



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 24-467**

**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:**

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nicole Daley, 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 Yeshivat Kinyan Torah Learning Academy (YKT Learning Academy) for the 2023-24 school year.<sup>1</sup> The district cross-appeals the issue of equitable considerations. The appeal must be dismissed. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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<sup>1</sup> The school is alternately referred to as YKT Learning Academy and YKT Voc in the hearing record. For purposes of this decision, it will be referred to as YKT Learning Academy.

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**

Due to the nature of the appeal, a full recitation of the student's educational history is unnecessary. Briefly, a CSE convened on June 6, 2023, and finding the student eligible for special education as a student with a speech or language impairment created an IEP to be implemented on

September 5, 2023 (see IHO Ex. I). At the time the CSE convened, the student was attending YKT Learning Academy where he was in ninth grade (id. at p. 1).<sup>2</sup> For the 2023-24 school year (tenth grade), the CSE recommended the student attend a 15:1 special class in a non-specialized school for each of his core academic classes and receive related services of two 30-minute sessions of individual occupational therapy (OT) per week and two 30-minute sessions of individual speech-language therapy per week (id. at pp. 19, 25).

In a letter to the district dated August 31, 2023, the parent asserted that the district had not offered the student an appropriate classroom placement recommendation and thereby denied the student a FAPE for the 2023-24 school year (Parent Ex. B at p. 2). The parent notified the district of her intent to unilaterally place the student at YKT Learning Academy for the 2023-24 school year and seek prospective tuition/tuition reimbursement for the student's attendance at YKT Learning Academy and the costs of the student's related services (id.).

On September 1, 2023, the parent signed a contract with YKT Learning Academy for the student's attendance at the school for the 2023-24 school year (see Parent Ex. D). The contract indicated that the school year would begin on September 5, 2023 and the tuition was \$125,000 (id. at p. 1).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated July 2, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parent asserted that June 2023 IEP was procedurally and substantively flawed, and that the CSE had not observed or evaluated the student (id. at p. 2). The parent asserted that the IEP was silent as to where the student would be when he was not in the 15:1 special class and that the recommended classroom placement was not appropriate (id.). Further, the parent asserted that the IEP goals were overly vague, lacked short term objectives, and were insufficient to address the student's delays (id.).

The parent indicated that she had notified the district of her intent to place the student at YKT Learning Academy and requested prospective tuition/tuition reimbursement for the student's placement, including the costs of related services (Parent Ex. A at pp. 2-3).

#### **B. Impartial Hearing Officer Decision**

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on August 8, 2024 (see Tr. pp. 1-54). In a decision dated September 14, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year; however, the IHO also found that the parent failed to meet her burden to demonstrate that YKT Learning Academy was an appropriate unilateral placement (IHO Decision at pp. 3, 8).<sup>3</sup> The

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<sup>2</sup> The IEP indicated that the student was projected to graduate in June 2026 and that no new testing had been done in anticipation of the annual review (IHO Ex. I at p. 1).

<sup>3</sup> The IHO decision was not paginated, for the purposes of this decision, the pages will be cited by reference to

IHO found that the district failed to offer a cogent and responsive explanation for its recommendations because it failed to present any evidence or testimony to establish that it offered the student a FAPE for the 2023-24 school year, and therefore, the IHO held that she must find that the district failed to offer a FAPE (id. at p. 6).

Turning to the parent's unilateral placement, the IHO held that the YKT Learning Academy progress report did "not explain what progress, if any, the student made during the school year" and noted that the progress report only identified the student's level of functioning and annual goals (IHO Decision at p. 4). The IHO determined that the progress report was "very short and [was] devoid of information about what level the Student was on at the beginning of the academic year, and whether the Student's current level of functioning show[ed] any gains or improvement" (id. at pp. 4-5). The IHO also noted that there was no testimony from the parent to explain what, if any, progress the student had made (id. at p. 6). Additionally, the IHO found that the student's program was not tailored to the student's academic needs (id. at p. 7). Specifically, the IHO noted the student's math program at the unilateral placement, referred to as algebra, was not meeting the student's individualized needs and held that the student would not derive educational benefit from the math placement (id.). With regard to progress, the IHO found that the educational supervisor's testimony that the student made progress was not substantiated by the hearing record (id.). Further, the IHO noted that the educational supervisor's testimony regarding the student's instruction contradicted the student's schedule, and that based on the supervisor's testimony the student had no meaningful academic instruction during the three periods listed as "vocational" (id.). Moreover, the IHO found that two additional periods of instruction, referred to as "community outreach," did not provide meaningful educational benefit to the student and instructional periods titled "guest speaker" and "success track" also provided limited, if any, educational benefit (id. at pp. 7-8). The IHO held that "the Student's program was not tailored to his academic needs, the Parent provided insufficient evidence of the Student's progress, and several of the periods in the Student's schedule seemed to provide no academic benefit whatsoever" and therefore, the IHO determined that "the Parent cannot meet their burden as to the appropriateness of the Private School program" (id. at p. 8). As the parent failed to meet her burden that the unilateral placement was appropriate, the IHO held that there was no need to render an analysis on the issue of equitable considerations (id.). The IHO denied the parent's requested relief (id.).

#### **IV. Appeal for State-Level Review**

The parent appeals. The parent asserts that she met her burden of proof to show that YKT Learning Academy was an appropriate unilateral placement. The parent contends that the documentary evidence she submitted was supported by affidavit testimony which detailed the student's needs and how the program at YKT Learning Academy met those needs. According to the parent, "none of the reasons offered by the IHO are factually supported by the record or legally valid for denying relief." Regarding the student's math class, the parent asserts that the IHO assumed facts not in evidence and that the record was clear as to what the student was being taught.

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their consecutive pagination with the first page (i.e., cover page) as page one (see IHO Decision).

The parent argues that the one-word description of the student's math class as algebra did not provide a sufficient basis to deny her requested relief.

The parent argues that the lack of evidence of progress in specific academic subjects was not evidence of an inappropriate program and, therefore, not a legal basis to deny relief. The parent contends that the overall appropriateness of the program should have been evaluated based on whether it was reasonably calculated, given the student's needs, to enable him to receive educational benefit. The parent contends that the hearing record includes detailed records that show YKT Learning Academy was aware of the student's needs and created a program reasonably calculated to address those needs. The parent asserts that moreover, the evidence shows that the student made progress that would facilitate his transition to life as an adult, and that in "this regard the [YKT Learning Academy] program was a success." The parent asserts that the educational supervisor testified as to the importance of the vocational, student success, guest speaker and community outreach activities in the student's schedule and that the IHO failed to appreciate the overall goal of YKT Learning Academy as it related to the student's ability to transition to life after school.

The parent argues that the IHO should have addressed equitable considerations, and that there was no evidence that the parent acted inequitably. The parent requests that the IHO's decision be overturned, and the parent be granted full funding for the tuition of \$125,000 at YKT Learning Academy for the 2023-24 school year.

In its answer with cross appeal, the district asserts that the IHO properly denied tuition for YKT Learning Academy for the 2023-24 school year. The district argues that the hearing record does not support a finding that the YKT Learning Academy program was reasonably tailored to meet the student's needs and that it lacks evidence that the student made progress. The district contends that the vocational courses provided by YKT Learning Academy do not constitute what the district must provide for a FAPE, would not have been included in an IEP, and were not specially designed to meet the student's unique needs. Moreover, the district argues that the amount of time the student spent in religious instruction should be weighed as a factor against appropriateness. The district contends that the hearing record does not include sufficient evidence to show that YKT Learning Academy was an appropriate unilateral placement that provided specially designed instruction to meet the student's unique needs.

For its cross appeal, the district argues that should the SRO review equitable considerations, they do not favor any relief. Specifically, the district contends that the parent did not provide a timely 10-day notice. In the alternative, the district argues that any funding should be reduced by 20% to reflect the portion of the day devoted to non-secular education.

## **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 Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

Here, the parties did not appeal the finding that the district failed to offer the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 3, 6). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR

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<sup>4</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

### **A. Unilateral Placement**

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

## **1. Student's Needs**

As noted above, the district has not appealed the IHO's determination that it failed to offer the student a FAPE for the 2023-24 school year and as such, the district's special education recommendations will not be reviewed here. However, to address the appropriateness of the parent's unilateral nonpublic school placement, it is necessary to describe the student's needs, and, thereafter, to review the instruction delivered to the student to determine if the nonpublic school provided specially designed instruction. The parent did not dispute the accuracy of the present levels of performance in the student's June 2023 IEP, and therefore the student's needs as described therein will be used in the analysis of the parent's unilateral placement.

As noted above, the student's June 6, 2023 IEP indicated that he was attending ninth grade in a nonpublic school and continued to be eligible for special education as a student with a speech or language impairment (IHO Ex. I at p. 1). According to the IEP, the student was in a class of three students where the teacher instructed students at their level (id.). The student was not taking Regents classes, was working on skills at a lower level, and despite modifications continued to struggle (id.). The IEP reflected that the student had been recommended for speech-language therapy and OT in his prior IEP but was not receiving either service (id.). The June 2023 IEP noted that no new testing had occurred in preparation for the student's annual review and that a vocational interest survey, sent to the parent by the district, had not been completed and returned at the time of the meeting (id.).

The June 2023 IEP indicated that the student's reading skills were at a fifth-grade level and while his reading had improved, he did not recognize periods as the end of a sentence and would stop at the end of a line instead (IHO Ex. I at p. 2).<sup>5</sup> According to the IEP, the student was unable to answer "wh" or inferential questions and was also unable to "support a claim with evidence from the text" (id.). In math, the 2023 IEP indicated that the student was functioning at a third or fourth grade level and that he had difficulty finding the greatest common factor, identifying and labeling fractions, and adding and subtracting fractions with unlike denominators (id.). The student was able to grasp and calculate least common multiple problems, and, "with a small prompt," add and subtract fractions with like denominators (id.). The June 2023 IEP reflected that in writing the student continued to struggle in all areas and he "typically require[d] lots of prompting to brainstorm ideas" (id.). The IEP indicated the student was able to spell basic words in context but struggled with the mechanics of letter formation and word spacing (id.). The June 2023 IEP also indicated that the student learned best when hearing oral information as his visual memory skills were weak, that he struggled with focus and motivation, and that his attention span

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<sup>5</sup> The IEP later noted that at the beginning of the year the student stopped reading at the end of the line but now paused appropriately at the end of a sentence (IHO Ex. I at p. 3).

was two to three minutes long (id. at pp. 1, 2). The IEP reflected the parent's concern that the student was delayed in all subjects (id. at p. 3). According to the IEP, the student demonstrated delays related to following directions, processing, expressing himself using age-appropriate and content vocabulary and understanding written text (id. at p. 5). The IEP noted that the student was not receiving speech-language therapy but also stated that speech-language goals should address his expressive and receptive language needs (id. at pp. 2-3).

Turning to the student's social/emotional development, the June 2023 IEP reflected that the student was typically quiet in school when around teachers but was described as friendly, caring and was well-liked by his peers (IHO Ex. I at p. 3). The parent noted that there were no social concerns at the time of the June 2023 CSE meeting (id. at p. 4).

The IEP indicated that, as reported by the parent, the student was in good health, his hearing and vision were within normal range, there were no concerns regarding his activities of daily living, and he had no history of asthma, allergies, or illness (IHO Ex. I at pp. 2, 4). The June 2023 IEP indicated that the student was not receiving OT but prior goals had addressed the student's needs related to time management, sensory integration and his ability to focus and that any recommended OT goals should address attention and focus (id. at p. 4).

The June 6, 2023 IEP identified the student's transition needs which included: support in identifying programs within high school which align with career interests possibly in real estate (or another office job); direct instruction in executive functioning including time management, organization, and prioritization; direct instruction in using a planner or agenda and creating a daily schedule; support in building resilience and perseverance in academic and social settings; support in building appropriate social and communication skills in preparation for volunteer work or employment; and, support in applying for internships, volunteer opportunities or part-time employment that align with stated interests (IHO Ex. I at p. 7).

The June 6, 2023 IEP identified strategies to address the student's management needs that included: verbal praise, encouragement; scaffolding; instruction that breaks tasks into smaller steps; engaging and high interest material; directions repeated, simplified and clarified as needed; frequent check-ins with teacher to ensure comprehension of task; focusing prompts and redirections when off-task; and multisensory instruction with visuals and manipulatives (IHO Ex. I at p. 5). Recommended testing accommodations included extended time, separate location, revised test directions, tests read aloud (when possible); focusing prompts; and breaks (id.).

## **2. YKT Learning Academy**

In her affidavit, the educational supervisor (supervisor) at YKT Learning Academy provided an overview of the private school, stating that it was "founded for students that have a variety of learning disabilities that impact their performance in a general education setting and require different learning modalities in a smaller more individualized setting" (Parent Ex. C at ¶ 6). She indicated that YKT Learning Academy is for high school students and that in addition to academics the school provided the students with "various vocational training to help prepare them for their future," and partnered with local businesses "to bring in professionals in various fields" (id.). The supervisor noted that many of the students struggled with social and pragmatic norms

and explained that the school brought in community leaders to help the students increase their self-esteem and develop the social and pragmatic skills needed to succeed in society (*id.*).<sup>6</sup> In addition, the supervisor reported that "[e]veryday life skills" were taught as part of the school's curriculum and taught in the classroom (*id.*). According to the educational supervisor, at YKT Learning Academy instruction was provided in a 6:1+1 special class for two core subjects and students were provided 1:1 modifications in other classes (*id.* ¶ 11).

The parent entered an undated exhibit into the hearing record identified as "Program Mission and Philosophy" which described, in more detail, the YKT Learning Academy program (Parent Ex. E). According to the program mission and philosophy statement, YKT Learning Academy built individualized programs for students based on their IEP and individualized needs (*id.* at p. 1). The statement indicated that the students learned in a small classroom setting of never more than six students, and received 1:1 instruction, if needed, in individualized subjects (*id.*). The mission and philosophy statement noted that related services were embedded into each student's daily program, that community outreach was considered a "vital part" of YKT Learning Academy's initiative, and post-secondary goals and transition were a "key emphasis" of the school (*id.* at p. 1). The mission and philosophy statement indicated that all YKT Learning Academy students were initially given the opportunity to pursue a Regents track program and obtain a Regents diploma but that the school also offered a high school equivalency track to upper classmen who were "significantly under-credited" and unsuccessful at passing Regents exams (*id.* at p. 2). According to the statement, in conjunction with these two tracks the school also provided students with vocational experiences, through courses and field work, that allowed students to obtain a license in a vocational track of their choice in addition to a Regents diploma or high school equivalency diploma (*id.*; *see* Tr. p. 32).

As reflected in the supervisor's testimony and affidavit, at the beginning of the 2023-24 school year, the student "presented with more than two years of delays in academic, social, and pragmatic skills," and his IEP and an "earlier" psychoeducational evaluation<sup>7</sup> were reviewed to design the student's program at YKT Learning Academy (Tr. p. 17; Parent Ex. C ¶ 8). She described the student as having "very limited" skills, a "low IQ" and stated that the student was academically at a second or third grade level in math and reading (Tr. pp. 17-19). The supervisor indicated that the student was enrolled in a tenth-grade 6:1+1 special class at YKT Learning Academy for the 2023-24 school year and he was pulled out of a Jewish law class to receive his related services of speech-language therapy and OT (Tr. pp. 19-21). The supervisor testified that initially, the student's goals were taken from the district's IEP but the "providers" then developed "their own goals during the first progress report (Tr. p. 29).

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<sup>6</sup> At the impartial hearing, the supervisor testified that there were two schools housed in the same building, one being YKT Voc, and the other being YKT which she described as the "mainstream host school" (Tr. pp. 14-15; *see* Parent Ex. C ¶ 7). The supervisor testified that the 2023-24 school year was the student's first year enrolled at YKT Voc while the June 6, 2023 IEP indicated that the student was attending "Yeshivat Kinyan Torah" at the time of the meeting (Tr. p. 17; Parent Ex. C ¶ 8; IHO Ex. I at p. 1).

<sup>7</sup> The psychoeducational evaluation referenced here by the supervisor was not included as evidence in the impartial hearing record.

In addition to the above information concerning the student's enrollment at YKT Learning Academy, the hearing record also included a copy of the student's tenth-grade weekly schedule (Parent Ex. F). According to the schedule, school took place Sunday through Friday (*id.*). The student's school day began at 7:40 a.m. and ended at 5:40 p.m. Monday through Thursday with dismissal at 12:40 p.m. on both Sunday and Friday (*id.*). Each of the student's school days began with a prayer period (Shaharit) and breakfast, followed by another prayer period (Talmud) (*id.*). Thereafter, the student engaged in classroom instruction in the following courses, and received the following related services and vocational activity periods: music, art, Jewish history, world history and geography, algebra, earth science (and lab), English, health and nutrition, ethics, OT, speech-language therapy, counseling, vocational development, community outreach (volunteering/networking), success track (lifestyle counseling) and guest speaker (empowerment) (*id.*; see Tr. pp. 21-23, 35). The schedule also included a daily midmorning 15-minute break, a daily lunch period and an afternoon prayer period (Mincha) on full days (*id.*). The student's schedule indicated that on Sunday, the student had two consecutive 40-minute periods of "gym" prior to dismissal at 12:40 p.m. (*id.*). During the impartial hearing, the IHO asked the supervisor to explain the periods listed as "vocational" on the student's schedule to which she replied that while the student was in tenth grade, he could not "take a full vocation and get licensed in it" as the YKT Learning Academy seniors did, but he could get a "taste almost of a different vocation" (Tr. pp. 33-34). She explained that for ninth and tenth grades the school invited different people from the community "that are doing various jobs for different portions of the year to come and spend time with [the students], obviously alongside with their special ed teachers and gen ed teachers to share with them" (Tr. p. 34). She gave examples of a barber, a mechanic and an individual from the Jewish ambulance service who came during this period to share "what their job was essentially like, trying to get [the students] kind of enticed into maybe pursuing one of these vocations as a future career" (Tr. pp. 33-34). The supervisor also explained the "success track" period listed on the student's schedule which she described as a period teaching students how to be successful in everyday life, such as by learning how to write a check or balance a budget (Tr. p. 35). In response to the IHO's question about the "ethics" period, the supervisor explained that it was a period dedicated to teaching about "teenage peer pressure" (Tr. pp. 36-37).

The hearing record also included a student academic progress report dated February 8, 2024 which indicated that the student was functioning at a sixth-grade math level but also stated that his math skills were at an elementary level (Parent Ex. G at p. 1). According to the progress report, the student continued to struggle with word problems, applied analysis, and although cooperative, "suffer[ed] from a short attention span" (*id.*). The February 2024 progress report noted that in reading, the student was reading at a fourth-grade level and continued to have difficulty with decoding and comprehension (*id.* at p. 2). More specifically the progress report stated that the student struggled to decode basic texts, "read[] slowly, and fumble[d] over nearly every word," and exhibited "practically nonexistent" comprehension (*id.*). The progress report reflected that the student was writing at an end of fourth-grade level and had made some progress "through determination" in his writing skills though he was still below his grade level and continued to be challenged by grammar and spelling (*id.* at p. 3). The February 2024 progress report went on to indicate that the student had "extremely poor expressive and receptive language skills" and that having a conversation with him was very difficult (*id.*). In terms of social/emotional functioning the progress report described the student as a "nice quiet boy," who

could get easily frustrated and become explosive and loud, and who was a "bit of a loner" (id. at pp. 3-4). The progress report identified individualized attention during class, one on one learning, and related services as interventions (id. at pp. 3-4).

The parent also presented an OT progress report dated April 17, 2024, which indicated that the student received OT one hour per week to address delays in executive functioning, social skills, emotional regulation, and attending (Parent Ex. H at p. 1). According to the OT progress report, the student exhibited impulsive behavior as well as delays in emotional regulation that impacted his behavior and social skills (id.). The progress report indicated that the student repeatedly interrupted teachers and peers and had difficulty with problem solving related to school conflict and everyday issues, and was "easily distracted during class when doing homework or studying for an exam" (id.). The occupational therapist noted that the student had made progress in his sensory processing skills and was working on improving his self-regulation using activities involving proprioceptive input such as deep breathing and exercises (id.). The occupational therapist opined that the student would continue to benefit from OT to help him "improve executive functioning, social skills, emotional regulation, and attention span skills, so he may socialize with his peers and function in the school and home environments" (id.). The OT progress report listed the programs and materials used to assist the student's "mastery of skills" as task completion, problem solving, emotional regulation, attention, sensory processing/modulation-proprioseption, supervision, verbal prompts, and sensory preparatory techniques, but the report itself did not describe the services provided by the occupational therapist to the student (id. at p. 2). The April 2024 OT progress report indicated that the student was continuing to work toward mastery of the goals included in the report (id.).

The hearing record also included an April 2024 speech-language progress report which noted the student had needs related to pragmatic language skills and executive functioning, and indicated that the student required prompting to use critical thinking skills, had difficulty explaining his reasoning in a clear and cohesive manner, demonstrated difficulty understanding the complexities of a given text and providing rationales for characters' actions or words, and had difficulty comprehending figurative language and grasping the significance of unfamiliar vocabulary (Parent Ex. I). The April 2024 speech-language progress report indicated that the speech therapist used a combination of books, games, cards, worksheets, adaptations of Visualization and Verbalization by Nancy Bell, classic short stories, and reading comprehension passages to improve the above noted areas (id.). Beyond prompting, the progress report did not provide any description of instruction provided to the student and the report indicated that the student continued to work toward mastery of the goals included in the progress report (id.).

The IHO found that the parent had not met her burden to demonstrate the appropriateness of YKT V, noting that the program was not tailored to the student's academic needs, several periods listed on the student's schedule "seemed to provide no academic benefit whatsoever," and the parent provided insufficient evidence of the student's progress (IHO Decision at p. 8).

In her request for review, the parent asserts that the IHO assumed facts not in evidence when she determined that the student's placement in an algebra class was not meeting his needs as he was several grade levels below algebra-level math according to the YKT Learning Academy progress report and the supervisor's testimony. The present levels of performance of the June 2023

IEP indicated the student was functioning at a third to fourth grade level in math and that he was working on finding the greatest common factor and identifying, labeling, adding, and subtracting fractions (IHO Ex. I at pp. 2, 25). The IHO correctly noted that while the supervisor testified that the student was performing at a second or third grade level in math, the YKT Learning Academy progress report indicated that the student was functioning at the sixth-grade level (Tr. pp. 18-19; Parent Ex. G). However, as noted above, the YKT Learning Academy progress report also stated that the student's math skills seemed to be at an elementary school level and according to the hearing transcript the supervisor testified that the student was performing "on a very, very low elementary school level and he [wa]s missing major skills" (Tr. p. 18). While the student's schedule indicated that he attended algebra four days per week, the parent correctly states in her request for review regarding the student's "algebra" class that "other than the class being called that there is nothing in the record detailing the precise subject matter" (Request for Review ¶ 13). Given the conflicting information provided by YKT Learning Academy regarding the student's skill level and the lack of information regarding the instructional content of the student's math class, I find the parent has not met her burden to show that this aspect of the student's program appropriately addressed his needs. The parent's mere assertion that the student's classes were modified by 1:1 instruction when needed is not sufficient proof of specially designed instruction.

The IHO found that the YKT Learning Academy vocational, community outreach, guest speaker, and success track classes provided the student with limited or no meaningful educational benefit. Here, the YKT Learning Academy educational supervisor described the goal of the identified classes, each of which focused on providing students with functional skills (see Parent Ex. E). As noted above, the supervisor reported that the vocational class exposed students to different professionals who spent time with the students and shared information to them about their jobs (Tr. pp. 33-34). She explained that the community outreach class involved students volunteering in community settings, assisting with basic tasks in those settings, and developing networking opportunities by meeting with community members (Tr. pp. 22-24). The supervisor reported that the success track class taught students skills necessary to be successful in everyday life such as how to balance a budget, write a check and write a letter (Tr. p. 35). Lastly, in the guest speaker class, the school brought in speakers from the community to share stories with the students to help empower and motivate them (Tr. pp. 35-36). The student's June 2023 IEP included an annual goal designed to increase the student's "knowledge about the world of work and career choices and relate this to personal skills, aptitudes, and abilities in future career decisions" and the IEP's "coordinated set of transition activities" included online research regarding career interests with respect to the educational and vocational criteria of each (IHO Ex. I at pp. 13, 23). Based on the supervisor's testimony the vocational, community outreach, guest speaker, and success track classes were designed to provide YKT Learning Academy students with information about potential careers and to assist them with developing functional skills; however, there is insufficient evidence in the hearing record to explain how these classes offered specially designed instruction to meet the student's unique educational needs, including his significant academic and functional delays, as opposed to providing the same general transitional information and opportunities to all students attending the YKT Learning Academy.

Next, the hearing record supports the IHO's finding that although the supervisor testified in general terms regarding the student's progress the hearing record does not substantiate her

assertion. The IHO correctly found that the YKT Learning Academy progress report reflected the student's level of functioning at the time it was written without explaining whether it represented improvement. While the progress report states that the student had shown some improvement in grammar and spelling it does not identify any specific skills the student mastered or made progress toward and the math and reading sections of the report do not address progress. To the extent progress can be inferred by comparing the supervisor's testimony that the student started the school year in September 2023 with academic skills at the second or third grade level in reading and math, with statements in the February 2024 progress report that the student was functioning at a sixth grade level in math and fourth grade level in reading, it seems unlikely that the student would make several years progress in academic skills over a six month period, given the private school's description of the his significant needs.

While no one factor, including whether or not the student made progress while attending the private school,<sup>8</sup> may be dispositive on the issue of the appropriateness of a unilateral placement, when a parent fails to demonstrate that, under the totality of the circumstances, the placement provided the student with specially designed instruction to address his or her unique needs and was reasonably calculated to enable his or her to receive educational benefits, the parent is not entitled to relief in the form of direct funding or reimbursement from the district for the costs of the student's attendance at the private placement as a remedy for the district's denial of a FAPE to the student.<sup>9</sup> Here, given the student's significant educational needs and demonstrated delays, and the lack of detail as to how the YKT Learning Academy modified the student's instruction and provided strategies and supports tailored to those needs, I find no support in the hearing record sufficient to disturb the IHO's finding that the parent failed to meet her burden to demonstrate that YKT Learning Academy provided educational instruction specially designed to meet the unique needs of the student.

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<sup>8</sup> It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D.-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

<sup>9</sup> Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

## **VII. Conclusion**

Having found that the IHO correctly determined that the parent failed to meet her burden to show that YKT Learning Academy was an appropriate unilateral placement for the student, the necessary inquiry is at an end and there is no reason to reach the district's cross-appeal regarding equitable considerations.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
January 17, 2025**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**