



The University of the State of New York

The State Education Department

State Review Officer

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No. 25-005

Application of a STUDENT WITH A DISABILITY, by her 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, P.C., attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Toni L. Mincieli, 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 daughter's tuition at the Big N Little: Bnos Menachem Program School (Bnos Menachem) for the 2023-24 school year. 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]). 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

A Committee on Preschool Special Education (CPSE) convened on December 9, 2021, to develop an IEP with an implementation date of December 10, 2021 (Parent Ex. B at pp. 1-2, 18, 22). The student was found eligible for special education as a preschool student with a disability (id.). The December 2021 CPSE recommended 12-month services consisting of 26 30-minute sessions (13 hours) per week of special education itinerant teacher (SEIT) services in a group of two, three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of

individual counseling services, and one 30-minute session per week of counseling services in a group of two (id. at pp. 1, 18, 19).¹

A CSE convened on May 11, 2022 to develop an individualized education services program (IESP) with an implementation date of September 6, 2022 (Dist. Ex. 1 at pp. 1, 8). The May 2022 CSE found the student eligible for special education as a student with a speech or language impairment (id. at p. 1).² The May 2022 CSE recommended 10-month services consisting of five periods per week of direct group special education teacher support services (SETSS), three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, one 30-minute session per week of individual counseling services, and one 30-minute session per week of group counseling services (id. at p. 8).³

On August 28, 2023, the parent signed a contract enrolling the student at Bnos Menachem for the 10-month 2023-24 school year (Parent Ex. D at pp. 1-3).⁴ On August 28, 2023, the student was assessed by a Bnos Menachem school psychologist, who prepared a confidential psychoeducational evaluation report (Parent Ex. I at pp. 1-7; see Parent Ex. H at p. 2).

In a letter dated October 17, 2023 that was transmitted to the district by the parent's attorney, the parent notified the district that she did not believe the student's needs could be met in a general education classroom (Parent Ex. J at p. 2).⁵ The parent requested that the district conduct

¹ State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). A list of New York State approved special education programs, including SEIS programs, can be accessed at <https://www.nysed.gov/special-education/approved-preschool-special-education-programs>. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

² The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

³ The CSE's recommendation that the student receive five periods per week of SETSS was listed twice in the IESP (Dist. Ex. 1 at p. 8). SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

⁴ The petitioner in this matter is the student's mother. I note that the hearing record includes two different surnames for the student's mother (compare Parent Exs. A at p. 1; D at p. 3; J at p. 2; K at p. 2, with Tr. pp. 1, 2; Parent Ex. B at pp. 1, 22; C at p. 23; M at pp. 1, 2).

⁵ The first page of the letter was a facsimile cover sheet from the parent's attorney (Parent Ex. J at p. 1). The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

a reevaluation of the student, reconvene "an IEP meeting" for the student, and place the student in a full-time special education classroom for the 2023-24 school year (id.). The parent advised the district that if these issues were not timely addressed, she intended "to unilaterally place [the student] in a private special education program for the 2023-2024 school year" and "seek tuition funding and/or reimbursement from the District for this program" (id.).

A November 16, 2023 entry in the district's special education student information system (SE SIS) log indicated that the district had received a 10-day notice for the 2023-24 school year for the student and that documents related to the student's placement were set to final status (Dist. Ex. 6 at pp. 5-6),

In a December 20, 2023 letter entitled "Ten Day Notice" that was transmitted to the district by the parent's attorney, the parent advised the district that she had previously requested that the district reevaluate the student, reconvene "an IEP meeting" for the student, and place the student in a full-time special education classroom; however, the district had not yet evaluated the student, provided her with an IEP, or offered her any placement (Parent Ex. K at p. 2).⁶ The parent reiterated her request for an evaluation and IEP for the 2023-24 school year (id.). The parent "advised that unless this issue can be resolved, [she] intend[ed] to unilaterally place [the student] in the private special education program" at Bnos Menachem and would "commence proceedings to seek tuition funding and/or reimbursement from the District for this program" (id.).

A January 9, 2024 entry in the district's SE SIS log indicated that a request for reevaluation of the student and a prior written notice for the student's reevaluation had been set to final status (Dist. Ex. 6 at p. 5). An entry in the SE SIS log dated February 6, 2024, stated that the parent had been contacted on January 9, 2024 and on February 6, 2024 to obtain consent for new testing (id.). A February 21, 2024 entry in the SE SIS log noted that the parent had located an August 28, 2023 private psychoeducational evaluation and that "[t]here [wa]s no need for new testing at th[at] time" (id.).

On February 26, 2024, a CSE convened to develop an IEP for the student with an implementation date of March 11, 2024 (Parent Ex. C at pp. 1, 21, 23). The February 2024 CSE continued to find the student eligible for special education and related services as a student with a speech or language impairment (id. at p. 1). The February 2024 CSE recommended 10-month services consisting of 10 periods per week each of math and English language arts (ELA), three periods per week of social studies and two periods per week of sciences in a 12:1+1 special class, one 30-minute session per week of group counseling services, one 30-minute session per week of individual counseling services, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of speech-language therapy (id. at pp. 16-17, 22). According to the SE SIS log, the district sent the parent a prior written notice package for placement on March 1, 2024 (Dist. Ex. 6 at p. 2).

⁶ The first page of the letter was a facsimile cover sheet from the parent's attorney (Parent Ex. K at p. 1). The letter further stated that the parent appointed the attorney's law firm to file a due process complaint notice and act as the parent's point of contact (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated July 11, 2024, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent alleged that the IEPs developed on December 9, 2021, and February 26, 2024 were inadequate and improper (id.). The parent also asserted that the district failed to timely reevaluate the student, failed to timely convene a CSE, and failed to timely develop an IEP and recommend an appropriate placement for the 2023-24 school year (id. at p. 2). The parent also claimed that the student's unilateral enrollment at Bnos Menachem was appropriate (id.). As relief, the parent requested "an impartial hearing and an order for the [s]tudent to remain placed in . . . Bnos Menachem" and for the district to directly fund or reimburse tuition for the 2023-24 school year (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on October 10, 2024 (Tr. pp. 54-89).⁷ In a decision dated November 22, 2024, the IHO found that "the timing of events [wa]s critical" and that the parent's decision to unilaterally enroll the student was made on August 28, 2023, when she signed the enrollment contract with Bnos Menachem (IHO Decision at p. 5). The IHO further found that by signing the enrollment contract, the parent agreed to "an unconditional obligation" to pay the full tuition and as of August 28, 2023, "there was no IEP or IESP in place" (id.). The IHO then determined that the district "had no reason to develop an IEP for [the s]tudent, as they were aware that [the s]tudent was parentally placed, hence the development of the 05/11/2022 IESP" (id. at pp. 5-6). Next, the IHO determined that the parent "did not request that the CSE convene to develop an IEP and offer a public-school placement until October 17, 2023, almost two months after [the p]arent signed the contract" (id. at p. 6). Based on those facts, the IHO concluded that the student had no individual entitlement to special education or related services at the time the parent signed the contract with Bnos Menachem, and thus the district "could not have failed to offer [the s]tudent a FAPE" (id.). The IHO then addressed the appropriateness of the parent's unilateral placement and equitable considerations for completeness of the record (id.).

With regard to the appropriateness of Bnos Menachem, the IHO found that the parent's evidence was "generic" and failed to demonstrate that the student was receiving specially designed instruction to meet her unique needs at Bnos Menachem (IHO Decision at pp. 6-7). Turning to equitable considerations, the IHO noted that an IESP was developed on May 11, 2022 and found that there was "nothing in the record to suggest that [the p]arent expressed any intent during that meeting for [the s]tudent to attend a public school or expressed disagreement with the IESP" (id. at p. 8). Next the IHO determined that the parent's 10-day notice letters were pretextual and disingenuous as the parent had already enrolled the student in a full-time special education

⁷ On August 6, 2024, the IHO held a status conference to address her receipt of three due process complaint notices concerning this student, and which also involved overlapping time periods at issue, as well as representation by two separate attorneys and an advocate (Tr. pp. 1-23; see IHO Decision at p. 3). On August 28, 2024, the IHO held a prehearing conference for this matter, which concerns the 10-month 2023-24 school year (Tr. pp. 24-38).

program and entered into an irrevocable financial obligation for tuition (*id.*).⁸ The IHO determined that equitable considerations were "entirely in [the d]istrict's favor" and had she found the district failed to offer the student a FAPE and that Bnos Menachem was an appropriate unilateral placement, she would have found that the parent was not entitled to any relief based on equitable considerations (*id.*). In conclusion, the IHO denied the parent's request for tuition funding for the 2023-24 school year and dismissed the matter with prejudice (*id.*).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district provided a FAPE when the district did not present evidence to explain why it failed to create an updated program for the 2023-24 school year, failed to defend the recommendations in the IESP and IEP, and failed to respond to the parent's notices.⁹ The parent further argues that the IHO erred in finding that Bnos Menachem was not an appropriate unilateral placement and that equitable considerations supported denying the parent any relief.

In an answer, the district responds to the parent's claims with denials and argues that the IHO's decision should be upheld in its entirety.

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]).

⁸ The IHO also noted that the parent's attorney attempted to raise an issue for the first time in her closing argument, which the IHO declined to address (IHO Decision at p. 8)

⁹ The district correctly noted in its answer that the parent's request for review contains several factual and legal errors (e.g. that the last educational program developed was a December 9, 2021 IESP, that the student was dually-enrolled pursuant to § 3602-c, that the student attended a different nonpublic school, misgendered the student, and requests tuition funding for a different nonpublic school) (Req. for Rev. ¶¶ 2, 7, 22, 24 & p. 10).

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]).¹⁰

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

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

VI. Discussion

A. FAPE- Annual Review

Although the parent's request for review contains numerous errors, the parent generally asserts that the IHO erred in finding that the district offered the student a FAPE and specifically claims that the district failed to have a program in place for the student prior to the start of the 2023-24 school year. The IHO found that the student was not entitled to a FAPE as of August 28, 2023, the date the parent enrolled the student at Bnos Menachem (IHO Decision at pp. 5-6). The IHO further found that the district had no reason to develop an IEP for the 2023-24 school year, because the student had been parentally placed in a nonpublic school for the 2022-23 school year (id. at pp. 5-6, 8). This was error.

The timing of the student's enrollment at Bnos Menachem and the timing of the parent's 10-day notices are issues to be addressed in equitable considerations (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024]), and do not relieve the district of its obligation to have an educational program in place for the student at the start of the 2023-24 school year.

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

¹⁰ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

district, a student's district of residence is responsible for providing a 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]).¹¹ 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 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

¹¹ Here, the district is both the district of residence and the district of location.

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]).¹²

Here, the parent's October 2023 and December 2023 letters contained a clear request for a CSE meeting and expressed the parent's desire that the student be placed in a full-time special education classroom (see Parent Exs. J at p. 2; K at p. 2). Thus, the October 2023 letter placed the district on notice that the parent no longer sought an IESP, as she had for the previous school year and, accordingly, triggered the district's obligation to convene the CSE.

A school district has a continuing statutory requirement to meet and revise a student's IEP periodically, but not less than annually. The IDEA and State regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that a district's failure to finalize an IEP until after the start of the school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

Prior to the start of the 2023-24 school year, the district last convened to create an IESP for the student on May 11, 2022 (see Dist. Ex. 1). The IESP indicated that the projected date for the student's annual review was May 11, 2023 (id. at p. 1). However, the CSE did not convene the CSE for development of either an IEP or an IESP for the student until February 2024, more than

¹² 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 an impact on equitable considerations.

one year after the May 2022 IESP and well after the parent's October 2023 letter requesting a CSE meeting. The mere fact that the student last had an IESP for implementation at the student's nonpublic school does not negate the district's requirement to annually convene a CSE and create a special education program for the student. In fact, as the district is aware, if the parent desired equitable services for the student for the 2023-24 school year, the parent was required to request such services from the district by June 1, 2023 (see Educ. Law § 3602-c[2][a] [a request for equitable services must be filed "on or before the first of June preceding the school year for which the request is made"]¹³). As there is no indication in the hearing record that the parent made such a request for equitable services, and there is no indication in the hearing record that the student no longer required special education services at the start of the 2023-24 school year, the district was required to convene the CSE for an annual review meeting and was also required to have an IEP in place for the student by the start of the 2023-24 school year. Since the district failed to do so, the student was denied a FAPE.

B. Unilateral Placement

The IHO determined that the parent's evidence did not demonstrate that Bnos Menachem offered educational instruction specifically designed to meet the student's unique needs (IHO Decision at p. 7). The IHO found that the program description was general, in that it discussed the school's curriculum and included a generic description of each subject; however, she opined that it did not discuss specifics about the student (id.). The IHO also noted that the student's schedule listed each subject and included a list of related services but gave no information when the student actually received any services other than speech-language therapy (id.). The IHO stated that the parent did not offer witness testimony describing when the student's related services were provided and what classes or subjects were missed by the student while related services were delivered (id.). With regard to the related services reports, treatment plan, and the special education teacher reports, the IHO found that the hearing record was "devoid of the actual work the providers/teachers d[id] with [the s]tudent" (id.). Further, the IHO determined that although the hearing record included evidence of the student's goals, the hearing record did not demonstrate how Bnos Menachem aided the student in reaching the goals (id.). As a result, the IHO found that the parent had not met her burden of demonstrating that Bnos Menachem offered an educational program which addressed the student's unique needs through specialized instruction (id.).

The parent asserts that the IHO erred in finding that she failed to meet her burden of demonstrating Bnos Menachem was an appropriate unilateral placement. The parent argues that she presented extensive testimony and documentation of the student's needs, of the program the school created to address the student's needs, and further demonstrated that the student made meaningful progress.

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

¹³ The statute does not differentiate between students already identified and receiving services pursuant to an IESP during the prior school year and those who are not; however, the law does make exceptions for students first identified as students with disabilities after the June first deadline (Educ. Law § 3602-c[2][a]). Accordingly, to satisfy the statutory notice requirement, parents must make the request each year for which they seek dual enrollment services.

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

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. The Student's Needs

Prior to addressing the adequacy of the unilateral placement, a brief discussion of the evidence related to the student's needs is necessary. On August 28, 2023, a private school psychologist conducted a psychoeducational evaluation of the student (Parent Ex. I at pp. 1-7). At the time of the evaluation, the student was in kindergarten at Bnos Menachem and according to the student's performance on the Wechsler Preschool and Primary Scales of Intelligence-Fourth Edition (WPPSI-IV), the student obtained a full scale IQ of 97 (*id.* at p. 2). The student's composite scores ranged from the low average range on the working memory and processing speed indices, the average range on the verbal comprehension and fluid reasoning indices, and the superior range on the visual spatial index (*id.*).

The May 2022 IESP indicated that in the area of academic performance, the student needed to develop age-appropriate skills related to sequencing, showing awareness of time concepts, predicting the end of a story, attending, and completing simple tasks (Dist. Ex. 1 at p. 1). She had difficulty solving abstract tasks not dependent on visual or tactile materials, following spoken directions, and understanding new ideas (*id.*). The student struggled with looking at people when talking, comprehending the concepts of more and most, understanding inclusion/exclusion words and location words, adjusting to changes in the classroom routine, transitioning from one classroom to another, and getting to and from various locations in her school (*id.*). She also had difficulty matching items based on category, selecting an item that was different in a group, and selecting an item that did not belong, remaining on task, continuing to work when encountering difficulty, following a daily schedule, asking and answering questions, and remaining on topic in conversation (*id.* at pp. 1-2). The student learned best with hands on materials and through play and touch (*id.* at p. 2). The August 2023 psychoeducational evaluation report indicated that on the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4), the student obtained a reading composite standard score of 56 (0.2 percentile), in the "extremely low" range, a written expression composite score of 74 (4th percentile), in the "very low" range, and a mathematics composite standard score of 83 (13th percentile), in the "low average" range (Parent Ex. I at pp. 4-5).

