



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-021

**Application of the BOARD OF EDUCATION OF THE UNION  
FREE SCHOOL DISTRICT OF THE TARRYTOWNS for  
review of a determination of a hearing officer relating to the  
provision of educational services to a student with a disability**

**Appearances:**

Bond, Schoeneck & King, PLLC, attorneys for petitioner, by Candace J. Gomez, Esq.

Gina DeCrescenzo, P.C., attorneys for respondents, by Gina DeCrescenzo, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that the district failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2021-22 and 2022-23 school years. The appeal must be dismissed.

#### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 presents with a full-scale IQ in the "[v]ery [l]ow range," and exhibits significant variability across his index scores with "language skills" being "one of [his] strongest areas of functioning" and "processing speed [being] an area of personal weakness" (Parent Ex. C at pp. 2-3, 8-9). The student's overall level of academic achievement was in the "[v]ery [l]ow range" (id. at pp. 7, 10). In addition, the student's receptive and expressive language skills were in the "[v]ery [l]ow range" and he lacked metalinguistic skills that affect his performance across all subject areas (Parent Ex. B at p. 8). However, his pragmatic language skills were appropriate (id.). The student has reportedly received a diagnosis of attention deficit hyperactivity disorder (ADHD) (Parent Exs. B at p. 1; C at p. 1). The student attended grades six through eight at the John Cardinal

O'Connor School (Cardinal O'Connor School) (Parent Ex. B at p. 1; see Dist. Ex. 9; Parent Post-Hr'g Br. at p. 4).

On June 9, 2021, the CSE convened to review the results of a reevaluation of the student and to conduct his annual review (see generally Parent Ex. D).<sup>1</sup> The CSE determined that the student remained eligible for special education services as a student with an other health impairment (Parent Ex. D at p. 1).<sup>2</sup> Based on the student's needs, the June 2021 CSE recommended that the student attend a 12:1+2 special class (experiential learning) for instruction in English, math, social studies, and science and receive two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of small group counseling (id. at pp. 1, 13).<sup>3</sup> In addition, the June 2021 CSE recommended supplementary aids and services that consisted of preferential seating; refocusing and redirection; word banks for content area vocabulary; copy of class notes; study guide outlines of key concepts; additional time to process and formulate responses; pre-teaching and re-teaching; directions clarified; project YOU; graphic organizers; check for understanding; assist with organization; clear behavioral expectations; and chunking information into small sequential segments (id. at pp. 13-14).<sup>4</sup> With regard to assistive technology, the June 2021 CSE recommended that the student have access to a calculator, audio books, and speech recognition software (id. at p. 14). Further, the student was recommended for 12-month services that consisted of placement in a 12:1+2 special class and related services consisting of two 30-minute sessions per week of individual speech-language therapy (id. at p. 15). Lastly, the June 2021 CSE recommended that the student participate in alternate assessments (id. at p. 16).

The student began the 2021-22 school year by attending the district 12:1+2 special class recommended by the June 2021 CSE (see Tr. pp. 76-78; Parent Ex. J at p. 2). On October 6, 2021, the CSE convened for a requested review (Parent Ex. E). The October 2021 CSE recommended that the student's special education program be changed and that he attend a 12:1+2 special class (experiential learning) for reading, social studies, and science, a 15:1 special class for math and English, and resource room (5:1) with all classes scheduled for three days in a six-day cycle (id. at pp. 1, 13). The recommendations for related services, supplementary aids and services, assistive technology, and 12-month services remained the same as the June 2021 IEP (compare Parent Ex. D at pp. 1, 13-15 with Parent Ex. E at pp. 1, 13-15).

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<sup>1</sup> The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

<sup>2</sup> The student's eligibility for special education as a student with an other health impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>3</sup> The district's experiential learning program is a program for students on a "life skills track" (June 28, 2022 Tr. pp. 36-37, 70). The experiential learning class is ungraded and includes reading, math, science, social studies, and pre-vocational components (July 13, 2022 Tr. pp. 13,62).

<sup>4</sup> Project YOU is the pre-vocational, work-based life skills component of the district's experiential learning program (July 13, 2022 Tr. pp. 13-14).

On February 21, 2022, the parents notified the district of their intent to place the student at Winston Prep and seek reimbursement for the cost of tuition, transportation, and related expenses due to the district's denial of the student's right to a free appropriate public education (FAPE) (Parent Ex. I).<sup>5</sup> On March 17, 2022, the parents executed an agreement with Winston Prep for the student's enrollment from March 21, 2022 through June 2022 (see Parent Ex. Q).

In response to the parents' February 2022 letter, the CSE reconvened for another requested review on March 4, 2022 (Parent Ex. J). As a result of the discussions at the March 2022 CSE meeting the annual goals related to speech-language therapy, reading, writing, and social/emotional development were adjusted (id. at pp. 2-3). The speech-language pathologist recommended the addition of a group speech-language therapy session; however, the parents declined the additional service (id. at p. 2). The March 2022 CSE continued to recommend a 12:1+2 special class (experiential learning) for reading, social studies, and science; resource room (5:1); and a 15:1 special class in math and English (id. at pp. 1, 16). The March 2022 CSE also continued its recommendation for related services of speech-language therapy and counseling together with the previously recommended supplementary aids and services and assistive technology (compare Parent Ex. E at pp. 1, 13-15 with Parent Ex. J at pp. 1, 16-17). Further, the March 2022 CSE recommended 12-month services that consisted of a 12:1+2 special class and speech-language therapy (Parent Ex. J at pp. 1, 17-18).

The student transferred to Winston Prep at the end of March 2022 (see Parent Ex. S at p. 1). On April 22, 2022, the CSE convened for an annual review to develop the student's IEP for the 2022-23 school year (Parent Ex. L).<sup>6</sup> The April 2022 CSE recommended that the student attend a 12:1+2 special class (experiential learning) for reading, math, and social studies, and a 15:1 special class for science and social studies (id. at pp. 1, 14). The April 2022 CSE also recommended that the student receive two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of small group (5:1) speech-language therapy (id. at p. 14). In addition to the same previously recommended supplemental aids and services and assistive technology, the April 2022 CSE recommended consultation with the social worker as needed to support the student in the classroom and to address anxiety and "perception of events" (compare Parent Ex. J at pp. 16-17 with Parent Ex. L at pp. 14-15). The April 2022 CSE recommended 12-month services of a 12:1+1 special class with one 30-minute session per week of individual speech-language therapy and one 30-minute session per week of small group (5:1) speech-language therapy (Parent Ex. L at p. 16). The student was again recommended to participate in alternate assessments (id. at p. 17).

On June 7, 2022, the parents signed an agreement with Winston Prep for the student's enrollment in the 2022 summer enrichment program (Parent Ex. R). On June 9, 2022, the parents notified the district of their intent to place the student at Winston Prep for the 2022-23 school year and seek reimbursement for the cost of the student's tuition, transportation, and related expenses due to the district's denial of a FAPE to the student (see Parent Ex. P). On or about June 28, 2022,

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

<sup>6</sup> At the time of the April 2022 CSE meeting the student was in attendance at Winston Prep as he left the district on March 17, 2022 (Parent Ex. L at p. 2).

the parents executed an agreement with Winston Prep for the student's enrollment for the 2022-23 school year (see Parent Ex. BB).

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

The parents filed an amended due process complaint notice dated July 10, 2022, alleging that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years (see Parent Ex. A).

The parents generally alleged for both school years that the district failed to thoroughly evaluate the student in all areas of suspected disability; the CSEs failed to appropriately consider available evaluative data and the data available to the CSEs demonstrated that the student required more special education than was offered; the IEPs did not offer scientifically proven methodologies or strategies based on peer-reviewed research; the IEPs did not include measurable annual goals to meet the student's needs, and a lack of baselines in the goals on the IEPs deprived the parents of meaningful participation; the CSEs failed to recommend appropriate related services; the CSEs failed to consider the full continuum of placement options for the student including those that would offer more intensive services; and the district failed to offer a program reasonably calculated for the student to make progress in light of his circumstances (Parent Ex. A at pp. 10-11). Additionally, for both school years, the parents alleged that the district violated section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act by failing to provide instruction to the student for him to meaningfully access his education (id. at p. 11).<sup>7</sup>

Next, the parents alleged that Winston Prep was an appropriate placement for the student for the 2021-22 school year (Parent Ex. A at p. 11). The parents asserted that Winston Prep offered "research-based methodologies, class sizes, and related services recommended by experts who ha[d] evaluated [the student]" (id. at p. 12). Additionally, the parents argued that the student received "daily 1:1 support with planning and executive functioning, in addition to support in developing a social network" (id.). As a result of the student's attendance at Winston Prep, the parents noted "a positive improvement in his overall well-being" (id.). For the 2021-22 and 2022-23 school years, the parents alleged that they cooperated with the CSEs, attended meetings, and timely notified the district of the student's unilateral placement at Winston Prep (id.).

The parents requested findings that the district denied the student a FAPE for the 2021-22 and 2022-23 school years and further that the district's violations impeded the parents' opportunity to participate in the CSE process and caused the student a deprivation of educational benefits (Parent Ex. A at p. 12). As relief, the parents requested compensatory education for the 2021-22 school year, prior to the student's unilateral placement at Winston Prep (id.). The parents also sought tuition reimbursement/prospective payment and transportation for Winston Prep for the 2021-22 and 2022-23 school years (id.).

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<sup>7</sup> Although not identified in the alleged violations section of their due process complaint notice that was labeled "Deprivations," the parents made factual statements that that the February 2022 progress report was inconsistent with prior progress reporting on reading; the March 2022 IEP reading goals were not measurable; and both the June 2021 and April 2022 IEPs included postsecondary goals that were not based on age-appropriate transition assessments (Parent Ex. A at pp. 4, 7-8).

## B. Impartial Hearing Officer Decision

An impartial hearing convened on June 28, 2022, and concluded on September 2, 2022, after seven days of proceedings (June 28, 2022 Tr. pp. 1-110; July 6, 2022 Tr. pp. 111-279; July 13, 2022 Tr. pp. 1-94; July 26, 2022 Tr. pp. 1-66; July 27, 2022 Tr. pp. 1-87; Aug. 5, 2022 Tr. pp. 1-17; Sept. 2, 2022 Tr. pp. 1-113).

In a decision dated December 31, 2022, the IHO held that the district failed to meet its burden to demonstrate that it offered the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 29, 39).

In connection with the 2021-22 school year, the IHO discussed the June 2021 IEP and that there "was discrepant testimony as to whether [the Cardinal O'Connor School] agreed that the life skills program was appropriate for the [s]tudent" (IHO Decision at p. 30). The IHO found that based on the June 2021 IEP and teacher reports from the Cardinal O'Connor School, the student "appeared to have academic skills that would warrant a less restrictive program despite his low standardized scores" (*id.*).

Then, the IHO discussed the October 2021 CSE meeting which was held as a result of the parents' concerns (IHO Decision at p. 30).<sup>8</sup> The IHO addressed the October 2021 IEP with respect to placement of the student in a 15:1 special class for English and math (*id.* at pp. 31-32). The IHO discussed that as a result of the recommendation for the 15:1 special class the student would no longer attend the experiential learning program (prevocational work program – Project YOU) in the afternoon and that the CSE "never made the determination that he didn't need this part of the program but made the change to accommodate the 15:1 program" (*id.* at p. 31). The IHO referenced the fact that the district witnesses testified that the student was recommended for the 15:1 special class "for socialization purposes" (*id.*). The IHO further discussed that there was no indication in the hearing record as to why the student was placed in a 15:1 special class for English and math as opposed to social studies and science except that the CSE believed that the resource room "would help with the shortfall" (*id.*).

The IHO discussed that both the June and October 2021 CSEs reviewed the student's scores demonstrating that he "performed in less than the first percentile in [m]ath" and noted that the district's speech-language pathologist testified that "she was very surprised that he was put in a higher level [m]ath class because in [s]peech she was working with the [s]tudent on basic understanding of certain [m]ath concepts" (IHO Decision at p. 31). The IHO also referenced the fact that the student received math instruction in the 15:1 special class as well as math instruction in the 12:1+2 special class although the math instruction in the 12:1+2 special class was not on the October 2021 IEP (*id.*). The IHO pointed out that none of the CSE meetings included staff from the 15:1 special class and any grades or progress reports were only reflective of the 12:1+2 special class and not the 15:1 special class (*id.* at pp. 31-32).

The IHO held that "several of the goals" in the October 2021 IEP were not appropriate based on the testimony of the parents' private speech-language pathologist who stated that the

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<sup>8</sup> In her decision, the IHO references an October 6, 2022 CSE meeting and IEP; however, the actual date of the CSE meeting and IEP was October 6, 2021 (IHO Decision at pp. 30-31; *see* Parent Ex. E).

October 2021 IEP annual goals for reading and math were not appropriate and "that the goals in general [we]re not specific enough and d[id] not necessarily clearly and appropriately reflect the [s]tudent's academic levels and needs" (IHO Decision at p. 32).

Next, the IHO discussed the April 2022 IEP and the fact that "[n]o data was presented from any of the teachers with base line scores to indicate whether [the student] made progress in any areas" (IHO Decision at pp. 32-33). In addition, the IHO addressed the fact that the present levels of performance in the April 2022 IEP failed to contain any information from the 15:1 English or math special classes (*id.* at p. 33). The IHO relied on the testimony of the parents' private speech-language pathologist who opined that "due to the [s]tudent's language based disability, he needed programming embedded into the school day" because he was unable to take what was learned in the speech-language therapy sessions and carry it back to the classroom (*id.*).

In generally discussing all of the IEPs, the IHO found that the 12:1+2 experiential learning special class did not contain students who were "on [the student's] level socially or academically" and, therefore, his needs "were not able to be addressed in this environment" (IHO Decision at p. 33). The IHO further relied on the testimony of the student's mother and the parents' private speech-language pathologist "that the programs that were offered to the [s]tudent were too low or too high for him and had a negative impact on his ability to learn" (*id.*). The IHO found that neither the 12:1+2 experiential learning special class nor the hybrid program of both the 12:1+2 special class and the 15:1 special class were "sufficient" to meet the student's needs or offer him academic benefit for the 2021-22 or 2022-23 school years (*id.*). Accordingly, the IHO found that the district failed to meet its burden of proof and denied the student a FAPE for the 2021-22 and 2022-23 school years (*id.*).

The IHO then reviewed the appropriateness of Winston Prep and found the parents met their burden to show that Winston Prep was appropriate for the student for both the 2021-22 and 2022-23 school years, and for the summer 2022 enrichment program (IHO Decision at pp. 33-36, 39). The IHO credited the testimony of the parents' private speech-language pathologist who assisted the parents in placing the student at Winston Prep, which contained small groups; the IHO noted that "the cohorts would be homogeneous in need, and teachers' orientation is cognitive linguistic in nature" (*id.* at p. 34). According to the IHO, the parents' private speech-language pathologist opined that because the student was "a language impaired learning disabled boy with attention deficit disorder" he should be taught by individuals "appropriately trained in language" (*id.*). The IHO discussed Winston Prep and that it was "specifically designed to work with students with learning difficulties, language-based learning challenges, executive functioning challenges, attentional issues, etc. students are grouped according to their learning profiles" (*id.* at p. 35). She discussed that students have a Focus teacher who works with each student 1:1 daily on their areas of need (*id.*). The IHO also discussed that the student was in a cohort with students who had similar challenges (*id.*). The IHO discussed that Winston Prep had "a continual [feedback] system" to "adjust their response to the student's educational needs in real time" (*id.*). Furthermore, the IHO found that the summer 2022 program was appropriate for the student to maintain skills and to prevent regression (*id.* at p. 36). Overall, the IHO found that the parents met their burden that Winston Prep provided the student with educational benefit in the least restrictive environment (LRE) for both the 2021-22 and 2022-23 school years (*id.*).

Next, the IHO evaluated equitable considerations and found that the parents participated in the CSE meetings and provided the district notice of the unilateral placement of the student for both school years at issue (IHO Decision at pp. 36-37, 39). Therefore, the IHO found that the parents cooperated with the district and there was "no basis to rule against them" (*id.* at p. 37).

Additionally, the IHO addressed the parents' request for compensatory services (IHO Decision at pp. 37-39). The IHO stated that the parents were "requesting 119 days of compensatory education" for the period of time when the student was in the district's program for the 2021-22 school year (*id.* at p. 39). The IHO found that the student's placement at Winston Prep for the 2021-22 school year provided the student with the support he needed for the denial of FAPE for the 2021-22 school year and therefore, declined to award compensatory education (*id.*).<sup>9</sup>

Based on the foregoing, the IHO found that the parents were entitled to tuition reimbursement for sums already paid by the parents and directed the district to provide direct funding for the balance of the student's tuition owed to Winston Prep from March 21, 2022 through the end of the 2021-22 school year, summer 2022, and 2022-23 school year (IHO Decision at pp. 39-40). The IHO reduced the total amount of tuition owed by the amount of financial assistance awards that Winston Prep previously provided to the parents, and she denied the parents recovery of fees for a nonacademic afterschool program that the student attended at Winston Prep during summer 2022 (*id.* at p. 39).

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

The district appeals from the IHO's conclusions that it denied the student a FAPE for the 2021-22 and 2022-23 school years, the findings that Winston Prep was appropriate for the student and the order of tuition reimbursement in favor of the parent. The district references its memorandum of law for further discussion and states that the "totality of the evidence presented in the hearing record" demonstrates that the district provided the student a FAPE for both school years in question. The district makes general statements in the request for review that the CSE's recommendations for both school years "were appropriate to meet the [s]tudent's needs, in light of the multiple supports, modifications, and individualized aspects of the placement and program recommendations coupled with the totality of the evaluative information available to the respective CSEs that supported their recommendations" (*id.*). The district contends, without citation to the evidence, that the hearing record is "replete with data-based documentation and assessments" demonstrating the student's needs and progress while enrolled in the district and that the district's proposed programming was in the LRE.

With respect to the challenged IHO decision, the district argues that the IHO improperly relied on the testimony of the parents' private speech-language pathologist in finding a denial of a FAPE. The district contends that the parents' private speech-language pathologist did not offer any information on the student's special education needs, did not evaluate him, did not observe him, and did not participate in CSE meetings. With respect to other witnesses, the district merely references its memorandum of law in general for further discussion and states that the IHO's

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<sup>9</sup> As the parents have not appealed the IHO's determination regarding compensatory education, that finding is 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]).



findings that the district's recommended programs were flawed "cannot be sustained" because the IHO failed to consider the district's witnesses' testimony and the evaluative information available to the CSEs without identifying any particular testimony or witnesses.

Next, the district contends that the IHO erred in concluding that Winston Prep was an appropriate unilateral placement for the student for the 2021-22 and 2022-23 school years.<sup>10</sup> Again, the district refers to its memorandum of law for further discussion and in more general terms argues that Winston Prep did not provide specially designed instruction to meet the student's "unique individual needs." However, the district also specifically argues that the IHO improperly relied on the testimony of the parents' private speech-language pathologist for the same reasons discussed above that she did not testify to the student's special education needs, did not evaluate him, did not observe him, and did not participate in CSE meetings. The district asserts that the testimony and documentary evidence are lacking in that they failed to establish how Winston Prep met the student's academic and social/emotional needs or how it provided specially designed instruction to the student. Additionally, the district argues that the IHO failed to consider the restrictiveness of Winston Prep in determining whether it was appropriate to address the student's needs.

The district also alleges that the IHO erred in determining that equitable considerations supported tuition reimbursement and offered no basis to rule against the parents. Without citation to any evidence, the district argues that, as discussed in its memorandum of law, the evidence in the hearing record shows that the parents did not cooperate with the CSE adequately and "did not[sic] fail to raise the appropriateness of the [d]istrict's program recommendations in a timely manner."

As relief, the district requests a finding that it offered the student a FAPE for the 2021-22 and 2022-23 school years, that Winston Prep was not an appropriate unilateral placement for either school year, and that equitable considerations did not favor the parents.

In an answer, the parents deny the material allegations contained in the district's request for review and seek to uphold the IHO's findings that the district denied the student a FAPE for the 2021-22 and 2022-23 school years, the award of tuition reimbursement, and direct funding for Winston Prep for the 2021-22 and 2022-23 school years.

## **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.

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<sup>10</sup> Of note, although the district appeals the IHO's award of tuition costs for Winston Prep for the 2021-22 and 2022-23 school years, the district fails to specifically appeal the IHO's award of tuition costs for the Winston Prep summer 2022 enrichment program (see IHO Decision at pp. 39-40; Req. for Rev. at pp. 4-6). As the district failed to specifically appeal the tuition award for the summer 2022 enrichment program, 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]).

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]).<sup>11</sup>

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

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

## **VI. Discussion**

### **A. Preliminary Matter**

#### **1. Scope of Review**

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the

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<sup>11</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

[IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

With regard to the district's request for review, incorporation by reference is specifically prohibited by the practice regulations (8 NYCRR 279.8[b]), and, as a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; see Davis, 2021 WL 964820, at \*11; see, e.g., Application of the Bd. of Educ., Appeal No. 22-092; Application of a Student with a Disability, Appeal No. 15-070). The practice regulations also require that the request for review contain "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[c][3]), but in this case the request for review includes multiple references to "the record" without citation and, where citations to the hearing record were made, most of the citations referenced the testimony of the parents' private speech-language pathologist in an argument that the very testimony being cited to was improperly credited by the IHO (Req. for Rev. ¶¶ 2, 5).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see Davis v. Carranza, 2021 WL 964820, at \*12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Here, the IHO made specific findings which were not specially challenged by the district in its request for review. The IHO determined that:

- The student "appeared to have academic skills that would warrant a less restrictive program despite his low standardized scores";
- in recommending the 15:1 special class, the October 2021 CSE effectively removed the student from the prevocational work program that was part of the experiential learning special class without determining the student's need for the prevocational work program;
- the student was recommended for the 15:1 special classes for socialization, but there was no explanation as to why the student was placed in 15:1 special classes for English and math as opposed to for social studies and science and the district's speech-language pathologist testified that she was surprised the student was placed

in a 15:1 Algebra class when she was working with the student on basic math concepts;

- the student had been placed in an Algebra 2 class without completing Algebra 1;
- although the student was in a 12:1+2 math class, the CSE did not provide math instruction in the 12:1+2 special class on the student's October 2021 IEP;
- team meetings failed to include staff from the 15:1 special class;
- the student's grades and progress reports were based solely on the 12:1+2 special class and not the 15:1 special class;
- several of the annual goals in the October 2021 IEP were not appropriate;
- with respect to the April 2022 CSE meeting, there was no data from any of the student's teachers to review to indicate whether the student made progress;
- the present levels of performance in the April 2022 IEP failed to contain any information from the 15:1 English or math class;
- the student was unable to take what he learned in the individual speech-language therapy sessions and carry it back to the classroom and instead should have had programming embedded into his school day;
- the 12:1+2 special class did not contain students who were on his level socially or academically;
- the student's needs could not be addressed in the 12:1+2 special class; and
- there was no appropriate program on the continuum of services within the district that was appropriate to address the student's needs and neither the 12:1+2 experiential learning special class nor the hybrid program of both the 12:1+2 special class and 15:1 special class could meet the student's needs or offer him academic benefit for the 2021-22 or 2022-23 school years

(IHO Decision at pp. 30-33). Instead of specifically addressing the findings made by the IHO, the request for review includes a conclusory allegation that the IHO erred in finding that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years (Req. for Rev. ¶¶ 1, 3). The use of broad and conclusory statements or allegations within a request for review does not act to revive any and all violations the district believes the IHO erroneously addressed or failed to address without the district specifically identifying which violations meet this criterion (M.C., 2018 WL 4997516, at \*23 [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]). The district arguably identified one specific error which is further addressed below, namely that the IHO should not have relied on the testimony of the private speech-language pathologist called by the parent.

Even if incorporation by reference of arguments set forth only in a memorandum of law was not explicitly prohibited by State regulation, the district's memorandum of law is problematic for the same reasons. It makes general, broad, and conclusory arguments with citations to the federal and State law without making specific fact-based arguments directed at the IHO's adverse findings to support its position (see generally Dist. Mem. of Law). For example, while mentioning goals in the memorandum of law, the district does not argue how the IHO's finding that the annual goals in the October 2021 IEP were not appropriate was made in error and instead simply recites federal and State law and regulations related to annual goals (Dist. Mem. of Law at p. 21). The district also references functional grouping in its memorandum of law, which it recognizes was not raised in the parents' due process complaint notice (id. at pp. 20-21). Similarly, the district

argues that the parent was able to participate in the CSE process, but the IHO made no findings regarding the parents' participation in the CSE process that were adverse to the district. Likewise, the district argued that the CSE was not required to place an instructional methodology on a student's IEP, but the IHO made no finding regarding the placement of an instructional methodology on the student's IEP that was adverse to the district. Rather than engage with the findings in the IHO's decision that undermined the district's programming choices, the district largely ignored the IHO's findings and repeated its arguments almost verbatim from its post-hearing brief.

Any arguments included solely within the district's memorandum of law have not been properly raised and will not be considered or addressed in this decision. Moreover, in rendering a conclusory challenge to the IHO's findings that the district failed to offer the student a FAPE, it is not this SRO's role to research and construct the appealing party's arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at \*3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at \*9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at \*4 n.3 [S.D. Ala. Aug. 23, 2007]). Thus, any arguments included solely within the memorandum of law have not been properly raised. I will turn to the districts specific challenge in the request for review, that the IHO should not have relied on the private speech-language pathologist's testimony.

## **B. FAPE — Weight of the Testimonial Evidence**

In its request for review, the district alleges that the IHO "improperly credited the testimony" of the parents' private speech-language pathologist. The district contends that the parents' private speech-language pathologist testified only "generally" about her "history of working with the [s]tudent and her understanding of his learning profile she offered no specific information regarding this [s]tudent's identified special education needs." Further, the district argues that the parents' private speech-language pathologist failed to evaluate the student, failed to observe the student at the district or Winston Prep, failed to participate in CSE meetings, and provided no information to the CSEs in the development of the student's IEPs. The district asserts that the parents' private speech-language pathologist met with the student's teachers outside of a CSE meeting, then followed up after the meeting in order to obtain information and not to express concerns with the CSE program recommendations. The district claims that the parents' private speech-language pathologist's "testimony should be afforded little to or no weight."

At best, the district's challenges to the opinion of the private speech-language pathologist provide a reason to question the weight of her testimony rather than to reject it as not being credible. A State Review Officer gives due deference to the findings of credibility of the impartial hearing officer, unless the non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record read in its entirety would compel a contrary conclusion (see Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [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).

As the IHO explained, the private speech-language pathologist was personally familiar with the student, had reviewed the student's performance on intelligence testing, and was familiar with the programing being offered by the district. The hearing record does not present a reason to disturb the credibility determinations of the IHO that the private speech-language pathologist was a credible witness. However, the district made convincing arguments that the IHO likely afforded greater weight to the testimony of the parents' private speech-language pathologist than it was due.<sup>12</sup> The IHO gave significant weight to the parents' private speech-language pathologist "who [was] an expert in language development, language disorders and literacy, has known the [s]tudent since he was eight years old, has reviewed all of his reports and evaluations, has observed the [s]tudent in school settings, has spoken to his teachers, his [p]arents, his tutor, and has attended CSE meetings and other professional meetings to discuss the [s]tudent and his needs" (IHO Decision at p. 32). However, those findings were not entirely supported by the evidence in the hearing record because there was also evidence showing that the parents' private speech-language pathologist did not actually participate in the student's CSE meetings, did not provide feedback regarding the IEPs to district staff, and did not observe him in the 12:1+2 or 15:1 special classes (Sept. 2, 2022 Tr. pp. 32, 52-53). Also, as the district points out, the parents' private speech-language pathologist did not evaluate the student (Sept. 2, 2022 Tr. pp. 51-52). Furthermore, the parents' private speech-language pathologist did not explain how, if at all, the district's evaluations of the student were deficient or improperly administered. Therefore, the evidence in the hearing record indicates that the private speech-language pathologist had a difference of opinion regarding appropriate programming for the student, but it does not show that that her opinion was shared during the CSE meetings relevant to this case or that the CSEs reliance on the district's evaluative information in formulating the student's IEPs was inappropriate (see Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).

However, the district's specific challenge that goes to the weight that the IHO should have accorded the private speech-language pathologist's testimony is insufficient to overcome the IHO's other specific findings listed above, which have otherwise drawn no specific argument from the district. Since the district's appeal fails to meaningfully challenge most of the IHO's determinations relevant to the question of the provision of a FAPE to the student for the 2021-22 and 2022-23 school years, there is insufficient basis to disturb the IHO's finding that the district denied the student a FAPE for the 2021-22 and 2022-23 school years.

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<sup>12</sup> Accordingly, to the extent that I agree or disagree with IHO's findings of fact, it is based on the weight accorded to the evidence, not the credibility of the witnesses' testimony (see L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 487-88 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at \*18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*9-\*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. 2013]).

### C. Unilateral Placement

The IHO found that the parents met their burden to demonstrate that Winston Prep was an appropriate unilateral placement for the student beginning on March 22, 2022 continuing through the 2021-22 school year and once again during the 2022-23 school years (IHO Decision at p. 34). The IHO relying on the testimony of the parents' private speech-language pathologist, the dean of students and academics at Winston Prep (dean), the student's mother, and the documentary evidence presented to show that Winston Prep met the student's special education needs, determined that Winston Prep was reasonably calculated to enable the student to benefit academically, and enabled the student to make progress (*id.* at pp. 34-36).

In its request for review, the district argues on appeal that Winston Prep was not appropriate to meet the student's needs and references its memorandum of law, stating that "the totality of the evidence presented in the hearing record shows that Winston [Prep] failed to provide the student with specially designed instruction which addressed his unique individual needs." Additionally, the district again argues that the IHO improperly relied on the testimony of the parents' private speech-language pathologist in finding that Winston Prep was appropriate for both the 2021-22 and 2022-23 school years. Further, the district contends that the IHO erred in finding that the parents established that Winston Prep was appropriate because it provided the student with specially designed instruction to meet his unique needs. Additionally, the district alleges that the IHO failed to address the restrictiveness of Winston Prep in rendering her decision.

In a unilateral placement case, 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. Description of the Student's Needs**

While the student's needs are not at issue, a review thereof facilitates the discussion of the issue to be resolved—namely, whether Winston Prep was an appropriate unilateral placement for the student for the 2021-22 school year. According to the present levels of performance contained in the June 2021 IEP, a January 2021 cognitive assessment showed that the student's full-scale IQ fell within the very low range, his verbal comprehension index score fell within the low average range, his visual-spatial and working memory index scores fell in the low range, and his fluid reasoning and processing speed index scores were in the very low range (Parent Ex. D at p. 5). Additionally, the present levels of performance indicated that according to a January 2021 administration of the Woodcock-Johnson IV Tests of Achievement (WJ IV ACH) the student's skills in reading were "significantly below average for his age," his mathematics skills were "well below average for his age," and his skills in writing were varied (id. at pp. 5-6). The IEP indicated that the student was reading at a fifth-grade instructional level (id. at p. 5). He was able to read unfamiliar multisyllabic words, demonstrated good fluency, and was able to answer literal comprehension questions with accuracy and ease (id.). However, according to the IEP, the student had difficulty answering inferential comprehension questions and drawing conclusions, and he struggled to identify the main idea and themes in stories (id.). The IEP noted that the student was functioning at an early fifth-grade instructional level in math (id.). He was able to perform basic operations with whole numbers but had "difficulty with any mathematical procedures that involve[d] more than one step" and required "maximum teacher support, prompting, visuals to aid instruction, and scaffolded instruction to complete these tasks" (id.). In addition, the student "struggle[d] greatly with word problems" and required support to identify key vocabulary and determine which operation to use (id.). Turning to writing, the IEP indicated that the student was beginning to write basic paragraphs and, although the student could identify the basic parts of a

paragraph, he had difficulty using them in his writing (*id.*). According to the IEP, the student did not consistently use proper capitalization or punctuation in his writing (*id.* at p. 6).

With regard to the student's speech-language development, the June 2021 IEP indicated that an administration of the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) indicated that the student's core language skills fell within the very low range (Parent Ex. D at p. 6). On informal testing, the student had difficulty sequencing picture cards when recalling a story and required help to identify the details in the cards necessary to sequence them correctly (*id.*) In addition, the student's narrative "did not specifically and accurately capture some of the information that [wa]s inferred, rather than shown in the scenes" (*id.*). The IEP stated that the student benefitted from a "slow presentation" of comprehension passages and from responding to questions throughout a passage, as opposed to at the end (*id.*). The IEP indicated that the student struggled to remember word meanings and was working "to recognize, understand, and discriminate specific math language vocabulary" (*id.*). The present levels of social development described the student as a "very kind, caring and respectful young man" who was frequently distracted both internally and externally (*id.* at pp. 7-8). Additionally, the June 2021 IEP indicated that the student enjoyed sharing with others and taking part in group activities; however, he continued to need counseling to help him better access and utilize positive, adaptive coping strategies to regulate his emotions, manage his impulsive behaviors, and improve his self-awareness (*id.* at p. 8). With regard to physical development, the June 2021 IEP indicated that the student did not have any physical or motor needs that should be addressed through special education (*id.*).

## **2. Winston Prep 2021-22 School Year**

In terms of addressing the student's needs, review of the evidence in the hearing record shows that the student began attending Winston Prep on or around March 21, 2022 (Parent Ex. Q at p. 1). According to the Winston Prep dean, the school is designed for students with learning differences, students with language-based learning challenges, non-verbal learning disabilities, and executive functioning challenges (July 27, 2022 Tr. pp. 20-21, 25-26). The dean explained that the school is run by two speech-language pathologists who work with the faculty and train them in strategies to use with students with language challenges (July 27, 2022 Tr. pp. 62-63). He further explained that students are grouped according to their learning profile, and specifically noted that students who have similarities in processing, working memory, and verbal comprehension are grouped together so they can be taught at an appropriate pace (July 27, 2022 Tr. p. 21). The dean indicated that the school day consisted of eight periods including academic classes such as history, science, math, language skills, and literature, as well as art and physical education and the Focus program (*id.*). The dean explained that the Focus program provides students with one-to-one instruction with a learning specialist for 45 minutes every day to work on their "greatest area of need" and indicated that the Focus teacher was the point person for communication with the teachers and the student's family (July 27, 2022 Tr. pp. 21-22). The Focus teacher also worked with students to develop goals and work on them (July 27, 2022 Tr. p. 22). Additionally, the dean reported that because the student started later in the school year, the Focus teacher worked closely on acclimating him to the strategies used at Winston Prep and helping him understand how to approach a particular assignment (July 27, 2022 Tr. p. 28). Further, the dean explained that the student would occasionally meet in a smaller group of up to four students within the Focus program to work on social skills (July 27, 2022 Tr. pp. 31-32, 68).

Finally, the dean explained that the student was also enrolled in an after school social-pragmatics class, as well as a comic book design class and computer coding class (July 27, 2022 Tr. p. 57).

The dean testified that the student was placed in a cohort with nine other students who also presented with significant comprehension challenges, including challenges in expressive and receptive language and executive functioning, and difficulty with metacognition (July 27, 2022 Tr. pp. 25-26, 30).<sup>13</sup> Additionally, the students required information to be broken down and the teachers used a lot of scaffolding and repetition along with teacher made materials designed to work with students with this learning profile (July 27 2022 Tr. p. 26). The dean further testified that he worked with the student to help him "navigate homework" and to manage his time effectively at home and to sustain his organization (July 27, 2022 Tr. p. 61). He explained that several times during the 2021-22 school year he met with the student and his Focus teacher to help him manage his time, get started on tasks, and deal with anxiety over schoolwork (July 27, 2022 Tr. p. 62). Finally, the dean indicated that while the student did not receive speech-language therapy, he did work with the Focus program director when he needed some extra help in executive functioning and navigating academic responsibilities (July 27, 2022 Tr. pp. 63-64).<sup>14</sup>

The dean explained that the teachers at Winston Prep use a "continuous feedback system" which starts by identifying the student's needs, then creating a program, reviewing the student's response, and adjusting based on the response, along with introducing new strategies or adjusting existing strategies to help the student (July 27, 2022 Tr. pp. 32-33). He testified that this continues as a "loop where we're always reviewing student response and how our approach is working" (*id.*).

With regard to the student's performance, the dean reported, based on conversations with the student's literature and language arts teacher, that the student experienced challenges staying on track in literature and needed material broken down a little more and the use of graphic organizers to "paint[] a picture" for the student (July 27, 2022 Tr. pp. 33-34). He reported that writing was more of a strength for the student and he was able to initiate and engage in the task and was able to develop some of his writing at the sentence level (July 27, 2022 Tr. p. 34). In history, the dean reported that the student's participation was improving, and based on conversations with his teacher he was engaging more in discussions (*id.*). The dean noted that the student was interested in history and "being able to talk a little bit more about the topics," which was something the student connected with (*id.*). In science, the dean reported that the teacher had connected well with the student and understood how his processing speed impacted him, and that she was able to reach the student at a level that provided him with some success (*id.*). With regard to math, the dean reported that word problems were very challenging for the student, and he needed a lot of support to follow directions when completing math problems (July 27, 2022 Tr. pp. 34-35). He explained that the vocabulary was difficult for the student as was understanding what to

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<sup>13</sup> The dean confirmed that the cohort would never be more than 12 students in any of the classes including academics, art, and physical education (July 27, 2022 Tr. p. 58).

<sup>14</sup> The hearing record indicated that the Focus program director was also the assistant head of school and a licensed speech-language pathologist who was trained by the parents' private speech-language pathologist (July 27, 2022 Tr. p. 63; Sept. 2, 2022 Tr. pp. 42, 54).

do, so the math teacher worked closely with the student to identify key words (July 27, 2022 Tr. p. 35).

Additionally, the dean indicated that the student could get stuck on an assignment, so a homework plan was designed to assist the student with managing time more effectively by limiting him to 20 minutes per assignment (July 27, 2022 Tr. pp. 80-81). Winston Prep prepared a document titled "Spring Report 2022" (Spring 2022 report) which indicated that the student was using a homework plan which allowed for a "balanced approach toward his assignments" (Parent Ex. S at p. 1). The report further indicated that the student tended to persevere on tasks and benefitted from encouragement and support to move on after "generating correct homework and when completing an assignment" (*id.*). The report indicated that the student was not yet able to move from one aspect of an assignment to the next independently; however, "with encouragement and positivity, he [wa]s gaining the skills needed to become more open to moving forward" (*id.*).

The Spring 2022 report indicated that because the student began attending the school at the end of March 2022, his time in the Focus program was dedicated to targeting his daily routine, developing proficiency using Google Classroom, and developing a consistent homework plan, which enabled him to feel more confident in school each day (Parent Ex. S at p. 1). Additionally, the report indicated that the student worked toward developing his skills in targeted goal areas and completing diagnostic testing throughout the spring semester (*id.*). Finally, the Spring 2022 report contained suggested academic goals designed to improve the student's reading comprehension, organization, time management, self-advocacy, and flexible thinking skills (*id.* at pp. 2-3). More specifically, the reading comprehension goal targeted the student's ability to locate or infer information from a given passage (*id.* at p. 2).

The Spring 2022 report included information regarding opportunities provided for the student to develop "Qualities of a Sustainable and Independent Learner" characteristics which included: management and organization, social responsibility, social communication, self-reflection, problem-solving, self-advocacy, self-regulation, and resiliency (Parent Ex. S at p. 3). The report described how the student took advantage of these opportunities noting, for example, that in management and organization skills, the student used his planner for assignments and would cross check these with his Google Classrooms (*id.*). Additionally, the student would self-advocate to develop an effective homework plan to support his time management skills and was developing his social communication skills (*id.*). According to the report, the student was working on self-awareness and his self-advocacy and problem-solving skills were emerging as he learned to navigate the school (*id.* at p. 4). Finally, the report indicated that the student was working to develop self-regulation skills during the Focus program and was beginning to demonstrate self-awareness (*id.*). The report indicated that social responsibility was a skill that the student should target moving forward (*id.*).

The Spring 2022 report indicated that the student's literature class focused on improving reading comprehension skills through identifying main ideas and supporting details, broadening understanding of vocabulary, understanding narrative components, making predictions, and finding evidence in the text to support answers to higher level critical thinking and inference questions using the "ACE" strategy (Parent Ex. S at p. 4). The report indicated that—with teacher modeling, classwork, and homework—the student was able to identify literary devices (e.g., hyperbole, foreshadowing/flashbacks and verbal irony), as well as explore the cause and effect and

the relationship between events or things (id.). The student was able to use cause and effect to summarize events in the story and understand why things happened (id.). Finally, the report indicated that, while the student's work showed thought and accuracy, he continued to benefit from reminders to cite to textual evidence and/or expand his answer, as well as having extra time to finish his work and time to start homework assignments in class (id.).

In terms of language skills, the Spring 2022 report indicated that the student's class focused on increasing exposure to written language at the paragraph level while placing an emphasis on correct punctuation and capitalization (Parent Ex. S at p. 4). The report indicated that the student benefitted from brainstorming sessions and guidance when generating an outline (id.). The report further indicated that after a brainstorming session, the student would use his transition work study guide to generate paragraphs comparing and contrasting people, places, and animals, and then to back up his opinion with facts from an article (id.).

In mathematics, the Spring 2022 report indicated that over the course of the semester, the student worked on "practical math concepts aimed at deepening his understanding of foundational mathematical concepts and how they are important components of everyday life" (Parent Ex. S at p. 5). Topics covered included real-world application of percentages and decimals, along with tipping, tax, and finding discounted prices (id.). With teacher support and the use of a calculator, the student was able to write a number sentence, find the discounted price, and determine if it was a good purchase (id.). To support generalization, the report indicated that project-based learning activities were incorporated into daily classwork such as being given a budget and an actual menu and having to stay within the set budget including having enough money for a tip (id.). With verbal cues and scaffolding the student was able to extract important and relevant information from multi-step practical word problems and generate a number sentence for each part of the problem and then solve and check his answer (id.). The report indicated that the student did well with addition and subtraction word problems; however, he benefitted from guidance when determining whether multiplication or division was required (id.). Finally, the report indicated that the student could become overwhelmed when learning new material; however, with reassurance and one-to-one guidance, "he c[ould] be redirected to complete the work feeling more confident" (id.).

The Spring 2022 report indicated that in biology, when learning about body systems, the student made self-to-text connections which supported his comprehension of the material (Parent Ex. S at p. 5). The report indicated that, as new concepts were solidified, students would participate in lab experiments to further demonstrate their knowledge (id.). The report indicated that the student participated in four different lab experiments involving the digestive system, chemical digestion, and muscles and bones (id.). The report stated that the student "strived to become comfortable with new routines and with his peers," he benefitted from prompting to follow along in class and to raise his hand before contributing to discussions, and he responded well to instructor feedback (id.).

In history, the Spring 2022 report indicated that the student participated, along with classmates, in a hands-on experience with a "cooperative science/history project of designing and launching their own rockets in a class wide 'Space Race'" (Parent Ex. S at p. 6). The report indicated that as a "fairly new student," the student demonstrated an inconsistent level of engagement and participation; however, he showed engagement when he connected with the material being covered (id.). Finally, the student was encouraged to take pride in his

accomplishments as well as to increase his self-advocacy in order to increase his understanding of material being presented (id.).

According to the parents' private speech-language pathologist, Winston Prep became a possibility for the student because it offered an environment with a small, homogeneous group of students with teachers "whose orientation is cognitive linguistic in nature, meaning the role that language plays in understanding, in comprehension, and in production" (Sept. 2, 2022 Tr. pp. 40-41). She opined that Winston Prep would "be an appropriate middle program" that would directly address the student's needs and would provide emotional support and address the "social aspect of language" (Sept. 2, 2022 Tr. p. 41).<sup>15</sup> The parents' private speech-language pathologist opined that the "setting, the nature of the group, the professionals, the nature of the goals, the intensity of the program, and the consistency of the program" was appropriate for the student (Sept. 2, 2022 Tr. p. 47).<sup>16</sup>

There is also evidence in the hearing record showing the student's progress during the 2021-22 school year. 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 v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; 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"]). It stands to reason that the converse must also be true, i.e., that a lack of evidence of progress is not dispositive of the appropriateness of a unilateral placement. According to the student's 2021-22 Winston Prep report card, the student attained final grades of A- to B- in all of his academic classes, specials, and Focus class for the spring semester (Parent Ex. T at p. 5). Review of the report card shows that each class grade was broken into three components: progress and performance, participation, and commitment (id.). The report card further specified that the criteria for the progress and performance grade (33 points) could include attentiveness to class work, skill improvement, thorough completion of homework assignments, projects, labs, performance on tests and informal assessments (id.). Criteria for the participation grade (33 points) could include organization, preparedness for class, participation in class, collaboration with peers, punctuality, and attendance (id.). Finally, the criteria for the commitment grade (34 points) could include openness to instruction, consistency in effort, willingness to take risks, implementation of feedback and self-reflection (id.). It appears that all three category grades are combined to make up the student's final letter grade in each class based on the following numerical ranges: A- 90-93, B+ 87-89, B 84-86 and B- 80-83 (id.).

While the evidence of progress above is not dispositive of the appropriateness of the unilateral placement at Winston Prep, it tends to support the parents' assertion that Winston Prep was an appropriate placement for the student during the 2021-22 school year. The evidence shows

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<sup>15</sup> The parents' private speech-language pathologist explained that she had known both the head of the school and the assistant head of the school for many years (Sept. 2, 2022 Tr. p. 42).

<sup>16</sup> It is noted that the parents' private speech-language pathologist had not observed the student at Winston Prep, nor conducted any formal evaluations of the student, nor did she participate in any of the CSE meetings for the 2021-22 and 2022-23 school years (Sept. 2, 2022 Tr. pp. 51-53).

that the student was being provided with specially designed instruction during the 2021-22 school year that was reasonably calculated to enable him to receive educational benefits and, furthermore, that the student's progress at Winston Prep factored in favor of reimbursement when considering the parents' request for reimbursement for the 2021-22 school year.

Although raised only in its memorandum of law, the district asserts that Winston Prep was not an appropriate placement for the student because it did not provide students with counseling or speech-language therapy and, therefore, it did not address the student's deficits in core language, expressive language, receptive language, and language memory (Dist. Mem. of Law at p. 26). However, even if the issue had been properly raised in the request for review, the hearing record shows that the student's needs in these areas were otherwise addressed by the school and a private school is not required to address those needs in the same manner as the public school. It is well settled that the legal standards by which unilateral placements are judged expressly allow for flexibility and consideration of the totality of the circumstances rather than rigidly proscribed criteria (see Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65 ["No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits . . . [and] . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]).

In this matter, the spring 2022 report indicated that at Winston Prep the student was working on skills similar to those outlined in the student's speech-language goals on the district's IEP such as answering reading comprehension questions, making inferences, and understanding vocabulary, including vocabulary related to mathematical operations (compare Dist. Exs. 2 at pp. 11-12; 4 at pp. 12-14 with Parent Ex. S at pp. 4, 5). With regard to counseling, the district's IEP targeted the student's need to develop coping skills and the hearing record shows that at Winston Prep staff worked with the student to develop a homework plan to help him manage his time and balance his school life with his home life (compare Dist. Exs. 2 at p. 12; 4 at p. 13 with Parent Ex. S at p. 4). The school also addressed the student need to develop self-advocacy skills and more flexible thinking and to improve his social awareness (Parent Ex. S at p. 4). Accordingly, although the student did not receive formal counseling or speech-language therapy while attending Winston Prep, the hearing record, as a whole, shows that the school was addressing the student's areas of need through specially designed instruction. Additionally, a failure to furnish every special service necessary for the student, including related services, will not render a unilateral placement inappropriate if the placement as a whole is reasonably calculated to enable the student to receive educational benefits (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]; C.L., 744 F.3d at 838-39).

Finally, to the extent the district argues that the IHO did not properly consider and weigh the restrictiveness of Winston Prep in determining whether it was appropriate, although the restrictiveness of a parental placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L., 744 F.3d at 830, 836-37 [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would

undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364).

In this instance, as described above, the student was placed in a cohort with nine other students at Winston Prep and those students presented with challenges in comprehension, expressive and receptive language, executive functioning, and metacognition (Tr. pp. 25-26). The hearing record did not identify whether all of the students at Winston Prep were students with disabilities; however, the dean did describe the school as having approximately 130 students broken into 14 cohorts of 8 to 12 students each, and as being designed for students with learning differences (Tr. pp. 20-21). In comparison, with respect to participation in regular classes, extracurricular and nonacademic activities with students without disabilities, the October 2021 IEP noted that the student would be removed from participation with non-disabled peers for speech-language therapy and counseling (Parent Ex. E at p. 17). The IEP also indicated that the student would have been placed in special classes for approximately 24.75 hours per six-day cycle with an additional 1.5 hours spent in speech-language therapy and counseling (id. at p. 13). However, there was no explanation as to how much time the student would have spent in extracurricular and nonacademic activities with students without disabilities. Considering the above, the LRE factor does not weigh heavily at all against the parents' selection of Winston Prep as a unilateral placement, given that the parties appear to agree that the student requires substantial periods of time in specialized settings in order to receive educational benefits. Absent a more substantial argument by the district asserting that the restrictiveness of the unilateral placement somehow resulted in it being an inappropriate placement for the student, there is no reasonable basis for finding it inappropriate based on LRE considerations.

### **3. Winston Prep 2022-23 School Year**

Turning to the next school year, the final day of the impartial hearing record was conducted on September 2, 2022, therefore the hearing record contains limited information regarding the student's activities at Winston Prep for the 2022-23 school year.

The dean testified that the student attended a summer program at Winston Prep which ran from June 29th to July 29th (July 27, 2022 Tr. pp. 37, 57; see Parent Ex. V). He indicated that the summer program helped students to maintain their skills and reduce regression, as well as work on skill development (July 27, 2022 Tr. p. 37). The dean explained that since the student had started at Winston Prep halfway through the year and time was devoted to helping the student to acclimate, staff wanted more time to work on skill development with the student (July 27, 2022 Tr. p. 37). The student's Focus teacher for the summer program was trained in Orton-Gillingham but the student was not receiving Orton-Gillingham instruction (July 27, 2022 Tr. pp. 34-36, 78).

According to the dean, summer school consisted of five-periods per day and each student who attends "has a reading comprehension course, written expression, organization and study skills, math and a one-to-one Focus class" (July 27, 2022 Tr. pp. 38, 40, 58). According to the dean, the student was engaged in the summer program and prior to experiencing some health issues he was "responding by showing growth in the academic realm where he was engaged in his classes,



but also socially" in that he started to open up and engage in more conversations with peers (July 27, 2022 Tr. p. 39). The student was in a cohort with three other students for summer (July 27, 2022 Tr. p. 39). According to the dean, students are not recommended for the summer program, rather families make the decision as to whether a student will attend (July 27, 2022 Tr. p. 40). The same criteria is used to place student's during the summer as is used during the school year (July 27, 2022 Tr. pp. 40-41).

When questioned about the 10-month portion of the 2022-23 school year, the dean testified that a schedule was not yet created but that the student would take similar classes of history, science, language skills, literature, math, enrichment, and Focus and he would be with the same cohort of students from the 2021-22 school year (July 27, 2022 Tr. pp. 41, 59-60). He further testified that Winston Prep planned "to continue to build upon the skills that we started to develop this past year," and work on skill development, and less on acclimating the student to the school (July 27, 2022 Tr. p. 41). The Winston Prep dean testified that the goals developed on the spring 2022 progress report would be reviewed at the beginning of the 2022-23 school year, but new goals would be developed for the student's "plan for the 2022-23 school year" (July 27, 2022 Tr. p. 77; see Parent Ex. S at pp. 2-3). The spring 2022 progress report noted that the student's scores on diagnostic testing would "help with class placement next year as well as specific Focus goals" (Parent Ex. S at p. 1).

The dean testified that at the end of the 2021-22 school year, a determination was made whether the student could return to Winston Prep for the 2022-23 school year and based upon the student's initial response to the program he was offered a contract to attend Winston Prep for the 2022-23 school year (July 27, 2022 Tr. pp. 36-37, 60; see Parent Ex. BB).

The parents' private speech-language pathologist testified that Winston Prep was appropriate for the 2022-23 school year because of "the nature of the goals, the intensity of the program, and consistency of the program is appropriate for [the student]" (Sept. 2, 2022 Tr. p. 47). However, she provided very little detail regarding the student's specific special education programming at Winston Prep.

In the context of analyzing the special education programming offered by a school district, courts have explained that "[w]hen 'an IEP is modeled on a prior one,' a student's progress under that prior IEP, although 'not dispositive,' is relevant to deciding whether the new IEP is 'reasonably calculated to continue that trend' (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]); see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed.Appx. 64, 67 [2d Cir. 2013]). Although Winston Prep is a unilateral placement rather than a public placement, the rule is no less applicable because the evidence in this case shows in a similar way that the student was being provided a program during the 2021-22 school year at Winston Prep that was appropriate and that the student made progress in the program and was achieving passing grades. The dean then adequately explained that the student received summer services from Winston Prep that addressed his areas of need. While the fall scheduling had not yet occurred at the time of the impartial hearing, according to the dean's testimony, the available evidence shows that the student's programming was going to remain similar insofar as he would have remained with the same cohort of students in the same classes and that Winston Prep would have reviewed and revised the student's goals for the 10-month 2022-23 school year. Under these circumstances it is reasonable to conclude that the student would likely have continued to receive educational

benefits in light of his circumstances and he would have made educational progress, such that it is reasonable to conclude that Winston Prep was an appropriate unilateral placement for the student the 2022-23 school year.

#### **D. Equitable Considerations**

The IHO found that equitable considerations weighed in favor of the parents (IHO Decision at p. 37). Specifically, the IHO found that the parents participated in the CSE meetings and provided the CSE with reports and evaluative information (*id.* at p. 36). Additionally, the IHO found that the parents provided 10-day notice of their unilateral placement of the student at Winston Prep for the remainder of the 2021-22 school year and for the 2022-23 school year (*id.* at pp. 36-37).

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).

The district argues on appeal that the IHO improperly found that the parents cooperated with the district. However, the district makes no factual allegations in the request for review regarding the parents' alleged misconduct and instead refers to its memorandum of law stating that the hearing record reflects that the parents "did not adequately cooperate with the CSE" and failed to timely raise the appropriateness of the CSEs program recommendations.

As previously noted, the district failed to properly argue the basis for overturning the IHO's finding on equitable considerations in its request for review by attempting to incorporate its memorandum of law. Even if it were permissible to reach the district's points about the parents' intentions to unilaterally place the student at Winston Prep and initial commencement of a due process hearing, the district was provided fair notice of the issues in this proceeding prior to the impartial hearing through the amended due process complaint notice, and there is no evidence that the parents failed to cooperate with the district's efforts to develop the student's IEPs. There is insufficient basis to overturn the IHO's finding that equitable considerations favored the parents (see 8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; (C.L., 744 F.3d at 840; Davis, 2021 WL 964820, at \*11; see, e.g., Application of a Student with a Disability, Appeal No. 15-070).

## **VII. Conclusion**

As discussed above, there is insufficient basis to overturn the IHO's conclusions that the district failed to provide the student with a FAPE during the spring of the 2021-22 school year and for the 2022-23 school years, that Winston Prep was an appropriate unilateral placement for the student for the 2021-22 and 2022-23 school years, and that equitable considerations favored the parents. Accordingly, the necessary inquiry is at an end.

I have examined the parties remaining contentions and find it is not necessary to address them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
March 30, 2023**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**