The University of the State of New York

The State Education Department
State Review Officer
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No. 24-006

Application of a STUDENT WITH A DISABILITY, by her 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:
The Harel Law Firm, P.C., attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq. and Irene Dimoh, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at Bais Frieda Child Care Center Inc. (Bais Frieda) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate it had offered to provide an appropriate educational program to the student for the 2022-23 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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 facts and procedural history of the case and the IHO's decision will not be recited in detail. According to the student's father, at the age of four, the student exhibited "numerous developmental delays" including speech and social/emotional deficits, "very intense temper tantrums," and self-injurious behaviors (Parent Ex. M at pp. 1-2). In June 2022, the district conducted an initial evaluation of the student, who was attending a Head Start program at that time (see Parent Ex. M). The CPSE convened on August 2, 2022, and finding the student was eligible for special education as a preschool student with a disability, developed the student's IEP for the 2022-23 school year (see generally Parent Ex. B).[1] On August 24, 2022, the parent asserted that the student "ha[d] not received a proper or adequate educational and school placement for the upcoming 2022-2023 school year" and notified the district of her intent to unilaterally place the student at Big N Little: Ziv Hatorah Program (Big N Little) for the 2022-23 school year (see Parent Ex. N).[2] Later, on October 19, 2022, the parent expressed to the district her continued disagreement with the lack of proper educational programming for the student and stated her intent to unilaterally place the student at Bais Frieda for the 2022-23 school year and seek tuition funding or reimbursement from the district (see Parent Ex. O).[3]

In a due process complaint notice, dated January 10, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 12-month 2022-23 school year (see Parent Ex. A). In particular, the parent alleged that the August 2022 IEP program recommendations would not meet the student's "academic, social, and behavioral needs" and she required a 12-month special education class with individualized support and a behavioral intervention plan (BIP) (id. at pp. 1-2). As relief, the parent sought direct funding of the tuition for Big N Little for summer 2022 and direct funding for the tuition at Bais Frieda for the 2022-23 school year (id. at pp. 1, 3-4).

After a prehearing conference on March 15, 2023 and a status conference on April 19, 2023, an impartial hearing convened on May 24, 2023 and concluded on October 23, 2023 after six days of proceedings (Tr. pp. 1-137). In a decision dated November 29, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, denied the parent's request for tuition for Big N Little for summer 2022, and determined that Bais Frieda was an appropriate unilateral placement for the student for the 2022-23 school year, and that equitable considerations weighed partially in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 9-10, 16, 21, 23, 25-28). Specifically, the IHO found that the

[1] 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 his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] Big N Little has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] Bais Frieda has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

district's failure to "defend" the IEP or explain through testimonial evidence how the recommendations in the August 2022 IEP were appropriate for the student resulted in a denial of FAPE for the 2022-23 school year (id. at pp. 8-9). In connection with 12-month services, the IHO determined that the CPSE recommended a 10-month school year, none of the evaluators referenced a need for 12-month services, and the evidence did not indicate that the student required a 12-month program or that the student demonstrated regression over school breaks (id. at pp. 9-10).[4] With respect to Bais Frieda, the IHO found that the student made progress and "substantial gains academically and with respect to the related services" (id. at pp. 15-16, 23). Lastly, in terms of equitable considerations, the IHO found that the parent's delay in providing the ten-day notice of unilateral placement to the district warranted a reduction in the tuition award (id. at pp. 25-28). As relief, the IHO ordered the district to reevaluate the student in all areas of suspected disability and directly fund the cost of the student's placement at Bais Frieda in the amount of $20,000 for the 2022-23 school year (id. at pp. 28-29).

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, the district's answer and cross-appeal, and the parent's reply and answer thereto is also presumed and, therefore, the specific allegations and arguments will not be recited here. The main issue presented by the parent is whether the IHO erred in finding that equitable considerations did not weigh fully in her favor and then in reducing the amount of tuition relief (Req. for Rev. at p. 1). The parent alleges that she cooperated with the district and "did not interfere" with the district's obligation to offer the student a FAPE (id. at p. 5). The parent admits that the ten-day notice was untimely but argues it is not a complete bar to an award for tuition reimbursement (id.). Further, the parent claims that she did not receive a procedural safeguards notice (id. at p. 7). As relief, the parent seeks findings that the district failed to offer the student a FAPE for the entire 2022-23 school year, that "the unilateral placement was appropriate," and that equitable considerations favored the parent, and an order awarding direct funding of the costs of the student's tuition at Big N Little for summer 2022 and direct funding of the full costs of the student's tuition at Bais Frieda for the 2022-23 school year (id.).

In its answer the district generally denies the material allegations contained in the parent's request for review. The district cross-appeals from the IHO's decision that it failed to offer the student appropriate programming, asserting that it offered the student a FAPE for the 2022-23 school year. The district also cross-appeals from the IHO's finding that the parent's unilateral placement of the student at Bais Frieda was appropriate, and argues that equitable considerations "at a minimum" support the IHO's equitable reductions of relief to the parent. Specifically, the district argues that the CPSE reviewed sufficient evaluative information in developing the August 2022 IEP. In addition, the district asserts that the lack of testimonial evidence is not a sufficient basis on which to find a denial of FAPE. The district further claims that the recommendation for special education itinerant teacher (SEIT) services and related services could have addressed the

[4] The parties and IHO repeatedly made reference to the "CSE" in documents in this proceeding, but this case addresses the programing for a preschool student created by the Committee on Preschool Special Education and therefore, for clarity, the acronym used throughout this decision is "CPSE" unless the context requires otherwise.

student's "academic, social, and behavioral needs."[5] Next, the district contends that the parent failed to meet her burden that Bais Frieda was an appropriate unilateral placement for the student as there was no evidence of specially designed instruction, "quantifiable progress reports," or objective assessments evidencing progress. Lastly, the district claims that since the parent failed to provide timely notice of the unilateral placement, if relief is awarded, the IHO's reduction should be affirmed (id. ¶ 24).

The parent filed an answer to the cross-appeal asserting that the IHO correctly found that the district failed to meet its burden of proving that it offered the student a FAPE for the 2022-23 school year. The parent asserts that the evidence in the hearing record demonstrates that Big N Little for summer 2022 and Bais Frieda for September 2022 through January 2023 were appropriate unilateral placements for the student. Lastly, as argued in her request for review, the parent contends that equitable considerations weigh in her favor.

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 or CPSE 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

[5] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/sites/default/files/programs/special-education/specialeducationitinerantservicesforpreschoolchildrenwithdisabilities.pdf; "Special Education Itinerant Teacher (SEIT) Services and Related Services for Preschool Students with Disabilities," VESID [June 2007], available at https://www.nysed.gov/sites/default/files/programs/special-education/special-education-itinerant-teacher-services-and-related-services-for-preschool-students-with-disabilities_0.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]).

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]).[6]

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

Although the parent makes a request for reimbursement from the undersigned for the 12-month services she obtained from Big N Little in summer 2022, the parent couches the argument as merely a challenge to an equitable reduction of tuition for the summer services by the IHO due to a late 10-day notice; however, the parent misreads the IHO decision and on appeal the parent does not challenge the IHO's actual findings that none of the evaluators indicated a need for 12-month services or that the student did not experience or was not likely to experience substantial regression for summer 2022 (see generally Req. for Rev.). Left unchallenged, these findings regarding summer 2022 have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[7]

A. August 2, 2022 IEP

The district asserts that the IHO erred in finding it denied the student a FAPE for the 2022-23 school year. More particularly, the district claims that the CPSE "reviewed sufficient evaluative

[6] 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).

[7] Even if I were to reach the issue of an equitable reduction by the IHO due to a late 10-day notice, relief would not be warranted because, as noted above, "[r]eimbursement 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), and in this case the IHO concluded that the 12-month services were not required in the first place.

data" to identify the student's needs and develop the management needs and annual goals (Answer and Cross-Appeal ¶ 13). Further, the district asserts that a lack of testimonial evidence by witnesses is "not an automatic basis" upon which to find a denial of FAPE (id. ¶ 14). To that end, the district claims that its submission of exhibits into the hearing record in this case was sufficient to find that the August 2022 IEP addressed the student's needs (id. ¶ 15). The district argues that although "regrettable that [it] was unable to secure witnesses to provide supporting testimony, the IHO should have evaluated the hearing record as a whole and measure[d] the [district's] evidence against the broad and ambiguous allegations in the [p]arent's [due process complaint notice] that the IEP was inappropriate" (id.).

Substantively, the district asserts that the evidence showed that the IEP recommended speech-language therapy, occupational therapy (OT), and counseling services each on an individual basis, which was the same as the related services provided to the student at Bais Frieda (Answer and Cross-Appeal ¶ 16). Then, the district argues in a conclusory fashion that the student has "academic, social, and behavioral needs" and the SEIT services "were recommended to specifically support the student in these areas" and allow the student to make meaningful progress (id. ¶¶ 16-17). In response, the parent asserts that the district failed to present any witnesses to explain or justify the IEP program recommendations.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Ordinarily, however, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

Here, the district has the burden of proof to demonstrate that the IEP it created was appropriate to meet the student's special education needs. While that burden does not require the district to call witnesses, it does require the district to defend its recommendations and provide evidence that explains such recommendations.

The Supreme Court held in Endrew F., the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" and the "nature of the IEP process [] ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue; thus, by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement" (Endrew F., 580 U.S. at p. 404). Lastly, the Supreme Court held that the "reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their

decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (id.).

The evidence shows that during the impartial hearing the district failed to present "a cogent and responsive explanation" to support the August 2022 CPSE's recommendations. Here, the August 2022 CPSE developed an IEP for the student for the 2022-23 school year based on a May 10, 2022 health examination form, a June 21, 2022 psychological evaluation report, a June 16, 2022 social evaluation, a June 21, 2022 educational evaluation, a June 23, 2022 OT evaluation, and a June 23, 2022 speech-language evaluation (Parent Ex. B at pp. 1, 3; Dist. Ex. 5 at pp. 1-2; see Parent Ex. M).

According to the August 2022 IEP, the student's overall cognitive skills were in the borderline range of intellectual functioning and she presented with "concerns in the areas of cognition, expressive/receptive language, social/emotional development, sensory processing, fine motor development and classroom functioning" (Parent Ex. B at pp. 3, 6). The IEP indicated that the student answered some basic questions, labeled common objects and followed simple directions; however, the IEP described the student as having difficulty following class routines and grasping concepts, including difficulty showing an understanding of opposites, object association, quantitative, and spatial concepts; labeling body parts and clothing; answering listening comprehension questions, retelling events, and describing character actions in stories read to her; classifying items into groups; and counting by rote or using 1:1 correspondence (id. at pp. 3-6). Additionally, the IEP indicated that the student's attention span was short and she had difficulty sitting for circle time or a group activity (id. at pp. 3, 6). Further, the August 2022 IEP indicated that the student's problem-solving and pretend play skills were delayed and that the student "needed constant repetition and prompting" to follow directions (id. at pp. 4-5).

The August 2022 IEP indicated the student's delays in her "verbal and motor development . . . adversely affect[ed] her overall pre-academic skills" (Parent Ex. B at p. 5). The student's delayed language skills and poor attention made it difficult for her to function in the classroom environment (id. at pp. 5-6). Regarding communication skills, the August 2022 IEP indicated the student demonstrated a limited vocabulary, "d[id] not use much language to express herself," spoke "in broken sentences," and "refer[red] to herself in the third person" (id. at p. 3). The August 2022 IEP indicated that "[a]uditory and language processing delays [were] evident" (id.).[8]

Turning to the student's social skills, the August 2022 IEP indicated that the student showed interest in playing with peers; however, she demonstrated "immature" play skills, did not appropriately initiate play with others, and exhibited difficulty sharing and taking turns with peers (Parent Ex. B at p. 6). According to the August 2022 IEP, the student was not able to self-regulate and she exhibited tantrum behaviors when she was upset (id.). The August 2022 IEP described the student as self-directed, "all over the place," and defiant towards teachers (id.). The student was observed to be fidgety and highly distractible, which impeded her ability to participate in

[8] While not included within the August 2022 IEP, a review of the student's June 2022 educational and speech-language evaluation reports noted that "[m]any of [the student's] utterances were unintelligible and difficult to understand" and her speech became "more difficult to understand" when the student "used [two]-[three] word utterances" which made it difficult for her to "communicat[e] with teachers and peers" (Parent Ex. M at pp. 14, 19-20, 23-24).

group activities (id.). Additionally, the August 2022 IEP reported that the student had sensory processing difficulties which impacted her "behavior, balance, safety awareness, and ability to engage in functional activities" (id.). Transitions were also noted to be a challenge for the student (id.).

Regarding the student's physical development, the August 2022 IEP indicated that the student demonstrated "adequately developed" gross motor skills but had delays in fine motor skills and sensory development (Parent Ex. B at pp. 7-8). She had "violent tantrums," exhibited self-injurious behaviors, screamed for long periods of time, and had difficulty self-soothing (id. at p. 7). The student had difficulty with tracing and copying lines and shapes (id.). She required assistance with dressing, eating with utensils, and cleaning herself when she became dirty (id.).

The August 2022 IEP included the following management needs: use of manipulatives to build conceptual understanding; use of transitional objects to increase vocabulary and sequencing; provision of ample time for verbal response; encouraged use of words; use of a quiet or calming corner; and provision of on-task focusing prompts, verbal information paired with visual aids, directions broken down and repeated, repetition and review of previously taught concepts, and teacher and peer praise (Parent Ex. B at p. 9).

Two annual goals within the August 2022 IEP were included to address the student's ability to become "more open and involved with teachers and authority figures," each of which included different objectives/benchmarks (Parent Ex. B at pp. 10-13). In addition, the August 2022 IEP included annual goals for the student to improve her ability to demonstrate age-appropriate social/emotional "acceptable" behaviors, social interaction skills, understanding of basic concepts and "cognitive prerequisite skills," age-appropriate classroom behaviors, attention span and focusing skills, speech intelligibility, receptive language skills, expressive language skills, fine motor coordination, pre-writing/handwriting tasks, and sensory processing skills (id. at pp. 11-16).

The August 2022 CPSE recommended that the student receive seven and a half hours per week of SEIT services, provided in three 30-minute sessions per day along with two 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual counseling (Parent Ex. B at p. 17). The August 26, 2022 prior written notice indicated that, based on the information the CPSE reviewed at the CPSE meeting, a "[g]eneral [e]ducation [c]lass setting with the support of SEIT and related services [were] deemed to be appropriate and least restrictive for the student" (Dist. Ex. 5 at p. 1). The prior written notice indicated that the CPSE considered additional hours of SEIT services but that seven and a half hours was "de[e]med appropriate and least restrictive at this time" (id. at p. 2). In addition to the information from the August 2022 prior written notice, the August 2022 IEP indicated that a special education teacher would "help to provide the individualized attention to succeed academically in a general education setting" and that "[c]ontinued exposure and engagement in age[-]appropriate preschool activities will help to promote language and early literacy" (Parent Ex. B at p. 9). The August 2022 IEP indicated that the student's "strengths allow[ed] access, participation and progress in the general education curriculum" (id.).

Turning to the IHO's findings, the IHO stated that the evaluative information in the hearing record failed to contain recommendations, which made it "difficult, if not impossible" to determine

whether the recommended program would meet the student's needs (IHO Decision at pp. 8-9). The evidence shows that this was an initial evaluation of the student to determine the student's eligibility for special education services, the purpose of which was "to gather relevant functional, developmental and academic information about the student that may assist in determining whether the student is a student with a disability and the content of the student's [IEP], including information related to enabling the student to participate and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities)" (NYCRR 200.4[b]; see Parent Ex. M). Review of the evaluation reports shows that the evaluators informed the parent that the "final recommendation w[ould] be made at the IEP meeting in conjunction with all the reports and parental input," and that "[a]ll recommendations [we]re pending CPSE review" (Parent Ex. M at pp. 3, 12, 17, 24, 29). Contrary to the IHO's finding, it is the CPSE under State law, not the evaluator, who is tasked with considering evaluative and other relevant information and then making a recommendation for appropriate special education programming and placement for a preschool student with a disability (see Educ. Law § 4410[4][c], [5][b]). Under state regulation, a CPSE is tasked with making recommendations for a student based on evaluations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]); the evaluations need not make specific recommendations in order to be deemed sufficient. Indeed, with respect to an initial evaluation of a preschool student to determine whether the student is eligible for special education, State regulation specifically provides that "The summary report shall not include a recommendation as to the general type, frequency, location and duration of special education services and programs that should be provided; shall not address the manner in which the preschool student can be provided with instruction or related services in the least restrictive environment; and shall not make reference to any specific provider of special services or programs" (8 NYCRR 200.16[c][2]). The IEP recommendation for a preschool student with a disability shall be developed in accordance with 8 NYCRR 200.4(d)(2)-(4), which are provisions that also address the procedures for the development of IEPs for school-aged students (8 NYCRR 200.16[e][3]). In developing such recommendations, the CPSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulation (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Next, the IHO mischaracterized the district's position in this matter, which was error. The IHO indicated that in the absence of a witness, the district "conceded" that the student was denied a FAPE (IHO Decision at p. 9), but that is not an accurate statement of the district's position because the district did not concede that it failed to develop an appropriate IEP in this proceeding (see Tr. pp. 1-137). If a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). Here, the district entered the initial evaluation of the student and the prior written notice stemming from the August 2022 CPSE meeting into the hearing record (Parent Ex. M; Dist. Ex. 5). However, while the district is correct that it was not required to call a witness to meet its burden of proof, in this case, the lack of either a witness or adequate documentary evidence to explain how the recommendation for one and a half hours of SEIT services per day in a general education setting

with related services would address the student's deficits as described in the student's IEP including poor attention, tantrums, distractibility, difficulty attending and focusing, sensory processing difficulties, and overall difficulty functioning in a classroom setting supports the IHO's determination that the district failed to offer the student a FAPE (see Parent Ex. B at pp. 3, 5-8; IHO Decision at p. 8). In particular, the district contends on appeal that the sole issue was whether the recommendation for seven and a half hours per week of SEIT services was sufficient to address the student's needs; however, the district merely offers that the student presented with academic, social, and behavioral needs and that "SEIT services are designed to and were recommended to specifically support the student in these areas" with references made to State law and regulations and guidance explaining the general function of SEIT services (Answer and Cross-Appeal ¶¶ 16-17). However, as noted by the district, in its answer and cross-appeal, the parent's challenge to the August 2022 IEP rested on her claim that the student required placement in a full-time special education program, rather than a general education program (id. at ¶ 12; see Parent Ex. A at p. 1). Accordingly, the district was required to explain, either through the documentation prepared by the CPSE process or through a witness, how the recommended program consisting of seven and a half hours per week of SEIT services plus related services was adequate to address the student's needs throughout the whole school day and, in this instance, the district has not presented such an explanation for this student. As such, for the reasons described above, although the evidence in the hearing record did not fully support some of the IHO's rationales, the district has not provided sufficient reasons factually rooted in the evidentiary record to disturb the IHO's ultimate conclusion that the district failed to offer the student a FAPE.

Therefore, the hearing record supports the IHO's conclusion that the district failed to offer the student a FAPE for the 2022-23 school year as the district failed to meet its burden of proof that a general education program with seven and a half hours per week of SEIT services and related services was appropriate to meet the student's needs. Based on the arguments presented in this proceeding, the district did not "offer a cogent and responsive explanation for their decisions that shows the IEP [wa]s reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (Endrew F., 580 U.S. at p. 388).

B. Unilateral Placement

The district contends that the IHO erred in finding that the parent met her burden to show that Bais Frieda was an appropriate unilateral placement for the student (Answer ¶¶ 18, 22). The district asserts that the hearing record failed to contain evidence of appropriate instruction for the student, objective testimony from the student's teachers or providers at Bais Frieda, assessments, or progress reports from Bais Frieda (id. ¶ 22).

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

limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

The evidence in the hearing record shows that Bais Frieda assessed the student's needs through an FBA and administration of the Vineland-3 Parent Form to measure adaptive behavior (Parent Ex. L at pp. 1-8). Bais Frieda conducted the students' FBA on September 1, 2022, which identified a variety of problem behaviors including aggression, destruction, non-compliance, inability to share or take turns, stealing, lying, tantrums, and controlling behaviors (id. at pp. 2-7). According to the information, the student "struggle[d] to display appropriate behaviors across all settings" and she "lack[ed] the ability to complete tasks" (id. at p. 3). Social settings were described as "a challenge," and the student was "unable to focus for a set interval of time" (id.). The problem

behaviors were noted to occur throughout the day in social or structured settings or when the student was tired or when the student was with a teacher she did not prefer (id. at p. 4). Problem behaviors occurred during social interactions, when the student was presented with a task or demand, or when she did not get her way (id.). The FBA indicated that the student "present[ed] with skill deficits . . . across all domains" and that she "lack[ed] the ability to communicate effectively" which resulted in tantrums (id. at p. 5). The student was described as unable to independently complete tasks (id.). According to the parent rating on the Vineland-3, the student's overall adaptive behavior scores were below the first percentile in communication, daily living skills, and socialization domains, indicating that her skills "well below" the normative average (id. at p. 8).

Consistent with the description of the student's needs in the August 2022 IEP, Bais Freda identified the student's deficits in communication, socialization skills, cognitive skills, attention, and academic skills, as well as her maladaptive behaviors (compare Parent Ex. B at pp. 3-9, with Parent Ex. L). The Bais Frieda director testified that the student had "extensive needs that prevented her from being in an inclusive group without extreme structure, . . . by the adults and the environment" (Tr. p. 53). Cognitively, the Bais Frieda September 2022 treatment plan indicated that the student presented with academic delays due to her behavioral challenges and noted the student "struggle[d] to learn efficiently across all domains" (Parent Ex. L at pp. 14-15). The student's ability to focus impacted her understanding of what was taught in the classroom, and she was "unable to focus for intervals that exceed[ed] 25 seconds" and was "easily distracted by any environmental stimuli" (id. at p. 15). In terms of communication, the student's receptive and expressive language delays were noted to "result in a variety of challenging behaviors" including tantrums, screaming, and grabbing items (id. at p. 14). According to the Bais Frieda treatment plan, the student did not know how to use words functionally, was unable to "attend to a conversation" and "require[d] significant prompts and verbal praise to complete basic tasks" (id.).

Socially, the treatment plan described the student as someone who enjoyed interacting with her peers but "struggle[d]" to do so appropriately and attempted to "control" peers with "manipulation" (Parent Ex. L at p. 14). The treatment plan indicated that the student was impulsive, aggressive, and touched her peers inappropriately to obtain a desired reaction (id.). The student "struggle[d] to control her emotions and [was] unable to self-calm" (id.). The Bais Frieda treatment plan noted that the student engaged in maladaptive behaviors that impeded her ability to function in all areas (id.). The treatment plan indicated the student was non-compliant and acted "without consideration for others" (id.). The student was described as "destructive," and the treatment plan indicated she "gain[ed] satisfaction from ruining others' work" (id.). According to the treatment plan, the student did not "follow classroom rules or routines" and engaged in self-stimulatory behaviors (id.).

2. Specially Designed Instruction

Given the description of the student's special education needs detailed above, the discussion now turns to the appropriateness of the parent's unilateral placement of the student at Bais Frieda. According to the curriculum and program description and testimony of the Bais Frieda director, Bais Frieda was an early childhood program consisting of two special education classrooms and three general education classrooms (Tr. pp. 39, 44; Parent Ex. H at p. 4). In a generalized description, these classrooms were labeled by Bais Freda as "integrated classrooms"

that had up to 18 students between the ages of three and six (Parent Ex. H at p. 4). The program was described as helping students with "special needs to integrate" into a general education setting (id.). The curriculum and program description indicated that Bais Frieda focused on students with autism and offering a program in the least restrictive environment (LRE) (id.). Students were offered multimodal learning experiences to develop academic and "classroom-readiness skills" (id.). The teachers and related service providers implemented the annual goals included in the student's IEP, and related services were provided pursuant to the IEP "in conjunction with SEIT services" (id. at pp. 4-5).

The Bais Frieda curriculum and program description indicated that the school's special education teachers focused on improving students' expressive and receptive language and cognitive functioning (Parent Ex. H at p. 5). The curriculum was developed in accordance with the New York State Early Childhood Learning Standards to help students achieve their IEP goals (id. at pp. 6-19). Additionally, students were taught personal health, adaptive living, safety, and communication skills (id. at pp. 19-20).

The Bais Frieda director testified that, during the 2022-23 school year, the student in this case was in a classroom that consisted of a total of 12 students with special education needs (the student and 11 other students), "one licensed special education teacher" and "assistants," and the student received OT, counseling, and speech-language therapy (Tr. pp. 46-48, 70). Bais Frieda created a daily schedule specifically for the student which included tabletop interactive play, mealtimes, circle, physical activities, applied behavior analysis (ABA) discrete trial programs, related services, group classroom activity, gross and fine motor activities, and individual time with a special education teacher (Tr. p. 93; Parent Ex. J at p. 1). According to the director and the student's schedule, during the ABA discrete trials, the student was provided with "direct instruction" on communication, socialization, expressive and receptive language, readiness skills, adaptive living skills, fine and gross motor skills, sensory processing and motor planning, problem-solving and reasoning skills, "curiosity and creativity," emotional development, cognitive skills, and personal health and safety skills (Tr. p. 92; Parent Ex. J at pp. 1-2). The director further clarified that this part of the schedule was 15 minutes long, specifically to address the student's limited attention span, and that even during this 15-minute block, the student "required breaks[,] sensory items, breaks in materials, [and] redirection" (Tr. p. 93).

The student's daily schedule incorporated several activities involving social interaction with general education students including physical activities, mealtimes, and interactive play (Parent Ex. J at pp. 1, 2). The Bais Frieda director testified that such opportunities with "appropriate peer models" were specifically integrated into each student's plan (Tr. pp. 44-45, 48). This integration with typical peers included mealtimes when the students sat and ate together as well as during social skills programs when typically developing peers were brought into the classroom (Tr. pp. 44-45). In addition, typically developing peers were also brought in when a student with special needs learned a particular skill and Bais Frieda provided an opportunity for the student to generalize that skill with a typically developing peer (id.).

The September 2022 Bais Frieda treatment plan indicated the student benefitted from small group or one-to-one learning (Parent Ex. L at pp. 14-15). Bais Frieda staff developed annual goals for the student in math and English language arts (ELA) (id. at pp. 15-16). Academically, the treatment plan indicated that in math the student worked on "basic numerical concepts through

hands-on activities and play" including counting, learning basic addition and subtraction concepts and shapes and patterns (id. at p. 15). In addition, the student worked on "learning the fundamentals of reading" including "letter-sound relationships and basic phonics principles" (id.). According to the Bais Frieda director, the student "required a lot of multisensory physical manipulation to . . . engage with anything [that was] in front of her because she was constantly darting" (Tr. p. 56). The director testified that the student had a good memory and some basic skills upon which to build, but her attention difficulties and behavior impacted her ability to engage with academic skills (Tr. pp. 53-57). During unstructured times the teacher increased supervision of the student (Parent Ex. L at pp. 9, 11). The director indicated that the student's "safety and [the] safety of others" was a challenge which was "why she required a behavior intervention plan" (Tr. pp. 58-59).

In order to decrease the student's maladaptive behaviors, the Bais Frieda FBA identified numerous supports and interventions then-currently in place, including functional communication training, counseling, token systems, reinforcement, modeling role play, visual timers and schedule, scheduled breaks, encouragement and praise, social stories, graphic organizers, one-to-one instruction and attention, and discrete trial training (Parent Ex. L at pp. 6-7). Bais Frieda developed a behavior intervention plan (BIP), which outlined specific prevention strategies, instructional plans for alternate behavior, behavior management strategies, and data collection procedures for each targeted behavior (id. at pp. 9-12). The director testified that Bais Frieda used "proactive instructional" approaches that ensured their environment "consistently me[t] the needs and the function of those behaviors" (Tr. pp. 61-62).

Therefore, contrary to the district's assertions on appeal, the evidence in the hearing record shows that Bais Frieda identified the student's special education needs, developed goals that addressed those needs, and provided specially designed instruction in programming specifically tailored to the student (Parent Exs. L; J).[9]

[9] The district asserts that the hearing record lacked "the credentials of the teacher and providers"; however, 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). The district also argues that the hearing record lacked testimony from the student's "direct teachers or providers," which is reminiscent to a degree of the IHO's criticism of a lack of witness testimony during the district's case and from which the district appeals. The district (and the IHO by extension) cannot have it both ways with regard to ignoring the documentary evidence in favor of demanding a minimum quantum of witness testimony without which a party's case must fail. Review of the documentary evidence in the form of the September 2022 Bais Frieda report, described above, provided sufficient information about the student's programming and, furthermore, the Bais Frieda director's testimony provided some evidence showing that she had observed the student both in and outside of the classroom, she coordinated with staff working with the student, oversaw her plan, made sure she was making progress, adjusted her plan as necessary, and was involved in the entirety of the student's "educational capacity, academic, behavioral, social-emotional, and making sure that . . . her needs were met" and her progress was monitored (Tr. pp. 45-46, 63; Parent Ex. L). Additionally, to the extent that the district argues the hearing record lacked evidence that the student "received all her contracted related services," the hearing record included information about the student's progress in related services as of December 2022 and January 2023, and does not otherwise suggest that the student was not receiving her related services (see Parent Ex. L at pp. 17-18, 23-34).

3. Progress

The district asserts on appeal that the hearing record lacked "objective and quantifiable progress reports"; however, review of the evidence in the hearing record belies that assertion.[10] According to the Bais Frieda December 2022 progress report from the student's teacher, the student made progress in her math, early reading, early writing, and social/emotional skills (Parent Ex. L at pp. 19-20). In math, the student improved her ability to "rote count" to 10, complete 1:1 correspondence activities with objects, identify numbers, and "differentiate between quantitative concepts such as big and small, tall and short, and heavy and light" (id. at p. 19). The student made progress in her ability to identify basic shapes and complete a 20-piece puzzle (id.). With respect to reading, the student improved her ability to identify her name, identify uppercase letters A-F, and make self-connections from text to describe a character (id.). The student demonstrated print awareness concepts and in a one-to-one setting the student was able to respond to "wh" questions from a book (id. at pp. 19, 23). In connection with writing, the student made progress in her ability to independently trace her name, shapes, numbers, and letters but had difficulty coloring and drawing within the lines (id. at p. 20).

Socially, the student had made progress in initiating and playing with peers but needed "constant" reminders to act appropriately (Parent Ex. L at p. 20). At the time the progress report was prepared, the student was "beginning to exhibit friendship-seeking behaviors"; however, she continued to exhibit maladaptive social behaviors (id. at pp. 20-21). The student made progress in following one-step directions but "need[ed] constant prompts and reminders" to follow "rules and classroom routines" (id. at p. 22).

Within speech-language therapy, the student demonstrated the ability to: follow two-part instructions, ask and answer "what" and "where" questions, comprehend concepts such as big and small, little and long, and stop and go, use 50-100 words and 2-3 words in a sentence, and use various parts of speech (articles, plurals, etc.) (Parent Ex. L at pp. 23-24). The student demonstrated skills measured by OT at the two to three year old level such as eating independently, picking up small objects with her thumb and one finger, completing insert puzzles, and tracing and copying shapes (id. at pp. 30-31).

According to progress information within the student's treatment plan, as of January 2023, the student had demonstrated progress toward achievement of her communication and social goals as well as her math and reading skills (Parent Ex. L at pp. 16-18). In addition, the BIP contained

[10] 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]).

both baseline data from September 2022 and updated data from January 2023, demonstrating that in each problem area, the frequency of behaviors had decreased (id. at pp. 9-10).

The director testified that the student "made meaningful progress within her program" at Bais Frieda during the 2022-23 school year, and that Bais Frieda provided the student with "instruction, love, and affection" that resulted in "a reduction in challenging behaviors" and "an increase in trust and readiness" to learn (Tr. pp. 63-65). According to the Bais Frieda director, the student benefitted from the consistency of the school's program and began to recognize "boundaries" (Tr. pp. 65, 68). The student exhibited "tremendous development" in readiness skills and following basic directions, "made significant progress in letter identification and sound identification," demonstrated increased attention to tasks, showed improvement in her response to her peers, learned to write her name, and demonstrated improvement in math skills (Tr. pp. 65-68).

Based on a review of the hearing record, the student demonstrated progress within Bais Frieda and benefitted from the individualized attention provided to her.

C. Equitable Considerations

The parent argues that the IHO erred in finding that equitable considerations did not weigh in her favor. Specifically, the parent asserts that she cooperated with the district and did not interfere with the district's offer of a FAPE. The parent also alleges that although she enrolled the student in Bais Frieda prior to sending ten-day notice to the district, it is not a bar to an award of tuition (Req. for Rev. at p. 5). Further, the parent asserts that it is discretionary as to whether an IHO reduces an award of tuition reimbursement as a result of noncompliance with the ten-day notice requirement (id. at p. 6). Furthermore, the parent asserts that she testified during the hearing that she did not receive a procedural safeguards notice at any time (id. at p. 7).[11] Accordingly, the parent argues that there are no equitable factors that would bar an award of tuition reimbursement (id.). Conversely, the district argues that the parent failed to timely notify the district of the student's unilateral placement which precludes an award of tuition reimbursement; however, if tuition is awarded, the district contends that the IHO's reduced award should be upheld (Answer ¶¶ 23-24).

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.,

[11] Although the parent testified that she was not provided with a procedural safeguards notice, there were no arguments presented during the hearing as to the import of that testimony (Parent Ex. P at ¶6). Additionally, the parent did not raise the issue of the district's failure to provide her with a procedural safeguards notice in the due process complaint notice and this issue has been raised for the first time on appeal (see Parent Ex. A). Accordingly, the district was not required to prove delivery of the procedural safeguards notice to the parent as part of this proceeding and this issue is outside of the scope of the impartial hearing it will not be considered on appeal. Even if it had been raised before the IHO, contrary to the parent's assertion on appeal, the evidence in the hearing record shows that the district provided the parent with the procedural safeguards notice as an attachment to the district's August 2, 2022 final notice of recommendation and that the parent was also provided with an additional means of obtaining the procedural safeguards notice in the August 26, 2022 prior written notice (Dist. Exs. 2 at p. 1; 5 at p. 2).

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 or CPSE 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).

I next turn to the IHO's statements regarding the parent's intent to place the student at a nonpublic school. Initially, a portion of the IHO's discussion of equitable considerations centers on the parent's placement of the student at Big N Little for the summer portion of the 2022-23 school year (IHO Decision at pp. 25-26). However, as noted above, on appeal, the parent has not addressed the IHO's determination that because there is no indication that the student required 12-month services, there was no basis for awarding funding or reimbursement for the summer program at Big N Little (IHO Decision at pp. 9-11). Perhaps because of the parent's oversight as to this issue, the parent has also failed to appeal from the IHO's failure to address the appropriateness of Big N Little as a unilateral placement for the student (see Req. for Rev.). Accordingly, as the issue of Big N Little is not properly presented on appeal, and is entirely outside the scope of review, there is no basis for holding the timing of the parent's initial request for funding as a request for summer services. Nevertheless, a review of the timing of the parties' communications leading up to the start of the 10-month 2022-23 school year is warranted.

On August 2, 2022, the district notified the parent of the recommendations made at the August 2022 CPSE meeting (Dist. Ex. 2). The parent acknowledged that she read the final notice of recommendation letter dated August 2, 2022 and signed the letter consenting "to the provision of 10 month preschool services as recommended" (id.). Another letter was sent to the parent notifying the parent when the recommended services would begin (September 1, 2022) and the location of where the services would be provided (Dist. Ex. 3). On August 24, 2022, the parent notified the district of her disagreement with the recommended program and her intent to unilaterally place the student at Big N Little for the 2022-23 school year (Parent Ex. N at p. 2). The parent then signed a contract with Bais Frieda, on August 25, 2022, for the student's enrollment from September 2022 through January 2023 (Parent Ex. H). On August 26, 2022, the district sent a prior written notice of recommendation with respect to the August 2022 CPSE meeting (Dist. Ex. 5 at pp. 1-2).

In assessing a reduction of the student's tuition at Bais Frieda under equitable considerations, the IHO found that the parent waited almost two months from the time she signed the contract with Bais Frieda in August 2022 to notify the district of this placement in October 2022, then "compounded" the untimely ten-day notice by agreeing to an "unconditional obligation" to pay tuition at Bais Frieda (IHO Decision at pp. 26-27). The IHO summarized his reasoning for weighing equitable considerations in favor of the district as the parent "continued to make unilateral decisions about the Student's placement, regardless of what the IEP and [prior written notice] recommended, failed to timely notify the District of these decisions . . . and evinced her intent to send the Student to the unilateral placements, again, regardless of what the IEP recommended" (id. at p. 27).[12]

In reviewing the IHO's determinations, it must be noted that the Second Circuit has held that even when parents have no intention of placing a student in the recommended program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L., 744 F.3d at 840).Accordingly, discounting the IHO's findings that were centered around the parent's intent to place the student at the unilateral placements regardless of the district's recommendations, the IHO's sole equitable factor used in the reduction was the timing of the parent's notices of her intent to place the student unilaterally. As will be discussed next, the timing of the parent's ten-day notice was not as egregious as the IHO determined and it did not interfere with the district's ability to recommend an appropriate educational program for the student.

The Second Circuit recently emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d, 152, 171 [2d Cir. 2021]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1];

[12] The IHO also made a number of credibility findings against the parent's testimony; however, the IHO did not appear to rely on these as equitable factors for reducing tuition funding (IHO Decision at p. 27). In this instance, even upon deferring to the IHO's findings in this regard, it is unclear to the undersigned how the parent's candor regarding the unilateral placement the hearing might weigh as an equitable factor regarding the parent's cooperation with the district's efforts to offer the student a FAPE. However, the timeliness of the parent's notices of unilateral placement is a different matter that was also addressed by the IHO and is further addressed herein.

Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the 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"]). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

As noted above, the parent initially sent a notice of her disagreement with the student's educational program along with her intent to unilaterally place the student at Big N Little on August 24, 2022—within one month after the August 2, 2022 CPSE meeting (Parent Ex. N; see Parent Ex. B). Then, on October 19, 2022, the parent sent a similar notice to the district but indicated that she intended to place the student at Bais Frieda for the 2022-23 school year and then "commence proceedings" to seek funding/reimbursement of the tuition from the district (id.).

Accordingly, the first notice to the district of any disagreement with the student's August 2022 IEP was contained in the parent's August 24, 2022 letter stating that the student "ha[d] not received a proper or adequate educational and school placement for the upcoming 2022-[]23 school year" (Parent Ex. N at p. 2). The parent then incorrectly stated her intent to unilaterally place the student at Big N Little (which had already elapsed, rather than the upcoming placement at Bais Frieda) for the 2022-23 school year (id. see Parent Ex. H at p. 1). The student started attending Bais Frieda on September 8, 2022, which is ten business days after the August 24, 2022 parent letter (see Parent Exs. I; K). Therefore, contrary to the finding by the IHO the parent did timely comply with the ten-day notice requirement. Moreover, although the parent incorrectly stated the name of the unilateral placement, she timely expressed her objections to the recommended program for the 2022-23 school set to begin in September 2022. As indicated above, the IDEA provides that parents notify the district "they were rejecting the placement proposed by the public agency to provide a free appropriate public education 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]). The IDEA does not, nor does the district present any authority, showing that a parent must correctly identify the specific school in which the student will be unilaterally placed or suffer a loss of funding for the private school. Under the circumstances of this matter and despite the erroneous reference to a different private school in the ten-day notice, equitable considerations do not warrant a reduction based on the lack of a 10-day notice, and the parent is entitled to direct funding of the tuition at Bais Frieda.

The tuition at Bais Frieda was $12,000 per month and according to the student contract for the 2022-23 school year the parent agreed to pay tuition for September 2022 through January 2023 for a total amount of $60,000 (Parent Exs. H at pp. 1-3; P ¶ 8). Accordingly, I shall award tuition in the amount of $60,000 to be paid directly to Bais Frieda.

VII. Conclusion

The evidence in the hearing record demonstrates that the district failed to offer the student a FAPE for the 2022-23 school year, and that the parent's unilateral placement of the student at

Bais Frieda was appropriate. However, the IHO's decision on equitable considerations must be reversed and the parent is entitled to direct funding of the Bais Frieda tuition for September 2022 through January 2023.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated November 29, 2023, is modified by reversing that portion which found that equitable considerations did not weigh in favor of the parent; and

IT IS FURTHER ORDERED that that the IHO's decision, dated November 29, 2023, is modified by directing the district to directly fund the tuition in the amount of $60,000 to Bais Frieda for September 2022 through January 2023.

Dated: **Albany, New York**
March 4, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER