



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-052

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

Mizrahi Kroub, LLP, attorneys for petitioners, by David Mizrahi, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Michael Gindi, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered their son appropriate educational programming and denied their request for direct funding of their son's tuition costs at the Gersh Academy (Gersh) for the 2022-23 and 2023-24 school years. The appeal must be sustained in part.

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.

A neuropsychological evaluation of the student was conducted over three dates in October 2021 and December 2021 when he was 14 years old (see Parent Ex. J). In a report dated December 17, 2021, the psychologist stated that the student's full scale IQ fell in the very low range, and determined that the student met the criteria for diagnoses of specific learning disability with impairments in reading (dyslexia), mathematics, and written expression (*id.* at p. 15). In the summary and conclusions of the report, the psychologist opined that the student "[wa]s expected to show further progress, provided he receive[d] appropriate treatment and necessary academic accommodations to address" his difficulties (*id.*). The psychologist made several

recommendations, including "[a] collaborative teaching class or any other small size class setting" for the student (id. at pp. 15-19).

The student was the subject of a prior administrative due process proceeding that was filed in October 2021 and was delayed for a long period of time for reasons that are not entirely clear (see Parent Ex. F at 1). While the proceeding was pending another IEP was developed by the CSE in August 2022 that, among other things, recommended that the student be placed in a special class in a State-approved nonpublic school (Parent Ex. B). In an IHO decision dated January 3, 2023, the IHO in the prior matter found that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (Parent Ex. F at p. 3). Although the 2022-23 school year was not a disputed issue before the IHO, as relief, the district was nevertheless ordered to provide compensatory education services to the student and to reconvene the CSE within 30 days of the date of the decision to effectuate the IHO's alterations to the district's programming by referring the student to the district's Central Based Support Team (CBST) "to find placement in a State Approved Non-Public School" (id. at p. 6). The IHO further ordered that "[i]f an appropriate placement cannot be found within thirty (30) days the [district] shall pay the tuition of a Private School for the remainder of the 2022-23 school year" (id.).

The CSE reconvened on January 19, 2023 to recommend programming to begin on January 30, 2023 (Dist. Ex. 4 at pp. 17-18, 25). The CSE determined that the student was eligible for special education as a student with autism and recommended a 12-month program consisting of a 12:1+2 special class placement in an approved nonpublic day school with one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of group speech-language therapy (id. at pp. 17-19).¹ Additionally, the CSE recommended assistive technology consisting of an individual touchscreen tablet device in all classes as needed both at home and school (id. at p. 18). The CSE further recommended testing accommodations, transition activities, and special transportation services (id. at pp. 20-22, 24).

The CSE referred the student's case to the CBST, which sent out information about the student to potential nonpublic school placements (see Dist. Exs. 5; 6; 8).

On March 3, 2023, the parents sent the district a 10-day notice of intent to unilaterally place the student at Gersh for the remainder of the 2022-23 school year (see Parent Ex. D). In that letter, the parents asserted that they had not yet received an acceptable State-approved nonpublic school placement and that the student required a smaller class size than the recommended 12:1+2 special class (id. at p. 1). The parents indicated that the student's first day at Gersh would be March 13, 2023 and that they would seek tuition reimbursement for the cost of the remainder of the school year (id. at p. 2).

The parents sent another notice dated June 29, 2023 to further inform the district that they intended to unilaterally place the student at Gersh for the 2023-24 school year and seek district funding for that time period as well (see Parent Ex. E). The parents similarly indicated that they

¹ The January 2023 CSE also recommended one 60-minute session per month of parent counseling and training (Dist. Ex. 4 at p. 18).

did not receive an acceptable school site for the student and did not agree with the recommendations of the January 2023 IEP (id. at p. 2).

In a due process complaint notice, dated September 22, 2023, the parents alleged that the district failed to offer the student a FAPE for a portion of the 2022-23 school year as well as the 2023-24 school year (see Parent Ex. K). Specifically, the parents contended that the January 2023 IEP present levels of performance, annual goals, and special class placement recommendations were not appropriate (id. at pp. 3-5).² The parents asserted that the district failed to provide them with a school location notice for the 2023-24 school year (id. at p. 4). The parents asserted that Gersh was an appropriate unilateral placement and that equitable considerations weighed in their favor (id. at pp. 5-6). For relief, the parents requested that the IHO order the district to fund the student's placement at Gersh from March 17, 2023 through the remainder of the 2022-23 school year and for the entirety of the 2023-24 school year (id. at p. 6).³

An IHO was appointed by the Office of Administrative Trials and Hearings (OATH) and an impartial hearing convened and concluded on December 6, 2023 (see Tr. pp. 1-116). In a decision dated January 3, 2024, the IHO determined that the August 2022 and January 2023 IEPs were appropriate and that the district offered the student a FAPE for the 2022-23 and 2023-24 school years (IHO Decision at pp. 8-11).⁴ As relevant to this appeal, regarding the January 2023 IEP, the IHO found that the CSE's recommendations were appropriate based on the credible testimony of the district's school psychologist (id. at pp. 9-10). Specifically, the IHO determined that the CSE had enough information about the student to make its recommendations, that those recommendations were appropriate, and that the annual goals were appropriate (id.). Further, the IHO found that the evidence in the hearing record did not support the allegation that the district failed to consider the 2021 neuropsychological evaluation (id. at p. 12).

Turning to the student's placement or lack thereof, the IHO found that the evidence in the hearing record did not support a finding that the district failed to provide an appropriate placement (IHO Decision at p. 13). The IHO held that the CBST administrator testified credibly and that her testimony was substantiated by various documents in the hearing record (id.). The IHO determined that the district "exerted great time and effort to assist this family in locating an appropriate school placement" (id.). The IHO found that the parents' contention that the district only reached out to one nonpublic school was "inaccurate" and not supported by the hearing record or the parent's testimony (id.). The IHO held that the parents "arbitrarily rejected all of the proposed placements under the mistaken belief that the proposed placements were inappropriate" and noted that the

² Specifically, the parents argued that the reading comprehension annual goal was insufficient, some of the annual goals lacked criteria for measuring progress and the progress monitoring was insufficient, and the IEP lacked appropriate transition planning (Parent Ex. K at p. 5).

³ The parents requested the order include "related costs" such as transportation and lunch, "as a form of compensatory educational relief" (Parent Ex. K at p. 6).

⁴ The IHO declined to address the district's claims that res judicata and collateral estoppel barred the parents' claim for relief for the 2022-23 school year because he determined that the district offered the student a FAPE (IHO Decision at pp. 5-8). However, the IHO conducted a short review of those issues, and found that it was not unreasonable for the district to raise these claims but that the hearing record on the issues was incomplete (id. at pp. 6-8).

parents did not appear for or agree to an interview with numerous schools (*id.* at p. 14). The IHO determined that the district recommended appropriate placements for the student and the parents failed to cooperate with the CBST process, resulting in the student not securing a placement from the district, the fault of which lay with the parents (*id.*). The IHO determined that since the district offered a FAPE to the student, he need not make a finding regarding the appropriateness of Gersh and dismissed the parents' due process complaint notice with prejudice (*id.*).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The essence of the parties' dispute on appeal is whether the January 2023 IEP offered the student a FAPE, and if not, whether the student's unilateral placement at Gersh was appropriate, and whether equitable considerations favor the parents' request for tuition reimbursement.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents'

opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew 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 Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁵

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

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

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

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

VI. Discussion

A. January 2023 IEP

The IHO held that the January 2023 IEP offered the student an appropriate program (IHO Decision at p. 8). Specifically, the IHO found that the district's school psychologist was credible and that the district reviewed the recommendations of the neuropsychologist (id. at p. 9, 12).⁶ Additionally, the IHO found that while the district failed to recommend a specific approved nonpublic school to implement the January 2023 IEP, such failure was attributable to the parents' lack of cooperation with the CBST process for obtaining such a placement. On appeal, the parents raise several substantive arguments with respect to the January 2023 IEP.

In the request for review the parents object to the IHO's determination that the January 2023 IEP was appropriate by arguing that the present levels of performance and annual goals were not appropriate, the transition plan failed to outline the student's "post-school goals," and the CSE failed to recommend an appropriate class size pursuant to the recommendations in the 2021 neuropsychological evaluation. Also, the parents argue that the district failed to provide a school location in February 2023 or the beginning of the 2023-24 school year identifying where the student's IEP would be implemented.

Upon my independent review of the hearing record, I find that the IHO in this matter conducted a well-reasoned analysis of the relevant evidence and controlling authority and, accordingly, generally adopt the findings of fact and conclusions of law regarding his analysis of

⁶ The IHO credited the school psychologist's testimony that the CSE had sufficient information to make the recommendations in the IEP and that those recommendations were appropriate for the student (IHO Decision at p. 9). The IHO also pointed out that the school psychologist's testimony was supported by the documentary evidence (IHO Decision at p. 10). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

the issues raised with respect to the student's January 2023 IEP as my own, as further described below.

1. Present Levels of Performance

Regarding the parents' argument that the present levels of performance were not appropriate, the parents allege that this "section in the IEP d[id] not provide a comprehensive and accurate description of [the student's] strengths and weaknesses" (Req. for. Rev. ¶ 48). The parents continue that the "IEP should include a more detailed and specific assessment of [the student's] current academic, functional, and social-emotional abilities to guide the development of appropriate and individualized goals" (id.).

The district's school psychologist testified via affidavit that she participated in the student's January 2023 CSE meeting and that a classroom observation, SANDI assessments, a social history, a psychoeducational, and a speech-language assessment were completed prior to the development of the IEP (Dist. Ex. 9 ¶¶ 1, 7). She further testified that the CSE considered the evaluations and discussed the student's functioning and performance in all areas during the meeting, and opined that the CSE had enough information to make recommendations for the student (id. ¶ 8).

Review of the student's January 2023 IEP shows that it included results from an August 2021 bilingual psychoeducational evaluation, which reflected results of intelligence testing that yielded average to low average scores on measures of the student's verbal comprehension, visual spatial, and matrix reasoning skills and very low scores on the figure weights, digit span, and picture span subtests (Dist. Ex. 4 at pp. 1-2). Administration of academic achievement testing to the student yielded a low average reading composite score, average spelling, sentence comprehension, and word reading scores, and a score in the very low range for math computation (id. at p. 2). In addition, the January 2023 IEP included information directly from the student's 2021 neuropsychological evaluation, which indicated the student's full-scale Wechsler Intelligence Scale for Children-V IQ "fell in the [v]ery [l]ow range" of functioning, and described the student's performance with respect to language, verbal comprehension, fluid reasoning, visual spatial, and processing speed skills (compare Parent Ex. J at pp. 14-15, with Dist. Ex. 4 at pp. 3-4). According to the results of the Woodcock-Johnson Tests of Achievement IV conducted during the 2021 neuropsychological evaluation and included in the January 2023 IEP, the student performed in "the low range" on the "Broad Reading, Mathematics, and Math Calculation Skills" clusters and "within the very low range" on the "Reading Fluency, Broad Mathematics, and Academic Fluency" clusters (compare Parent Ex. J at p. 15, with Dist. Ex. 4 at p. 4). The student's scores on the "Reading, Basic Reading Skills, and Written Language" clusters were "within the average range" (compare Parent Ex. J at p. 15, with Dist. Ex. 4 at p. 4). In addition to information from standardized measures of the student's academic and cognitive performance, review of the January 2023 IEP shows that it included narrative information about the student's specific skills and deficits in the areas of math, English language arts, and speech-language skills, and his ability to use an iPad for reading and writing (Dist. Ex. 4 at pp. 2-3, 4).

Review of the January 2023 IEP also shows that it included information from the January 2023 social history, specifically parent concerns and parent reports regarding the student's physical development, and that the social and physical development present levels provided information about the student's performance during counseling sessions and physical education class, his

medical history, and diagnoses offered as part of the 2021 neuropsychological evaluation (Dist. Ex. 4 at pp. 4-5; see Parent Ex. J at p. 15).

The description of the student's needs in the IEP aligned with the evaluative information and the parents do not otherwise point to any specific needs, abilities, strengths or weaknesses of particular importance that the student exhibited and the January 2023 IEP failed to include. Specific to the issue of present levels of performance, I adopt the findings of the IHO as he conducted a well-reasoned analysis of the relevant evidence and controlling authority. Therefore, the evidence in the hearing record supports the findings of the IHO that the present levels of performance in the student's January 2023 IEP were appropriate.

2. Annual Goals and Transition Plan

The parents argue on appeal that the IHO erred in finding that the January 2023 IEP provided appropriate annual goals in that the goals were "not measurable or meaningful," lacked criteria for measuring progress, did not outline a schedule for progress monitoring, and were not specific to the student's needs (Req. for Review ¶¶ 45, 46, 49, 50).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

However, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]).

Throughout the January 2023 IEP present levels of performance, the student's primary needs involved completing multi-step math word problems, and reading comprehension, inferencing, and writing tasks, interacting with peers, and improving problem-solving skills (Dist. Ex. 4 at pp. 2-6). The annual goals included in the January 2023 IEP were designed to address the needs of the student as identified in the present levels of performance by improving his ability to ask for assistance, identify the main idea of a story, write a three or four paragraph essay, "apply reading comprehension skills" to solve "multi-step word problems," independently solve problems "by going to his job coach/teacher for instruction and clarification," read a story and make inferences, write compound and complex sentences, identify the central idea of reading passages, answer inferential questions, identify and express positive statements about himself, engage in on-topic conversations, and solve multi-step multiplication and division word problems (id. at pp. 8-17).

In their request for review, the parents argue that the annual goal to address the student's ability to initiate and maintain a conversation was not measurable or meaningful, and specifically that it did not identify "how long [the student] must maintain the conversation" (Req. for Rev. ¶ 45). The January 2023 IEP indicated that the student had friends at school and "greet[ed] his teachers and peers when entering the classroom and when leaving" (Dist. Ex. 4 at p. 5). However, the student required support to engage in conversation, particularly with "peers he might not know very well" (*id.*). While the annual goal to initiate and maintain an on-topic conversation with minimal prompting might be more general than the parents would prefer, the CSE identified that the criteria to measure whether the goal was achieved was four out of five trials, using teacher or provider observations, and that progress toward this skill would be measured once per month (*id.* at p. 15). This annual goal addressed an identified need, and while more specificity might have been included with short-term objectives—defined in State regulation as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—those are required for students who participate in alternate assessment (8 NYCRR 200.4[d][2][iv]; *see* 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). Here, this student had not been identified as requiring alternate assessments, and therefore, the CSE was not required to develop short-term objectives to be included in his annual goals (Tr. p. 28; Dist. Ex. 4 at p. 23).

The parents also argue in their request for review that a reading comprehension goal developed for the student was "not specific enough to address his individual needs" and did not identify "the level of support, types of texts, and criteria for success" (Req. for Rev. ¶ 46). The January 2023 IEP identified an annual goal for the student to "read a story and make inferences" about wh-questions by "answering comprehension and critical thinking questions with minimal support" (Dist. Ex. 4 at p. 12). The January 2023 IEP present levels of performance indicated that the student needed to improve his understanding of the main idea and ability to cite evidence (*id.* at pp. 2-3). While this goal focused on the student's ability to make inferences and answer questions, the January 2023 IEP included other reading-related annual goals based on the student's needs such as identifying the main idea with supporting details, applying reading comprehension skills to word problems, identifying the central idea of a paragraph with evidence, and answering inferential questions both verbally and in writing (*id.* at pp. 9, 10, 12, 13, 14). Further, the annual goal in question identified a specific level of support ("with minimum support") and a criteria to determine if the goal was achieved (80 percent, three out of five times) (*id.* at p. 12). While the annual goal did not identify the type of texts the student was to be provided with, such a heightened level of specificity is not required in an IEP goal by the IDEA as a procedural matter, nor would I conclude that it would render the IEP so defective that it would lead to a substantive denial of a FAPE to the student.

Regarding the parents' claim that the January 2023 IEP annual goals were not measurable, review of the goals shows that they had a specified criteria to determine if the goal was achieved such as four out of five trials, 80 percent accuracy in three out of five trials, or "[w]ith 90 [percent] accuracy in [four] out of [five] trials" (Dist. Ex. 4 at pp. 8-17). The method of measuring progress varied between goals and included such methods as teacher or provider observation, therapeutic tasks, and classroom assessments (*id.*). In addition, each goal's schedule of progress monitoring included either one time per month or one time per quarter (*id.*). In her affidavit, the school psychologist opined that the January 2023 "IEP included appropriate goals" that "addressed all

areas of need and each of the goals [were] specific and measurable and demonstrate[d] appropriate areas in which [the student⁷] needed further support" (Dist. Ex. 9 ¶ 13).

Turning to the issue of the student's transition plan, the IHO determined that the January 2023 CSE recommended a coordinated set of transition activities to assist the student and recommended several measurable postsecondary goals for the student (IHO Decision at p. 11). On appeal, the parents argue that the January 2023 IEP "lack[ed] a comprehensive and individualized transition plan that specifically outline[d] [the student's] post-school goals and the steps required to achieve them" (Req. for Rev. ¶ 47).

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).⁸ An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]).

Review of the January 2023 IEP shows that one of the participants at the CSE meeting was a district "Transition Coordinator" (Dist. Ex. 4 at p. 27). The CSE identified the student's transition needs including his "desire to complete his local high school diploma with a Career Development and Occupational Studies (CDOS) credential" and need to pass specific Regents exams to accomplish that goal (id. at p. 7). According to the IEP, with his guidance counselor, the student would identify his courses, graduation requirements, and diploma options, and register for those courses and achieve passing grades (id.). Further, with the assistance of related services providers, the student would improve his pragmatic skills "to a variety of settings including job settings" (id.). The student's post-secondary goals included attending a two-year college to study graphic web design, obtaining gainful employment working in the technology field as a graphic designer, and living at home while developing his independent daily skills (id.). The IEP included an annual goal for the student to demonstrate the ability to solve problems independently by going to his job coach/teacher for instruction and clarification when presented with unfamiliar tasks in role play situations (id. at p. 11). The coordinated set of transition activities in the IEP identified the activities the student would engage in to meet his post-secondary goals, including the course of

⁷ The student in the present case was referred to at the beginning of this paragraph, but at the end of the same paragraph another student's initials were used.

⁸ In addition, State regulations require districts to conduct vocational assessments of students aged 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

instruction needed to achieve a local diploma, the related services needed to improve vocational, conversational, and expressive language skills, and the community experiences the student would participate in such as field trips, events, and exploring community resources (*id.* at pp. 21-22). Transition activities in the IEP also included the student's participation in job-shadowing and work-based learning opportunities to gain understanding of employment opportunities, and continuation of enrollment in life skill/vocational classes to further the student's communication skills, finance management, interview strategy and resume writing skills (*id.* at p. 22).

Contrary to the parents' assertions on appeal, review of the annual goals within the January 2023 IEP indicated that the CSE developed annual goals that addressed the student's identified needs. Additionally, each annual goal identified the criteria to determine whether the goal had been achieved, the method of measurement, and the schedule of when progress would be measured (Dist. Ex. 4 at pp. 8-17). With regard to transition planning, the student's post-secondary goals, transition annual goal, and coordinated set of transition activities were specific to the student and were consistent with the requirements of the IDEA (*id.* at pp. 7, 11, 21-22). As such, review of the evidence in the hearing record does not provide a basis to overturn the IHO's determinations that the annual goals and transition planning in the January 2023 IEP were appropriate to meet the student's needs.

3. Placement

The IHO recognized a serious problem with the placement analysis in this case, namely that the placement set forth in the January 2023 IEP was, at least in part, created in accordance with the directives in the unappealed January 2023 order of the IHO in the prior proceeding that was to address the 2019-20 through 2021-22 school years, and the IHO recognized that he was without authority to review or enforce the provisions of that order. In dicta, the IHO went on at some length regarding how confusing the analysis was and how vague and poorly crafted the order was (IHO Decision pp. at 7-8). The points raised by the IHO regarding both the poor quality of the prior decision and the lack of enforcement jurisdiction are accurate. Thus to the extent that the parents fault the district for failing to carry out actions such as adhering to the requirement to place the student in a nonpublic school or place the student at any unidentified private school of the parents' choosing with no criteria whatsoever, such a matter should be taken up in a court of competent jurisdiction. Because it was unappealed, review of the terms of the January 2023 order over a year later is foreclosed.

Notwithstanding the disarray left by the prior IHO, the IHO in the instant case attempted to thread the needle in between the prior orders in the January 2023 decision with respect to the class size and determined that the January 2023 CSE's recommendation for a 12-month 12:1+2 special class placement in a nonpublic day school together with assistive technology, counseling and speech-language therapy was not "substantively deficient in any way" and was "reasonably calculated to enable the student to make progress appropriate with his abilities" (IHO Decision at p. 11).⁹ As discussed above, the January 2023 IEP reflects information from the 2021

⁹ In a six page decision, other than ordering placement in a nonpublic school, when taking the matter out of the hands of the CSE in a subsequent school year, the prior IHO failed to identify most of the key contours that would have been important for an IEP placement, and the findings and factual analysis that amounted to less than one page to address claims covering three prior school years was stunningly careless.

neuropsychological evaluation and the IHO correctly cited to case law and found that the district was not required to adopt the neuropsychological evaluation's recommendations in order to show that the CSE considered them (*id.* at pp. 12-13; *see* Dist. Ex. 4 at pp. 3-4, 5-6).¹⁰ Also, it was proper for the IHO to weigh the evidence in the hearing record and determine that the psychologist's opinion did not deserve greater weight than the judgement of the district staff (IHO Decision at pp. 12-1312). Here, the IHO properly weighed the evidence in the hearing record on these issues and I adopt his findings regarding the January 2023 CSE's recommendations and consideration of the psychologist's recommendations.

The parents argue on appeal that the IHO erred in finding that the 12:1+2 special class placement the January 2023 CSE recommended was appropriate as the psychologist who conducted the 2021 neuropsychological evaluation recommended a "small size class" and one of the student's prior IEPs recommended an 8:1+1 special class (Req. for Rev. ¶¶ 37, 38; *see* Parent Exs. A at p. 18; J at p. 19).¹¹ The parents assert that the IHO failed to "engage with the record evidence" and credit the psychologist's recommendation for a small class size and also a prior IHO finding that the district failed to offer the student a FAPE (Req. for Rev. ¶¶ 36, 39, 40).

In the student's 2021 neuropsychological evaluation report, the psychologist recommended a "collaborative teaching class or any other small size class setting" (Parent Ex. J at p. 19). In reference to use of a "multi-sensory approach to learning" the psychologist recommended that "[a] smaller class size should continue" (*id.* at p. 18).¹²

The psychologist provided direct testimony by affidavit that he recommended a "smaller class size[], preferably a 6:1:1," determining that the student "benefit[ed] significantly from a smaller classroom size" as it "allow[ed] for more individualized support and decrease[d] sensory distractions" (Parent Ex. N ¶¶ 2-4). The psychologist further testified that the small classroom setting "enable[d] educators to provide the necessary modifications and adaptations tailored to [the student's] unique learning profile and processing speed" (*id.* ¶ 4). During cross-examination the psychologist testified that he "recommended a smaller classroom size" than the student was in "at

¹⁰ I concur that while the CSE was required to consider reports from privately retained experts, it was not required to adopt their recommendations (*see, e.g., Mr. P. v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 753 [2d Cir. 2018]; *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; *C.H. v. Goshen Cent. Sch. Dist.*, 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; *T.B. v. Haverstraw-Stony Point Cent. Sch. Dist.*, 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], *aff'd*, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

¹¹ In the request for review, the parents assert that the student's December 2021 IEP offered an 8:1+1 special class; however, review of evidence shows that the December 2021 CSE recommended a 12:1+3 special class placement in a nonpublic school, and it was the August 24, 2021 CSE that recommended an 8:1+1 special class in a district specialized school (Req. for Rev. ¶¶ 37, 38; *compare* Parent Ex. A at pp. 18, 24, *with* Dist. Ex. 3 at pp. 21, 28).

¹² The term "collaborative teaching" or "collaborative team teaching" used by the evaluator fell into disuse in the mid 2000s and the term integrated co-teaching services was adopted in its place and it involves a less supportive but less restrictive type of placement that is not relevant to this proceeding (8 NYCRR 200.6).

the time of the evaluation," and that "the "individualized attention" and "specialized education" provided within a smaller classroom "would be most beneficial for [the student]" (Tr. pp. 69, 72).¹³

Notably, the class size recommendations from the psychologist's affidavit and cross-examination testimony were not provided to the CSE and were not included in the 2021 neuropsychological evaluation report which the January 2023 CSE used—among the other evaluative information described above—to develop the student's January 2023 IEP (compare Parent Ex. J at pp. 18, 19, with Tr. p. 69 and Parent Ex. N ¶ 3; see Dist. Ex. 4 at pp. 1-6). In addition, the psychologist indicated in his affidavit and testimony that a small class placement was "preferable" and would be "most beneficial" but at the time he prepared the evaluation report, he did not identify a specific class size (see Tr. p. 72; Parent Exs. J at pp. 18-19; N ¶ 3). The CSE was not required to adopt the psychologist's placement recommendation, and the specific class size recommendation was not available to the CSE for consideration at the time the January 2023 IEP was developed. As such, the psychologist's specific class size recommendations proffered after the fact during the impartial hearing were not required to be considered or address by the CSE (R.E., 694 F.3d at 186 [adopting the view that the IEP must be evaluated prospectively as of the time of its drafting]).

The January 2023 IEP indicated the student "require[d] a small[,] structured setting" and that he would not "participate in general education programs" (Dist. Ex. 4 at pp. 6, 24, 27). The January 2023 IEP further indicated that the student "require[d] special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions" (id. at pp. 24, 27).

According to the IEP, the January 2023 CSE considered a 15:1 special class in a community school, a 12:1+1 special class in a specialized school, and a 12:1+(3:1) special class in a specialized school, but rejected those options as the "student ha[d] academic, speech[-]language and social[/]emotional needs" that could not "be adequately addressed in th[o]se setting[s]" (Dist. Ex. 4 at pp. 26-27). The school psychologist testified via affidavit that the CSE considered alternative programs but rejected them as they "would not be appropriate to meet [the student's] needs" (Dist. Ex. 9 ¶ 15). Therefore, the January 2023 CSE recommended a 12-month program in a 12:1+2 special class within a State-approved nonpublic day school, which was confirmed by the school psychologist's affidavit testimony (Dist. Exs. 4 at p. 17; 9 ¶ 9). In her affidavit, the school psychologist testified that the recommendation "was appropriate" and "would enable [the student] to receive educational benefit" (Dist. Ex. 9 ¶ 10). The school psychologist testified in her affidavit that the student "ha[d] limited social skills and need[ed] some assistance and supervision with most school[-]related self-care activities" (id.). As such, the school psychologist testified that the recommended program in the January 2023 IEP was appropriate to meet the student's needs (Tr. p. 28; Dist. Ex. 9 ¶¶ 10, 11).

¹³ The student's August 24, 2021 IEP, which was in effect at the time of the first two neuropsychological evaluation dates, recommended an 8:1+1 special class within a district specialized school (Parent Exs. A at pp. 18, 24; J at p. 1). The CSE convened on December 9, 2021 and recommended a 12:1+3 special class placement in a nonpublic day school to be implemented beginning September 1, 2021 (Dist. Ex. 3 at pp. 21, 28, 30). The 2021 neuropsychological evaluation report, dated December 17, 2021, indicated that the student was attending a 12:1+4 special class at that time (Parent Ex. J at pp. 1, 2).

Based on the above, the IHO properly found that the January 2023 IEP placement recommendation was appropriate to meet the student's unique educational needs and, accordingly, the parents' substantive IEP claims asserted on appeal must fail.

There is one aspect of the IHO's analysis where I differ to some degree. The IHO, in effect, found that the parents' lack of cooperation in the CBST process to find an appropriate approved nonpublic for the student prevented the district from ultimately identifying an appropriate nonpublic school placement. While the parents' failure to cooperate with the CBST and CSE is certainly relevant to an analysis of whether equitable considerations may bar an award of the parents' requested relief, it does not relieve the district of its obligation to provide the student with an assigned school site in the first instance merely because the parents have not met their independent obligation to cooperate. Rather, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented. This analysis also fits with the competing notions that, while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

As a result, while the January 2023 IEP passed muster for purposes of offering the student a FAPE, the district's inability to complete the process nonetheless failed to offer the student a FAPE for the 2023-24 school year which was covered by the January 2023 IEP due to the fact that it never identified a "brick and mortar" location for the IEP to be implemented. As a result, the IHO's finding that the district offered the student a FAPE for the relevant time period must be reversed. As for the remainder of the 2022-23 school year, the prior January 2023 IHO order squarely the CBST process to occur for that time period, and I decline to engage in what is

essentially an enforcement matter which may well have a different outcome if pursued in the proper forum and the parties' respective conduct with regard to carrying out the terms of the January 2023 order is taken into account under the relevant legal standards.

B. Equitable Considerations

As discussed above, while the IHO incorrectly addressed equitable considerations as part of his FAPE analysis I note that his analysis of the equities thorough, well-reasoned and supported by the hearing record. (IHO Decision at p. 13-14). Accordingly, for the reasons further discussed below, I agree with the IHO's analysis on the issue of equitable considerations and find that the parents are not entitled to tuition reimbursement or funding as they thwarted the district's ability to make a placement recommendation. Relatedly, as equitable considerations weigh against the award of any of the parents' requested relief, in the interests of judicial economy, I decline to remand the matter to the IHO for findings on the appropriateness of Gersh as a unilateral placement.

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

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

2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the IHO found that the parent's testimony was not credible and held that the district's CBST administrator was credible (IHO Decision at p. 13). As noted above, deference should be given to an IHO's credibility decision unless it is not supported by documentary evidence (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, the documentary evidence supports the IHO's conclusion and supports finding that equitable considerations do not favor the parents. Specifically, the hearing record contains documentary evidence that the district reached out to 11 potential nonpublic schools, and that approximately four of those schools were interested in holding an interview with the parents (see Dist. Exs. 5; 6; 8; 10 ¶ 8). However, the parents did not agree to interview with any of the schools that expressed interest in the student (Dist. Exs. 5 at p. 2; 10 ¶¶ 12, 13). Parents are expected to cooperate with the intake process and are not entitled to exercise a veto over the district's proposals to provide the student with an appropriate school placement (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12 [S.D.N.Y. Dec. 16, 2011]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 675-76 [S.D.N.Y. 2011]; see also J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 675-76 [S.D.N.Y. 2011]).

As the parents failed to cooperate with the district by unreasonably refusing to proceed with the steps required to secure an approved nonpublic placement for the student, which both parties agreed was necessary to provide the student with an appropriate educational program, equitable considerations weigh against the parents and bar the relief they have requested.

VII. Conclusion

The evidence shows that the IHO was thorough and careful and did not err in concluding that the January 2023 IEP was appropriately drafted. However, the district was nevertheless charged with the responsibility of completing the process for identifying the specific nonpublic school but did not do so. The mandate to complete the CBST process was initially drawn from the January 2023 IHO decision in evidence and the IHO in this case was correct that administrative hearing officers cannot enforce prior administrative orders and thus I am without jurisdiction to assess or address the sufficiency of the district's compliance with the prior IHO's order or attribute comparative fault to the parties for any violation thereof. But the terms of the January 2023 IHO's order did not extend into the 2023-24 school year. Having determined that the evidence in the hearing record does not support the IHO's determination that the district offered the student a FAPE for the portion of the 2023-24 school year covered by the January 2023 IEP, I nevertheless find that equitable considerations nonetheless weigh against an award of the parents' requested relief, and thus ultimately reach the same result as the IHO, albeit under slightly different reasoning. Accordingly, as the IHO similarly concluded, no relief is warranted under the circumstances of this case.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision dated January 3, 2024 is modified by reversing the finding that the district offered the student a FAPE for the portion of the 2023-24 school year covered by the January 2023 IEP.

Dated: **Albany, New York**
 April 11, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER