



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-045

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:

Law Offices of Lauren A. Baum, P.C., attorneys for petitioner, by Matthew Finizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Reimels, 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 son's tuition costs at the Hamaspik School (Hamaspik) for the 2021-22 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 facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, for the 2020-21 school year, the student attended a 12:1+1 special class at a district school and participated in remote instruction (see Parent Ex. A at p. 2). The CSE convened on January 26, 2021 and finding the student eligible for special education as a student with an intellectual disability, recommended that he attend a 10-month 12:1+1 special class with related

services of speech-language therapy and occupational therapy (OT) in a non-specialized district school (Dist. Ex. 2).¹

The parent disagreed with the recommendations contained in the January 2021 IEP for the 2021-22 school year and notified the district of her intent to unilaterally place the student at Hamaspik in a letter to the district dated August 17, 2021 (see Parent Ex. B).²

In an amended due process complaint notice, dated September 19, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see IHO Ex. I).³ The parent argued that she did not understand that the January 2021 meeting was convened for the purpose of developing a program for the 2021-22 school year and the CSE failed to provide the parent with a copy of the IEP until September 14, 2023 (id. at p. 3). The parent contended that the January 2021 IEP was insufficient and inappropriate for the student for reasons that included that the class size was too large and the proposed program was not appropriate (id. at p. 4). The parent also asserted the present levels of performance, management needs and goals were insufficient (id.). Based on the aforesaid allegations related to the January 2021 CSE process and the substance of the January 2021 IEP, the parent asserted that she unilaterally placed the student at Hamaspik, which she contended was an appropriate placement for the student and further argued that equitable considerations favored tuition reimbursement (id. at p. 5).

An impartial hearing held before an IHO with the Office of Administrative Trials and Hearing (OATH) convened on July 26, 2023, and concluded on November 26, 2023, after four days of proceedings (see Tr. pp. 1-100).

In a decision dated December 27, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 school year and that the parent did not meet her burden to demonstrate that the unilateral placement was appropriate (IHO Decision at pp. 15-16). The IHO ordered the district to fund a neuropsychological evaluation, a speech-language evaluation, an OT evaluation, a functional behavior assessment, and any other evaluation recommended by the independent neuropsychological evaluation (id.).⁴

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,

¹ The CSE attendance page listed the parent as a participant in the January 26, 2021 CSE meeting (Dist. Ex. 2 at p. 24). The January 2021 IEP listed a projected implementation date of January 26, 2021 (id. at p. 1).

² The parent signed the contract with Hamaspik on September 14, 2021 (Parent Ex. M at p. 8). The parent paid \$250.00 to Hamaspik via check on September 14, 2021 (Parent Ex. N).

³ The original due process complaint notice was dated June 23, 2023 (see Parent Ex. A).

⁴ The IHO ordered that all the evaluations be conducted by a provider of the parent's choosing at the provider's customary rates (IHO Decision at pp. 15-16).

the allegations and arguments will not be recited here. The crux of the parties' dispute on appeal is whether the unilateral placement was appropriate for the 2021-22 school year.

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 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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Unilateral Placement

The parent appeals the IHO determination that the parent failed to meet her burden to prove that Hamaspik was an appropriate unilateral placement for the student for the 2021-22 school year (see IHO Decision at pp. 12-15).⁵ In determining that Hamaspik was an inappropriate unilateral placement, the IHO made several findings, including that the parent failed to provide

⁵ Neither party appealed the IHO's finding that the district denied the student a FAPE for the 2021-22 school year or the order granting independent educational evaluations (IEEs) (see IHO Decision at pp. 11-12, 15-16). As such, these findings 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]).

persuasive evidence that the private school "catered to [the] Student's unique needs;" that one of the student's teachers at Hamaspik was not qualified to teach a special education classroom because she only had a high school diploma and lacked sufficient experience as a head teacher in a special education classroom; that most of the evidence provided by the parent regarding the student's progress was not meaningful and given the parent's "unreliable" recollection of past events, the IHO could not afford her testimony much weight; and that the student regressed behaviorally at the private school (*id.* at pp. 12-14). Lastly, the IHO found that although the private school provided the student with a smaller classroom size than the proposed district program, there was no objective evidence that the student required a smaller classroom (*id.* at p. 14).

In the verified request for review,⁶ the parent argues that the IHO failed to properly weigh the evidence in the hearing record regarding the appropriateness of Hamaspik and that the hearing record demonstrates Hamaspik is an appropriate placement for the student. The parent also asserts that the IHO erred in finding that the student failed to make appropriate progress and regressed during the 2021-22 school year at Hamaspik and failed to apply the correct standard for determining the appropriateness of a 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 student's special education needs (see *Gagliardo*, 489 F.3d at 112, 115; *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 129 [2d Cir. 1998]). 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

⁶ Regarding the parent's request for review, the district asserts that the parent's request for review does not comply with the 10-page limitation set forth in regulations (8 NYCRR 279.8[b]). State regulation provides that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents (8 NYCRR 279.8[a]-[b]; see *T.W. v. Spencerport Cent. Sch. Dist.*, 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (*J.E. v. Chappaqua Cent. Sch. Dist.*, 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting *Foman v. Davis*, 371 U.S. 178 [1962]). The parent's amended request for review could be construed as technically more than ten pages as the filing by the parent of this pleading consisted of two pages of a template entitled "Request for Review" and a 10-page "Verified Request for Review" (see Req. for Rev.). Nevertheless, I decline to exercise my discretion to reject the parent's pleading due to this irregularity in this instance (see 8 NYCRR 279.8[a]), given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result. However, I will only review the "Verified Request for Review" as that document comports with the practice regulations.

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. The Student's Needs

Although not in dispute on appeal, a brief discussion of the student's needs is necessary to resolve the issue of whether Hamaspik was an appropriate unilateral placement for the student for the 2021-22 school year.

The hearing record includes a January 2022 OT progress report; March 2022 educational progress report; April 2022 physical therapy (PT) progress report; May 2022 speech-language therapy progress report; end of the year reports for education, speech-language therapy and PT; and a June 2022 assessment check list for OT (Parent Exs. D-K). All of the reports were written by Hamaspik staff and collectively they showed that during the 2021-22 school year, the student exhibited delays in gross and fine motor skills, expressive and pragmatic language, social-emotional development, age-appropriate behavior, visual/perceptual skills, attending, and self-regulation skills (*id.*). More specifically, the January 2022 OT progress report and June 2022 OT assessment check list indicated that the student demonstrated difficulty with emotional regulation, noting that he was self-directed at times and struggled with transitions; challenges with hand

strength, finger dexterity and graphomotor skills; delayed perceptual skills; overall weakness and poor postural control; compromised executive functioning; and required assistance with zippers and small buttons and donning and lacing shoes (Parent Exs. H; I at p. 5).

The March 2022 educational progress report indicated that the student experienced difficulties in preacademic and academic skills, including identifying initial consonant sounds in words auditorily, reading sight words, pointing to pictures in a book, and recognizing number patterns (Parent Ex. J at pp. 1-2). In terms of social-emotional development, the progress report indicated that the student was easily distracted and had difficulty with transitions, as well as difficulty identifying his emotions and those of others and limited perspective taking skills (*id.* at p. 2). According to the progress note, the student imitated the inappropriate behavior of others (*id.*). In addition, the student engaged in problem behavior when presented with challenging tasks or was denied access to a desired item or activity (*id.* at p. 3). The report indicated that the student's problem behaviors presented as non-compliance, shutting down, and ignoring teacher directives (*id.*).

Next, according to an April 2022 PT progress report, the student had received a diagnosis of Down Syndrome and presented with generalized muscle weakness and hypotonia (Parent Ex. D at p. 1). More specifically, the student exhibited delays in gross motor skills such as balance, motor planning, ball/eye-hand coordination and jumping skills (*id.*). The PT progress report indicated that the student demonstrated overall body weakness, poor core strength and poor dynamic balance and agility (*id.*). In terms of communication, the May 2022 speech and language progress report and end of year report indicated that the student exhibited delays in his expressive and pragmatic language skills, as well as articulation, and play skills (*see* Parent Exs. F; G). The speech-language pathologist reported that at the start of the school year the student used one-to-two-word phrases when speaking; answered simple "wh" questions; often used gestures to make requests and protest; exhibited a vocabulary that consisted of mainly nouns and action words; and presented with some articulation and phonological deficits (Parent Ex. F at p. 1). According to the student's speech-language pathologist, the student's strengths included his strong receptive language skills and creative imagination (*id.*).

In her written testimony, the director of Hamaspik (director) indicated that the student struggled with impulsivity, short attention span and rigidity, was easily distracted by auditory and visual stimuli, and engaged in "problem behavior" primarily during transitions and when denied access to preferred items (Parent Ex. Q at ¶ 16). Additionally, she noted that he was a tactile learner and responded well to hands-on activities and reminders during the school day (*id.*).

2. Specially Designed Instruction and Progress

Turning to the question of whether Hamaspik provided the student with specially designed instruction to meet his unique needs, the hearing record indicates that the student began attending Hamaspik in September 2021 (Parent Ex. Q ¶ 13; *see* Parent Ex. M). According to the Hamaspik director, the school is for school-aged children who have received a diagnosis of Down Syndrome (Parent Ex. Q at ¶ 5; *see* Parent Ex. C). In her written testimony, the director indicated that each Hamaspik classroom consists of eight students with one teacher and three paraprofessionals with additional 1:1 behavioral paraprofessionals provided depending on a student's needs (Parent Ex. Q at ¶ 6). She further explained that the school's "academic curriculum is a combination of group

learning and small group instruction," that the school uses multi-sensory teaching, and that it embeds engagement strategies and reinforcement in all lessons to achieve higher interest, cooperation, and participation (*id.* at ¶ 7).

Further review of the hearing record shows that during the 2021-22 school year, the student attended a classroom with an 8:1+5 student-teacher ratio (reflecting paraprofessional support in the classroom) and received the related services of two 30-minute individual and one 30-minute group sessions of speech-language therapy, PT and OT (Tr. p. 80; Parent Ex. Q at ¶¶ 14-15). The Hamaspiik director reported that the student had a hard time with transitions and the "plan for that" was a visual schedule hanging on the wall that was reviewed with the student every morning to improve his ability to handle changes within his school day (Tr. pp. 84-85). Additionally, the OT progress report indicated that the student had been completing formal training to help manage his emotions (Parent Ex. H). The report explained that the student had been practicing body calming strategies and learning to recognize his body state, emotions associated with the need to use self-regulation strategies, and triggers to dysregulation (*id.*). According to the OT progress report, social stories and classroom participation related to topics associated with self-regulation had helped the student to build awareness for and incentive to use the strategies being practiced (*id.*). According to the end of the year reports, in PT the student worked on improving his strength, ball skills, and jumping skills and in speech-language therapy the student worked on expanding his mean length of utterance, accurately responding to "wh" questions, and making inferences, among other things (Parent Exs. E; G).

In her written testimony, the director reported that small group instruction helped the student "to be more focused during academics" and explained that multi-sensory techniques were incorporated into all lessons (Parent Ex. Q at ¶ 17). She explained that the student was given memory aids, picture cues, flashcards, kinetic sand and clay to support his learning, and that songs and music were used to keep lessons engaging and to help the student retain information (*id.*). The director reported that the Orton Gillingham Program was used in reading and the student was placed in small groups of two or three similarly functioning students (*id.* at ¶ 18). In writing, the student was taught in small groups of similarly functioning students using the Visual Auditory Kinesthetic Tactile (VAKT) approach and Handwriting Without Tears (*id.* at ¶ 19). Math was also taught in small groups of similarly functioning students using My Math (*id.* at ¶ 20).

Regarding the student's behavior, as noted above, the March 2022 educational progress report indicated that the student engaged in problem behavior primarily when presented with challenging tasks and activities or when he was denied access to a desired item or activity (Parent Ex. J at p. 3). The teacher hypothesized that a lack of motivation, sensory dysregulation and rigidity played a role in the student's behavior (*id.*). She further reported that a schedule, sensory breaks, earning a desired item or activity, and validation were some of the proactive strategies being used to increase appropriate behaviors (*id.*). Hamaspiik also employed reactive strategies that included maintaining the demand, redirection, and engaging in sensory activities to help the student self-regulate (*id.*). Finally, the teacher indicated that a class wide behavior plan was also used to increase the student's social motivation and appropriate behaviors (*id.*).

Turning to the parent's argument that the IHO erred in her determination that the student failed to make appropriate progress, 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]).

Here the IHO opined that the evidence of the student's progress was not meaningful because it lacked specificity or referred to accomplishments that had already noted in the January 2021 IEP (IHO Decision at p. 13). However, the IHO's findings are not supported by the hearing record. As discussed in more detail below, the progress reports contained in the hearing record provided sufficient information by which the student's progress could be determined.

According to the March 2022 educational progress report, the student was slowly progressing in his phonological awareness skills and was making slow but steady progress in reading three sight words on the Dolch word list (Parent Ex. J at p. 2). In math, the student was making progress in his ability to recognize number patterns and size relationships (id.). Additionally, the student was making slow but steady progress in his ability to give a specific number of items from a larger set of 20 (id.).

Review of the April 2022 PT progress report for the 2021-22 school year shows that the student displayed progress in his gross motor skills (Parent Ex. D at p. 1). The report specifically notes that in the beginning of the school year the student was unable to walk on a 4-inch-wide balance beam unassisted but, as of the date of the progress report, he had progressed enough to be able to walk on a narrow beam unassisted with occasional support (id.). Additionally, the physical therapist explained that the student demonstrated improved agility and better running patterns, could jump over obstacles and land with a more stable landing, showed improved balance and coordination, and had developed "very good motor planning ability" (id.).

The May 2022 speech and language progress report indicated that the student had improved in his ability to understand stories with plots of increasing complexity, could sequence five-step sequencing cards with prompts and visuals, and could sort items or pictures into categories with increased accuracy (Parent Ex. F at p. 1). In expressive language, the student made progress toward increasing his utterance length through the use of sentence strips, expanding utterances task cards and pacing boards, and was producing three-to-four-word utterances consistently during structured activities (id.). The speech language pathologist reported that the student made limited gains in his pragmatic skills (id. at p. 2). Additionally, the report indicated that the student was generally understood by others; however, he presented with phonological processes including final consonant deletion and cluster reduction which at times reduced his intelligibility (id.). The evaluator noted that through modeling and sound helpers, the student was correctly producing single words with most blends and final sounds when prompted in the therapy room (id.).

According to the June 2022 annual OT assessment checklist, the student had mastered: zipping his coat independently; letters FEDPBRNM and writing his first name using VAKT protocol (Parent Ex. I at p. 6).⁷ Additionally, the checklist indicated that the student could navigate the classroom environment independently and attend to his own things; identify and name four basic emotions and follow cues in self-regulation stories; improved his copying skills; improved his endurance to jump on a trampoline for 15 minutes; and could successfully use scissors to cut simple shapes including circles (*id.*).

Regarding the IHO's determination that the student regressed behaviorally, a review of the hearing record demonstrates that the IHO's finding is not supported by the evidence in the hearing record. While the student continued to demonstrate some behaviors while at Hamaspiik, the hearing record reflects that Hamaspiik staff had identified his behavioral needs and used a variety of supports and strategies to address those needs in the classroom (Parent Ex. J at p. 3). The IHO's reference to some indications of the student's behavioral progress at the district school that were included in the January 2021 IEP which, in any event, she had found inappropriate (*see* IHO Decision at p. 14), was insufficient to support a finding that Hamaspiik was an inappropriate unilateral placement given the totality of the program's specialized instruction and related services, and the student's overall slow but steady progress while at Hamaspiik.

Lastly, turning to the IHO's finding that the student's teacher at Hamaspiik lacked appropriate qualifications, upon review I find that while the IHO was factually correct regarding the qualifications of the student's teacher, the hearing record does not support the IHO's conclusion that this was a factor to find the unilateral placement inappropriate (*see* IHO Decision at p. 13). It is well-settled that a unilateral placement need not employ certified teachers or develop IEPs for its students (*Carter*, 510 U.S. at 13-14). In this instance, the teacher the IHO deemed unqualified had experience working with students with special needs (Tr. pp. 76-77). The Hamaspiik director reported that the teacher in question had worked for two years as a paraprofessional in the district's schools and for two years as a head teacher in a private special education program for students with Down Syndrome (Tr. pp. 76-77). In addition, the teacher was supervised by a Hamaspiik staff member who held a master's degree in special education and was working toward a degree in social work (Tr. p. 78). The supervising teacher would meet with the classroom teacher once a week to review lesson plans, discuss students, and strategize different methods to use with struggling students (Tr. p. 78; Parent Ex. Q ¶ 14). In addition, the supervisor would observe the teacher in the classroom once a week (Tr. pp. 78-79; Parent Ex. Q ¶ 14).

⁷ The earlier January 2022 OT progress report indicated that the student was making "nice progress" toward meeting his OT goals (Parent Ex. H at p. 1). Specifically, the progress report indicated that the student was "demonstrating nice gains toward self-regulation following engagement" in mindfulness tasks as demonstrated by his ability to engage in breathing exercises and to select an item from his "relax box" (*id.*). Additionally, the occupational therapist reported that the student was demonstrating improvement in his finger strength and dexterity; ability to maintain appropriate pencil pressure and control; and ability to perform tasks using a tripod grasp when appropriate (*id.* at p. 2). The progress report further indicated that the student was making "nice progress toward building his graphomotor abilities" and had progressed from practicing lines and shapes to writing capitals using the Handwriting Without Tears program (*id.*). Improvement was also noted in the student's ability to use a quadrupod grasp to write letters "F" and "E" and in his ability to copy his name (*id.*). The occupational therapist indicated that with respect to visual perceptual/perceptual motor skills the student had been engaging in therapeutic tasks that helped him build skills related to copying on paper, improved body awareness, and improved ability to sort and locate personal items (*id.*).

Based on the foregoing evidence and my independent review of the hearing record, I find that the IHO erred in concluding that the parent failed to demonstrate that Hamaspiik was an appropriate unilateral placement. The parent submitted multiple reports from Hamaspiik into evidence and presented testimony that described the specialized instruction provided to the student for the 2021-22 school year and how the specialized instruction addressed the student's unique needs and allowed him to access the curriculum and make appropriate academic, social/emotional and behavioral progress (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

B. Equitable Considerations

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

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

In the instant case, the IHO did not make a finding on equitable considerations (see IHO Decision). The parent did not appeal the IHO's failure to address the equities. In its answer, the district argues that relief should therefore be denied because the parent failed to appeal the lack of a finding on equities which constitutes a necessary component for tuition relief under the Burlington/Carter standard.

I decline to find that the parent's lack of an appeal from the IHO's failure to reach the issue of equitable considerations supports a denial of relief to the parent under the circumstances of this case. Having found that the parent did not satisfy the second prong of the Burlington/Carter standard, it is understandable that the IHO did not reach the third prong and render a determination on equities and, indeed, there was no requirement that the IHO address this issue in what would be, in effect, an alternative finding. However, as each prong must be satisfied for a parent to be entitled to an award of tuition reimbursement under the IDEA, I will briefly address the equitable considerations present in this matter pursuant to my independent review of the hearing record and my authority to fashion equitable relief that is supported by that record.

Upon my independent review, I find there is no evidence in the hearing record that the parent did not cooperate with the CSE process.⁸ It is noted that the parent attended the January 2021 CSE meeting and provided the district with a 10-day letter advising of her intent to place the student in the Hamaspik School for the 2020-21 school year (see Parent Ex. B; Dist. Ex. 2 at p. 24). Moreover, the district, in its answer, does not raise any specific arguments that the equities disfavor the parent and instead only argues that the parent failed to raise the issue on appeal. As there is no evidence in the hearing record that the parent did not cooperate with the district and the district has failed to assert substantive arguments identifying any equitable considerations that would weigh against an award of the requested relief to the parent, I find that there are no equitable considerations present here that would warrant a reduction or denial of an award of tuition reimbursement and direct funding to the parent.

VII. Conclusion

The hearing record supports a finding that Hamaspik was an appropriate unilateral placement for the student for the 2021-22 school year and that equitable considerations favor the parent's requested relief.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated December 27, 2023, is modified by reversing those portions that found that the parent's unilateral placement at Hamaspik was not appropriate; and

⁸ The IHO determined that the parent's testimony should not be given much weight because the IHO found that the parent's recollection was unreliable (IHO Decision at p. 13). The IHO made this determination based on the parent's inability to fully remember the student's progress during the 2021-22 school year; however, I decline to find that the parent's inability to remember details during testimony almost two years after the conclusion of the school year suffices as a basis to bar or reduce an award for tuition funding under equitable considerations.

IT IS FURTHER ORDERED that the IHO's decision, dated December 27, 2023, is modified to provide that the district shall directly fund the full cost of the student's tuition for the 2021-22 school year and reimburse the parent \$250.00 for payments already made to Hamaspik.

Dated: **Albany, New York**
 April 8, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER