determine "whether the school accepted the placement, whether the school could implement the IEP, and whether the parents believe[d] that the school could actually implement the IEP effectively" (Tr. p. 3). Additionally, in the parents' opening statement, counsel for the parents did not indicate that there was any issue to be determined other than that the parents were unable to obtain information from the assigned school (Tr. pp. 65-69). Accordingly, the only issues challenges related to the district's IDEA obligations to be resolved during the impartial hearing related to the parents' ability to visit or obtain information about the assigned school.

The Supreme Court and the Second Circuit have continually reminded litigants that "[t]he IEP is 'the centerpiece of the [IDEA's] education delivery system for disabled children (Endrew F., 137 S. Ct. 988, 994 [2017]; see D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 157 [2d Cir. 2020]). Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id. at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B., 589 Fed. App'x at 576).[9] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F. 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York

[9] The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Regarding the parents' allegation that they were unable to tour the assigned public school site, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]). On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Here, as discussed above, a CSE convened in December 2020, then, in February 2021, the district sent the parents a prior written notice and school location letter (Dist. Exs. 12; 13; 15).[10] The CSE next convened in May 2021 to review the results of the April 2021 neuropsychological evaluation report (Dist. Ex. 16; see Parent Ex. 11). Following the May 2021 CSE meeting, where

[10] It is noted that the December 15, 2020 IEP had a projected implementation date of January 7, 2021 (Dist. Ex. 9 at p. 1).

the district recommended that the student be placed in a 12:1+1 special class in a district non-specialized school (see Parent Ex. 16 at pp. 24-25, 28; Dist. Ex. 24 at pp. 27, 32), the district provided the parents with both a prior written notice and school location letter (Parent Ex. 18 at p. 2; see Dist. Exs. 25; 26).[11]

In their post-hearing brief, the parents framed their communications with the district following the May 2021 CSE meeting as an attempt to gather information about whether the assigned school could implement the program recommended in the May 2021 IEP (Parent Post Hr'g Br. at p. 12). However, review of the hearing record shows that the parents had made six specific requests, which were (1) to visit the school location; (2) to meet with school administration responsible for special education; (3) to visit the "exact classroom" and meet the teachers; (4) to "attend a class and observe, if possible, interaction of students with teachers and service providers"; (5) to "observe the potential interaction of students with disabilities with general education students"; and (6) to visit the related services locations and meet with the staff who would provide the student with services (Parent Ex. 18 at p. 2; 22 at pp. 2-3; 24 at p. 1).

Although it is not mentioned in the email communications, the student's father testified that during the prior school year, he visited the assigned school in September 2020 (Tr. pp. 155-56). At that time the student's father spoke with the assistant principal at the assigned school (Tr. pp. 155-56, 158-59).

The parent first made the above requests in a May 31, 2021 email to the district (Parent Ex. 18).

In an email dated June 5, 2021, the parent coordinator at the assigned school responded to the parents informing them that their email would be forwarded to the assistant principal and a learning specialist and directing them to visit the school's website for a virtual tour (Parent Exs. 22 at p. 2; 24 at p. 3). The parents responded that they had taken the virtual tour and found there was "plenty of information about the school in general and less specific info about special education classes" (Parent Exs. 22 at p. 1; 24 at p. 3).[12]

The parents sent another request for the same information on August 19, 2021 (Parent Exs. 24 at p. 1; 26 at pp. 2-3).

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[11] It appears from review of the email communication between the parents and the district that a prior written notice and school location letter were sent to the parent in May 2021; however, copies of those letters are not included in the hearing record (Parent Ex. A at p. 2). Instead, the hearing record includes the February 2021 prior written notice and school location letter and the June 2021 prior written notice and school location letter; the June 2021 letters were sent in response to the parents' May 31 email to the district in which they requested that the change in the student's classification be noted in a prior written notice (Parent Ex. 18 at p. 2; Dist. Exs. 12; 13; 25; 26). The email sent to the parent on May 26, 2021, which indicated it included the May 2021 prior written notice and school location letter, identified in the body of the email the school the student was assigned to attend, the same school as previously identified in the school location letters included in the hearing record (Parent Ex. 18 at p. 2; Dist. Exs. 13; 26).

[12] The student's father testified that he did not take a virtual tour but reviewed slides that were on the school's website (Tr. pp. 198-99).

According to the student's father, the parents "wanted to visit the school to check with the school administration that they are able to implement the IEP" (Tr. p. 185). The student's father testified that he did not receive any response to the emails he sent for information regarding the assigned school (Tr. pp. 178-86).

Certainly, it would have been better practice for the district to have responded within a reasonable time to the parents' requests as the parents reached out to the assigned school more than once and were unable to visit the assigned school in their preferred manner. However, in this instance, the district's failure to respond was not a procedural violation that rises to the level of a denial of FAPE.

As discussed above, the district is not required to allow a parent to visit an assigned school (see J.B., 242 F. Supp. 3d at 195; J.C., 2015 WL 1499389, at *24 n.14; E.A.M., 2012 WL 4571794, at *11; S.F., 2011 WL 5419847, at *12). While one division of the U.S. Department of Education has said that allowing a parent to observe a proposed class does not violate the Family Educational Rights and Privacy Act of 1974 (FERPA) because FERPA prohibits teachers from disclosing information from an educational record to other students or observers (Letter to Mamas, 106 LRP 15971 [Family Policy Compliance Office 2003]), the special education division indicated shortly thereafter that it does not result in the right to visit (Letter to Mamas, 42 IDELR 10 [OSEP 2004]). In this case, the parents were aware at the time of the May 2021 CSE meeting that the district was likely to recommend the same assigned school as they had made the recommendation previously (see Tr. pp. 155-56; Dist. Ex. 13). And, as discussed above, the student's father testified that he visited the school during the prior school year and spoke with the assistant principal (Tr. pp. 155-56, 158-59).

Additionally, the parents' request to observe how the students in the class interact with the teachers and how students with disabilities at the school interact with the general education students in the school does not appear to relate to the parents' assertion that the purpose of the visit was to see if the school was able to implement the IEP (Parent Ex. 18 at p. 2; Tr. p. 185). The parent requested an observation during the 2020-21 school year; however, the district cannot guarantee that the student would have been in a class with the same students or the same teacher as the class the parents would have observed (M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]; cf. R.E., 694 F.3d at 187, 192 [noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP]).

If the parent wanted to speak with the teacher who would have taught the student or the related service providers who may have provided him with services, the parent could request that those individuals attend the CSE meeting (see 8 NYCRR 200.3[a][1][ix] [a parent can invite "other persons having knowledge or special expertise regarding the student" to a CSE meeting). In the notice of meeting, the parents were informed of this right and were advised that they "ha[d] the right to invite other individuals who you determine to have knowledge or special expertise about your child" (Dist. Ex. 23 at p. 2). Parents may make such a request in an attempt to allay their concerns, however, it also should be noted that there is no guarantee that a school district will be in a position to identify such providers at the time a CSE meeting is held, nor is it necessarily a procedural violation if the school district is unable to fulfill such a request.

Finally, the hearing record demonstrates that the assigned school had an opening for the student on the first day of the 2021-22 school year and would have been able to implement the student's IEP as written (Tr. pp. 87, 90-94). The parents did not assert that there was anything substantively wrong with the May 2021 IEP recommendations in the due process complaint notice or at the impartial hearing.[13] Considering the above, the district's failure to respond to the parents' requests to visit the school is not sufficient to find that the district denied the student a FAPE.

While I do agree that some information would have been helpful to the parents and the district should have engaged in courtesy of a response to the parents prior to the start of the 2021-22 school year; this is does not correlate to a finding that the district denied the student a FAPE. An administrative officer may find that a student did not receive a FAPE due to a procedural violation, only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

Considering that the parents had visited the assigned school during the prior school year, the parents were aware of the district's continuing recommendation to place the student at the same school, the parents were able to obtain information about the school through the school's website, the information being sought by the parents was both potentially invasive of the privacy rights of other students at the school and not designed to elicit a response as to the school's ability to implement the recommended educational program, and the parents did not attempt to obtain some of the information being sought through the CSE review process, the district's failure to directly respond to the parents' requests, in this instance, did not significantly impede the parents' opportunity to participate in the decision-making process.

It is noted that the parties have an extensive procedural history dating back to when the student was very young and that the parents might have been skeptical to trust the district due to this history. While I can sympathize with the parents' concern, their skepticism cannot be the basis to require the district going forward to comply with requests for visits for which I find parents are not entitled under the factual circumstances of this case. The district was required to produce an IEP that provided an "appropriate" education, but the district need not "provide[ ] everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132).

B. Unilateral Placement

Although, a FAPE was offered by the district, I will address the IHO's findings regarding the parents' unilateral placement of the student at the Aaron School. The IHO found that the parents failed to meet their burden as they did not produce a witness from the private school and provided no documentary evidence that the private school was appropriate (IHO Decision at p.

[13] It is noted that the only potential substantive complaint that the parents indicated during the hearing and in the exhibits, was that the parents were unhappy with the CSE finding the student eligible for services as a student with an other health impairment (Tr. p. 154). This first occurred in February 2020 (id.). However, after the parents emailed the district regarding this concern (see Parent Ex. 18), the IEP was updated to change the student's classification to speech or language impairment (see Parent Ex. 17 at p. 1; Dist. Ex. 24 at p. 1).

10). The parents appeal, arguing that the IHO erred as the student's father testified regarding the appropriateness of the Aaron School and that they submitted multiple reports of the student's progress at the school. The district contends that the IHO was correct in finding there was insufficient evidence in the hearing record to show that the Aaron School was an appropriate placement for the student.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. 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).

Here, the IHO correctly determined that the evidence in the hearing record was not sufficient to make a finding as to whether the Aaron School was an appropriate placement for the student 2021-22 school year. The student's father testified that the student made progress while attending the Aaron School (Tr. p. 188). According to the student's father, the parents have seen "tremendous progress" in that the student has started speaking, "we now communicate to him. He can express his feelings, express his needs, and so he advanced tremendously" (Tr. p. 188). The student's father testified that the student's "progress was documented by the numerous reports" (Tr. p. 188). However, the only Aaron School progress reports included in the hearing record are from the 2016-17 and 2018-19 school years, and a mid-year report from the 2020-21 school year (Parent Exs. 34; 36; Dist. Ex. 20).[14] The parents did not present any testimony or documentary evidence regarding the educational program that the student was receiving at the Aaron School during the school year at issue, the 2021-22 school year.

The student had been attending the Aaron School since kindergarten and while the parents believed the Aaron School would continue to be an appropriate placement for the student moving forward;[15] the hearing record nevertheless lacks any information regarding what educational programming the student was receiving from the Aaron School during the 2021-22 school year, which was the relevant information required to make a finding whether the unilateral placement was appropriate for the 2021-22 school year. The parents had the burden of presenting sufficient evidentiary support to render a factual and/or legal determination that the Aaron School was an appropriate placement for the student for the 2021-22 school year. A determination that the Aaron School was an appropriate placement for a prior school year is not sufficient to support a finding that it continues to be appropriate to address the student's needs during the school year at issue without some evidence that the program the student received in the prior school years would continue in the current school year. Generally, the courts have been clear that for purposes of a tuition reimbursement claim, the student's needs and the specially designed instruction that is offered each school year must be analyzed separately (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]).

VII. Conclusion

For the reasons described above, the IHO's conclusion that the district failed to offer the student a FAPE for the 2021-22 school year must be reversed and the evidence in the hearing

[14] The hearing record also includes the student's report card for the 2020-21 school year (Dist. Ex. 21).

[15] The parent testified that they had issues with the district preschool location, which prompted them to enroll the student at the Aaron School (Tr. pp. 175).

record regarding the Aaron School does not describe the special education services provided to the student or any progress made by the student during the 2021-22 school year at issue and therefore is inadequate to support a finding that the Aaron School was an appropriate unilateral placement for the student.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 11, 2022, is modified by reversing that portion which found that the district denied the student a FAPE for the 2021-22 school year.

Dated: **Albany, New York**
September 6, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER