



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-174

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 Ezra Zonana, 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 a decision of an impartial hearing officer (IHO) which determined that the parent's unilateral placement, the Hamaspik School (Hamaspik) was not appropriate for the student for the 2023-24 school year and that equitable considerations would warrant a reduction in tuition funding/reimbursement. Respondent (the district) cross-appeals from that portion of the IHO's decision which did not fully reduce funding/reimbursement for special transportation services and ordered continued funding for Hamaspik. The appeal must be dismissed. The cross-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 in detail here. The student has received a diagnosis of Down syndrome and began receiving special education services as a young child (Parent Ex. M ¶¶ 2, 3).

The district conducted a psychoeducational evaluation of the student on February 19, 2019 as part of the student's transition from preschool to school-age special education services (see IHO Ex. I at p. 1). At the time of the evaluation, the student was fluent in Yiddish and understood some English, and his cognitive and academic skills were significantly delayed (see id. at pp. 3, 8-9).

A CSE convened on March 22, 2021, determined that the student was eligible for special education services as a student with an intellectual disability, and developed an IEP to be implemented beginning on April 12, 2021 (IHO II at pp. 1, 16).¹ The CSE recommended a 12:1+1 special class placement in math, social studies and sciences in Yiddish, and English language arts (ELA) in English (id. at pp. 11-12). For related services, the CSE recommended that the student receive three 30-minute sessions of individual occupational therapy (OT) per week in English, two 30-minute sessions of group physical therapy (PT) per week in English, and three 30-minute sessions of individual speech-language therapy in Yiddish per week (id. at p. 12). The CSE also recommended daily (.2) individual paraprofessional services for toileting and five periods per week of adapted physical education (id. at pp. 11, 12).

In a letter dated August 18, 2023, the parent informed the district that a CSE had not convened and no IEP had been developed for the student for the 2023-24 school year; as such, the parent notified the district of her intent to unilaterally place the student at Hamaspik for the 2023-24 school year and seek tuition funding/reimbursement (Parent Ex. D).²

On September 5, 2023, the parents signed a contract with Hamaspik for the student's attendance at Hamaspik "for the 2023-2024 10 month school year" (Parent Ex. K). According to the contract the tuition at Hamaspik was \$120,000 for the 10-month school year (id.).

A. Due Process Complaint Notice

By due process complaint notice dated November 13, 2023, the parent argued that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at pp. 1-2). The parent contended that there was no CSE held, no IEP developed, no prior written notice, no placement recommendation and no public placement for the 2023-24 school year (id. at p. 1). The parent asserted that, through her attorney, she gave notice in writing to the district, that there had been no CSE or IEP developed (id. at pp. 1-2). As a result of the lack of action by the district, the parent unilaterally enrolled the student at Hamaspik for the 2023-24 school year (id. at p. 2). The parent requested a finding that the district failed to offer the student a FAPE for the 2023-24 school year and funding/prospective funding/reimbursement of tuition for Hamaspik and related services (id.).³

¹ The student's eligibility for special education as a student with an intellectual disability is not in dispute (see 34 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

² The Commissioner of Education has not approved Hamaspik as a school with which school districts may contract to instruct students with disabilities (200.1[d]; 200.7).

³ The parent noted that she reserved the right to raise other issues regarding FAPE (Parent Ex. A at p. 2). It is noted that transportation services was not one of the reserved issues (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on December 14, 2023 and concluded on March 13, 2024 after three days of proceedings (Tr. pp. 1-72).⁴

In a decision dated March 27, 2024, the IHO noted that the district conceded that it denied the student a FAPE for the 2023-24 school year and found that given the concession, the only issues for the IHO to review were the appropriateness of Hamaspik and equitable considerations (IHO Decision at pp. 5, 13, 15).⁵

The IHO held that the parent failed to meet her burden to demonstrate that Hamaspik was an appropriate placement for the student (IHO Decision at p. 13). The IHO noted that the student's teacher was not certified and the majority of the student's instruction came through the paraprofessional, who was only required to have a high school diploma (*id.*). The IHO acknowledged that private schools are not required to meet state certification requirements, however, the IHO held it was relevant in this case, given the student's level of functioning (*id.*). The IHO found that there was no objective evidence of progress in the hearing record, no evidence of the student's instructional level or how instruction was individualized to meet the student's unique needs (*id.*). The IHO noted that there was no progress information from the school year at issue, despite the hearing taking place in January 2024 (*id.* at pp. 13-14). The IHO determined that appropriateness of a unilateral placement is to be determined every year, and a program that may have been appropriate the prior school year, does not automatically make the program sufficient for the next school year (*id.* at p. 14). The IHO held that the testimony in the hearing record demonstrated what the whole class was receiving and that this did not meet the requirement that the program be sufficiently tailored to meet the student's needs (*id.*). The IHO found "it concerning that [Hamaspik] seems to be operating under a one-size-fits-all approach for students with Down syndrome by assuming that they all learn in the same way and have the same needs" (*id.*). Moreover, the IHO determined that it was even more concerning that there was no evidence that the student's significant related service and physical needs were being met (*id.*). The IHO held that the hearing record lacked sufficient information regarding the student's related services and the student's schedule called into question whether related services were provided at all (*id.*). Therefore, the IHO found that the parent failed to meet her burden that Hamaspik was appropriate for the 2023-24 school year (*id.*).

Turning next to equitable considerations, the IHO found that an analysis on the issue was not necessary based on the appropriateness finding; however, held that if the parent was entitled to funding, she would reduce the award by \$1,500 based on equities (IHO Decision at p. 14). Specifically, the IHO determined that the parent failed to provide notice of her intent to seek reimbursement/funding for transportation costs and the parent did not request transportation costs

⁴ The parties agreed to pendency at Hamaspik for 10-month school year per a prior, unappealed IHO decision dated November 8, 2023 (IHO Decision at p. 3; see also Pendency Implementation Form).

⁵ The IHO held that the parent failed to raise the issue of transportation in the due process complaint notice and found that the issue was outside the scope of the impartial hearing (IHO Decision at p. 4).

(*id.*). The IHO noted that although it was undisputed that the student was entitled to transportation, that does not impute knowledge to the district that it was expected to provide transportation (*id.* at p. 15). Further, the IHO noted that the parent did not allege a failure by the district to provide transportation in her due process complaint notice, so it was not properly part of the impartial hearing (*id.*). The IHO also held that Hamasplik went beyond what was required for FAPE, as the student did not require paraprofessional supervision as part of his transportation services; therefore, the IHO determined that relief should be reduced by \$1,500, or 10% of the transportation costs (*id.*).

The IHO ordered the district to conduct any necessary evaluations within 15 days of the date of the decision and develop an appropriate, new IEP based on all evaluative information (IHO Decision at p. 15). Within 45 days, the district was ordered to offer the student a school location to implement the new IEP (*id.*). The IHO also ordered the district to directly fund the student's tuition costs at Hamasplik until June 30, 2024 or such time that the district implemented the new IEP, and the district must offer an appropriate placement for the following school year (*id.*).⁶

IV. Appeal for State-Level Review

The parent appeals.⁷ The parent argues that the IHO erred in finding that the parent did not meet her burden to show that Hamasplik was appropriate for the 2023-24 school year and that equitable considerations would warrant any reduction in funding. Regarding Hamasplik, the parent contends that the IHO failed to give proper weight to the testimony and documentary evidence. The parent asserts that the IHO erred in finding that Hamasplik was an inappropriate unilateral placement based on her finding that its staff were not qualified.. Further, according to the parent, the IHO failed to consider the significant training and supervision that the staff received during and prior to the 2023-24 school year. The parent argues that the IHO failed to sufficiently consider Hamasplik's ability to meet the student's individual needs. The parent contends that the student

⁶ The IHO noted that this was a unique case where, the private school was previously the student's stay-put placement and held that the student was entitled to receive education until the CSE reconvenes and develops an appropriate program (IHO Decision at p. 15). The IHO found that the least disruptive option is to keep the student in school at Hamasplik until that happens (*id.*).

⁷ 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 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.

made progress during the 2023-24 school year and that the IHO erred in finding there was no objective evidence of progress. The parent asserts that the formal mid-year progress report was not available at the time of the impartial hearing, but that the student's teacher testified to the student's progress.⁸ Based on these arguments, the parent requests that the IHO's finding be overturned and replaced with a determination that Hamaspik was an appropriate placement for the 2023-24 school year.

Turning to equitable considerations, the parent argues that the IHO erred by finding the award would have been reduced by 10% of the transportation costs or \$1,500. The parent contends that she provided timely notice of her intent to unilaterally place the student at Hamaspik and part of the tuition at Hamaspik includes transportation. The parent asserts that there is no dispute that the student needed transportation during the 2023-24 school year. The parent notes that the cost of transportation is not segregated in the contract. The parent argues that she was not obligated to put the district on notice of her intent to seek transportation costs separately because it was included as part of Hamaspik's tuition. The parent requests that an SRO direct the district to fully fund the full tuition amount for Hamaspik.⁹

In its answer with cross appeal, the district contends that the IHO correctly determined that the parent failed to meet her burden of proof. The district argues that the IHO should have fully deducted the transportation costs, totaling \$15,000 when computing an award pursuant to equitable considerations because the parent failed to properly assert a request for transportation costs in the due process complaint notice or during the hearing. The district further asserts that if it is determined on appeal that the parent is entitled to transportation funding, the district the IHO's \$1,500 reduction should be upheld. The district also cross-appeals the IHO's order for continued funding at Hamaspik. The district argues that the IHO did not have authority to make such an order and that case law prevents funding/reimbursement when a unilateral placement is not appropriate. Further, the district argues that the IHO erred by ordering the CSE to reconvene as that was not a request made by the parent.

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

⁸ The parent attached four mid-year progress reports with the request for review (see SRO Exs. A-D). The district objects to these documents being considered on appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the exhibits attached to the request for review by the parent will not be reviewed or admitted as additional evidence because they were available at the time of the March 2024 hearing. Notably, three of the four proposed exhibits were dated in February 2024. I decline to exercise my discretion to amend the hearing record as the parent failed to sufficiently demonstrate why these documents were not presented during the impartial hearing.

⁹ The parent requested \$400 be reimbursed to the parent and the balance sent to Hamaspik.

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. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere

'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [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]).¹⁰

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

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

During the impartial hearing the district conceded that it failed to offer the student a FAPE for the 2023-24 school year (see Tr. p. 15). Neither party has appealed from the IHO's formalization of that concession (IHO Decision at p. 5). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR

¹⁰ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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]).

A. Unilateral Placement

The parent argues that the IHO failed to give proper weight to the testimony and documentary evidence and erred in finding that Hamaspik was not an appropriate unilateral placement. In an answer, the district asserts that the hearing record supports the IHO's determination that the parent failed to meet her burden to show that Hamaspik was appropriate for the student for the 2023-24 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). 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 (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and

regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student 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 2023-24 school year.

The hearing record includes June 2023 educational, OT, and PT progress reports and an end of the 2022-23 school year report for reading, math, and handwriting (Parent Exs. G-J). All of the reports were written by Hamaspik staff and collectively they showed that during the 2022-23 school year, the student exhibited delays in academic, fine and gross motor, visual/perceptual, social, self-care, and daily living skills (see id.). Additionally, the student demonstrated inattentive, noncompliant, and fidgeting behaviors (Parent Ex. G at pp. 1, 3).

Specifically, the June 2023 educational progress report indicated that the student exhibited processing needs and limited attention and had worked on improving his pre-academic and academic skills (Parent Ex. G at p. 1). The report stated that the student worked on following a visual schedule and engaging in classroom activities for extended periods of time (id. at p. 2). Additionally, the student's "high distractibility" impeded his ability to perform tasks independently, and continuous reinforcement and engaging activities were necessary for the student to complete tasks throughout his day (id.). The student's classroom teacher for the 2023-24 school year testified by affidavit that the student needed "significant" one-to-one instruction to address his slower processing speed and maintain attention and focus during lessons (Parent Ex. O ¶¶ 1, 12-14).

The end of year 2022-23 report indicated that the student needed to work on naming letters and sounds with fluency, decoding words with long vowel sounds, and encoding words with consonant blends, reading two to three sentence passages and answering questions independently, and increasing knowledge of sight words (Parent Ex. H at p. 1). In writing, the report noted that the student was able to write numbers and letters but continued to work on writing both legibly (id. at p. 2). The report also included that in math, the student needed continued practice counting

with one-to-one correspondence and with rote counting, improving number identification, and improving his skills "leading up" to addition problems (id. at pp. 1-2).

According to the June 2023 educational report and the classroom teacher, the student was working on improving his social skills and was "easily distracted by visual and auditory stimuli and struggle[d] with poor perspective taking skills" (Parent Exs. G at p. 2; O ¶ 13). The student required support during social interactions and play activities to remain engaged and interactive with others, and teacher support to solve problems (Parent Ex. G at p. 3). The report indicated that the student had difficulty identifying "big emotions" within himself and understanding his peers' thoughts and feelings (id.). The evidence indicated that the student engaged in fidgeting or noncompliant behavior primarily when presented with challenging tasks or when he was seeking attention from adults (Parent Exs. G at p. 3; O ¶ 13).

With regard to the student's speech-language needs, the March 2021 IEP indicated that the student then-currently presented with receptive and expressive language delays as well as oral musculature strength needs (IHO Ex. II at p. 1).

The June 2023 OT report indicated that the student's occupational therapist provided interventions that focused on developing the student's self-care, visual perception, fine motor, graphomotor, balance, strength/endurance, and ocular motor skills (Parent Ex. I at p. 1). The student demonstrated challenges with finger grasp, scissor skills, using utensils, hand dexterity, zipping, and buttoning snaps after toileting (id.). The OT report noted that the student had then recently completed a vision screening and had "difficulty with endurance for sustained tracking, limited eye head dissociation, poor eye teaming, poor ability to perform saccades and pursuits, and difficulty with convergence [and] divergence" (id. at p. 2). These challenges impacted the student's ability to attend to learning materials, particularly when reading, tracing, and completing puzzles (id.). The report also stated that the student demonstrated overall weakness and poor postural control, and delays in those areas had impacted his sitting posture as he was often observed "crouched/bent over" when in his chair (id.).

Regarding the student's gross motor skills, the June 2023 PT report indicated that areas of intervention were motor control, core strength, balance and "righting reactions," speed and agility, overall gross motor development and coordination of body parts (Parent Ex. J at p. 1). Further, the physical therapist reported that the student had overall muscle weakness which impacted his gross motor skills of balance and coordination, motor planning, hand-eye coordination, and jumping skills (id.). According to the June 2023 OT report, the student exhibited coordination deficits and balance difficulties when "walking up steps, walking on stools, and while jumping during trampoline group" (Parent Ex. I at p. 2).

2. Unilateral Placement and Specially Designed Instruction

A Hamaspiik program description included in the hearing record described that the school "cater[ed]" to students with a diagnosis of Down syndrome (Parent Ex. E at p. 1). The school director indicated that Hamaspiik enrolled students ages five to twelve years old, many who were bilingual (English/Yiddish), and that each classroom typically contained six students, one teacher, and four paraprofessionals (Parent Ex. N ¶¶ 1, 4, 6). She stated that two of the paraprofessionals

were assigned to the class, and two other paraprofessionals went into the classroom "during academics to assist in 1:1 and small group instruction" (id. ¶ 6). The director indicated that 1:1 behavioral paraprofessional services were provided depending on a student's specific needs and students were grouped in classrooms "with other children that function[ed] on similar academic and social levels and ha[d] similar language abilities" (id.).

The Hamaspik program description indicated that the school's academic curriculum was a combination of group learning and small group instruction and that small learning groups contained a maximum of three students (Parent Ex. E at p. 3). The program description stated that Hamaspik's English language-arts (ELA) curriculum was aligned with the "New York State Next Generation learning standards" and included "systematic and explicit phonics instruction thorough research based multi-sensory approaches" (id.). For writing, Hamaspik used Handwriting Without Tears, described as a multisensory handwriting curriculum (id.). The Hamaspik math curriculum was described as aligned with the "Common Core standards," and used approaches such as natural environment, real-life teaching, and multisensory learning "to help students break down math concepts in . . . concrete, pictorial, and abstract concepts" (id.). In addition, Hamaspik used The Social Thinking Program, described as a "language and research-based approach" to teach students to "generalize social skills in a systematic manner," and that students were taught adaptive daily living skills in a variety of settings throughout the day to promote independence and increase skill level (id.).

Further, Hamaspik offered a "combination of conventional pull out and push in" individualized therapy sessions for OT, PT, and speech-language therapy, to address students' individual goals (Parent Ex. E at p. 4). To address behavior, Hamaspik used principles of applied behavior analysis (ABA) and behavior modification strategies, and conducted ongoing parent workshops and training for families and staff, to "ensure that the skills taught in school are generalized in other settings," (id.). To target behaviors, the school provided proactive strategies and reinforcement, a classroom-wide behavior system, and individualized behavior intervention plans, as needed (id.). Lastly, the Hamaspik program description indicated that to "ensure optimal communication" between home and school, the staff used daily communication notebooks, weekly newsletters, a weekly math and reading report (per student), monthly teacher/therapist phone calls with families, bi-monthly written therapy updates, monthly team meetings with interdisciplinary team, parent teacher conferences, written progress reports, and the school maintained an "open-door" policy for parental observation or visits (id. at pp. 4-5).

In her testimony by affidavit, the student's teacher indicated that during the 2023-24 school year, the student was in a class with five other students, and two full-time paraprofessionals, with one paraprofessional assigned to a specific student for the school day (Parent Ex. O ¶¶ 9, 10). She testified that three additional paraprofessionals pushed into her classroom during academic instruction (id. ¶ 10). According to the teacher, the student needed "significant 1:1 instruction," 1:1 support to focus, memory aids, and multisensory techniques during academic instruction (id. ¶ 14). The student was provided with picture cues, flashcards, kinetic sand, clay, songs and music to support his learning and engagement (id.). His teacher indicated that after she instructed "the main lesson" to the whole class in reading or math, the student received one-to-one assistance from his paraprofessional to complete material, including worksheets that corresponded to his functioning level (id. ¶¶ 16, 18). The teacher testified that during writing instruction, the student

was provided support from an occupational therapist (id. ¶ 17). Additionally, the teacher used a "class wide" token chart to help during transitions and assist the student to know what was expected of him (id. ¶ 14). In her affidavit, the student's teacher stated that the student received OT, PT, and speech-language therapy during the 2023-24 school year (id. at ¶ 15).

While the teacher's testimony described some of the strategies used with the student during academic instruction, the IHO found that the hearing record lacked evidence "regarding how the student's significant related service and physical needs [we]re being met" during the 2023-24 school year (IHO Decision at p. 14). Although the teacher testified that the student was receiving related services, the hearing record lacked any evidence—such as the progress reports or bi-monthly therapy updates that the Hamaspik program description listed and the parent provided regarding the 2022-23 school year—which described how the related services provided specially designed instruction to meet the student's unique needs (see Parent Exs. E at p. 5; I; J). Also, the hearing record included a 2023-24 class schedule that did not indicate when related services were delivered (Parent Ex. F).

Here, review of the evidence in the hearing record shows that the student exhibited significant gross and fine motor, language, and self-care needs (Parent Exs. G-J). There was insufficient evidence to demonstrate that the Hamaspik program, absent information about how the related services provided specially designed instruction to address those needs, was an appropriate unilateral placement. While a unilateral placement need not provide every service deemed beneficial for a student (see M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]), the lack of any information concerning how significant areas of the student's needs were addressed by Hamaspik other than a conclusory statement that certain related services were provided does not suffice to meet the parent's burden to prove that the unilateral placement was appropriate under the Burlington-Carter standard (see R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [finding a unilateral placement was not appropriate where it was undisputed that speech-language therapy was "critical" to remediate the student's language needs, the private placement chosen by the parents did not provide speech-language therapy and, although the parents claimed the student received private speech-language therapy, they "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]). Accordingly, upon considering the totality of the circumstances, including a review of the evidence submitted by the parent regarding the educational services the student received during the 2023-24 school year, the IHO's finding that the parent did not meet her burden to establish that Hamaspik was appropriate to address all of the student's special education needs is supported by the hearing record. Moreover, as to the district's cross-appeal, the IHO erred in ordering the district to fund the costs of the student's tuition at Hamaspik when the IHO determined that the parent did not meet her burden to demonstrate that such unilateral placement was appropriate. Therefore, I will vacate that portion of the IHO's order.

VI. Conclusion

Having found that the IHO correctly determined that the parent failed to meet her burden to demonstrate that Hamaspik was appropriate to meet the student's needs for the 2023-24 school

year, the necessary inquiry is at an end and it is unnecessary to review the IHO's findings on equitable considerations. The IHO's order for the district to continue to fund Hamaspik despite the IHO's finding that it was an inappropriate placement is vacated.¹¹

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the IHO's decision dated March 27, 2024 which ordered the district to continue funding the student's placement at Hamaspik until June 30, 2024 is vacated.

Dated: **Albany, New York**
 July 1, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER

¹¹ Regarding the district's request to rescind the IHO's order to reconvene, a CSE is required to convene annually to review a student's educational progress and to revise the student's program to reflect the student's progress and anticipated needs (20 U.S.C. §1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). I decline to vacate the order directing the CSE to reconvene, as the new school year is approaching and the CSE is obligated to reconvene every year; therefore, it was not an abuse of discretion for the IHO to make such an order.