The University of the State of New York

The State Education Department
State Review Officer
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No. 23-251

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Bulban Salim, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for his son's tuition costs at the Special Torah Education Program (STEP) for the 2022-23 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

Briefly, the CSE convened on May 10, 2022 to formulate the student's IEP for the 2022-23 school year (see generally Parent Ex. B).[1] Finding the student eligible for special education as a student with autism, the CSE recommended a 12-month program in an 8:1+1 special class for

[1] The hearing record contains two copies of the May 2022 IEP (compare Parent Ex. B, with Dist. Ex. 1). For purposes of this decision, only the parent exhibit is cited.

five periods per week in math, eight periods per week in English language arts (ELA), three periods per week in social studies, and three periods per week in sciences (Parent Ex. B at p. 13).[2] The CSE also recommended related services consisting of one 30-minute session per week of group (3:1) counseling services, two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual speech-language therapy, as well as three 45-minute sessions of group parent counseling per year (id.). The CSE also recommended that the student be provided with the support of a full-time individual paraprofessional for behavior (id.).

The district sent the parent a prior written notice dated May 12, 2022, identifying the program recommended by the May 2022 CSE and a subsequent prior written notice, dated June 10, 2022, identifying the public school where the student's IEP would be implemented (Dist. Exs. 2, 3).

In an August 22, 2022 letter to the CSE, the parent indicated that the district had not provided the parent with "an updated IEP or school placement letter" for the 2022-23 school year and, as a result, notified the district of their intent to unilaterally place the student at STEP (Parent Ex. R).

On September 6, 2022, the parent signed an enrollment contract with STEP for the student's attendance during the 2022-23 school year (Parent Ex. S). The student attended STEP for the 2022-23 school year (Parent Ex. T).

In a due process complaint notice, dated June 27, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parent included allegations related to the size of the recommended 8:1+1 special class, the student's need for a special class for more than 19 periods per week, the functional grouping of the students within the class, and the need for a class wide behavioral program (Parent Ex. A at pp. 1-2).

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on September 7, 2023 and concluded on September 19, 2023 after two days of proceedings (Tr. pp. 14-102).[3] In a decision dated October 2, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year, that STEP was not an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent (IHO Decision at pp. 11-14). As a result of his findings, the IHO denied the parent's request for an award of tuition reimbursement (id. at p. 14).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore,

[2] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The parties also appeared for a prehearing conference on August 2, 2023 (Tr. pp. 1-13).

the allegations and arguments will not be recited here in detail. The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. whether the IHO erred in determining that the evaluations of the student before the May 2022 CSE contained sufficient information about the student for the CSE to develop an appropriate IEP;

2. whether the IHO erred in determining that the student did not require a behavioral intervention plan (BIP) to address his behaviors;

3. whether the IHO erred in determining the 8:1+1 special class recommended by the May 2022 CSE was appropriate for the student;

4. whether the IHO erred in determining that STEP was not an appropriate unilateral placement to address the student's needs.[4]

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir.

[4] In the request for review, the parent alleges that there was no evidence of an actual placement being made available to the student or that a placement was available that could implement the May 2022 IEP. The district alleges that the parent did not raise such allegations relating to the proposed district placement's ability to implement the student's May 2022 IEP as written or the district's failure to propose a school location to implement the student's IEP for the 2022-23 school year in his June 2023 due process complaint notice. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Review of the parent's due process complaint notice reveals that the parent made an unsupported claim that "the [district] delayed in providing the student with a proposed program and placement" and did not raise an allegation relating to implementation (Parent Ex. A at p. 1). Nevertheless, the hearing record includes a prior written notice dated June 10, 2022 which indicated the student's extended school year program and his program for the 2022-23 school year (Dist. Ex. 3 at p. 3). The prior written notice also identified the school that would implement the student's IEP on the first day of school and included contact information for the parent to schedule a school visit and how to access the procedural safeguards notice (id.). The parent did not put forth a claim that he did not receive the June 2022 prior written notice. Accordingly, I will not further address the allegation about the proposed school location's ability to implement the student's May 2022 IEP.

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]).[5]

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. Sufficiency of Evaluative Information

In her decision, the IHO noted that the district school psychologist credibly testified at the impartial hearing that she observed the student in his preschool class, conducted a functional behavioral assessment (FBA) because of the student's behaviors, and she attempted to conduct a cognitive assessment, but it was not completed as the student was unable to engage (IHO Decision at p. 11). The IHO also noted that the district school psychologist reviewed the student's OT and speech-language therapy progress reports, his preschool progress report, the FBA, the classroom observation, and the parent's independent psychoeducational evaluation to prepare for the May 2022 CSE meeting (id.).

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and

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

the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Insofar as the parent argues that the district had insufficient evaluative information at the time of the May 2022 CSE meeting, a review of the hearing record does not support this claim. The hearing record confirms that in developing the student's May 2022 IEP, the CSE reviewed a March 24, 2022 social history update, a March 22, 2022 psychoeducational assessment, and an April 27, 2022 FBA (see Tr. pp. 34, 37, 40; Dist. Ex. 2 at p. 2; see also Parent Exs. D; Q). The May 2022 CSE also had available reporting from the student's teachers and providers, a private psychological assessment dated March 27, 2022 provided by the parent, and input from the parent; information from all of these sources can be found within the student's present levels of performance identified on the May 2022 IEP (Parent Ex. B at pp. 1-6; see Parent Ex. C).

The district school psychologist, who was also the district representative for the May 2022 CSE meeting, testified that she observed the student for over an hour at his preschool classroom and attempted a cognitive assessment of the student but was unable to complete it due to difficulties with joint attention (Tr. pp. 34, 44). More specifically, the district school psychologist testified that she tried to administer the Wechsler Preschool & Primary Scale of Intelligence (WPPSI) but could not "encapsulate a true score" because the student was unable to engage with her to get a standardized score with validity (Tr. p. 50-51). She noted that she attempted certain subtests of the WPPSI and that the student enjoyed the tactile part of the assessments but was very random in his responses (id.). She further stated that she used qualitative instead of quantitative information to describe how the student performed (Tr. p. 51). She also clarified that the assessment was not cut short, rather, she attempted each portion of the assessment, but it was not a fair representation of the student's abilities (id.).

The parent's main dispute with the sufficiency of the evaluative information was that the May 2022 CSE relied on an incomplete assessment to develop its program recommendation and, thus, the district's recommendation was inappropriate and "[c]learly, additional testing was needed" (see Req. for Rev. ¶¶ 18-20). However, as indicated above, the May 2022 CSE had other

evaluative information, including the March 27, 2022 private psychological assessment (see generally Parent Ex. B at pp. 1-6). The March 2022 private psychological assessment provided additional evaluative information to the May 2022 CSE as the testing used by the private psychologist was different than the testing done by the district school psychologist (compare Parent Ex. C, with Parent Ex. D). As indicated in the March 2022 private psychological assessment, the evaluator performed an oral and written interview with the parent and behavioral observation and interview with the student and administered the Stanford-Binet Intelligence Scale, Fifth Edition (SB-5), the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), the Autism Spectrum Rating Scales (6-18 Years)- Parent Ratings, and the Autism Diagnostic Observation Schedule (ADOS-2) Module (Parent Ex. C at p. 2). There was no allegation raised by either party that this evaluation was not properly performed or presented an inaccurate representation of the student's then-current needs.

After considering the evaluative information relied on by the May 2022 CSE, including the information described above, I find that the evidence in the hearing record shows that the May 2022 CSE had sufficient evaluative information from a variety of sources that informed the CSE's identification of the student's needs and development of the student's IEP for the 2022-23 school year.

B. May 2022 IEP

1. Special Factors—Interfering Behaviors

The parent asserts the IHO erred in determining that the student required a BIP, but that the management needs detailed in the May 2022 IEP were sufficient to address the student's interfering behaviors and thus a BIP was not needed (IHO Decision at p. 12).[6]

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

[6] More specifically, the IHO stated that the district's "only shortcoming was that it did not provide the student with a BIP" but found that "the management needs were sufficient to relay how to address the student's behaviors to the student's teacher" (IHO Decision at p. 12).

> the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "[t]he [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]).

The district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

In this matter, the March 27, 2022 private psychological evaluation indicated that the student presented with mild anxiety and "required an excessive amount of encouragement to engage with tasks" but "readily complied" with directives (Parent Ex. C at p. 2). The evaluator also noted that the student required an immense amount of positive reinforcement in order to maintain rapport but remained in his seat appropriately during the duration of the evaluation and that his frustration tolerance was considered moderate (id.). According to the evaluator, the student had difficulty establishing and maintaining eye contact throughout testing (id.).

Further, according to the March 27, 2022 private psychological evaluation, the student's danger awareness was not yet developed and he was described as "a runner" (Parent Ex. C at p. 6). Regarding the student's socialization, the student was described as being "very self-directed" and liked to do "'his own things'" without interacting with peers (id.). It was further reported that the student did not acknowledge other students his own age and preferred to engage with younger students (id.). He was selective about who he played with and was usually able to stay away from "aggressive and unwelcoming" students (id.). The evaluation report noted that the student was "frequently frustrated and thr[e]w tantrums easily" (id.). When the student became upset, it was reported that he needed to let his emotions out before being able to verbalize what he needed and why he was upset (id. at p. 7). The parent reported that the student related well to adults, used language appropriately, and did not have problems with attention and/or motor and impulse control (id.). However, the parent also reported that the student had difficulty using appropriate verbal and non-verbal communication for social contact, providing appropriate emotional responses in

social situations, tolerating changes in routine, and relating to children (id.). In addition, the student engaged in stereotypical behaviors and overreacted to sensory stimulation (id.).

The district psychoeducational evaluation completed in March 2022 indicated that the student struggled to engage appropriately during the evaluation (Parent Ex. D at p. 1). The district school psychologist who administered the evaluation noted that the student initially crawled on the floor when she attempted to escort him to the testing area and, when the student later transitioned to another room, he "ran around the room in circles" until he was eventually taken to gym area where he could run with supervision from his parent (id. at p. 2). The school psychologist also noted that, because of the student's high level of distractibility and difficulty engaging, testing was ultimately "discontinued" and neither an IQ nor an achievement score could be obtained (id.). According to parent responses on the Vineland-3, the student struggled to recognize emotions in others, make culturally appropriate eye contact, and share his toys or possessions when told to do so (id.). The parent also reported that the student's maladaptive behaviors included being overly needy or dependent, engaging in temper tantrums, disobeying people in authority, being more active or restless than peers, and fixating on objects or parts of objects (id.).

Despite the foregoing information available to the May 2022 CSE about the student's behavioral needs, the IEP indicated that the student did not need "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others" and did not need a BIP (Parent Ex. B at p. 7). Despite that the CSE checked "no" to indicate that the student did not need positive behavioral interventions or a BIP, the IEP did elsewhere describe and provide for supports and strategies to address the student's interfering behaviors (see id. at pp. 6, 11, 13)

In particular, to address the student's behavior and safety needs indicated above, the May 2022 CSE recommended the following resources and strategies in the management needs section of the student's IEP: use of visual aids; prompting; manipulatives; multi-step verbal directions broken down into short, concise steps; directions simplified and repeated; verbal prompts, refocusing, and redirection to stay on tasks; use of a multi-sensory teaching approach/strategies to sustain the student's attention and concentration; a token economy board of high interest items that the student enjoys "(i.e. a token economy with velcro pictures of construction vehicles which he is highly interested in)"; explicit social modeling; toileting assistance and training from the paraprofessional; immediate reinforcers to shape positive behaviors; and for self-regulation, the IEP noted that puzzles, books, and doing art work had successfully worked to calm the student down when he was upset (Parent Ex. B at p. 6).

Additionally, in the management needs section, under the heading "Safety concerns," the May 2022 CSE noted that the student had an FBA and BIP that were created on the preschool level to address safety concerns that the student exhibited in and outside of the school building, in conjunction with a behavior paraprofessional to ensure his safety throughout the school day (Parent Ex. B at p. 6). The IEP also noted that it was critical that the student be unable to open the classroom door because he was known to run out of the classroom and had a history of running away from the parent when leaving school and laying in the street (id.). Further, it was noted that the student needed the company of an adult who knew him well to hold hands during fire drills

and when transitioning in the halls to ensure the student did not run to an exit and leave school (id.).[7]

In the management needs section under the heading "Behavior concerns," the May 2022 CSE noted that, according to the student's preschool BIP, the student had a very low frustration tolerance, spoke in one to two word utterances, and his frustration frequently manifested as physical aggression, such as throwing chairs (Parent Ex. B at p. 6). The IEP also indicated that, if the teacher did not use the same word for an item (i.e., teacher says coat instead of jacket), the student would tense up his body and scream at the top of his lungs, which could persist for a long time (id.). The May 2022 IEP reflected that the student should receive "constant support to ensure he d[id] not throw things when frustrated that could hurt another adult or child" (id.).

Among other IEP supports for the student, the May 2022 CSE included an annual goal to address the student's needs in the area of communication (Parent Ex. B at p. 11). Specifically, the IEP included an annual goal that was designed to improve the student's social interaction skills necessary for verbal communication with peers and adults throughout various settings (id.). In addition to the management needs and supports available to the student in the special class, the May 2022 CSE also recommended group counseling services once a week for 30 minutes in addition to a full-time 1:1 paraprofessional for behavior support (id. at p. 13). The Second Circuit has found that recommendation for a 1:1 paraprofessional in a student's IEP tends to mitigate a district's failure to recommend a BIP for the student (see, e.g., M.W., 725 F.3d at 141; R.E., 694 F.3d at 193; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]).

As such, even if the student exhibited behaviors that interfere with the student's learning or that of others such that the CSE should have recommended a BIP, the hearing record supports the IHO's finding that the May 2022 IEP identified the student's behavioral needs within the management needs section of the IEP and recommended sufficient supports and services to address the student's behavior and safety needs such that the lack of a BIP does not amount to a denial of a FAPE. With that said, while the recommendation for a 1:1 paraprofessional to support the student's behavioral needs appears to have been an appropriate support for the student in this instance, the district is reminded that State guidance provides that, in considering whether a student needs the support of a 1:1 aide, the CSE should also consider other natural supports, accommodations, and services that could support the student to meet his needs, specifically mentioning the support of a BIP and that a 1:1 aide "may not be used as a substitute for certified, qualified teachers for an individual student or as a substitute for an appropriately developed and implemented [BIP] or as the primary staff member responsible for implementation of a [BIP]" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide, Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at

[7] The copies of the May 2022 IEP included in the hearing record were cut off along the right margin; accordingly, there is some information missing from the copies available in the hearing record (Parent Ex. B; Dist. Ex. 1). For example in the "Safety concerns" section, the IEP noted that the student "cannot have acc" without anything on the following line leaving it unclear what the student cannot have (Parent Ex. B at p. 6; Dist. Ex. 1 at p. 6). As there are two copies of the IEP included in the hearing record and both are cut off at the same point without explanation, the error appears to have been in the district's printing of the IEP.

https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disabilitys-need-for-a-one-to-one-aide.pdf).

2. 8:1+1 Special Class

Turning now to the May 2022 CSE's recommendation for an 8:1+1 special class, the evidence in the hearing record does not support the IHO's determination that the May 2022 IEP was appropriate to address the student's needs.

State regulations provide that a special class placement with a maximum class size not to exceed eight students, staffed with one or more supplementary school personnel, is designed for "students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b]). By way of comparison, State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social, and physical development (8 NYCRR 200.1[ww][3][i][d]).

The district school psychologist testified that she worked in and was familiar with the dynamics of an 8:1+1 special class in a district specialized school (Tr. p. 44). She testified that she recommended an 8:1+1 special class for the student based on the skill level of the teacher, the ratio of teachers to students, as well as the immersion of language that the student would get, the support that would be provided within that classroom environment, and the behavior techniques and strategies the teachers are trained to use within the 8:1+1 special class (id.).

The district school psychologist further indicated that a 6:1+1 special class was a "more restrictive" classroom than the 8:1+1 special class and that 6:1+1 special classes were typically reserved for students with autism who were nonverbal (Tr. pp. 38-39).[8], [9] The district school

[8] The IHO also referred to the relative restrictiveness of the special class, finding that the 8:1+1 special class "allowed the student to be more social and provided a least restrictive environment" (IHO Decision at p. 12). The district school psychologist's and the IHO's reference to restrictiveness conflates the student's need for additional adult support within a classroom compared to the student's placement in the LRE, the latter which relates to the disabled student's opportunities to interact with nondisabled peers and not a student's opportunity to interact with other disabled peers in a special class (see R.B. v. New York City Dep't of Educ., 603 F. App'x 36, 40 [2d Cir. 2015] [explaining that the requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement with the goal of integrating children with disabilities into the same classrooms as children without disabilities]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7 [S.D.N.Y. Mar. 30, 2016] [noting that "restrictiveness" pertains to the extent to which disabled students are educated with non-disabled students, not to the size of the student-staff ratio in special classes]).

[9] The May 2022 IEP indicated that a 6:1+1 class was considered for the student but noted that it was rejected because the student did "not need such intensive specialized instruction to address his educational needs" (Parent

psychologist indicated that a 6:1+1 special class was considered for the student, but due to the fact that the student had language and was able to use a couple of word utterances, and when motivated some sentences, the 8:1+1 class was more appropriate as the student would be exposed to natural language in the classroom environment as well as peers who could model appropriate behaviors while still receiving specialized support in the classroom with other students with autism (Tr. p. 39).

Moreover, the IHO noted the 8:1+1 special class was consistent with the 12:1+2 preschool class the student attended in that both offered a ratio of one adult for every four children (IHO Decision at p. 12). Based on the foregoing information regarding the recommended program and the student's needs, it appears that the 8:1+1 special class in a specialized district school would have been appropriate to meet the student's needs. However, although the IHO noted in his decision that he "consider[ed] an 8:1+1 class size to be small and the district [specialized] school [to be] a special education school where the student would have received special education for the full day" (IHO Decision at p. 12), the actual recommendation included on the May 2022 IEP was limited to a specific number of periods and there was unrebutted testimony from the district school psychologist that the May 2022 CSE did not recommend a full-time special educational program for the 2022-23 school year, which the student in this case required (see generally Tr. pp. 48-49; Parent Ex. B at p. 13).

The May 2022 CSE recommended that the student be placed in an 8:1+1 special class for nineteen periods per week—five periods for math, eight periods for ELA, three periods for social studies, and three periods for sciences—which the district school psychologist testified was not a full-day program (Tr. p. 49; Parent Ex. B at p. 13). State guidance provides that, "For a student who is recommended for special class for a portion of the school day and only for specific subjects, the IEP should list them separately" ("Questions and Answers on Individualized Education Program (IEP), the State's IEP Form and Related Requirements," at pp. 32, 39 [updated Oct. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf). Thus, if the CSE intended to recommend the 8:1+1 special class full time for all subjects, there would be no need to separately list the subject areas.

Here, there was no evidence presented as to how long a period was, how many periods were in a school day, or what type of setting the student would have attended outside of those nineteen periods recommended for placement in an 8:1+1 special class. The district school psychologist indicated that the 8:1+1 special classes within the district were all different in terms of how the class periods were broken down (Tr. p. 40). She further stated that, at the time the May 2022 CSE recommended the 8:1+1 special class, the CSE was unaware of the period breakdown at the proposed school location and that it was up to the proposed school location to amend the student's IEP to align the student's needs and the recommended 8:1+1 special class program to the structure of the proposed school's period breakdown (Tr. p. 48). She indicated that the reason why the May 2022 CSE would not know the proposed school location was because, once an IEP is finalized, it is sent to the school location officer who then would assign a district school (Tr. pp. 48-49). Even more detrimental to the district's case, however, in response to a question asking whether the recommended program was a full time program and whether it was appropriate for the

Ex. B at p. 17).

student to be in a part-time program, the district school psychologist responded "No, I don't think it was appropriate" before explaining that the CSE did not know how to break down the periods (Tr. p. 49). The district did not attempt to elicit further testimony from the school psychologist to explain or qualify this statement.[10]

Based on the foregoing, the evidence in the hearing record does not support the IHO's finding that the May 2022 IEP, as written, offered an appropriate program for the 2022-23 school year. Based on the inconsistencies contained with the May 2022 IEP and the testimony of the district school psychologist, the evidence is insufficient to show what programming recommendations the CSE made for the student for the full school day. It may be that the CSE believed the IEP could be finalized after the CSE meeting, to conform with the schedule of the school the student was ultimately assigned to attend; however, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child before the beginning of a school year and that a district may not rely on testimony about actions a school district would have taken to amend a student's IEP in order to address a student's needs to rehabilitate a deficient IEP (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 [indicating that "[a]t the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). In this instance, the testimony of the district school psychologist shows that in order for the May 2022 IEP to have been appropriate as written it would have required further future amendments for it to conform to the proposed school location's period schedule. The district school psychologist specifically stated that the May 2022 IEP, as written, was not a full-time program and thus not appropriate to meet the student's needs. Accordingly, the IHO's determination that the district offered the student a FAPE for the 2022-23 school year must be reversed. Next, I will address the parent's argument that the student's unilateral placement was appropriate.

C. Unilateral Placement

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

[10] Although the May 2022 IEP only included a recommendation for a special class placement for 19 periods per week, leaving the inference that the student would not receive special education support for the remainder of the school day, in response to questions regarding the extent to which the student would not participate in "regular class, extracurricular and other nonacademic activities" or a "regular physical education program," the May 2022 IEP included notation that the student would "be in a specialized class in a specialized school" (Parent Ex. B at pp. 13, 15). During the impartial hearing, the IHO did inquire of the school psychologist whether the student would be with a general education gym class or lunch period, to which the school psychologist responded that the student would be attending a specialized school and had a paraprofessional assigned (Tr. pp. 49-50). Ultimately, the IHO found that the student would receive special education in the specialized school for the full school day (IHO Decision at p. 12); however, without a recommendation for a special class ratio or other program recommendation, the provision for attendance in specialized school for the remainder of the day is insufficiently specific, particularly in light of the district school psychologist's testimony that the recommendation was not appropriate absent further amendment and revision of the IEP.[11] Two exhibits admitted into evidence by the parent's attorney contain names different than that of the student and, as such, the relevance of the documents to this student is questionable and, therefore, they have not been considered (see Parent Exs. E at p. 1; G at p. 1). However, the remainder of the hearing record, in its totality, shows that STEP addressed the student's needs and provided an appropriate program for him.

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).

The evidence shows that the student attended STEP during the 2022-23 school year and was placed in an ungraded 4:1+2 class with the additional support of a 1:1 paraprofessional assigned to him (Tr. pp. 66-68, see Parent Ex. T). The student received related services of

individual speech-language therapy three times per week for 30 minutes, individual OT two times per week for 30 minutes, and individual PT two times per week for 30 minutes (see Parent Exs. F; G; M; N; P; S at p. 2).

Testimony by the private school's principal shows that STEP is an ungraded school for children and young adults with special needs (Tr. pp. 62, 68). The principal of STEP indicated that STEP provided a positive environment where everything was focused on the physical, cognitive, academic, social/emotional, behavioral, and life skills needs of its students (Tr. p. 63). The principal reported that the classes had a high staff-to-student ratio so that students receive a lot of individualized instruction and attention (id.). The principal noted the school was very goal-oriented, and focused on helping its students achieve the highest level of functioning and as much independence and integration into the community as possible (id.). The principal also noted that students at STEP received related services as well as aqua therapy and music therapy (Tr. p. 64). According to the principal, depending on the school year, enrollment at STEP ranged between 35 and 50 students, and depending on the school's population, there were between six and eight classes (id.).

According to the STEP principal, the student attended a 4:1+2 class comprised of four students, one main teacher, and two assistant teachers (Tr. pp. 66-67). The student also had his own paraprofessional (Tr. p. 67). Although the student's class was ungraded, all students in the class were within two chronological years of his age (Tr. p. 68). The student's class was chosen for him based on his age and the functioning level of the other students in the class (id.). The principal testified that the student's class offered good peer choices for the student to have as friends and there was one student who was slightly higher functioning who staff felt would be a good peer model in terms of peer interaction (Tr. p. 70). The principal reported that, from meeting the student, staff felt the 4:1+2 ratio would be appropriate for the student and as the year progressed that proved to be true (Tr. p. 70). The principal reported that, within that ratio, the student "was able to succeed . . . with having peers to interact with but having staff to work with him, instruct him, and enable him to learn new behaviors and new skills" (Tr. p. 70). The principal confirmed that the student was in the same class ratio throughout the day for "everything" including lunch and music (Tr. pp. 70-71). The principal also indicated that any time staff observed the student in the hall where he might encounter other children (i.e., during transition times), his grabbing, frustration, or eloping behaviors were exacerbated; therefore, STEP kept the student in a 4:1+2 class throughout the school day during both academic and non-academic times (Tr. p. 71).

Documentary evidence included in the hearing record shows the student had a schedule that included, in part, academics and individual related services sessions, adapted physical education, opportunities to participate in a sensory activities room, arts and crafts/fine motor activities, music and movement, lunch, and healthy snack and circle time, as well as swimming/aquatic therapy/hygiene, interactive play, shopping, and cooking/baking (Parent Ex. F).

Additional documentary evidence reflects that, during the 2022-23 school year, the student worked on specific goals and objectives aligned to his needs in communication, academics, speech-language therapy, OT, PT, and play skills (Parent Exs. H; I, J; K; L). For example, with regard to the student's communication needs, STEP developed a goal that targeted the student's ability to display, "[i]ncreased understanding of use of language, establish compliance, increased ability to comprehend and follow directions, and build foundation skills for appropriate expression of needs

and wants, increase spontaneity of speech and MLU [mean length of utterance]" (Parent Ex. H at p. 1). Objectives aligned with this goal addressed the student's receptive language needs, specifically identifying following one-step directives with one prompt, acknowledging redirection in a calm manner, and responding to simple questions about a short picture book read to the student (id.). Other objectives aligned to the same goal addressed the student's expressive language needs, identified as requesting desired objects, answering on topic, approaching/responding to peers/simple greetings, decreasing use of loud and inappropriate vocalization, decreasing aggression in place of communicating, maintaining eye contact when spoken to/responding, identifying familiar objects, and responding to simple short questions about a short picture book read to him (id.).

Similarly, additional documentary evidence included goals and objectives for the 2022-23 school year specific to pre-math skills, play skills, pre-reading/reading/comprehension, and fine motor/writing skills (Parent Ex. I; J; K; L). Further, multiple documents dated April 2023 written by the student's teacher, speech-language pathologist, and physical therapist reflect the work done with the student over the 2022-23 school year on his goals and objectives, and the goals and objectives the student would continue to work on with his teachers and related service providers (Parent Exs. M; N; O; P).

The hearing record also reflects that the student made progress at STEP. It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (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]).

The STEP principal testified that he monitored the student's progress and the student's program was adapted when needed (Tr. p. 74). He opined that the program worked well as long as the proper behavioral interventions and reactions were in place (id.). The principal explained that there were expectations of the student and "he was required to comply with certain things and certain behaviors were unacceptable" (id.). The principal indicated that the student's understanding increased incrementally although he might still try to run out of the room at times (id.). According to the principal the student was able to improve his ability to attend to a task with prompting from five minutes to between 20 to 30-minutes by the end of the school year (id.). Further, his tendency to throw a tantrum and bang his head decreased significantly (id.). The principal reported that the student began to understand cause and effect of his behavior (id.). For example, if he threw a toy across the room or banged his head he would have to sit on a mat (id.). The student also learned

that if he used the techniques he had been taught (i.e., taking a deep breath, asking for music for five minutes) he could rejoin the class and participate in the activities he enjoyed (id.). The principal explained that the student "learned the inherent pleasure of being part of a classroom" (id.). According to the principal, by the end of the school year the student participated in a toileting schedule and took some initiative to walk toward the bathroom when the toileting "alarm" went off (id.). The student also learned to wash his hands with one or two prompts and his eye contact improved (id.). Additionally, by the end of the school year the student used short phrases with fewer prompts (i.e., "use your words") (Tr. pp. 75-76). The principal reported that this decreased the student's frustration and, in turn, increased his ability to interact with those around him (Tr. p. 76).

The principal further testified that the student made additional progress with eating and clean-up skills, pre-academics (i.e., identifying all letters of the alphabet, forming CVC words, reading "a CVC like" short sentence in a preschool book with pictures), and community behaviors (taking a walk outside while holding someone's hand) (Tr. pp. 76-77). On the student's best day, he could answer a simple question by pointing to a picture (Tr. p. 77). The student could also recognize and count numbers one through ten and participated in multisensory activities involving the counting out of objects (id.). With someone sitting next to him, the student could attend to a tablet or a book (id.). According to the principal, with someone sitting next to the student, "he was really able to complete work" (id.). However the student still required 1:1 attention; according to the principal, the student could, sometimes, "work with another child on a 1:2 basis, but anything more than that, he could not have succeeded" (id.).

In finding STEP inappropriate, the IHO found that it was not the student's LRE and that the student's needs did not warrant such a small student-to-adult ratio. However, while a reduction could be warranted in a particular case for excessive segregable services, that the unilateral placement provided more support than the student needed would not warrant a finding that it was inappropriate (see Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]). Further, as noted above, the level of support or class size does not relate to LRE, which pertains to the degree of access to nondisabled peers, not the level of adult support in a setting with no nondisabled peers (see R.B., 603 F. App'x at 40; T.C., 2016 WL 1261137, at *7). And, in any event, 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; 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 consideration of all of the above, the parent met her burden to prove that, based on the totality of the circumstances, STEP was an appropriate unilateral placement for the student for the 2022-23 school year.[11]

D. Equitable Considerations

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

The IHO determined that equities weighed in favor of the parent (IHO Decision at p. 13). The IHO found that there was no evidence that the parent did not attend the May 2022 CSE meeting, failed to provide the district with a ten-day notice, or was uncooperative with the evaluations performed by the district (id.). The district did not put forth an argument that the parent was not entitled to direct funding nor did it cross-appeal from the IHO's determination that equities weighed in favor of the parent.[12][13]

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[11] Two exhibits admitted into evidence by the parent's attorney contain names different than that of the student and, as such, the relevance of the documents to this student is questionable and, therefore, they have not been considered (see Parent Exs. E at p. 1; G at p. 1). However, the remainder of the hearing record, in its totality, shows that STEP addressed the student's needs and provided an appropriate program for him.

[12] During the hearing, the district asserted that any award of reimbursement or direct funding for STEP should be reduced on a prorated basis for any portion of the school day dedicated to religious worship or instruction; however, this issue was not addressed by the IHO and the district has not raised this issue on appeal (see Tr. pp. 98-99).

[13] Recent cases have called into question whether proof of an inability to front the cost of a student's tuition is required before making a direct payment award (see Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4-*5 [S.D.N.Y. Sept. 26, 2023] [ruling that parents "are not required to establish financial hardship in order to seek direct retrospective payment"]; Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10

The hearing record shows that the parent sent the district a 10-day notice letter on August 22, 2022, in which the parent alleged he did not receive an updated IEP or a school placement letter for the 2022-23 school year and that he intended to enroll the student at STEP for the 2022-23 school year and to seek funding for the cost of the student's placement from the district (Parent Ex. R at p. 2). On September 6, 2022, the parent entered into a contract with STEP in which he agreed to pay the tuition cost, including all related services and an individual health paraprofessional (Parent Ex. S).

Based on the foregoing, the hearing record supports a finding that the parent is entitled to direct funding of the student's full tuition costs at STEP for the 2022-23 school year.

VII. Conclusion

Based on the foregoing, I find that the IHO erred in finding that the district offered the student a FAPE for the 2022-23 school year and that STEP was not an appropriate placement designed to address the student's needs, thus the IHO erred in denying the parent's request for direct funding of the student's tuition costs at STEP.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 17, 2023 is modified by reversing those portions which found that the district offered the student a FAPE for the 2022-23 school year and declined the parent's request for direct funding of the student's tuition costs at STEP; and

IT IS FURTHER ORDERED that the district shall directly pay STEP the student's tuition costs for the 2022-23 school year.

Dated: **Albany, New York**
January 3, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]; see also Maysonet v. New York City Dep't of Educ., 2023 WL 2537851, at *5-*6 [S.D.N.Y. Mar. 16, 2023] [declining to reach the question of whether parents must show their inability to pay in order to receive an award of direct tuition funding but, instead, considering additional evidence proffered by the parents about their financial means to award direct tuition payment]). Here, as the district did not argue that the parent failed to establish an entitlement to direct payment relief instead of tuition reimbursement, I will order the district to pay the tuition directly to STEP.