



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-009

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

Appearances:

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jennifer Kob, 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)¹ appeals from a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Special Torah Education Program (STEP) for the 2022-23 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

¹ While the due process complaint notice lists both the student's mother and father as petitioners, the request for review and reply to answer list only the student's mother as petitioner. Accordingly, all references to "the parent" in this decision are to the student's mother.

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student attended STEP for the 2021-22 school year (Interim IHO Decision at pp. 2, 3). On March 9, 2022, a CSE convened to develop an IEP with an implementation date of July 5, 2022 (Parent Ex. C at pp. 1, 22). The March 2022 CSE recommended that the student attend an 8:1+1 special class in a district specialized school on a 12-month basis (id. at pp. 14, 16, 21). The CSE found the student eligible for special education as a student with an "other health impairment" (id. at p. 1). The CSE recommended that the student be provided with two 30-minute sessions per

week of occupational therapy (OT), one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, one 30-minute session per week of individual counseling services, and one 30-minute session per week of group counseling services (id. at pp. 14-15). The CSE further recommended that the student receive special transportation services (id. at p. 19).

On June 17, 2022, the parent notified the district of her rejection of the district's offered placement and her intent to unilaterally place the student at STEP for the 2022-23 school year and seek tuition funding from the district for the costs of tuition (Parent Ex. U). On July 5, 2022, the parent signed an enrollment contract with STEP for the extended 2022-23 school year (Parent Ex. Q at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2022, the parent alleged that the district denied the student a FAPE for the 2022-23 school year (Parent Ex. A at p. 2). The parent asserted that the district's most recent IEP recommended a 10-month school year in a 12:1+1 special class with related services (id. at p. 1). According to the parent, the recommended related services were as follows: one 30-minute session per week of group counseling services, one 30-minute session per week of individual counseling, two 30-minute sessions per week of individual OT, one 30-minute session per week of individual speech-language therapy and two 30-minute sessions per week of group speech-language therapy (id.) The parent argued that the proposed IEP was not appropriate for the student (id.).

The parent alleged that the student's unique needs would best be addressed through a 12-month program in a special class with higher staff-to-student ratio than twelve students to one teacher and one aide (Parent Ex. A at p. 1). The parent argued that the student's "social, emotional and behavioral needs" would be better addressed in a smaller class (id.). The parent contended that the district delayed informing the parent of the particular public school site to which it assigned the student to attend and that Covid-19 restrictions hindered the parent's ability to visit the assigned school (id.). The parent alleged that she provided the district with appropriate notice of her intent to enroll the student in STEP and that she would seek tuition reimbursement from the district (id.). The parent stated that the district never responded to the parent's notification (id. at p. 2). The parent reported that she enrolled the student in STEP for the 2022-23 school year (id.).

As relief, the parent requested a pendency order and a determination from the IHO that the district failed to offer the student a FAPE (Parent Ex. A at p. 2). The parent further requested that the IHO determine that the student's school year should be 12-months and that the services the student was currently receiving through STEP were appropriate and that the IHO order the district to fund the student's tuition at STEP, including costs for related services, along with whatever relief the IHO should deem to be appropriate (id.).

B. Impartial Hearing Officer Decision

An IHO who was initially assigned to this matter conducted a prehearing conference on September 21, 2022, and he directed the district to fund the student's placement at STEP pursuant to pendency (stay-put) from the date of the due process complaint until the time that the matter was completed (Tr. p. 7; Sept. 21, 2022 Interim IHO Decision at p. 3). The matter was thereafter

reassigned to another IHO in the Office of Administrative Trials and Hearings because the prior IHO had become incapacitated, and a second prehearing conference was held by the new IHO on October 25, 2022 (Tr. pp. 11-27; IHO Decision at p. 2).

An impartial hearing on the merits was held on November 9, 2022 (Tr. pp. 28-76). During the impartial hearing, the district did not enter any exhibits or call any witnesses and conceded that there had been a denial of a FAPE but argued that the parent's unilateral placement was inappropriate and that the parent therefore failed that element of Burlington/Carter test (Tr. pp. 35-36).

In a decision dated December 9, 2022, the IHO found that the district failed to offer the student a FAPE for the 2022-23 school year but that the unilateral placement was inappropriate for the student; therefore, the IHO denied the parent's request for tuition reimbursement from the district (IHO Decision at p. 2). In reaching this finding, the IHO described how the STEP program director's² affidavit stated that the student attended a 12:1+3 classroom at STEP, but that during cross-examination testified that the student attended an 8:1+2 classroom at STEP (id. at p. 7). The IHO described that when the STEP program director was "confronted with this inconsistency" she responded that the information contained in her affidavit "must be a typo" (id.). The IHO stated that she believed "this glaring inconsistency . . . severely undermine[d] the credibility" of the STEP program director (id.). The IHO noted that she found "no credible persuasive testimony or documentary evidence" was presented to show that STEP offered a program tailored to address the student's unique needs or that the student was receiving related services appropriate to his needs (id. at pp. 8-9). The IHO determined that the parent failed to prove that the unilateral placement at STEP was appropriate and, therefore, denied the parent's request for reimbursement (id. at pp. 12-13).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the parent failed to meet her burden to prove that STEP was an appropriate unilateral placement for the student for the 2022-23 school year. The parent alleges that the IHO failed to apply a "totality of the circumstances" test to the evidence presented by the parent regarding STEP's program. Instead, the parent claims that the IHO erroneously "cherry-picked a handful of results from a nine-page evaluation" and notes that neither the district nor the IHO questioned or discussed the evaluation during the impartial hearing. The parent claims that the IHO also erred in concluding from the evidence in the record that the student made no progress in speech between the March 2022 IEP to the October 2022 speech progress report. The parent alleges that the IHO improperly rejected testimony of the parent's primary witness, the STEP program director, as lacking in credibility due to the witnesses' concession during the impartial hearing that her direct testimony by affidavit contained a typographical error with respect to the special class ratio. The parent also notes that the IHO failed to reach a determination regarding equitable considerations.

² The principal of STEP referred to the "program director" as the "curriculum director" and provided a different name for the "director of the school" (Tr. pp. 60, 62-63). For the purposes of this decision, the title "STEP program director" will be used to refer to the witness from STEP who testified via affidavit and in-person at the hearing.

In an answer, the district denies to the parent's material allegations and argues that the IHO's decision should be affirmed and the parent's request for review be dismissed.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).³

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).

³ 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., 580 U.S. at 402).

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

Initially, as neither party has appealed the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year, that finding has become final and binding on the parties and will not be further discussed (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, the remaining issues to be addressed relate to relief sought by the parents.

A. Unilateral Placement

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

1. Student Needs

Before reviewing the evidence of the adequacy of the special education and related services offered by STEP, I will review the evidence in the hearing record that describes the student's special education needs. At the time of the March 9, 2022, CSE meeting, the student was attending STEP (Parent Ex. C at p. 1). The IEP indicated that, chronologically speaking, the student should have been entering the eighth grade for the 2022-23 school year but attended an ungraded class (id. at p. 2). With respect to his academic achievement and performance, the IEP noted that the student read on a "4.5" grade level, that he answered questions, including those that required inferencing, and that he was able to sequence events, identify a simple main idea, identify characters, and identify cause and effect (id.). According to the IEP, the student was able to independently formulate a simple sentence and write legibly, and "[wa]s working on writing more neatly" (id.). The IEP indicated that the student had regained his confidence in his multiplication skills during the school year and was able to divide with two-digit divisors, four-digit dividends, and two-digit quotients with remainders (id.). The student was able to apply addition, subtraction and simple multiplication to word problems, make change independently, and tell time on an analog clock (id.). With respect to science, the IEP indicated that the student "learned about and participated in experiments on, friction, air pressure, and combining substances to form a compound" (id.). The IEP noted that the student "learned about the discovery of America, the Spanish Inquisition, and World War II" and studied a map of Europe (id.).

The March 2022 IEP noted that, according to the student's speech provider, the student's "disabilities affect his communication and language development which made it difficult for him to express his wants and needs" (Parent Ex. C at p. 2). Notably, the student's speech and language skills were limited with respect to "his ability to follow multi-step directions, answer questions based on a story passage, and maintain conversations " (id.). In addition, the IEP indicated that the student's deficits were also apparent in his "social/personal skills, cognitive abilities, and self-help skills" (id.). The student demonstrated aggression or disengaged during therapy sessions "unless maximally prompted," and he required "repeated verbal prompting and assistance to stay on task along with many incentives for cooperation" (id.). The IEP stated that the student was working on "receptive language skills, such as understanding story passages, and answering more complex 'wh' questions appropriately," as well as working on "auditory attention skills, such as maintaining eye contact, and responding consistently when he [wa]s called" (id.). In addition, the

IEP noted that the student worked on "expressive language skills, including speaking in full sentences and expressing his feelings in an appropriate manner as well as his conversational and social pragmatic skills" (id.). The student demonstrated "difficulty initiating and maintaining a topic and topic closure" (id.). The IEP reflected that the student "d[id] not demonstrate appropriate conversational turn-taking," and, at times "require[d] verbal reminders to stay on topic" (id.). The IEP stated that the student demonstrated a difficult time expressing himself with peers and noted that if he was unable to get what he wanted, he might "get physical and push his peers" (id.). In addition, if the student did not get what he wanted from the clinician or teachers, he might "shut down completely and not respond to any requests or discourse", and sometimes the entire session was used to help the student come out of these "negative situations" (id.).

With the respect to social development, the IEP indicated that the student was "working on building his self-esteem and trust, as well as in believing he was able to succeed" (Parent Ex. C at p. 3). The IEP noted that due to his low self-esteem and trust as well as poor motivation, the student was not putting sufficient effort into his work and tried to find excuses to stay at home so that he did not have to do any work (id.). According to the IEP, once the student began to understand that he could succeed, there was a positive improvement in his general attitude (id.). Although the IEP indicated that the student's disturbances had "decreased considerably," it also indicated that he continued to engage in inappropriate laughter and made "silly and hurtful comments and jokes" (id.). The IEP stated that the student was "working to learn how to form successful relationships and to develop his self-esteem and trust so that he [could] empathized with others as well" (id.). The student's counselor reported that the student's moods varied, and while he could be congenial and casual, and was "well liked and much admired by some of his peers," he conversely presented "as guarded, distrusting, and hostile when he doesn't get what he wants" (id.). The IEP indicated that if the student believed that he could profit from a relationship, he could be manipulative, calculating, and strategically chose whom he befriended (id.). The IEP stated that in addition to low self-esteem the student suffered from "mild anxiety, and depression" (id.). With respect to the student's strengths, the IEP indicated that the student was "making progress following class rules and routines" (id.). With respect to the student's needs, the IEP indicated that the student demonstrated difficulty "expressing his emotions and frustrations," and that he responded well to encouragement and required "consistent validation in order to bolster his self-confidence and make him feel proud of his efforts" (id.).

With respect to physical development, the March 2022 IEP indicated that the student wore glasses and was in good general health with no health concerns (Parent Ex. C at p. 3). The student carried a diagnosis of attention deficit hyperactivity disorder (ADHD) and took medication at home (id.).

As supports for the student's management needs, the IEP noted that he benefited from "structuring and breaking down of large assignments into manageable units with rewards for small gains, redirection and refocusing when needed, rephrasing and rewording and clarification of spoken directions" (Parent Ex. C at p. 4). In addition, the IEP indicated that the student benefited from "gentle, yet clear and firm limits and expectations, as he was responsive to directions, and aim[ed] to please adults" (id.).

The March 2022 IEP noted that the student presented with "social and sensory regulation delays that m[ight] impact his ability to attend to lessons and engage in class activities," and that

he had "made great progress" with regard to "socializing and classroom behavior" and did not require a functional behavioral assessment (FBA) or a behavioral intervention plan (BIP) at the time of the meeting (Parent Ex. C at p. 4). In addition, the IEP noted that STEP believed the "classroom behavior modification system to address social and emotional needs [was] sufficient to address [the student's] behavioral needs" (*id.*).

2. Specially Designed Instruction

In assessing the appropriateness of a unilateral placement for tuition reimbursement purposes, parents must demonstrate that the private school provides specialized instruction tailored to the student's unique individual needs; this evidence may, at times, consist of descriptions of the school's programmatic elements without more specific evidence related to the student's experience with the individualized program during the school year at issue. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], *cert denied*, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]).

One of the factors to consider in determining if a private school is appropriate is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient" (Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]). While 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; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]), a lack of evidence as to how a student's significant area of need is addressed by the unilateral placement can result in a finding that the unilateral placement is not appropriate (see R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [finding a unilateral placement was not appropriate where it was undisputed that speech-language therapy was "critical" to remediate the student's language needs, the private placement chosen by the parents did not provide speech-language therapy and, although the parents claimed the student received private speech-language therapy, they "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"]), *aff'd*, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [finding that the parent failed to prove that the unilateral placement addressed the student's considerable social-emotional needs absent testimony from the

student's counselor, evidence concerning the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]).

With regard to the evidence in this case, the STEP program director provided a general overview of the STEP program. She testified that STEP is an ungraded school for children with disabilities ages 6 to 21 (Tr. pp. 51-52; Parent Ex. S at p. 1). The school serves approximately 40 students and children are assigned to classrooms with students of similar age and levels of functioning (Tr. pp. 51-52; Parent Ex. S at p. 1). The STEP program director explained that the largest class had an 8:1+2 ratio, but that actual class size ranged from three to eight students, and the staff to student ratio varied according to the functioning level of the students (Tr. p. 52). She noted that "[a]ll educational instruction [wa]s provided in a small classroom setting by a certified and licensed bi-lingual Yiddish special education teacher" (Parent Ex. S at p. 1). The STEP program director testified that "STEP School educational program r[an] Monday through Thursday from 9:00 a.m. until 4:00 p.m., Fridays from 9 a.m. until 12 p.m. and Sundays from 10:00 a.m. until 2:00 p.m." (*id.* at p. 3). According to the program director, that the school was closed for most Jewish holidays, but open for all public-school secular holidays and vacations. (*id.*)

The STEP program director testified that STEP "provide[d] students with a secular, general education educational program, that [wa]s with the exception of a 30-minute period each day and a 15 minute [period] Mondays through Thursdays, during which the children ha[d] a 'Davening' or prayer period" (Tr. pp. 50-51; Parent Ex. S at p. 4). In addition, she noted that, due to the specialized facilities and equipment available at STEP, the quality of services provided to the student "[we]re of much greater variety and quality than those which would have been available to him in the proposed public-school placement" (*id.* at pp. 4-5). The STEP program director opined that STEP methodology, which included "the small school setting and small group instruction" were essential to the student's success (*id.* at p. 8).

The STEP program director testified that, if the teacher of the 8:1+2 special class needed to give individual time to a specific student, the two classroom aides would "take on reviewing the ongoing lesson or provide feedback for the individual work that's taking place" (Tr. p. 46). In addition, the aides ensured the safety of students if the class was on a shopping trip and assisted with cooking activities (*id.*).

The principal of STEP testified that a student was determined to be appropriate for the school by a team including himself, the STEP curriculum director, and the teachers (Tr. p. 61). The team met with the students, spoke to the parents, looked at prior IEPs, and had a student sit in a class to see if they were a good fit for the school and class based their functional level and age (*id.*).

The STEP program director noted that she spent a good deal of time in every classroom observing every student and met with the teachers regularly to discuss each student's progress and to make changes or modifications to a student's individualized education program when necessary (Parent Ex. S at p. 2). She stated that she met "with each student on a one-to-one basis in order to better understand and to more effectively address their educational and behavioral needs" (*id.*).

Regarding the student in this matter specifically, the STEP program director testified that she "observed and interacted with [the student] both one-on-one and in group settings on an almost daily basis" and that this occurred "in his classroom, in the hallways of the school, during one-on-

one meetings with him, and in the course of his receiving services from related service providers" (Parent Ex. S at pp. 2-3). The STEP program director testified that the student received a variety of services throughout the day including counseling, speech-language therapy, and OT (Tr. p. 47). In addition, the student participated in swimming sessions once a week, provided by a physical therapist, that "include[d] hygiene before and after" (id.). The STEP director reported that the purpose of the swim sessions was to provide the student with sensory input and noted that the sessions also provided the student with social interaction (id.).

The STEP program director stated that the student not only suffered from cognitive deficits but was socially and behaviorally impaired in his interactions with others and his impairments affected his ability to learn and to retain new information and skills (Parent Ex. S at p. 5). She noted that STEP addressed these problems because it was a small school where children were under constant supervision, that the methodology of STEP, particularly the small school setting and small group instruction, was essential for the student to make educational progress, that his goals were individualized and tailored for him and were constantly revisited to match his progress and address any new areas of concern (id. at pp. 5-6, 8). The STEP program director further testified that the STEP program encouraged the student to complete his work and held him accountable for his progress as well as for his behaviors which made school a positive experience for him (id. at pp. 8-9). She further commented that STEP incorporated positive activities into the student's daily instruction such as music, incorporated regular physical activity such as aqua therapy, and offered a strong educational program with a challenging and ambitious educational environment in which he made a great deal of progress (id. at p. 9).

The student's weekly schedule at STEP included the following periods of instruction: organization/homework review, Davening, speech group, counseling group, current events, math/daily living math, individual counseling, reading and language arts, individual speech, handwriting and typing, typing and computer skills, educational outings, home economics, lunch prep, swim and hygiene, social skills/games, lunch, handwriting, individual OT, Mincha, social studies, science, communication (expressive language/conversation skills), art, music and rhythm "ADP," and pack up and dismissal (Parent Ex. D).

The hearing record includes a STEP bi-annual student evaluation which was administered in July 2022 (Parent Ex. M at p. 9). The evaluation includes a list of skills under the following headings: pre-reading/reading, writing/fine motor, mathematics, money management, communication/interpersonal, personal care, personal safety, food management, housekeeping, transportation, educational/job planning, community living skills, health, childcare, and legal issues (id. at pp. 1-9). The evaluation also includes a ratings key that indicated whether a skill was "non-applicable" or whether the student had mastered the skill at a basic, intermediate, or advanced level (id. at p. 8).

The hearing record shows that STEP recommended numerous goals and objectives related to areas in which the student's mastery of a particular skill was at a basic or intermediate level (Parent Exs. I; M). The STEP program director testified that STEP determined what specific goals or topics the student needed to work on based on the student's past year's performance on the sequential based performance checklist (Tr. p. 48). For example, the evaluation indicated that the student had mastered basic skills for identifying factual information and determining the main idea and intermediate skills for reading multisyllabic words and understanding context while reading

orally and silently (Parent Ex. M at p. 1). For the student's July 2022 to June 2023 education program, STEP developed objectives that corresponded with the student's needs in these areas and targeted his ability to distinguish between fact and fiction and fact and opinion, identify the main idea, decode multisyllabic words with greater fluency, and answer "wh" questions on paragraphs read out loud and silently (Parent Ex. I at p. 1). With regard to writing and fine motor skills, the bi-annual student evaluation indicated that the student had basic skills with regard to using spell check and looking up a word in the dictionary and intermediate skills with respect to using proper sizing and spacing while writing (Parent Ex. M at pp. 1-2). STEP developed corresponding objectives for the student that targeted his ability to write letters and sentences with proper formation, sizing and spacing and to complete a simple spelling quiz (Parent Ex. I at p. 2). The evaluation indicated that the student's skills related to using a keyboard to write letters and numbers were at the intermediate level and STEP developed an objective for the student to develop beginning typing skills (Parent Exs. M at p. 2; I at p. 2).

Turning to mathematics, the bi-annual student evaluation indicated that the student had mastered many math skills at an advanced level but had less developed skills when it came to rounding numbers, reading fractions, understanding time value, reading and using charts, and making a transaction at a store and counting change (Parent Ex. M at pp. 2-3). STEP recommended numerous math objectives, some directly traceable to the student's needs as identified in the bi-annual student evaluation and some not. Specifically, the STEP math objectives targeted the student's ability to calculate change independently and understand the concept of elapsed time (Parent Ex. L at p. 1). Math objectives also targeted the student's ability to complete division operations with remainders, a skill the student was working on according to his IEP (Parent Exs. C at p. 2; L at p. 1). The STEP objectives also called for the student to use basic operations to solve simple word problems, develop an understanding of fractions and decimals and complete fraction/decimal operations using addition, subtraction, multiplication, and division (Parent Ex. L at p. 1). In addition, STEP developed math objectives for the student related to order of operations and algebra (id.).

STEP also developed objectives for the student in other areas identified in the bi-annual student evaluation in which he had not mastered skills at an advanced level. These included objectives that were related to the student's ability to independently brush his teeth and hair, wash his hands and face, and shower, and dress and undress himself in a given time frame (personal care skills); set a table and prepare a simple lunch (food management skills); ask for assistance when needed and follow two-step directions (communication/interpersonal skills); and cross a street safely (personal safety skills) (Parent Exs. M at pp. 3-5; J at p. 1). The STEP program director testified that the student tended to be negligent in his hygiene skills, and that as part of his weekly swimming sessions, hygiene was included before and after with his therapist and teacher providing guided practice in showering, dressing, and grooming (Tr. p. 47). Although the STEP bi-annual student evaluation did not capture the student's behavioral difficulties, they were described in the present levels of performance of the July 2022 IEP (Parent Ex. C at pp. 2-4). STEP developed objectives for the student that addressed his need to use words to express emotions and in place of aggressive behavior (Parent Ex. K at p. 1). STEP also developed a sensory diet to be used with the student, an outline of expected classroom routines and expected behavior, and a behavior modification plan (Parent Exs. N; O at pp. 1-2; P). The STEP program director testified that the swim sessions provided sensory input for the student who sought sensory input (Tr. p. 47). The behavior modification plan explained that the student would be provided with a 20-square grid and

receive stickers "for refraining from responding to peers in an aggressive or sarcastic manner" (Parent Ex. P at p. 1). When the grid was complete after approximately two weeks, the student would be able to choose between going to the store to purchase a special snack or receiving extra time to play on the school's iPad (*id.*). The behavior modification plan noted that the student's behaviors would also be addressed "through the use of role play, modeling and [Carol Gray's] social stories" (*id.*). The program director testified that, to address the student's low self-esteem, aversion to learning and coming to school, and his self-sabotaging of peer relationships, STEP's program helped him trust, reassured him that teachers were there to work with him, and showed him how peer relationships were formed and how he benefitted from them (Tr. p. 53). The director noted that the rewards put in place at STEP for the student were not necessarily tangible rewards but built him up and made him feel very good about himself, provided a few minutes to sit with the teacher, and by taking care of the class pet, the student felt he was caring, nurturing and in charge of something (Tr. p. 54). Tangible rewards included playing on the iPad or a walk to the store to choose a snack (*id.*). In addition, the STEP program director agreed that STEP addressed one of the student's management needs by breaking down goals and providing rewards when necessary as well as if the student seemed overwhelmed by a task, the classroom teacher broke it down into smaller tasks (Tr. pp. 48-49).

The student's placement in a STEP special class with related services of speech-language therapy, OT, and counseling, coupled with the educational objectives and behavior interventions developed by STEP, show that the parent's unilateral placement provided the student with specially designed instruction designed to meet his educational needs. Notably, the student had progressed in the same program during the prior school year and it is reasonable to conclude that the student would likely to progress during the 2022-23 school year if STEP continued to provide similar programming (Parent Exs. C at p.4; E at pp. 1-2; G at p. 1; H at pp. 1-2). The evidence in the hearing record supports a finding that STEP provided the student with specially designed instruction tailored to advance his education and to meet his sensory, behavioral and social-emotional needs.

3. Progress

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

In her affidavit, the STEP program director stated that the student made progress during the 2022-23 school year and, although he continued to require supervision and prompting regarding his behaviors, he nevertheless made a great deal of progress both educationally and behaviorally (Parent Ex. S at pp. 6-7). She opined that his tendency toward aggression decreased significantly, his attitude became more positive, he was significantly more motivated and willing to put effort into his studies and to participate, and he started to form successful, social connections (*id.* at p. 7). Further, she stated that he exhibited an increased understanding of the effects of his behaviors and demonstrated a greater ability to self-calm with decreased prompting (*id.*). The director reported that the student had made progress in his language skills and learned to use his

words more readily to express emotions, and that his improved speech and language skills "had a significant effect on his ability to better control his emotions" (id. at p. 8). However, to the contrary, the October 2022 speech pathologist's report stated that the student had a hard time expressing himself with peers, and if he was unable to get what he wanted, he got physical and pushed them (Parent Ex. E at pp. 1-2). In addition, if the student did not get what he wanted from a clinician or teacher, he might "shut down completely and not respond to any requests or discourse" (id. at p. 2). According to the speech pathologist, there were times when the entire therapy session was used to help the student "come out of these negative situations" (id.).

The March 9, 2022 IEP stated that the student had "made great progress socializing and [in] classroom behavior" and did not require an FBA or BIP at the time of the meeting (Parent Ex. C at p. 4).⁴ An October 2022 counseling report noted that, compared to the prior year, the student was focused and participated in group counseling, appeared less guarded in individual counseling, more open to change, and more likely to take ownership of his behavior (Parent Ex. G at p. 1). The October 2022 teacher report stated that the student showed significant growth in building self-esteem and trust, in believing he was able to succeed, and this resulted in an increased overall positive attitude (Parent Ex. H at p. 1). The report noted that the student put effort into completing tasks, demonstrated greater motivation to complete work, and sometimes continued to work on a task during his lunch period (id.). The teacher report indicated that the student's participation in class activities and discussions increased, that he showed improvement in making social connections, significantly decreased his aggression as well as decreased his sarcasm, and demonstrated "an improved understanding of the importance of good hygiene" (id.). With respect to academics, the report noted that the student read on a 5.0 grade level, his decoding skills had become more fluent, and he was more willing to read aloud (id. at p. 2). The October 2022 speech pathologist's report stated that the student demonstrated some progress in expressing wants and needs, following multi-step directions, and maintaining conversations; that progress was still needed; and with consistent therapy and targeting the long and short-term goals, improvement was expected (Parent Ex. E at pp. 1-2).⁵

⁴ The March 2022 IEP also included a statement to the contrary regarding the student's social skills and behaviors, and this verbatim statement is found in the October 2022 speech report and noted above and below (compare Parent Ex. C at p. 2, with Parent Ex. E at pp. 1-2).

⁵ The IHO noted that full passages of the "speech pathologist's report," dated October 2022 were identical word for word to portions of the March 2022 IEP (IHO Decision at p. 9). The IHO cited to a passage that appeared verbatim in both the October 2022 report and the March 2022 IEP regarding the student's difficulty with peer and adult interactions stating that he could get physical with his peers, and with clinicians or teachers, shut down completely (id.; compare Parent Ex. C at p. 2, with Parent Ex. E at pp. 1-2). She further stated that this repetition indicated that the student had made no progress in the area of interaction and behavior from March 2022 to October 2022, a period of seven months or more during which he was attending STEP, and that, since the passage in the IEP was presented as speech provider report, it would appear to have been copied from some similar document created by the private school before March 9, 2022 suggesting an even longer period without progress (IHO Decision at p. 10). To the extent the IHO's observation could support a finding of minimal progress in this area, as noted, progress is not dispositive, and, in any event, the totality of the circumstances supports a finding that the unilateral placement was appropriate to meet the student's needs.

While all of the above is not dispositive of the appropriateness of the unilateral placement at STEP, the hearing record shows evidence of the student's progress at STEP, which factors favorably when considering the parent's request for reimbursement.

4. IHO's Reasoning

I will turn next to the parent's contention that the IHO failed to apply the "totality of the circumstances" test when considering the evidence of the student's unilateral placement at STEP. More specifically, the parent argues that the IHO improperly discredited the testimony of the STEP program director based on a typographical error in the STEP program director's direct testimony by affidavit and because the IHO appeared to believe that the STEP program director failed to answer a question when providing live testimony during the impartial hearing (*id.* at pp. 6-7).

Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], *aff'd* 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

When the IHO asked the STEP program director "how is [the student] rewarded?" the STEP program director answered "Can I diverge just for a moment to describe the student to you? Because that will be part of my answer" and then proceeded to describe the student's family life and how some of the rewards STEP provides to the student "are not necessarily tangible rewards" (Tr. pp. 53-54). A reading of the STEP program director's testimony indicates that she did exactly what she told the IHO she was going to do: describe the student and his needs so she could then explain STEP's reward program for this student (*id.*) Accordingly, other than being more verbose than the IHO may have preferred, the program director's live testimony cannot be described as unreliable due to evasiveness, and the IHO's conclusion on that point was error.

In addition to offering as evidence the testimony of the STEP program director, the STEP principal, and the parent herself, the parent also offered 21 exhibits into evidence, several of which are summarized above and support a finding that STEP was an appropriate unilateral placement (see Parent Exs. A-U). Despite these records, the IHO found that there was "no credible persuasive testimony or documentary evidence presented to show that [STEP] offer[ed] a program that address[ed] the [s]tudent's particular needs" and found STEP was not an appropriate placement for the student (IHO Decision at pp. 8, 12). The IHO stated that "the [p]arent testified that she chose [STEP] for [s]tudent because 'my oldest has been there for a few years. And he's progressing very nicely, so I figured it might be good for my other boy as well who has ADHD' (Tr: 66)" (IHO Decision at p. 8). The IHO noted that, "[a]bsent any description of the sibling's disability (if any), there is no evidence that the [p]arent's decision to enroll [s]tudent at [STEP] was based on consideration of whether [STEP] would serve this [s]tudent's individual needs" (*id.*). The fact that the parent had prior experience with STEP with her other child is not particularly relevant to whether STEP addressed student's needs in this case, but merely provides background context. That information goes to the weight the evidence should be afforded rather than the parent's

credibility. Because it is not material to the case at hand, I would dissuade the IHO from encouraging parties to muddy an evidentiary record in a due process proceeding with evidence about another child's needs and special education programming. The brief testimonial statement here about the student's sibling was not damaging to the parent's case.

Further, the IHO found that, overall, "the evidence presented at the hearing paints a picture of [STEP] that focuse[d] primarily on [s]tudent's social/emotional and behavioral needs as well as his attention to personal hygiene and other activities of daily living" and his "[a]cademic goals [we]re generalized, with no reference to the complexity of the material to be mastered" (*id.* at p.12). While it is true that school districts are required to create IEPs that contain a written statement of measurable annual goals, and that each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][II]-[III]; 34 CFR 300.320[a][2][i], [3]), the same IEP planning documents are not imposed on the evaluation of parent's unilateral placements under the Burlington/Carter test in a tuition reimbursement case. Furthermore, in the case of a school district's IEP, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D., 2013 WL 1155570, at *10-*11; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], *aff'd*, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Similarly, it was error for the IHO to conclude that the unilateral placement was inappropriate due to some vagueness in the written goals created by the unilateral placement.

The IHO found the STEP program director's testimony to lack credibility and "in the absence of credible witness testimony, there [wa]s insufficient reliable documentary evidence concerning the educational services provided by [STEP]" (IHO Decision at p. 9). During the impartial hearing, the STEP program director was asked to refer to the paragraph in her direct testimony by affidavit that stated that the student "was placed in a 12:1:3 class" and the STEP program director replied: "Yes, that must be a typo. He was in an 8:1:2 class" (Tr. pp. 45-46; *see* Parent Ex. S at pp. 1-2). Later, the IHO questioned the STEP program director as to what was the largest class STEP offers and the STEP program director stated that "[T]he largest class is an 8:1:2" (Tr. p. 52).

It must be noted that the IHO did not err in highlighting the conflict between the STEP program director's the live and affidavit testimony with regard to the student-to-staff ratio in the special class at STEP. Such concerns should not be dismissed lightly, but the IHO placed too much weight on the typographical error. The program director readily conceded the error and there is no other evidence whatsoever in the hearing record that STEP even had a 12:1+3 special class setting during the relevant time period and the IHO did not find that there was. However, the distinction between the IHO's conclusions and the analysis herein falls to a question of the evidence presented by the parent compared to the due process complaint drafted by the parents' attorney, which the IHO pointed out was also incorrect regarding the ratio (IHO Decision at p.6 n7). The IHO mentioned the totality of the evidence standard (*see* IHO Decision at p. 5), but I find that the totality of the evidence above indicates that STEP provided appropriate special

education and related services to the student, that the evidence of progress overall was favorable to the student's needs and that the student was likely to continue to progress at STEP. Accordingly, the IHO's conclusion must be reversed.

B. Equitable Considerations

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

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

In this case, while the parent appeals the IHO's lack of a decision regarding equitable considerations, the district makes no assertions as to whether equitable factors weigh against an award of tuition reimbursement (see generally Answer). The hearing record shows that the parent notified the district of her intent to unilaterally enroll the student in STEP for the 2022-23 school year via an email dated June 17, 2022 (Parent Ex. U). The evidence in the hearing record also

shows that the parent attended the March 2022 CSE meeting and there is no indication that she impeded the district's ability to meet its obligations under the IDEA (Parent Ex. C). As such, I find no basis in the hearing record to reduce or deny the parent's requested relief related to equitable considerations.

VII. Conclusion

Having determined that the evidence in the hearing record supports the conclusion that the district failed to offer the student a FAPE for the 2022-23 school year, the IHO's determination denying the parent tuition reimbursement must be reversed, and the appeal sustained. As the record supports the parent's argument that STEP was an appropriate placement for the student and that the equitable considerations weigh in favor of the parent, the parent's request for tuition reimbursement for STEP for the 2022-23 school year is hereby granted.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 9, 2022, is modified by reversing those portions which found that the parent did not meet her burden to prove that STEP was an appropriate unilateral placement for the student for the 2022-23 school year; and

IT IS FURTHER ORDERED that the district is directed to reimburse the parent for the costs of the student's tuition at STEP for the 2022-23 school year.

Dated: Albany, New York
March 10, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER