The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-393

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:
The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 denied her request that respondent (the district) fund the costs of her son's tuition at the Big N Little TOL/OYYL Program (TOL/OYYL) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). In addition, when a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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

A CSE convened on April 26, 2023 and, finding the student eligible for special education as a student with a learning disability, developed an IESP for the student, which recommended six

periods of group special education teacher support services (SETSS) per week in the student's general education classroom, one 30-minute session of group counseling per week, two 30-minute sessions of group occupational therapy (OT) per week in the general education classroom, one 30-minute session of OT per week in a therapy room, and two 30-minute sessions of individual physical therapy (PT) per week (Parent Ex. B at p. 10). All services were to be implemented beginning on September 7, 2023, at the start of the 2023-24 10-month school year (id. at p. 1). According to the IESP, at that time, the student was parentally placed in a nonpublic school (id. at p. 13).

In August 2023, the student was evaluated by a school psychologist and licensed behavior analyst employed by TOL/OYYL as a school counselor, who recommended that the student would "benefit from a special education program in a 12:1:2 setting" along with related services of speech-language therapy, PT, OT, and counseling (Parent Exs. H at p. 2; I). According to the hearing record, as of the 2023-24 school year, it appears that the school the student had been attending, i.e., TOL/OYYL, "formed a self contained class" (see Parent Ex. C at p. 1). On September 4, 2023, the parent signed an enrollment contract with TOL/OYYL for the student's attendance from September 2023 through June 2024, unconditionally committing to $120,000 in tuition for the 2023-24 school year (Parent Ex. D. at pp 1-3).[1] The student began attending TOL/OYYL on September 5, 2023 (Parent Ex. G).

In a letter dated October 18, 2023, bearing the typed name of the parent in place of a written signature and referencing the parent's attorney as being authorized to proceed on the parent's behalf, the district was advised that the parent was requesting a reevaluation, a reconvene of the CSE, and that the student be placed in a full-time special education classroom for the 2023-24 school year (Parent Ex. J at p. 2). The letter further advised that, "if these issues [we]re not timely addressed," the parent would place the student in an unidentified private special education program and seek tuition funding or reimbursement (id.).

In a letter dated December 21, 2023, again bearing the typed name of the parent, it was reiterated that the district had not evaluated the student, issued an IEP, or provided any placement for the student (Parent Ex. K at p. 2). The letter requested an IEP for the student and placement in a full-time special education classroom for the 2023-24 school year and advised that, if the issue was not resolved, the parent would place the student at TOL/OYYL and seek tuition funding or reimbursement (id.).[2]

On February 13, 2024, a CSE convened, changed the student's disability classification from learning disability to speech or language impairment, and developed an IEP for the student with a

[1] At times, the hearing record includes references to TOL/OYYL as the "Tree of Life" program (see Parent Exs. C at p. 6; K). For purposes of this decision, the program will be referred to as TOL/OYYL. TOL/OYYL has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] Both the October and December 2023 letters were accompanied by fax cover sheets reflecting they were sent from the attorney's office; the letters were not accompanied by fax confirmation sheets (see Parent Exs. J at p. 1; K at p. 1).

projected implementation date of March 27, 2024 (Parent Ex. C at pp. 1, 21).[3] The IEP noted that the student was being evaluated at "the mother's request due to academic difficulties" (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated May 23, 2024, filed by an attorney identifying herself as "Attorney for [the student]," it was alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year, that the April 2023 IESP and the February 2024 IEP were both inadequate, and that the student required a 12:1+1 special class and a behavioral intervention plan (BIP) in order to make progress (Parent Ex. A at p. 1).[4] As relief, the due process complaint notice sought placement of the student at TOL/OYYL for the 2023-24 school year and direct funding or reimbursement of cost of the student's tuition (id. at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on July 10, 2024 (see Tr. pp. 1-20). In a decision dated August 5, 2024, the IHO ruled that the district "could not have failed to offer a FAPE" as, at the time the parent made the decision to place the student at TOL/OYYL, the operative educational program for the student was the April 2023 IESP and the parent did not request an IEP from the district until October 2024 (IHO Decision at pp. 6-7). The IHO further determined that the district met its burden as to the provision of equitable services, notwithstanding the district's failure to appear or present evidence at the impartial hearing, finding the district developed an IESP for the student and the district was not obligated to implement the IESP given the parent's unilateral placement of the student in a special education program for the 2023-24 school year (id. at p. 7). The IHO next addressed the parent's unilateral placement of the student at TOL/OYYL and determined that the parent failed to show that the private school was meeting the student's individual special education needs or that the instruction offered was reasonably calculated to enable the child to receive educational benefits (id. at pp. 8-9). The IHO then addressed equitable considerations and noted, among other concerns, that the parent's delay in sending the 10-day notice until after the student's enrollment at TOL/OYYL would have resulted in a denial of tuition funding (id. at pp. 10-11). Overall, the IHO found against the parent as to the district's provision of a FAPE to the student, the appropriateness of TOL/OYYL, and equitable considerations; accordingly, the IHO denied the parent's request for relief (id. at p. 11).

IV. Appeal for State Level Review

The parent appeals, alleging that the IHO erred in determining that the district could not have denied a FAPE to the student. The parent argues that, because the district failed to provide

[3] The February 2024 IEP includes multiple references to a March 11, 2024 CSE meeting; however, the hearing record is not clear if the February or March dates were clerical errors or if the CSE convened in February and March 2024 (see Parent Ex. C at pp. 1, 4).

[4] In one place, the due process complaint notice refers to an IESP developed on November 4, 2022 (see Parent Ex. A at p. 3); as there is no evidence of a November 2022 IESP in the hearing record, it is presumed that this was a typographical error.

any testimony or documentary evidence regarding the appropriateness of its recommended programs and failed to show that it implemented either the April 2023 IESP or the February 2024 IEP, the district denied the student a FAPE. The parent further argues that the documents she submitted into evidence showed that her unilateral placement of the student at TOL/OYYL was appropriate. Finally, the parent argues that equitable considerations weigh in favor of the parent's requested relief, as the parent cooperated with the district and did not interfere with the district's obligation to provide a FAPE to the student.

In an answer, the district responds to the parent's allegations, seeks to uphold the IHO's findings, and alleges that the district offered the student with a FAPE, that testimonial evidence was not required to meet its burden to prove it offered the student a FAPE, that the parent's unilateral placement was inappropriate, and that equitable considerations do not weigh in favor of an award of tuition funding.

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" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist.

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

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 IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]). However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[6] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special

[6] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[7] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. April 2023 IESP

As an initial matter, the IHO correctly observed that the operative program in place for determining whether the parent was entitled to reimbursement for the cost of the student's placement at TOL/OYYL for the 2023-24 school year was the April 2023 IESP.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]). In addition, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).

Here, leading into the 2023-24 school year, the April 2023 IESP was in place (see Parent Ex. B). After the CSE developed the April 2023 IESP, the parent signed an unconditional contract on September 4, 2023, unilaterally placing the student at TOL/OYYL for the 2023-24 school year for September 2023 through June 2024 (Parent Ex. D). As the April 2023 IESP was the student's educational program in effect at the time of the parent's placement decision, that was the operative program for assessing the parent's claims. Review of the IHO's decision shows that he correctly identified the operative educational program, but that he erred in finding that the district "could not have failed to offer the [s]tudent a FAPE" or, in this case, appropriate equitable services based on the IESP (see IHO Decision at pp. 6-7).[8]

The parent alleged in her due process complaint notice and again in her request for review that the April 2023 IESP was inadequate and inappropriate for the student because the student required placement in a full-time 12:1+1 special class and a BIP in order to meet his academic,

[8] The IHO may have been of the view that, generally, a parent could not seek tuition reimbursement for a unilateral placement as a remedy for a district's failure to recommend appropriate equitable services in an IESP meant to be delivered in a parental placement paid for by the parent. This may be the case; however, as discussed below, because I agree with the IHO that the parent did not meet her burden to prove the appropriateness of the unilateral placement and that equitable considerations do not support the relief sought, it is unnecessary to further discuss the issue.

social, and behavioral needs and to make meaningful progress for the 2023-24 school year (Parent Ex. A at pp. 3-4; Req. for Rev. at ¶ 12).[9] As the IHO's findings related to the April 2023 IESP were simply that the district met its burden by developing an IESP and that the district was not obligated to implement the IESP due to the unilateral placement of the student at TOL/OYYL (IHO Decision at p. 7), the IHO did not adequately address the parent's design claims related to the April 2023 IESP.[10] In fact, review of the parent's due process complaint notice shows that it could be read to include allegations related to a failure to evaluate the student, including allegations that the district did not address the student's social, emotional, or behavioral needs (Parent Ex. A at pp. 3-4, 5). Accordingly, the IHO should have addressed whether the district failed to meet its burden of proof as to the substance of the April 2023 IESP. On that point, the district did not present any documentary or testimonial evidence in response to the parent's claims and, therefore, the IESP stands as the only evidence relevant to the addressing the claims.[11]

As noted above, the parent alleged that the student required a BIP and that the student had behavioral deficits (Parent Ex. A at pp. 3-4). The April 2023 IESP described behaviors, including that the student, at times, initiated inappropriate behaviors and other classmates followed him and that he let out his anger physically when he was upset or did not get his way, "often tend[ing] to use his hands to throw or damage items," but also described that he was able to regain composure after some time had passed (Parent Ex. B at p. 2). The IESP noted that the student would be able to progress in the general education environment with SETSS, OT, and PT (id. at p. 4). However,

[9] With respect to the plausibility of a recommendation for equitable services consisting of a special class in addition to the student's attendance at the general education nonpublic school, it may be that a special class would have to be offered at a location other than the nonpublic school. In interpreting a prior version of § 3602-c, the New York Court of Appeals addressed the question of whether a district must provide special education programs and services to a student with a disability at the nonpublic school a student attends, and found that the location in which services are provided to a parentally-placed nonpublic school student with a disability pursuant to § 3602-c should be determined based on what is appropriate to address the individual educational needs of the student, with consideration given to LRE principles (Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293-94 [2010]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 183-88 [1988]).

[10] Although the IHO found that the district did not have to implement the IESP, the parent did not allege that the district failed to implement the April 2023 IESP for the 2023-24 school year in her due process complaint notice as a claim to be addressed at the impartial hearing (see Parent Ex. A).

[11] In Endrew F., the Supreme Court held that the "reviewing court may fairly expect [school] authorities . . . to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"(580 U.S. at 404). While the district's burden does not require that the district call witnesses, it does require the district to defend its recommendations and provide evidence that explains such recommendations. If the district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]).

the district proffered no evidence or testimony in support of its recommendations and the hearing record does not include any evaluative information relied on by the April 2023 CSE.[12]

Turning to the IHO's finding that the district had no reason to offer the student an IEP at the beginning of the 2023-24 school year given that the student was parentally placed, in its Official Analysis to Comments in the Federal Register, the United States Department of Education noted that when a student is placed in a nonpublic school located outside of the district, a student's district of residence is responsible for providing FAPE, but further indicated that "[i]f the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child" (71 Fed. Reg. 46,593 [Aug. 14, 2006]). The United States Department of Education has maintained this position, in relatively recent guidance answering the following question:

> If a parent makes clear his or her intention to keep the child with a disability enrolled in the private school, is the LEA where the child resides obligated to offer FAPE to the child and develop an individualized education program (IEP) for the following school year, and annually thereafter?
>
> Answer: No. Absent controlling case law in a jurisdiction, after the LEA where the child resides has made FAPE available to the child, and the parent makes clear his or her intention to not accept that offer and to keep the child in a private school, the LEA where the child resides is not obligated to contact the parent to develop an IEP for the child for the following year and annually thereafter. However, if the parent enrolls the child in public school in the LEA where the child resides, the LEA where the child resides must make FAPE available and be prepared to develop an IEP for the child.

("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 12, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf).

Courts have grappled with the effect of a parent's intention to place a student at a nonpublic school on a district's obligation to provide the student with an IEP. On the one hand, it is clear that a district violates the IDEA by refusing to convene a CSE meeting to develop an IEP when the parent of a student who is parentally placed in a private school is making inquiries about potentially enrolling a student in a public school for special education programming and an

[12] The April 2023 IESP cites a single evaluation indicating that there were no concerns with regard to the student's adaptive skills (Parent Ex. B at p. 1).

outdated IEP in that instance is not a permissible placeholder (Bellflower Unified Sch. Dist. v. Lua, 832 Fed. App'x 493, 496 [9th Cir. Oct. 26, 2020]). However, in E.T. v. Board of Education of Pine Bush Central School District, after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (2012 WL 5936537, at *16 [S.D.N.Y. Nov. 26, 2012]; see R.G. v. New York City Dep't of Educ., 585 F. Supp. 3d 524, 539 [S.D.N.Y. 2022] [examining the parents' intent as an equitable consideration]). In contrast to the court's holding in E.T., at least two federal district courts have found that an objective manifestation of the parent's intention to place a student in a nonpublic school is a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).[13]

Here, as discussed further below, while the hearing record is not well developed on the question of the parent's intent leading into the 2023-24 school year, the parent does not dispute that the parent had originally intended to place the student at her own expense and wanted the district to provide special education services through an IESP (see Parent Ex. J; see also Req. for Rev. ¶ 8 [noting that "[f]or the 2023-2024 school year, the Student was enrolled in a non-public school" and that the dual enrollment statute, therefore, required the district to make special education services available to the student at the nonpublic school]).

Ultimately, it is unnecessary to rule on the issues of whether the district met its burden to prove that the April 2023 IESP offered appropriate equitable services or whether the district was required to develop an IEP notwithstanding that the student was parentally placed at the parent's expense because, in this instance, there is insufficient basis to disturb the IHO's denial of relief on other grounds related to the appropriateness of TOL/OYYL and equitable considerations. It is to these issues that I now turn.

B. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 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

[13] The Second Circuit has noted that "[a] local educational agency may not be required to offer an IEP if the parent's expressed intention is to enroll the child in a private school outside the district, without regard to any IEP" (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451 n.9 [2d Cir. 2015], citing Child Find for Parentally-Placed Private School Children with Disabilities, 71 Fed. Reg. 46,593 [Aug. 14, 2006]; but see J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 665-66 [S.D.N.Y. 2001] [noting that the "district-of- residence's obligations do not simply end because a child has been privately placed elsewhere"]). The Court did not specifically address the situation presented here, where the nonpublic school the student attended was located within the district, and it may be that under that circumstance the district would not be relieved from the obligation to develop an IEP. The Court also did not reach the issue of whether or how the parent's actions might have impacted on equitable considerations.

receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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., 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). 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).

As noted by the IHO, the hearing record includes an August 2023 psychoeducational evaluation, a 2023-24 TOL/OYYL program description, a curriculum outline, the student's 2023-24 schedule and attendance report, an August 2023 functional behavioral assessment (FBA), a September 2023 BIP, a September 2023 treatment plan, November 2023 and May 2024 teacher progress reports, two November 2023 speech check lists, two June 2024 counseling reports,

November 2023 and June 2023 PT checklists, and the student's report card (IHO Decision at p. 8; Parent Exs. D at pp. 4-12; F-I).

The IHO found that, despite the evidence submitted, the parent did not meet her burden to prove that the unilateral placement of the student at TOL/OYYL for the 2023-24 school year met the student's needs (IHO Decision at pp. 8-9). The IHO specifically determined that the parent did not establish that the curriculum provided by the school was specially designed to meet the student's needs, the evidence regarding the student's related services raised questions and there was no evidence as to when or if the student actually received the related services, and there was no evidence regarding how the goals identified in the student's treatment plan would be reached (id. at pp. 8-9). Reviewing the allegations on appeal, the parent has not identified a convincing basis to disturb the IHO's findings in this regard.

The parent does not specifically allege that the IHO erred in finding that the evidence about the curriculum was not specific to the student (see IHO Decision at pp. 8-9). The TOL/OYYL program contract included a description of the general program and philosophy at TOL/OYYL but only included a brief, generic description of each subject and did not describe how the program was specially designed to meet the student's individual needs (see Dist. Ex. D at pp. 4-7). Additionally, the "curriculum outline" identified the instructional materials used by TOL/OYYL to teach English language arts (ELA), including the Read Bright curriculum, and a list of published leveled readers, and also provided a list of numbered "key ideas and details" for ELA (id. at pp. 8-11). The outline further indicated that math instruction was provided using the "Sadler Math Workbook; Volume One" and identified a list of topics covered in each chapter for math (id.). However, it was not clear what materials were used with the student; for example, the February 2024 IEP noted that, according to the student's teacher, she was not using "any particular curriculum" to teach the class, and that the student's ELA teacher reported using the Read Bright program but indicated it had only been purchased a month prior (Parent Ex. C at p. 4). The February 2024 IEP also related that, when curriculum information was requested by the CSE, TOL/OYYL "only supplied a list of books" (id.). The February 2024 IEP further stated that the student had "not had adequate instruction in secular studies in his current private religious school" and indicated that the student had not received sufficient exposure to reading and writing instruction (id. at pp. 4, 6).

The TOL/OYYL treatment plan and November 2023 and May 2024 teacher progress reports do briefly identify the student's communication, social, behavioral, cognitive, attention, ELA, and math needs, and include annual goals for math, ELA, communication, and socialization (Parent Ex. H at pp. 13-28). Moreover, the November 2023 and May 2024 teacher progress reports in some instances show a progression of skills taught from one assessment period to the next; however, the goals noted as mastered in the May 2024 progress report are different from the goals identified in the November 2023 progress report and there is no indication that the goals set forth in the November 2023 progress report were met, nor is there any discussion of the student's progress toward those goals (compare Parent Ex. H at pp. 20-23, with Parent Ex. H at pp. 24-26). In addition, although the November 2023 teacher progress report noted that the student "was not fluent in the complete alphabet," a foundational reading skill, there is no goal or other evidence of instruction provided to address this area of need and no evidence of mastery of this key skill in either the November 2023 teacher progress report or May 2024 teacher progress report (compare

Parent Ex. H at p. 21 with Parent Ex. H at p. 25). Further, on appeal, the parent does not grapple with the IHO's finding that the evidence did not demonstrate how the student would reach the identified goals. The parent generally indicates the student was placed in a classroom of "up to 12 students with special needs" with "one licensed special education teacher at all times" (Req. for Rev. ¶ 22) but cites no evidence for this statement.[14]

On appeal, the parent also does not address the IHO's determination about the provision of related services (see IHO Decision at p. 9). While the director of TOL/OYYL affirmed that the student's tuition for the 2023-24 school year included: one 30-minute session of group counseling; three 30-minute sessions of individual OT; two 30-minute sessions of individual PT; one 30-minute session of individual speech-language therapy: and, one 30-minute session of group speech-language therapy, and the student's first grade "curriculum schedule" contained a list of related services and their frequency and duration, there is no evidence that the student actually received any related services at TOL/OYYL (Parent Ex. E at p. 2; see Parent Ex. F). The hearing record contains two "speech" checklists which, upon comparison are both dated November 2023 but have different skills checked off (compare Parent Ex. H at pp. 28-34, with Parent Ex. H at pp. 35-41). The provider's name is blank on both reports, and there is no indication on either report, or elsewhere in the hearing record that these checklists were completed by a speech-language pathologist or that any services to address development of these skills were ever provided (Parent Ex. H at pp. 28, 35). Likewise, the November 2023 and June 2024 checklists of gross motor skills development, labeled "PT Checklist," and hearing record in general do not provide the name of a physical therapist or evidence that the student was actually provided with PT services (Parent Ex. H at pp. 46-55). Further, the February 2024 IEP noted that "the parent stated that it was difficult to find providers," and the student was "not receiving all of his recommended services" (Parent Ex. C at p. 1). The February 2024 IEP also noted that the student "ha[d] not received his mandated counseling services," though the hearing record contains two counseling checklists, which upon comparison, are both dated June 2024 but have different skills checked (compare Parent Ex. H at pp.42-43, with Parent Ex. H at pp. 44-45). Again the counseling checklists do not identify a provider name (Parent Ex. H at pp. 42-45).

Finally, the student's first grade report card was simply a list of first grade reading and math standards, with three untitled columns that each included the number one or two (see Parent Ex. H). There was no explanation of what each column represented or what the numbers signified, nor any report card data for any other subject area or related service (Parent Ex. H at pp. 56-60).

Review of the IHO decision shows that the IHO considered the evidence presented by the parent and made specific findings regarding the curriculum provided by the school, the related services or lack of evidence of delivery thereof, and a lack of evidence to indicate how the goals in the student's treatment plan would be reached (IHO Decision at pp. 8-9). Review of the evidence, as discussed above, does not controvert the IHO's findings. Additionally, review of the parent's request for review shows that the parent has not grappled with the IHO's specific findings; rather, the parent simply identifies the evidence included in the hearing record and contends that

[14] There is little evidence in the hearing record regarding the composition or ratio of the class the student attended. The February 2024 IEP, which described the student's class at TOL/OYYL as "a special education class," reported that, according to the parent, the student was in a class with "approximately 3-4 other boys" and, according to the teacher, the student's class "consist[ed] of 6 students"(Parent Ex. C at pp. 1, 4).

it was sufficient to identify the student's needs and the program provided by the school and that it shows the student made progress (Req. for Rev. at ¶¶ 21-23). While I am tasked with conducting an independent review of the hearing record on appeal, it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

Accordingly, based on the foregoing, there is insufficient basis to disturb the IHO's finding that the parent failed to meet her burden to prove that the unilateral placement met the student's needs for the 2023-24 school year.

C. Equitable Considerations

Having found insufficient basis to disturb the IHO's determination that the parent failed to meet her burden of proving that the unilateral placement of the student at TOL/OYYL was appropriate, it is unnecessary to reach equitable considerations. However, given the connection discussed above between the district's obligation to offer a FAPE to a parentally placed student and equitable considerations, I will address them briefly here.

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"]).

In addition, 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).

As noted above, there is district court authority that the issue of parental intent may be addressed as a factor in balancing equitable considerations and that, upon consideration of any relevant equitable factors, tuition reimbursement may be reduced or eliminated (E.T., 2012 WL 5936537, at *16; see R.G., 585 F. Supp. 3d at 539 [noting that a notice of intent to parentally place represented an affirmative statement that the parent would pay for the student's placement "and sought only an IESP," whereas without such notice, the district "had no reason to believe that the parents sought to parentally place [the student] at the parents' expense for that year" and, therefore, would be required to offer a FAPE]).

Here, the parent attended and participated in the April 2023 CSE, at which time the CSE developed an IESP for the student with a projected implementation date of September 7, 2023 because the student was parentally placed in a nonpublic school (Parent Ex. B at pp. 1, 10, 13). There is no indication in the IESP, or elsewhere in the hearing record, that the parent expressed any intent during that meeting for the student to attend a public school or expressed disagreement with the IESP. The parent then had the student evaluated on August 30, 2023 by a school psychologist, who was also identified as the school counselor at TOL/OYYL (Parent Ex. I; see Parent Ex. H at p. 2). There is no indication in the hearing record that the report of the August 2023 psychoeducational evaluation was ever shared with the district. On September 4, 2023, the parent signed a contract with TOL/OYYL for the student's enrollment for the 2023-24 school year and the student began attending on September 5, 2023 (Parent Exs. D; G). The first evidence of the parent contacting the school district was a "10-day Notice" dated October 18, 2023, a month and a half past the date on which the parent unconditionally obligated herself to enroll the student and pay tuition to the nonpublic school (Parent Ex. J). It is worth noting that in the October 18, 2023 letter, the parent requested a reevaluation and a reconvene of the CSE and only indicated that "if these issues are not timely addressed, [she] intend[ed] to unilaterally place [the student] in a private special education program" (id. at p. 2). The parent then sent a follow-up letter dated December 21, 2023, in which she again indicated her intent to unilaterally place the student if her issues were not resolved (Parent Ex. K). The district then convened a CSE for the student in February 2024 (Parent Ex. C).

Considering the above, even assuming full tuition reimbursement would be available for as a remedy for finding that an IESP did not offer the student a FAPE, the parent's actions as described above were not reasonable and would warrant a complete bar to recovery on equitable grounds. The parent's failure to communicate her intent or her disagreement to the district and her failure to share private evaluation results interfered with the CSE's opportunity to develop an IEP for the student and propose an appropriate public school placement prior to the parent placing the student at TOL/OYYL for the entirety of the school year. Based on the foregoing, equitable considerations would also warrant a complete denial of relief.

VII. Conclusion

Having found that the parent failed to meet her burden of proving that her unilateral placement of the student at TOL/OYYL was appropriate and that, even if it were necessary to reach them, equitable considerations warrant a complete denial of tuition reimbursement or funding, the parent's request for relief is denied. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 16, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER