



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

## **The State Education Department**

**State Review Officer**

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**No. 24-606**

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

### **Appearances:**

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

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's tuition at the Big N Little Tiferet Torah Program School (Tiferet Torah) for the 2022-23 and 2023-24 school years. The appeal must be sustained in part.

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

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

programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local CSE (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### III. Facts and Procedural History

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here in detail.

The student has received special education and related services from a young age and attended nonpublic schools since first grade (Parent Ex. P at p. 1). A September 2020 CSE determined the student was eligible for special education as a student with a learning disability and developed an IESP that recommended the student receive five periods per week of direct group special education teacher support services (SETSS), two 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of counseling in a group (Parent Ex. B at pp. 1, 7).<sup>1</sup>

According to the parent, on February 3, 2022 the district developed an IESP for the student, recommending that he receive five periods per week of SETSS and one 30-minute session per week of counseling in a group setting (Parent Ex. A at p. 3).

On August 22, 2022, the parent signed a tuition contract with Tiferet Torah for the student's attendance during the 2022-23 school year (Parent Ex. C at pp. 1, 3).<sup>2</sup> The parent unilaterally placed the student at Tiferet Torah for the 2022-23 school year (ninth grade), where he attended a special class consisting of 12 students, one special education teacher, and one teaching assistant, and received OT and counseling services (Parent Ex. Q ¶ 19).

On December 26, 2022, the parent, through her attorney, submitted a letter to the district, stating that the student's needs could not be met in a general education classroom, and requesting that the district reevaluate the student, reconvene a CSE meeting, and offer him a placement for the 2022-23 school year (Parent Ex. H at pp. 1, 2).<sup>3</sup> The parent also advised the district of her intent to unilaterally place the student at Tiferet Torah and seek tuition funding for that placement (id. at p. 2).

On August 22, 2023, the parent signed a tuition contract with Tiferet Torah for the student's attendance during the 2023-24 school year (tenth grade) (Parent Ex. I at pp. 1, 3). The student attended tenth grade at Tiferet Torah in a special class consisting of 12 students, one special education teacher, and one assistant, and he received OT and counseling services (Parent Ex. Q ¶ 19).

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<sup>1</sup> The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>2</sup> The Commissioner of Education has not approved Tiferet Torah as a school with which school districts may contract to instruct students with disabilities (see NYCRR 200.1[d]; 200.7).

<sup>3</sup> The December 2022 letter was titled, "TEN DAY NOTICE" (Parent Ex. H at p. 2). The letter bore the typed name of the parent in place of a written signature and referenced the parent's attorney as being authorized to proceed on the parent's behalf (id.). The letter in evidence is accompanied by a fax cover sheet (id. at p. 1).

The parent, through her attorney, submitted a letter to the district dated September 11, 2023, and a follow up letter dated November 13, 2023 (Parent Exs. N; O).<sup>4</sup> In the letters, the parent requested that the district conduct a reevaluation, reconvene a CSE meeting, and recommend that the student attend a full-time special education classroom placement for the 2023-24 school year (Parent Ex. N at p. 2; O at p. 2). The parent also advised the district of her intent to unilaterally place the student and seek tuition funding for that placement, specifically identifying Tiferet Torah as the unilateral placement in the November 2023 letter (Parent Exs. N at p. 2; O at p. 2).

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

In a due process complaint notice dated June 18, 2024 the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years (see Parent Ex. A). Generally, the parent alleged the district denied the student a FAPE by failing to reevaluate the student, failing to reconvene the CSE to create an IEP, and failing to provide a timely and appropriate program and placement for the student for the 2022-23 and 2023-24 school years (id. at p. 4). The parent indicated that she repeatedly requested for the district to reevaluate the student, reconvene the CSE to create an IEP recommending a full-time special education class with up to twelve students, one teacher, and one assistant, and develop and implement a behavioral plan to address his academic, social, and behavioral needs because the student's needs could not be met in a general education classroom (id. at pp. 3-4).

The parent further claimed that, due to the district's failures, she unilaterally placed the student at Tiferet Torah, a private special education program, for the 2022-23 and 2023-24 school years and that such placement was necessary for the student to receive an appropriate special education (Parent Ex. A at p. 4). As relief, the parent sought an order directing the district to directly fund or reimburse the tuition costs at Tiferet Torah for the 2022-23 and 2023-24 school years (id. at p. 5).

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

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 24, 2024 and concluded on September 25, 2024 after three days of proceedings (Tr. pp. 1-53). On August 1, 2024, the district submitted a motion to dismiss the parent's claims relating to the 2022-23 school year, arguing that the parent lacked standing to bring a claim for tuition reimbursement for any date before April 4, 2023 (IHO Ex. I at pp. 2, 11).<sup>5</sup> The district argued that State and federal law made clear that a student was only entitled to a FAPE when the student had an IEP and that, in this instance, for the 2022-23 school year, the student had an IESP,

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<sup>4</sup> Both the September and November 2023 letters bore the typed name of the parent in place of a written signature, referenced the parent's attorney as being authorized to proceed on the parent's behalf, and were accompanied by fax cover sheets (Parent Exs. N at pp. 1-2; O at pp. 1-2). The fax cover sheet accompanying the September 2023 letter referred to the letter as a "Request for Evaluation" (Parent Ex. N at p. 1). The November 2023 letter was titled, "FOLLOW UP TEN DAY NOTICE" (Parent Ex. O at pp. 1-2).

<sup>5</sup> The district's motion to dismiss is not paginated; for purposes of this decision, the motion to dismiss shall be cited by reference to pages 1-13, with the email to the IHO as page 1 and the first page of the motion as page 2 and so on (see IHO Ex. I at pp. 1-13).

thus was not entitled to a FAPE, and the district could not be held responsible for defending its recommended placement in the IESP because the parent did not request an IEP until "well into the 2022-2023 school year" (id. at p. 6). Additionally, the district claimed that the parent did not file a purported 10-day notice until December 26, 2022, and that such letter was actually a request for an IEP rather than an IESP (id. at p. 9). Further, the district argued that the letter indicated that, unless an IEP was "somehow miraculously developed during the Christmas holiday and without regard for the timelines to produce an IEP found in part 200.4 of the commissioner's regulations," the parent would continue her placement of the student at the Tiferet Torah (id.). The district contended that, at most, the letter could be deemed to trigger the 60-day timeline to evaluate the student (id.). The district argued that, because the parent's 10-day notice was in fact a request for an IEP, the timeline for the CSE to evaluate the student would have concluded on April 4, 2023 and thus tuition reimbursement for the 2022-23 school year "should be prospectively dismissed as relief by the IHO before that date" and any award should be pro-rated (id. at p. 11).

On August 6, 2024, the parent submitted an opposition to the district's motion to dismiss, arguing the parent was required to be given a fair opportunity to present her case as she was not in agreement with the February 2022 IESP created for the student and that the district was required to show that the IESP created for the student was appropriate, thus the matter needed to be handled at a hearing (IHO Ex. II ¶ 5).<sup>6</sup> The parent cited to a Third Circuit case to argue that her failure to provide a timely 10-day notice of unilateral placement did not serve as an automatic categorical bar to her claim for tuition reimbursement (id. ¶ 10). Accordingly, the parent requested an order dismissing the district's motion to dismiss (id. at p. 5).

In a decision dated November 4, 2024, the IHO granted the district's motion to dismiss the parent's claims for the entire 2022-23 school year (IHO Decision at pp. 11-12). The IHO also determined that the district denied the student a FAPE for the 2023-24 school years, that the student's placement at Tiferet Torah was not an appropriate program placement, and that equitable considerations did not favor the parent's request for tuition funding (id. at pp. 12-14).

With respect to the 2022-23 school year, the IHO noted that the parent indicated in her opposition to the district's motion to dismiss that she was not in agreement with the February 2022 IESP; however, the IHO also noted that the parent failed to submit the February 2022 IESP at the hearing (IHO Decision at p. 11).<sup>7</sup> The IHO also determined that the parent did not provide sufficient evidence of disagreement with the February 2022 IESP, and noted that she had signed a contract with Tiferet Torah which obligated her to pay full tuition regardless of any subsequent IEP development (id. at pp. 11-12). Further, the IHO determined that, even if the district had

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<sup>6</sup> The parent's opposition to the district's motion to dismiss is not paginated; accordingly, for purposes of this decision, the document shall be cited by reference to pages 1-5 (with the email to the IHO as page 1 and the first page of the motion as page 2 and so on), except when reference to paragraphs would be more appropriate (see IHO Ex. II at pp. 1-5).

<sup>7</sup> According to the exhibit list and the transcript of the impartial hearing, Parent Exhibit B was intended to be the February 2022 IESP but instead the parent submitted a copy of the student's February 2020 IESP (IHO Decision at p. 11; Tr. pp. 12, 30; Parent Ex. B). The IHO noted this discrepancy on October 29, 2024 in an email to the parties and requested for the February 2022 IESP to be provided (IHO Ex. III at p. 1). The student's February 2022 IESP was not included in the hearing record (see Parent Exs. A-R; IHO Exs. I-III).

convened and developed an IEP and placement for the student for the remainder of the 2022-23 school year, regardless of whether the parent accepted the district placement or not, she would have still been responsible for the full tuition at Tiferet Torah (*id.* at p. 12). Accordingly, the IHO found that the hearing record and the equitable considerations did not support the parent's claim for tuition funding for the 2022-23 school year and granted the district's motion to dismiss (*id.*).

Regarding the 2023-24 school year, the IHO determined that the district failed to offer a FAPE for the 2023-2024 school year as it did not create an IEP or offer a placement for the student despite the parent's requests (IHO Decision at p. 12). However, the IHO found that the parent did not meet her burden of proving the appropriateness of the student's placement at Tiferet Torah because the evidence did not demonstrate how the curriculum was tailored to the student's specific needs or how the student responded to interventions (*id.* at pp. 13-14). The IHO concluded that equitable considerations also did not support the parent's claim for tuition funding for the 2023-24 school year, as the parent had already committed to paying the tuition for the Tiferet Torah program before requesting an IEP from the district (*id.* at p. 14). Accordingly, the IHO denied tuition funding for both the 2022-23 and 2023-24 school year (*id.*).

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

The parent appeals, arguing that the district failed to offer a FAPE for both the 2022-23 and 2023-24 school years. Regarding the 2022-23 school year the parent alleges that the IHO erred in granting the district's motion to dismiss, arguing that the IHO dismissed her claims for a longer period than requested by the district and failed to provide a full decision on the student's unilateral placement and equitable considerations for such school year. The parent also claims that the district did not create an appropriate IEP and failed to provide a public school placement for the student for the 2023-24 school year. The parent asserts that the student's unilateral placement at Tiferet Torah was appropriate for the student for both school years, as the school created an individualized program that met the student's unique needs and enabled meaningful progress. The parent claims that the equitable considerations favor her request for relief because she cooperated with the district, sent proper notices, and did not interfere with the district's ability to provide a FAPE. As relief, the parent seeks an award of tuition funding for both school years at issue.

In an answer, the district argues that the hearing record supports the IHO's decision to dismiss claims for the 2022-23 school year, arguing that the parent's lack of standing and the timeline of the FAPE obligation justified the dismissal. Further, the district argues that the parent failed to prove that the unilateral placement at Tiferet Torah was appropriate for the 2023-24 school year because the evidence provided was too general and did not demonstrate that the program was tailored to the student's unique needs. The district also argues that equitable considerations do not support an award of tuition reimbursement for the 2023-24 school year, as the parent did not cooperate with the district and failed to provide timely notice of the unilateral placement. The district requests a dismissal of the parent's request for review and to affirm the IHO's decision denying tuition funding for both school years.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations



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

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

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<sup>8</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" (Endrew F., 580 U.S. at 402).



## VI. Discussion

At the outset, the district does not appeal from the IHO's determination that it failed to offer the student a FAPE for the 2023-24 school year; accordingly, such finding 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 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. Scope of the Impartial Hearing & FAPE for the 2022-23 School Year

As an initial matter, it must be determined if the IHO erred by granting the district's motion to dismiss for the entire 2022-23 school year.

A review of the IHO's decision shows that the IHO granted the district's motion to dismiss for the entire 2022-23 school year because she determined that the parent was not entitled to tuition funding based on the merits (IHO Decision at pp. 11-12). In addition to finding that the parent did not establish disagreement with the February 2022 IESP and "that the earliest date on which the District was obligated to create an IEP for the student was sixty days after the December 26, 2022 correspondence," the IHO also determined as an equitable consideration that the contract the parent entered into with Tiferet Torah had an unconditional obligation clause that bound the parent to the terms of the contract whether the district offered the student an IEP or not (*id.*). The IHO stated that "[g]iven the terms of the [c]ontract . . . the record and equities do not support the [p]arent's claim for tuition funding for the 2022-2023 school year and [d]istrict's motion to dismiss such a claim is granted" (*id.* at p. 12). The IHO's finding on equitable considerations will be addressed below.

With respect to the parent's disagreement with the February 2022 IESP, although the IHO framed her findings in terms of the parent's failure to present particular evidence, the issue is more one of whether the parent's disagreement with the February 2022 IESP was within the scope of the impartial hearing. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, within the due process complaint notice, the parent stated that the student's last IESP was developed on February 3, 2022 and noted the services recommended in that plan (Parent Ex. A at p. 3). The parent went on to state that, for the 2022-23 and 2023-23 school year, the student

needed a full time special education classroom and a behavior plan (*id.* at pp. 3-4). The parent then summarized letters that she sent to the district beginning with her December 2022 letter in which she requested an IEP and a public-school placement (*id.* at p. 4). As for the allegation of a denial of a FAPE, the parent asserted that the district "failed to reevaluate, reconvene an IEP, and provide a timely and appropriate program, and placement for the student (*id.* [emphasis added]).

The parent's due process complaint notice can not reasonably be read to raise an allegation regarding the appropriateness of the February 2022 IESP (*see* Parent Ex. A).<sup>9</sup> Instead, the allegation asserted by the parent relates to the lack of an IEP for the student.<sup>10</sup> Accordingly, while my reasoning differs from the IHOs, I do not find that the IHO erred in declining to address the appropriateness of the February 2022 IESP.

Turning to the issue within the scope of the impartial hearing, the parties dispute whether the district was required to develop an IEP for the student during the 2022-23 school year and, if so, when. Leading into the 2022-23 school year, there is no dispute that a February 2022 IESP was in place (*see* Parent Ex. A).<sup>11</sup> The parent did not allege in the due process complaint notice that the February 2022 CSE should have developed an IEP rather than an IESP (*see id.*). Further, in her due process complaint notice and direct testimony by affidavit, the parent indicated that she requested an IEP from the district in December 2022, not before (Parent Exs. A at p. 4; R ¶ 3; *see*

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<sup>9</sup> This is not an instance where the parent's due process complaint notice alleged that the IESP was inadequate or improper and, in conjunction with such allegation, contended that the student needed a full time special education program (*see Application of a Student with a Disability*, Appeal No. 24-393).

<sup>10</sup> When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of *M.H. v. New York City Department of Education* (685 F.3d at 250-51; *see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D.*, 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; *B.M.*, 569 Fed. App'x at 59; *J.G. v. Brewster Cent. Sch. Dist.*, 2018 WL 749010, at \*10 [S.D.N.Y. Feb. 7, 2018]; *C.M. v. New York City Dep't of Educ.*, 2017 WL 607579, at \*14 [S.D.N.Y. Feb. 14, 2017]; *D.B. v. New York City Dep't of Educ.*, 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; *N.K. v. New York City Dep't of Educ.*, 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; *A.M. v. New York City Dep't of Educ.*, 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; *J.C.S. v. Blind Brook-Rye Union Free Sch. Dist.*, 2013 WL 3975942, \*9 [S.D.N.Y. Aug. 5, 2013]). Here, as the district presented no testimony at the impartial hearing, there is no basis for a finding that the district opened the door to the issue of the appropriateness of the February 2022 IESP.

<sup>11</sup> Under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*). Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c.

Parent Ex. H). The language in the December 2022 letter reflects that it had "become clear" to the parent that the student's needs could not be met in a general education classroom, implying that it had not previously been clear to the parent that she wanted the district to develop an IEP for the student (Parent Ex. H at p. 2).

Relevant to the district's obligation to offer the student a FAPE after having developed the IESP, in its Official Analysis to Comments in the Federal Register, the United States Department of Education noted that, when a student is placed in a nonpublic school located outside of the district, a student's district of residence is responsible for providing FAPE but further indicated that, "[i]f the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child" (71 Fed. Reg. 46,593 [Aug. 14, 2006]).<sup>12</sup> The United States Department of Education has maintained this position in relatively recent guidance answering the following question:

If a parent makes clear his or her intention to keep the child with a disability enrolled in the private school, is the LEA where the child resides obligated to offer FAPE to the child and develop an individualized education program (IEP) for the following school year, and annually thereafter?

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

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

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

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<sup>12</sup> Here, the district is both the district of residence and the district of location.

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

Here, the hearing record shows that, in December 2022, the parent requested that the district reconvene the CSE for the purpose of providing a full-time special education placement for the student (Parent Ex. H). Hence, the December 2022 letter placed the district on notice that the parent no longer wanted an IESP and triggered the district's obligation to convene the CSE.

State regulation provides that "within 60 school days of the referral for review of the student with a disability, the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[d], [e][i]).<sup>14</sup> Here, the parent's December 2022 letter triggered the district's 60 day timeline, which means, taking into account school vacations and days off, by approximately April 4, 2023, the district should have convened the CSE to develop an IEP for the student. However, the hearing record contains no evidence that the district reconvened the CSE, explained its refusal to do so, or responded to the parent's December 2022 letter in any way. By failing to act in response to the parent's December 2022 letter, the district violated the procedural requirements of the IDEA and its State counterpart.<sup>15</sup>

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

<sup>14</sup> According to a parent guide published in 2002 by the State Education Department's Office of Vocational Rehabilitation and Educational Services for Individuals with Disabilities (VESID), a "referral for review means the projected date of review as noted on [the student's] IEP or the date of the request for such review by [the parent], [the student's] teacher or another appropriate individual" ("Special Education in New York State for Children Ages 3–21 A Parent's Guide," at p. 23 [May 2022], available at <https://www.nysed.gov/sites/default/files/programs/special-education/a-parents-guide-to-special-education.pdf>).

<sup>15</sup> Even if the district had an obligation to develop an IEP annually for the student despite the parent's enrollment

Since the district did not reconvene the CSE by April 4, 2023, the district denied the student a FAPE for at least a portion of the 2022-23 school year. Although I do not find basis to disturb the IHO's finding that the "earliest date on which the District was obligated to create an IEP for the student was sixty days after the December 26, 2022 correspondence" (IHO Decision at pp. 11-12), I find that the IHO should have gone further to find a denial of a FAPE on this ground. In addition, the IHO should have made a determination as to whether Tiferet Torah was an appropriate unilateral placement for the student for at least that portion of the 2022-23 school year before weighing whether the equitable considerations favored the parent.

## **B. Unilateral Placement**

I turn now to the parties' dispute regarding whether Tiferet Torah was an appropriate unilateral placement for the student during the 2022-23 and 2023-24 school years.

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.

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of the student in a nonpublic school at her own expense, on equitable grounds, as set forth below, I would not find that the parent was entitled to any relief for the period of time preceding April 4, 2023.

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**

A brief discussion of the student's needs provides context for the issue to be resolved, namely, whether Tiferet Torah delivered specially designed instruction to the student to address his unique needs during the 2022-23 and 2023-24 school years. The hearing record did not include the student's February 2022 IESP, therefore, the student's needs are extrapolated from the program supervisor's affidavit and the psychoeducational evaluation completed in August 2022 (see Parent Exs. B; P; Q).

A school psychologist conducted a psychoeducational evaluation of the student in August 2022 when the student was 14 years old (Parent Ex. P at pp. 1, 6).<sup>16</sup> The evaluation took place over three days during which the evaluator reported the student was focused, worked at a consistent pace throughout the evaluation, and did not require a break during testing (id. at pp. 1, 3). The student's overall cognitive abilities fell within the borderline range and he demonstrated relative strengths with performance falling in the average and low average range, respectively, on tasks measuring verbal comprehension and visual spatial skills (id. at pp. 2-4). According to the evaluation report, the student's academic skills in word reading, reading comprehension, math problem solving, and numeral operations fell within the borderline range (id. at pp. 2-5). Areas of greatest difficulty were spelling and essay composition with the student's performance falling in the extremely low range (id. at pp. 2-5). The student wrote one paragraph for the essay composition subtest with many of the words unrecognizable due to illegible handwriting (id. at p. 5). On a measure of adaptive behavior, the student's teacher rated his communication, daily living, and socialization skills to be in the low average range (id. at pp. 3, 5-6). The school psychologist recommended the student receive "highly effective instruction in reading, writing, and math" in a 12:1+2 special class as well as two sessions per week of individual OT to improve his handwriting (id. at p. 6).

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<sup>16</sup> The hearing record does not indicate whether the district conducted this evaluation, or it was privately obtained by the parent, or whether it was shared with the district.

The program supervisor at Tiferet Torah testified via affidavit that the student entered the program with delays in multiple areas, including social/behavioral, cognitive, and academic domains, as well as expressive and receptive language deficits (Parent Ex. Q ¶¶ 3, 13). According to the program supervisor, the student was easily angered, struggled to regulate his emotions, displayed a pessimistic attitude when challenged, broke school and classroom rules, did not follow classroom routines, struggled to control his impulses, disrupted classroom lessons, was disorganized and not prepared for class, and had poor self-esteem (id. ¶ 14). The student also lacked basic social skills which made it difficult for him to maintain positive peer relationships, he avoided interacting with peers, struggled to initiate friendships, and annoyed peers which instigated conflict (id. ¶ 15). Additionally, the program supervisor reported that the student had difficulty regulating his emotions, struggled to self-calm when frustrated, and was "generally indifferent to the emotions of others" (id.).

Cognitively, the program supervisor testified that the student had "severe" deficits that impaired his academic learning including limited comprehension abilities, and poor processing, critical thinking, and working memory skills (Parent Ex. Q ¶ 16). The program supervisor testified that the student required an extended period of time to learn new topics and struggled to apply it to his work (id.). Further, the student struggled to express his thoughts and ideas in a coherent manner, did not use proper grammar when speaking and writing, and had deficits in vocabulary (id.). Additionally, the student engaged in off-task behavior, did not complete classroom tasks, struggled to focus on tasks and teacher lessons, and had difficulty maintaining a calm body (id.).

Academically, the program supervisor stated the student was functioning below grade level in math and English language arts (ELA), which is supported by the results of the August 2022 psychoeducational evaluation (compare Parent Ex. P at pp. 2-5, with Parent Ex. Q ¶ 17). According to the program supervisor, the student had difficulty reading grade-level text and answering questions based on the text (Parent Ex. Q ¶ 17). In writing, the student had difficulty organizing his thoughts, using proper grammar, and expressing his thoughts and ideas in writing (id.). The program supervisor testified that the student struggled with all math topics, was below grade level in numerical operations and reading comprehension, and struggled to read fluently (id.).

## **2. Appropriateness of Tiferet Torah**

Turning to the unilateral placement, the IHO determined that the parent did not meet her burden to show that Tiferet Torah delivered specially designed instruction to meet the unique needs of the student (IHO Decision at pp. 13-14). The IHO reasoned that the information did not sufficiently describe how the curriculum was modified for the student, how the student responded to interventions used or why certain interventions were used over others, and that the OT and counseling progress reports failed to sufficiently describe the methods used or how the student responded to those services (id. at p. 13). As identified above, the IHO erred by failing to address the appropriateness of the student's Tiferet Torah program for the 2022-23 school year (id. at pp. 11-12).

The evidence in the hearing record shows that Tiferet Torah was a boys high school program "housed in a separate wing" of a general education nonpublic school and provided services to students "with learning disabilities, behavioral issues and attention deficit disorders" in



a "self-contained environment" with "small, structured classes" (Parent Exs. C at p. 4; Q ¶¶ 5, 7). The program aligned itself with the New York State Common Core Curriculum, but modified instruction in "many different ways" to meet the needs of individual students (Parent Ex. Q ¶ 6). Further, the program was "aligned with the [applied behavior analysis] ABA methodology" which included "electronic data collection" that created an individual profile for each student and "drove the instruction" (id. ¶¶ 6, 10). According to the program supervisor, clear and direct instructions were provided for each student with specific material allocated for the instruction, and clear and direct reinforcement plans/point system were used for the "class as a whole" and for individual students (id. ¶ 6). Access to general education students during the day allowed students in the Tiferet Torah program the opportunity to engage and benefit from peer models to build social skills, confidence, and self-esteem (id. ¶ 9).

#### **a. 2022-23 School Year**

During the 2022-23 school year, the student was in ninth grade in a special class up to 12 students with disabilities, one State-certified special education teacher, and an assistant during secular instruction (Parent Ex. Q ¶ 19). In addition to classroom instruction, the student received two 30-minute sessions per week of individual OT and one 30-minute session per week of group counseling sessions (id.; see Parent Ex. E).

To address the student's needs, in August 2022, Tiferet Torah conducted a functional behavioral assessment (FBA) of the student and, in September 2022, developed a behavior intervention plan (BIP) (Parent Exs. G at pp. 2, 8; Q ¶ 12). Review of the FBA showed it incorporated State regulations regarding the content of an FBA, including the identification and definitions of the target behaviors, data sources, setting events, antecedents and consequences, function of the behaviors, skill deficits related to the behaviors, baseline data, functional hypothesis, behavioral supports and interventions, reinforcers, and replacement behaviors (Parent Ex. G at pp. 2-6; see 8 NYCRR 200.1[r]; 200.22[a][3]). The September 2022 BIP identified four target behaviors and provided baseline data from September 2022 and "current status" as of June 2023 (Parent Ex. G at p. 8). The program supervisor testified by affidavit that the behavior plan was frequently monitored to help replace maladaptive behaviors with functionally equivalent appropriate behaviors (Parent Ex. Q ¶ 20). A reward system was utilized to motivate the student and increase his concentration and participation in class (id.). The BIP showed a reduction in the four identified behaviors from September 2022 to June 2023 (Parent Ex. G at p. 8).

In regard to how instruction was tailored toward the student's unique needs, the program supervisor testified the following strategies were used with the student: "DTT, NET," Premack Principle, positive reinforcement, teaching replacement behaviors, social skills training, prompt hierarchy, shaping, prompt fading, task analysis, sensory toys, "FCT," "mand for break," coping mechanisms, prompting, "DRI, DRA," scaffolding, graphic organizer, redirection, social stories, sensory breaks, and sensory activities, and that "[e]xtinction and response block were utilized to decrease maladaptive behaviors" (Parent Ex. Q ¶ 21).<sup>17</sup> The program supervisor stated, "[b]y virtue of being part of a class with a low student-to-teacher ratio, [Tiferet Torah] was able to offer [the student] a personalized program which was designed to support him in his areas of deficiency

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<sup>17</sup> The hearing record did not define the acronyms the program supervisor referred to in his affidavit.

and challenge, and to enable him to make academic and functional progress" (id. ¶ 20). In addition, the program supervisor reported that the student required social skills training to interact with others, program modification and accommodations in the classroom, differentiated instruction, frequent prompting, redirection, and repetition to initiate, remain focused, and follow through with his assignments (id. ¶ 18).

Furthermore, Tiferet Torah developed a treatment plan for the student on September 15, 2022, which included teacher progress reports from February 2023 and June 2023 (Parent Ex. G at pp. 11-22). The treatment plan identified the student's then-current functioning and areas of need in communication, socialization, maladaptive behaviors, attention, math, reading, and writing (id. at pp. 11-13). Individual goals were set for communication, social skills, math, and ELA (id. at pp. 12-16). Review of the student's treatment plan reflects documentation of the student's progress toward the communication and socialization goals from baseline (September 2022) to June 2023 (id. at pp. 14-16).

In the area of reading, the teacher progress reports indicated the student made progress in reading comprehension and decoding and was working on reading with expression (Parent Ex. G at pp. 18, 20). The student benefited from stopping every few sentences when reading longer passages (id. at p. 18). The June 2023 teacher progress report indicated the student made progress in reading comprehension over the school year but continued to struggle and "would benefit from reading over the summer months to prevent regression" (id. at p. 20). In writing, the teacher progress report noted the student benefited from graphic organizers, spell check tools, and extended time to complete writing tasks (id.). He was reported to have become more cooperative in trying writing tasks, his spelling test average improved, and he learned many grammar rules (id. at p. 21).

According to the February 2023 teacher progress report, in the area of math, the teacher identified the following "tools, accommodations, special education methods used to teach math concepts (specifically for the student and in general for the class)": small classroom setting, visual prompts, functional communication training, advance warning, incremented tasks, and scheduled breaks (Parent Ex. G at p. 17). The June 2023 teacher progress report indicated the student "benefit[ed] from a small group learning, incremented tasks, review, and visual learning" (id. at p. 20). Additionally, the report indicated that the student made progress over the school year and was learning about "equivalent fractions, mixed numbers, comparing and ordering fractions" (id.).

While there are no specific progress reports provided in the areas of OT and counseling services for the 2022-23 school year (see Parent Exs. A-R; IHO Exs. I-III), the BIP and treatment plan identified strategies and goals that Tiferet Torah to address the student's organization skills, focus and attention, and social skills (see Parent Ex. G). For example, the BIP provided that the student's organization skills would be met in a social skills group in which the teacher would help the student organize his materials (id. at p. 9). The student's attention and focus would be addressed with strategies such as use of visual schedules and timers, scheduled breaks, and sensory lessons (id. at p. 8). In the areas of social skills, the treatment plan identified goals related to regulation and understanding of emotions, communication, conflict resolution, self esteem, and engagement with peers (id. at pp. 15-16).

Given the information included in the hearing record and the student's areas of need and taking into account the totality of the circumstances, the hearing record demonstrates that Tiferet Torah delivered specially designed instruction through the development of an FBA, a BIP, and a treatment plan, and the program supervisor and teacher progress reports identified the specific instructional strategies used with the student during the 2022-23 school year.

#### **b. 2023-24 School Year**

The student continued to attend Tiferet Torah for tenth grade in a 12:1+1 special class for the 2023-24 school year (Parent Exs. I at pp. 1-4; Q ¶¶ 11, 19). In August 2023, Tiferet Torah conducted an FBA of the student and, in September 2023, developed a BIP (Parent Ex. M at pp. 2, 8). The BIP focused on six of the student's behaviors including lack of task completion, disorganization, lack of joint attention (defined as daydreaming, staring out window or doodling), misconduct (defined as ignoring classroom rules or doing as he desired), purposeful disturbances (defined as talking to his peers when teacher is not looking), and lying (*id.* at pp. 8-9). The BIP identified the antecedents, function of the behavior, baseline data and "current status" data as of June 2024, and replacement behavior/techniques used to address the behavior (*id.*). Strategies for addressing these behaviors included: visual schedule/visual timer displayed in classroom, breaks provided in student's schedule, verbal praise, visual and verbal cues for redirection, classroom rules displayed, earned points toward classroom privileges, token economy, planned ignoring of certain behavior, social stories, and conversations with the teacher (*id.* at pp. 8-10). The student made progress in reducing the targeted behaviors in the BIP, with the student mastering two behaviors of lack of task completion and disorganization (*id.* at pp. 8-9).

The program supervisor identified multiple individual strategies used with the student during the 2023-24 school year including: "DTT, NET," Premack Principle, positive reinforcement, teaching replacement behaviors, social skills training, prompt hierarchy, shaping, prompt fading, task analysis, sensory toys, prompting, "FCT," "mand for break," coping mechanisms, "DRI, DRA," scaffolding, graphic organizer, redirection, social stories, sensory breaks, and sensory activities (Parent Ex. Q ¶ 21). In addition, the program supervisor indicated that the student learned from "peer role modeling and practic[ing] behavior management" and that the "intense and comprehensive supports provided for [the student] allowed him to make meaningful progress" (*id.* ¶¶ 21; 22).

The September 2023 treatment plan identified the student's current functioning and areas of need in the areas of communication, social skills, maladaptive behaviors, cognitive skills, attention, math, reading, and writing (Parent Ex. M at pp. 12-26). Tiferet Torah developed individual goals for the student to improve his communication, social, math, reading, and writing skills (*id.* at pp. 13-19).

In reading, the teacher reported that the student's decoding and fluency skills were "significantly below grade level" (Parent Ex. M at p. 13). The student struggled to blend sounds and his reading was slow, especially when given unfamiliar or more complex words (*id.*). He was able to identify key points in a text but had difficulty rewording it using his own words (*id.*). According to the November 2023 teacher progress report, the student mastered goals when presented with how, why, and what-if questions, repetition, phrasing for meaning and oral rereading, prompting and modeling, and would work on upcoming goals using verbal cues, direct

instruction, visual maps, modeling, repetition, phrasing for meaning and oral rereading (*id.* at p. 21). By June 2024, the student made progress in his ability to respond to multiple choice questions based on what he read and had "increased the frequency in which he accurately organize[d] information by main idea" (*id.* at pp. 24, 25). The teacher reported the student had mastered goals to increase his vocabulary skills given verbal cues, improve his comprehension skills via silent reading to respond to multiple choice, cite the main idea of a grade level text, improve his decoding skills and fluency, and organize information by main idea (*id.* at p. 25). The program supervisor testified that "[w]ith interventions in place," the student improved in his decoding and fluency skills, and his vocabulary expanded (Parent Ex. Q ¶ 22).

In terms of writing, the November 2023 progress report stated that the student's handwriting was poor, which negatively impacted his ability to express himself through writing (Parent Ex. M at pp. 20, 22).<sup>18</sup> He was reported to have "notable clarity of thought when it [came] to analysis," but his spelling and grammar were poor (*id.* at p. 22). The student struggled to brainstorm ideas in relation to a main topic, but with prompting his performance improved (*id.*). The June 2024 teacher progress report stated the student had "relatively high comprehension and inferential abilities which [came] across when he manage[d] to write legibly" (*id.* at pp. 24, 25). The student mastered the following writing goals: to spell words using knowledge of prefixes, suffixes, and root words, write using the pronoun that agreed with the antecedent, capitalize days/months/years, incorporate details in his sentences, and write using collective nouns (*id.* at p. 26). The student's new goals were designed to improve his ability to answer questions in writing after reading grade level texts, interpret texts with a point of view, provide a concluding statement explaining the significance of the argument, and write a proper introductory paragraph (*id.*). The program supervisor testified that the student "worked on his grammar skills" (Parent Ex. Q ¶ 22).

In math, the treatment plan reflected that the student was "functioning below grade level" (Parent Ex. M at pp. 12, 13). The student had a solid understanding of basic arithmetic operations but had difficulty with more complex concepts (*id.* at p. 13). According to the treatment plan, the student benefited from one-to-one learning, additional practice, hands-on manipulatives, visual aids, explicit instruction to reinforce math skills, visual cues, graphic calculator, extra time for class worksheets and exams, "easier work," and "less questions" to answer (*id.* at pp. 13, 20, 24). The November 2023 and June 2024 progress reports identified "mastered" math goals (*id.* at pp. 20, 24). The program supervisor testified that the student made progress in his math skills (Parent Ex. Q ¶ 22).

Turning to OT, the two progress reports from November 2023 and June 2024 indicated that the student had difficulty with organizational skills, focus and attention, and computer typing skills (Parent Ex. M at pp. 28, 29). The occupational therapist reported that the student made gains in organization, grasping, and attention span in the November 2023 progress report (*id.* at p. 28). In June 2024, the occupational therapist wrote that "[w]orking in therapy to complete exercises and focusing on [the student's] organizational skills ha[d] allowed [the student] to cope better with classroom activities" (*id.* at p. 29). According to the occupational therapist, "[a] full complement

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<sup>18</sup> According to the teacher progress report, the student's handwriting was rated a "2" on a scale from 1 (poor legibility) to 5 (good legibility) (Parent Ex. M at p. 22).

of OT services w[ould] improve [the student's] chances of making appropriate gains in all developmental deficits" (id.).

In the areas of communication and social skills, the treatment plan identified baseline data from June 2023 and "current level" data in June 2024, criteria for mastery of the goal, and whether the student met the goal or at what percentage the student was currently performing (Parent Ex. M at pp. 15-19). The teacher progress report stated the student had difficulty interacting with peers and focusing while in class (id. at pp. 23, 26). To improve the student's social/emotional functioning and interpersonal relationships, the teacher reported providing one-to-one attention, specific praise, and predetermined reinforcers (id.).

The student's counseling progress reports reflected areas of concern included aggression, poor social skills, and self-esteem (Parent Ex. M at pp. 30, 31). Several counseling goals included a treatment strategy for the student to learn the skills "during DTT with verbal support" (id. at p. 18). The November 2023 counseling report reflected goals for the student to reduce the intensity/frequency of verbal and physical aggression, resolve core issues that were the source of his aggression, improve ability to express anger in a healthy manner, gain improved sense of self, show an increase in self-esteem, establish/maintain a friendship with a peer, be accepted by peers, and develop the skills necessary to handle common social situations (id. at p. 30). By June 2024, the counselor reported that the student had "significantly reduced the intensity and frequency of his verbal and physical aggression" by using the skills he learned in therapy and demonstrated some improvement in his social skills and self-esteem (id. at p. 31). Additionally, the counselor reported that the student had "made great strides in regulating his frustration/anger" although it remained an issue, and that he continued to exhibit poor self-esteem (id.). The counseling report reflected "[n]ew [g]oals" for the student to work on during the upcoming school year (id.).

Given the above discussion, review of the evidence in the hearing record shows that the parent met her burden to prove that Tiferet Torah provided the student with specially designed to meet the student's unique needs, and the IHO's decision to the contrary is not supported by the hearing record. Rather, the evidence reflects that Tiferet Torah conducted an FBA, developed a BIP and individual academic, social, and communication goals, and provided specially designed instruction to address those goals during the 2022-23 and 2023-24 school years.

### **C. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New

York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

As an initial matter, the parent cites to R.E. to argue that a substantive inadequacy of a proposed placement "automatically entitles the parents to reimbursement"; however, this is an inaccurate representation of the finding of R.E. (Req. for Rev. ¶ 26). In R.E. the Court was distinguishing between substantive and procedural violations of the IDEA (see R.E., 694 F.3d at 190-191). The Court noted that a substantive inadequacy would not require the further analysis of whether the violation "impeded the child's right to a [FAPE]," 'significantly impeded the parents' opportunity to participate in the decision making process,' or 'caused a deprivation of educational benefits'" as would a procedural violation, and, prior to this, the Court articulated the standard requiring a finding that equitable considerations favor the parents in order to award tuition reimbursement (R.E., 694 F.3d at 185, 194, quoting 20 U.S.C. § 1415[f][3][E][ii]). Further, it has been held that arguments similar to the parent's "conflate[] the first and third prongs" (Mejia v. Banks, 2024 WL 4350866, at \*8 [S.D.N.Y. Sept. 30, 2024]; Landsman v. Banks, 2024 WL 3605970, at \*5 [S.D.N.Y. July 31, 2024]). Indeed, "[t]here would be no need for a third prong—the equities—if it were the case that a finding of a denial of FAPE and an appropriate unilateral placement (the first two prongs) precluded denial or reduction of reimbursement costs for families" (Donohue v. New York City Dep't of Educ., 2021 WL 4481344, at \*10 n.4 [S.D.N.Y. Sept. 30, 2021]; Melendez v. Porter, 2023 WL 4362557, at \*9 [E.D.N.Y. July 6, 2023] [noting that, even if a district conceded it denied the student a FAPE, a review of the record to separately weigh the equities is required]).

The IHO determined that the equitable considerations did not favor the parent's requested relief for either the 2022-23 or the 2023-24 school year because the parent had already committed to paying the tuition at Tiferet Torah before requesting an IEP from the district (see IHO Decision at pp. 12, 14). The parent argues that the IHO's finding that the enrollment contracts were signed before her notices to the district is an irrelevant point since she attempted to actively participate in the IEP process. To be sure, the Second Circuit has held that, even when parents have no intention of placing a student in the recommended program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L., 744 F.3d at 840). Accordingly, the timing of the parent's contract is not, on its own, determinative of the matter. However, reimbursement/funding may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st



Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The parent's December 2022 letter was not dated more than 10 business days prior to the first day of the 2023-24 school year (see Parent Ex. H). As noted above, for the 2022-23 school year, the parent initially sent a notice of her request for an IEP and public school placement from the district in her December 2022 letter, and, in the same correspondence, informed the district that "[t]he needs of [the student] [we]re such that he c[ould] not wait for an evaluation and placement to be offered to him" and that therefore, she "inted[ed] to unilaterally place" the student at Tiferet Torah (id. at p. 2). The letter was sent almost four months after the parent signed the unconditional enrollment contract for the student's attendance at the unilateral placement on August 22, 2022 (Parent Exs. C at p. 3; H at p. 2).<sup>19</sup> Further, although the parent's December 2022 letter to the district stated a future intent to unilaterally place the student, in fact, the student had already been attending Tiferet Torah since September 1, 2022 (Parent Ex. F).<sup>20</sup>

Overall, the timing of the notice of unilateral placement may have been a factor to be weighed, but, more indicative of the parent's cooperation in this matter, or the lack thereof, is the timing of the parent's notice to the district of her request for a public school placement for the student, which just happened to be in the same letter as the statement of intent to unilaterally place the student (Parent Ex. H). As noted above, even if the parent's prior intent to place the student at her own expense was not determinative of the district's obligation to offer the student a FAPE, it is a factor for the balancing of equities (see R.G., 585 F. Supp. 3d at 539; E.T., 2012 WL 5936537, at \*16). The phrasing and timing of the December 2022 letter requesting that the district develop an IEP reflects a lack of genuine cooperation, as the parent removed the student before given the district an opportunity to respond to the parent's request for a public school placement (Parent Ex. B at p. 2). In preempting the district, the parent did not give the district an opportunity to engage in educational planning before the student was removed and unilaterally placed in Tiferet Torah Program for the 2022-23 school year.

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<sup>19</sup> Here, both the enrollment contracts for the student to attend Tiferet Torah for the 2022-23 and 2023-24 school year included an "UNCONDITIONAL OBLIGATION" clause which stated "[e]nrollment of the student by submission of this contract to the school [is] an unconditional commitment for payment of the full tuition for the school year without any right to deduction, credit, and prorated apportionment of refund for any reason, including, without limitation, withdrawal, dismissal, absence, or illness of the student" (Parent Exs. C at p. 1; I at p. 1).

<sup>20</sup> The parent does not deny that the December 2022 letter providing notice of her intent to unilaterally place the student was untimely. Instead, the parent argues that "it would be inequitable under the specific facts of th[e] case to reduce the funding of the [s]tudent's tuition expenses" and also alleges she did not receive any procedural notices (Req. for Rev. ¶ 27). The IDEA provides that an award of reimbursement may not be reduced or denied if the parent did not receive a procedural safeguards notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504). The parent testified that she did not receive a procedural safeguards notice "within a year prior to the start of the 2022-2023 and 2023-2024 school years" (Parent Ex. R ¶ 5).



With respect to the 2023-24 school year, however, as of the beginning of the school year, the district had still not responded to the parent's December 2022 letter requesting an IEP and public school placement. The hearing record indicates that the parent signed the enrollment contract for the student to attend Tiferet Torah on August 22, 2023 (Parent Ex. I at p. 3). Then on September 11, 2023, the parent sent a letter again requesting that the district evaluate the student and convene the CSE to create an IEP, along with notifying the district of her intent to enroll the student "in a private special education program" (Parent Ex. N at p. 2). The district did not respond to the September or November 2023 letters.

While the IHO relied on the timing of the parent's August 2023 contract with Tiferet Torah and the parent's September 2023 letter to the district stating her intent to unilaterally place the student for the 2023-24 school year, I find that, given that the district had still not responded to the parent's December 2022 letter, the parent's delay in communicating with the district at the beginning of the 2023-24 school year does not weigh against her requested relief for the 2023-24 school year. Accordingly, the IHO's determination that equitable considerations warranted a denial for tuition funding for the 2023-24 school year is not support by the hearing record.

## **VII. Conclusion**

The evidence in the hearing record indicates that the district denied the student a FAPE for at least the portion of the 2022-23 school year after April 4, 2023, the parent met her burden to demonstrate that Tiferet Torah was an appropriate unilateral placement for the 2022-23 and 2023-24 school year, and equitable considerations warrant a denial of tuition funding for the 2022-23 school year but support an award of funding for the 2023-24 school year.

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

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated November 4, 2024, is modified by reversing those portions which dismissed the parent's claims relating to the district's failure to offer the student a FAPE for the entirety of the 2022-23 school year; which found that the parent did not meet her burden to prove that Tiferet Torah Program was an appropriate unilateral placement for the student for the 2022-23 and 2023-24 school years; and which found that equitable considerations did not support an award of tuition funding for the 2023-24 school year;

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for any tuition paid and directly fund the remaining costs of the student's tuition at Tiferet Torah for the 2023-24 school year.

**Dated:**           **Albany, New York**  
                      **April 18, 2025**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**