The University of the State of New York

The State Education Department
State Review Officer
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No. 24-588

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:
Mayerson & Associates, attorneys for petitioner, by Gary S. Mayerson, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 Winston Preparatory School (Winston Prep) for the 2024-25 school year. The district cross-appeals from that portion of the IHO's decision that found there were no equitable factors to bar or limit the parent's claim for relief. 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]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD), specific learning disorder with impairment in mathematics, language disorder, and speech sound disorder, and began receiving special education services in early elementary school (Parent Ex. D at pp. 1, 3, 10-11). From the 2017-18 school year (first grade) through the 2023-24 school year (seventh grade) the student attended an "independent inclusion school," where during the latter year he received accommodations, occupational therapy (OT), speech-language therapy, and counseling services (Parent Ex. D at pp. 3-4; Dist. Ex. 3 at pp. 1, 12-15).

On January 8, 2024, the parent signed an enrollment contract with Winston Prep for the student's attendance for the 2024-25 school year beginning in September 2024 (see Parent Ex. P).[1] In a letter to the parent dated April 3, 2024, the district proposed to reevaluate the student because the district's records indicated the last CSE meeting was held in November 2022 and the student was due for a reevaluation (Dist. Ex. 4 at p. 1).

A CSE convened on April 25, 2024, determined that the student was eligible for special education as a student with an other health-impairment, and developed an IEP to be implemented beginning May 9, 2024 (Dist. Ex. 1 at pp. 1, 26).[2] The April 2024 CSE recommended 10-month programming for the student in a district non-specialized school consisting of five periods per week of integrated co-teaching (ICT) services for each subject (math, English language arts (ELA), social studies, and sciences); one 40-minute session per week of group counseling services; one 40-minute session per week of group OT; one 40-minute session per week of group speech-language therapy; and one 40-minute session per week of individual speech-language therapy (id. at pp. 20-21, 27). The April 2024 CSE also recommended the student receive specialized transportation services (id. at pp. 25, 27).

On May 3, 2024, the parent sent the district an email, notifying the district that she had not yet received a copy of the student's April 2024 IEP, that she disagreed with the CSE's failure to recommend a 12-month school year for the student, and that she believed that an "ICT class" was too large for the student (see Parent Ex. G).

Via a ten-day notice, dated June 14, 2024, the parent notified the district of her concerns regarding the student's IEP, that she had not yet received a copy of the IEP or a school location letter, and that if the district failed to recommend an appropriate program and placement for the student, the student would attend Winston Prep for the 12-month 2024-25 school year and she would seek reimbursement/funding from the district for the costs of that placement (see Parent Ex. C).

On June 28, 2024, the parent signed a contract with Winston Prep for the provision of services to the student at Winston Prep's summer enrichment program (see Parent Ex. J). The student attended Winston Prep during summer 2024 for the "Summer Enrichment Program" and continued attending "full time in September 2024" (Parent Ex. U ¶ 21).

A. Due Process Complaint Notice and Events Post-Dating the Due Process Complaint Notice

The parent filed an initial due process complaint notice on July 1, 2024, alleging that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year, listing, among other reasons, the sufficiency of the evaluative information available to the CSE, the adequacy of the class size recommendation and related services recommendations, the

[1] Winston Prep 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] The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

sufficiency of the annual goals, and that the parent never received a school location letter (Parent Ex. W).

In prior written notice and school location letters dated July 17, 2024, the district notified the parent of the April 2024 CSE's recommendations and the assigned public school site (see Dist. Ex. 2).

Via an amended ten-day notice dated August 8, 2024, the parent informed the district of her concerns surrounding the assigned public school, and that she had attempted to speak with someone from the assigned public school multiple times in July 2024 but received no response (see Parent Ex. B). The parent notified the district that she believed the student needed a 12-month program and that she had enrolled the student in Winston Prep for the summer program and intended to place the student in Winston Prep for the 2024-25 school year and would seek funding for both (id.).

In an amended due process complaint notice dated August 13, 2024, the parent repeated her allegations that the district denied the student a FAPE for the 2024-25 school year and added a proposed solution and additional claims about the public school site the district assigned the student to attend for the 2024-25 school year (see Parent Ex. A). The parent invoked the student's pendency entitlements, and, as relief, the parent sought direct funding for the costs of Winston Prep along with transportation costs and compensatory education (id. at pp. 2, 10-11).

C. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 17, 2024 (Tr. pp. 1-76).[3, 4] In a decision dated October 23, 2024, the IHO found that the district failed to meet its burden that it offered the student a FAPE for the 2024-25 school year; that the parent failed to meet her burden to show that Winston Prep provided the student with instruction designed to meet his unique needs; that the student was not entitled to programming on a 12-month basis; and that equitable considerations would have supported the parent had the IHO found that the parent met her burden of proving that Winston Prep was an appropriate unilateral placement for the student (IHO Decision at pp. 5-10).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the parent failed to meet her burden of proving that Winston Prep was an appropriate unilateral placement for the student. The parent asserts that the IHO's decision was written before the hearing transcript was available, thereby depriving the IHO of the opportunity to review the entire hearing record before rendering his decision. The parent argues the IHO held the parent to a higher standard of proof than was

[3] A pre-hearing conference was held on August 6, 2024 and a status conference was held on September 26, 2024 (August Tr. pp. 1-8; September 26, 2024 Tr. pp. 9-16).

[4] The August 6, 2024 and September 26, 2024 transcripts were consecutive from pages 1-16 and then the October 17, 2024 transcript's pagination started at page one again. For ease of reference, the August and September transcripts will be identified by date and page number and the October transcript will be referenced with only the transcript cited (see Aug. Tr. pp. 1-8; Sep. 26, 2024 Tr. pp. 9-16; Tr. pp. 1-76).

proper. In her appeal, the parent submits the student's fall report from Winston Prep as additional evidence for the purpose of establishing the progress the student made at Winston Prep during the 2024-25 school year.

In its answer and cross-appeal, the district asserts that Winston Prep is not an appropriate unilateral placement for the student and cross-appeals from the IHO's determination that equitable considerations weighed in favor of the parent. The district further argues that the documentary evidence submitted by the parent on appeal should not be admitted into the hearing record. The district asserts that because the parent did not appeal the IHO's failure to address transportation, the parent effectively waived transportation services.

On January 15, 2025, the parent submitted a 13-page memorandum of law in response to the district's cross-appeal.[5] On January 17, 2025, the district submitted a reply which argued that the parent's reply memorandum of law should be dismissed for failing to comply with form requirements by exceeding the 10 page limit.

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

[5] The parent labeled the January 15, 2025 submission with a heading that states "Reply", but the body of the document is labeled as "Petitioner's Reply Memorandum of Law" and there is no accompanying reply.

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]).[6]

[6] 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).

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

A. Preliminary Matters

1. Form Requirements

Initially, the district's assertion that the parent's submission titled as "P[etitioners]' R[eply] M[emorandum O[f] L[aw]" must be rejected as an attempt to circumvent the page limitations set forth in State regulation.

Specifically, State regulation provides that "the request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). State regulation further provides that "a memorandum of law in support of an answer to a cross-appeal or reply shall not exceed 10 pages in length" (id.). Pursuant to State regulations, documents that do not comply with the pleading requirements "may be rejected in the sole discretion of a State Review Officer" (8 NYCRR 279.8[a]).

In this instance, the parent's reply, whether labeled as a reply or a memorandum of law, was limited in length to 10 pages; however, the document, as received, contained 13 pages. Additionally, as noted by the district in its January 17, 2025 reply, the parent's counsel is an experienced special education law attorney who should be fully aware of the regulations governing practice before the Office of State Review and the page limitations for pleading contained therein. Accordingly, the parent's reply is in violation of State regulation and it is being rejected and will not be considered on appeal.

2. Additional Evidence/Record Issues

Turning to the parent's request for review the parent seeks the introduction of additional documentary evidence into the hearing record, specifically: an email dated October 31, 2024 attaching the student's fall report; a 2024 Winston Prep fall report; and a November 1, 2024 email from the court stenographer (see Req. for Rev. ¶¶ 12, 30; pp. 18-29).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Review of the student's Winston Prep fall report, as submitted with the request for review, shows that it is unsigned and undated. Submitting of such an undated and unsigned progress report, after the conclusion of the hearing, creates a question as to the reliability of its contents and, in this instance, the district asserts that it has been denied the opportunity to cross-examine witnesses regarding the fall progress report. The parent included an email that shows the fall report was sent from Winston Prep to the parent on October 31, 2024, two weeks after the last hearing date and after the IHO decision had been issued (Req. for Rev. at p. 18; see IHO Decision at p. 10; Tr. p. 1). However, despite the email to the parent from Winston Prep with the attachment of the fall report, the district is correct in its assertion that there is not a sufficient basis to conclude when the report itself was created or that the underlying information in the report was unavailable at the time of the hearing. In fact, it appears as though much of the information contained in the fall report was likely in the school's possession at the time of the hearing and could have been produced on or before the October 17, 2024 final hearing date. For example, almost all of the student's teachers referred to in the fall report were also listed in the affidavit of the academic dean of Winston Prep (dean) as teachers of the student (see Parent Ex. U ¶ 34), and the parent could have chosen to present any of the teachers as witnesses during the impartial hearing, thereby allowing the district to cross-examine them on the methods and practices used by Winston Prep to address the student's unique needs.

Regarding the parent's allegation concerning the issuance of the IHO's decision prior to the generation of the hearing transcripts, I agree with the district that "this belated evidence is not necessary for a decision" (Answer ¶ 16). The IHO was present and participated in the hearing, including by questioning the parent's witness (Tr. pp. 44-45). Having conducted the hearing, the IHO was not required to wait for receipt of the transcript before rendering his decision.

Based on the foregoing, the parent's proposed exhibits do not constitute reliable additional evidence and, as such, they are not necessary to render a decision in this matter and will not be considered on appeal.

B. Winston Prep

The district does not challenge the IHO's determination that it failed to offer the student a FAPE for the 2024-25 school year. Therefore, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, I next turn to the merits of the parties' dispute on appeal,

the appropriateness of the placement of the student at Winston Prep during the 2024-25 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; 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).

Although the student's needs are not at issue in this matter, a brief description thereof provides context for the issue to be resolved.

The hearing record includes a November 2021 neuropsychological evaluation report, which related that the student demonstrated overall cognitive abilities in the low average range (Parent Ex. D at p. 10). Academically, the student demonstrated strengths in spatial memory, spelling skills and grammatical knowledge and particular weakness in math skills (id.). The student had elevated levels of inattention and hyperactivity, difficulty with executive functioning, deficits in phonological awareness, receptive language, and articulation, difficulty with short-term and long-term memory, and "emerging" symptoms of depression and anxiety (id.). The neuropsychological evaluation report reflected diagnoses of attention-deficit/hyperactivity disorder, combined presentation, specific learning disorder with impairment in mathematics, language disorder, and speech sound disorder (id. at pp. 10-11).

Speaking to the student's academic needs, the April 2024 IEP noted that based on the student's third quarter (2023-24 school year) seventh-grade progress report, it was estimated that he was decoding on a seventh grade level, had "[e]nd of" seventh grade comprehension skills, and had seventh grade writing skills (Dist. Ex. 1 at p. 1). In English, the student had grown in his written expression and confidence (id.). He was able to keep up with notes and followed along thoughtfully while reading (id.). The student needed frequent teacher check-ins, preferential seating, repeating and clarifying directions, on-task focusing prompts, and support with planning written responses (id.).

In math, the student was working at the "[e]arly" sixth grade level (Dist. Ex. 1 at p. 1). He needed teacher prodding to participate, complete independent work, and ask questions (id. at pp. 1-2). The student required visual supports, reminders of steps, and multiplication charts when completing problems involving fractions (id. at p. 2). When given mixed operation problems, the student tended to confuse the steps of adding/subtracting versus multiplying/dividing (id.). He could decode one-step word problems that involved fractions when operation keywords were highlighted for him (id.). The student needed similar supports when working on problems with ratios (id.).

Regarding the student's speech-language needs, the April 2024 IEP related that the student continued to work on his expressive language and articulation skills and had made significant progress in answering inferential questions using context clues, expressing cause/effect relationships, using temporal concepts, and identifying parts of speech with moderate verbal and visual prompts or cues (Dist. Ex. 1 at p. 3). He was provided with structured worksheets, reading passages, or real-life scenarios that focused on inferential comprehension and prediction (i.e., identifying contextual evidence and supporting details for implied meaning and outcomes), sequence of events, cause-and-effect relationships, and locating various parts of speech within a given sentence, and depending on the complexity of the task, his therapist provided binary choices, verbal explanations, explicit instructions, and direct modeling when required (id.).

In terms of the student's social/emotional skills, the April 2024 IEP stated that according to an April 2024 progress report, the student continued to integrate coping strategies when dysregulated, effectively communicated his feeling when facing negative emotions, and could self-advocate and use fidgets such as a stress ball or pop-it when feeling overwhelmed (Dist. Ex. 1 at p. 3). He showed discomfort with sharing his thoughts and feelings, especially relative to his academic challenges, but through group discussions and role-playing scenarios he could communicate his thoughts and opinions about a specific topic while considering how others may have different perspectives and ideas (id. at pp. 3-4). The student continued to engage in positive self-talk exercises and positive attributes activities to challenge fixed thoughts or ideas (id. at p. 4). The April 2024 IEP noted that, according to the parent and nonpublic school staff, the student no longer needed 1:1 counseling and his counselor at the nonpublic school "recommended [one] group counseling session" (id.).

Speaking to the student's physical needs, the April 2024 IEP related that, according to an April 2024 progress report, the student received OT to "address executive functioning, handwriting, and fine motor goals" (Dist. Ex. 1 at p. 4). During OT sessions, the student worked on attention, problem-solving skills, sequencing, body awareness, self-regulation, and functional writing tasks (id.). His performance on the WOLD Sentence Copy Test showed that his writing pace of 72 letters per minute was approaching the standardized average of 74 words per minute for students in seventh grade (id. at pp. 4-5). When working on calendar planning, the student had difficulty counting forward and backward a certain number of days or weeks on a calendar and when given hypothetical work scenarios and asked to provide solutions, the student needed moderate cuing and prompting from the therapist (id. at p. 5). In all activities, the student was able to initiate tasks within one minute of being asked and sustained attention to tasks until they were finished (id.). The April 2024 IEP recorded concerns from the student's then-current nonpublic school representative who "expressed concern that the progress [the student] ha[d] made [wa]s within a small school" and that the student "need[ed] typically developing peers, as the ICT model would have, but [he] also require[d] a setting where he w[ould] not feel overwhelmed" (id. at p. 27).

Turning to the appropriateness of the unilateral placement, the IHO determined that the evidence in the hearing record did not establish how the student's program at Winston Prep was tailored to address his needs (IHO Decision p. 7). The parent argues that the Winston Prep dean testified as to how the student's program was tailored to meet his needs and what his program and curriculum entailed (Req. for Rev. ¶ 14).

The hearing record contains a brief description of Winston Prep which shows that Winston Prep served students who have received diagnoses of language processing disorders, nonverbal learning disabilities, and executive functioning difficulties and the school was "designed to challenge strengths while developing the essentials of reading, writing, mathematics, organization, and study skills" (Parent Exs. O at p. 1; U ¶ 7). The Winston Prep program description explained that "[e]ach student's educational program [was] based upon an in-depth understanding of his/her learning profile that evolve[d] as the student progress[ed] and mature[d]," and that "[s]kills and content [were] taught explicitly using multisensory techniques, in classes that average[d] ten students" (Parent Ex. O at p. 1).

Regarding the school's general program, the dean testified that Winston Prep provided "intense skills remediation, while encouraging students to build independence, resilience, responsibility, self-awareness, and self-advocacy . . . by providing each student highly individualized one-on-one support through [the] [f]ocus [p]rogram, a skill-based curriculum, small, homogeneous class groupings, an expert faculty, a great emphasis on social-emotional development, and a supportive learning community" (Parent Ex. U ¶ 15). According to the dean, each student's program was based on an in-depth understanding of the student's cognitive, academic, and social-emotional profile that evolved as the student progressed (id. ¶ 19).

Speaking to the student specifically, the dean testified that the Winston Prep curriculum was skills-based, which "mean[t] addressing [the student's] weaknesses within the curriculum of each class" and that Winston Prep focused on "presenting him opportunities throughout the day to build those skills through each subject area" (Parent Ex. U ¶ 24). The dean testified that the student's deficits included weakness in attentiveness to visual details and visual motor integration, ability to reason and understand visual intel while simultaneously processing it, and difficulty registering, maintaining, and manipulating visual and auditory information, which corresponded to his struggles with time management, prioritization, and attention and impacted his ability to fully complete writing tasks (id. ¶ 26). The student also had difficulty expressing his academic and social needs, and had difficulty asking for help, communicating with his classmates, and expressing himself with clarity (id.).

While the dean described areas of difficulty that were not inconsistent with the needs identified in the student's April 2024 IEP, she offered little information regarding how Winston Prep addressed these needs. The dean testified that the student was in a class of eight seventh and eighth grade students who had similar needs in the areas of written expression, executive functioning, social pragmatics, and academic problem solving (Parent Ex. U ¶¶ 27, 29). According to the dean, the student's curriculum was "skill based and goals [were] created for him in each class" to address his "weaknesses in academic and social problem-solving, written expression and reading comprehension within the curriculum of each class" (id. ¶ 28). The dean testified that Winston Prep spent "a lot of time working on executive functioning skills, including organization of materials, attention, self-awareness, self-control, and time management" (id. ¶ 31). Additionally, the dean testified that the student's goals were "focused around strengthening executive functioning skills, reading comprehension skills, developing stronger written expression, and building his academic problem-solving skills" (id. ¶ 32).

The dean also testified that the Focus program provided 45 minutes per day of one-to-one remedial instruction for each student targeting their individual goals in the areas of greatest need (Parent Ex. U ¶ 35). According to the Winston Prep dean, focus instructors were "responsible for developing an in-depth understanding of each of their students' learning profile, creating goals that target[ed] remediation in various areas of need, and applying appropriate methodologies and materials to address these goals" (Tr. p. 34; Parent Ex. U ¶ 35). The dean testified that the student's Focus session was individualized for him and that "the programming for his group was tailored to the learning profile of that group" (Tr. pp. 34-35). According to the dean, she "create[d] a living document that talk[ed] about [the student's] learning profile as well as those around in his group" and the student's Focus teacher "work[ed] closely with the focus director to review [the student's] materials, his testing, all the things that [Winston Prep] kn[ew] about him in his admission and his neuropsych[ological] documents and then create[d] a program based on his learning needs" (Tr. p. 42). The dean followed up testifying that Winston Prep utilized a "continuous feedback system"

and the school was "continually assessing [the student's] progress (Tr. p. 42). However, neither the referenced "living document" created by the dean, nor any document that provided specific details of the student's Focus program or how the student's progress was continuously assessed at Winston Prep were entered in the hearing record (see Parent Exs. A-W).

The IHO also determined that the hearing record did not identify how the student's related services needs were met at Winston Prep, as the Winston Prep dean testified that the student's related services were integrated into the school day but the record did not describe how this occurred (IHO Decision at p. 7). On appeal, the parent asserts that Winston Prep sufficiently addressed the student's needs without formal related services (Req. for Rev. ¶ 20).

As noted above, the April 2024 CSE recommended that the student receive one 40-minute session of group counseling per week, one 40-minute session of group OT per week, one 40-minute session of group speech-language therapy per week, and one 40-minute session of individual speech-language therapy per week (Dist. Ex. 1 at pp. 21-22). The dean testified that "[w]hile formal related services [were] not offered at Winston [Prep]," the school "integrate[d] them into the focus program and within content classrooms" (Parent Ex. U ¶ 16). According to the dean, Winston Prep was " an integrated program in which services [were] integrated into all classes throughout the day" (Tr. p. 35; Parent Ex. U ¶ 16). The parent testified that she was aware that Winston Prep would not directly provide the student with the related services recommended in his April 2024 IEP, but that she "understood that all the related services [were] embedded as part of the curriculum" (Tr. p. 51).

According to the dean, at Winston Prep the student did not receive any direct services from a speech-language pathologist, occupational therapist, or school counselor (Tr. pp. 37-39). Regarding counseling, the dean testified that the student had "access to a counselor, but again that social, emotional [was] embedded into [Winston Prep's] programming" (Tr. p. 38). Counseling was on an "as need[ed]" basis, and the student could meet with the counselor "[i]f he wanted to," but if the student's team and parent "decided that was something that was necessary [the school] would also utilize that then" (Tr. pp. 38-39; Parent Ex. U ¶ 37). The dean testified that, at the time of the impartial hearing, the student had "not utilized the services of the counselor yet" (Tr. p. 39). When asked to provide examples of how the student's speech-language therapy services would be incorporated into a class, the dean identified possible areas of focus, such as broadening understanding of conversation norms, a bare minimum level of fluency and reading fluency, and social pragmatics, and indicated that "[t]here would be more of an emphasis on how to engage in those, sort of, types of conversations," but she did not describe what Winston Prep did with the student to address these skills (Tr. pp. 42-43). Similarly, when asked how OT would be incorporated into the student's program at Winston Prep, the dean offered little insight, testifying that "even if it [was] a small integration of like how do we hold certain things, but then also there are certain integrations in the typing that we do and the handwriting that we do and things like that" (Tr. pp. 43-44).

Here, while the dean and the student's parent testified to the overall program provided to students at Winston Prep generally and identified the student's areas of need, the evidence presented during the impartial hearing nonetheless lacked sufficient evidence of specially designed

instruction provided to the student at the private school for the 2024-25 school year, individualized to address the student's unique needs.[7]

As discussed above, much of the evidence in the hearing record that can be used as support for the appropriateness of the nonpublic school consists of generalized descriptions of the overall program offered to all students at the Winston Prep. In support of their burden to demonstrate the appropriateness of a unilateral placement for tuition reimbursement purposes, parents may, at times, present evidence that consists of descriptions of the school's programmatic elements without more specific evidence related to the student's experience with the individualized program during the school year at issue. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert denied, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]). However, relying on more general information concerning the school and the resources and programs it offers to all students, even if the student in question has an educational profile that is similar to other attendees of the school and needs for which the program offers services and supports—such as individualized attention to the unique learning profile of each student and collaboration between teachers to address the students' individual needs—runs the risk of conflating specially designed instruction which addresses the unique needs of a student who has been classified and found eligible for special education and related services with globally beneficial elements of the unilateral placement's educational milieu (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]).

Here, the dean's broad testimony that Winston Prep provided the student with a "systemic approach to addressing his academic and executive functioning deficits" and that the student "benefit[ted] hugely from the daily one-to-one Focus sessions, and the close integration of his teacher" did not sufficiently explain what specially designed instruction was provided to the student either during his regular school day or during the 45 minutes of 1:1 Focus instruction

[7] 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]).

(Parent Ex. U ¶ 46). Accordingly, while the testimony presented at the impartial hearing in support of the appropriateness of Winston Prep as a unilateral placement described the general benefits of the school for all students, and described how the school utilized various strategies and supports to individualize instruction to each student, such as the Focus program, the specifics of such individualization for the student in this matter is lacking and, therefore, the evidence in the hearing record does not adequately describe, or provide examples of, how the instruction provided at Winston Prep was specially designed to meet the student's unique needs.

In addition, one of the factors to consider in determining if a private school is appropriate is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient" (Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]). Parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]), as a lack of evidence as to how a student's significant area of need is addressed by the unilateral placement can result in a finding that the unilateral placement is not appropriate (see R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [finding a unilateral placement was not appropriate where it was undisputed that speech-language therapy was "critical" to remediate the student's language needs, the private placement chosen by the parents did not provide speech-language therapy and, although the parents claimed the student received private speech-language therapy, they "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided")], aff'd, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [finding that the parent failed to prove that the unilateral placement addressed the student's considerable social/emotional needs absent testimony from the student's counselor, evidence concerning the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]).

Here, given the student's needs and the lack of detail as to how Winston Prep modified the student's instruction and provided strategies and supports tailored to those needs during the 2024-25 school year, including the lack of evidence of how the student's needs in the areas of speech-language, OT, and counseling were to be addressed, the hearing record does not support disturbing the IHO's finding that the parent failed to meet her burden to demonstrate that Winston Prep provided educational instruction specially designed to meet the unique needs of the student.

VII. Conclusion

Having found that the IHO correctly determined that the parent failed to meet her burden to show that Winston Prep was an appropriate unilateral placement for the student, the necessary inquiry is at an end.

I have considered the partes' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 5, 2025

STEVEN KROLAK
STATE REVIEW OFFICER