With respect to the student's social/emotional needs, the May 2022 IESP stated that the student had difficulty asking for help and would become increasingly frustrated and not ask for assistance (Dist. Ex. 1 at p. 2). She was unable to maintain eye contact and had difficulty remaining on topic in conversation, often getting distracted and talking about something else (*id.* at p. 3). The student had made progress sharing toys, greeting others, playing with friends, and cooperating during games (*id.*). She struggled with transitions, changes in routine, and shifting focus from one activity to the next (*id.*). She often got upset when a preferred activity ended (*id.*). The August 2023 psychoeducational evaluation report noted that on the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) maladaptive scale, the student's internalizing (*e.g.*, emotional) behaviors v-scale score of 20 was in the elevated range and her externalizing behaviors (*e.g.*, acting out) v-scale score of 21 was in the clinically significant range (Parent Ex. I at pp. 2, 4). According to the psychoeducational evaluation report, the student was "very needy, anxious, irritable, and crie[d] for no clear reason ... ha[d] temper tantrums, disobey[ed] those in authority, and argue[d] with adults ... [could] be active [sic] than her peers and [broke] rules" (*id.* at p. 4). During the classroom observation, the student interrupted the teacher frequently, and despite being told to "hold her thoughts, she persisted in talking, leading to repeated disruptions" to the lesson (*id.* at p.

5). When doing independent work, the student did not have supplies ready and took an "excessive" amount of time to gather the necessary materials (id. at p. 5). She completed the first page of independent work on her own, but as the format of the questions changed, she showed signs of frustration and disengagement, repeatedly stated that the task was too hard, expressed an inability to complete it, and required significant encouragement and support to persevere (id. at p. 5).

The May 2022 IESP further noted that the parent and the student's teacher expressed concerns regarding the student's articulation, expressive language, and receptive language (Dist. Ex.1 at p. 2). The August 2023 psychoeducational evaluation report reflected the student's score in the average range on the WPPSI-IV verbal comprehension index, which required her to listen to questions and respond appropriately (id. at p. 3). The student's verbal comprehension performance was "weaker than her performance on tasks that required her to figure things out by looking at them and use logic to solve problems" (Parent Ex. I at p. 3). The psychoeducational evaluation report additionally related that during the classroom observation, the student demonstrated poor receptive language skills, particularly for comprehending multistep directions and she required "additional support and scaffolding to understand and follow complex directions" (id. at p. 5). Her expressive language skills were also "limited" and she "often resort[ed] to tantrums and meltdowns when frustrated or overwhelmed" (id.).

In terms of her physical development, the student needed to develop the skills to remain on task when distractions occurred, continue to work when encountering difficulty, and follow three-step related directions (Dist. Ex. 1 at p. 3). She had difficulty using a crayon with adequate pressure, performing visual perception activities, and using a mature pencil grip (id.). The student exhibited deficits with motor planning, maneuvering through a simple obstacle course, comprehending orientation and spatial directions, balance/postural and equilibrium reaction activities (id.). She needed to reduce "craving of excessive touching," reduce excessive fidgeting, learn to sit still for longer periods of time, and manage under-responsiveness to vestibular stimuli (id.).

To address the student's needs, the May 2022 CSE recommended five periods of group SETSS per week, three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, one 30-minute session of individual counseling per week, and one 30-minute session of group counseling per week (Dist. Ex. 1 at p. 8). The CSE also recommended supports to address the student's management needs that included praise and encouragement, positive feedback, verbal prompts and cues, checks for understanding, and modeling (id. at pp. 3-4).

2. Specially Designed Instruction

Addressing the appropriateness of the program at Bnos Menachem, the IHO stated that the program description was general and found that the private school's curriculum was not tailored to the student (IHO Decision at p. 7).

A review of the Bnos Menachem program description shows that it is an early childhood program for students with disabilities who have behavioral challenges, language delays, and academic challenges, located within a general education school (Parent Ex. D at p. 4). The program description noted that the school's special education team members collaborated on

"classroom strategies, techniques, and curricula in order to provide appropriate adaptations for students with disabilities," and classroom teachers and related service providers provided students with "support, structure, and guidance that the disabled students require[d] and work[ed] to generalize students' skills across multiple environments and situations" (id.). Learning activities included dramatic play, creative art, music, computers, science and math experiences, development of communication skills, and exposure to literature (id.). Instruction of appropriate social behavior occurred through interactive learning and educational experiences, circle time activities supported students' development of literacy skills and provided a sense of community, and multimodal learning experiences helped to develop literacy, science, math, and classroom readiness skills (id.). Related services were "provided in conjunction with the special education classroom" (id. at p. 5). Each student had an education team that followed long-term and short-term goals "as developed by the team and written on the [student's] IEP" (id.).¹⁴ Service coordinators and supervisors provided support for staff, were "easily accessible" for therapists' needs, and connected with therapists during observations and monthly meetings (id.). Special education classroom teachers used the classroom and curriculum to achieve the goals of improving expressive and receptive language through "direct teaching of concepts and vocabulary words that the mainstream teacher taught" (id.). Special education teachers also assisted students in increasing cognitive functioning (id.). Interactive games and books were "provided to assist [students with disabilities] to learn and achieve what [was] presented in the class" and memory building and multisensory learning opportunities were available in the classroom (id.). The Bnos Menachem program description provided a general list of learning standards, including a description of activities, how the special education teacher and related services providers might be involved, and what IEP goal would be addressed through the activity (id. at pp. 7-22). The program description also contained a list of IEP goals/standards for special education students for personal health and safety skills, and safety and self-protection/adaptive living skills that were not specific to the student (id. at pp. 23-24).

The parent argues that the Bnos Menachem program supervisor's testimony provided information on the program the school created to address the student's specific needs. The program supervisor testified that the program at Bnos Menachem was aligned with New York State standards but was modified in "many different ways in order to meet the needs of an individual student," such as if their individual needs required instruction using applied behavior analysis (ABA) (Parent Ex. L ¶ 7). The program supervisor testified that students in the program had opportunities to "be exposed to typically developing peer models" during mealtime, during the social skills program, and "when probing for mastery and generalization of individual academic targets" (id. ¶ 9).

Regarding the student in this case, the hearing record shows that at Bnos Menachem, the student was in a 12:1+1 special class (Parent Ex. L ¶ 16). According to the program supervisor, Bnos Menachem determined the student's needs through a functional behavioral assessment (FBA), developed an individualized behavioral intervention plan (BIP), and monitored the student's progress and adjusted her goals "through careful data collection" (id. ¶ 15). In addition

¹⁴ While the Bnos Menachem program description refers to IEPs several times, a private school is not obligated to develop IEPs for special education students and the hearing record does not include a document identified as a Bnos Menachem IEP for the student in this matter. As described herein, the hearing record does include a treatment plan and progress reports for the student for the 2023-24 school year (see Parent Ex. H).

to the two classroom teachers, there was a board certified behavior analyst (BCBA) "in the classroom for much of the time," and the student received speech-language therapy, counseling services, and OT from appropriately licensed professionals (id. ¶ 16). The program supervisor also testified that Bnos Menachem used "numerous other supports, accommodations, and methods" to help the student make meaningful progress, including positive reinforcement, sensory toys, "FCT", "mand" for break, coping mechanisms, prompting, "DRI", "DRA", scaffolding, graphic organizers, the "Premack principle", redirection, social stories, sensory breaks, and sensory activities (id. ¶ 17).

Although the IHO acknowledged the program description, curriculum, schedule, FBA, BIP, treatment plan, teacher progress reports, speech-language therapy progress reports, OT progress reports, and counseling progress reports contained in the hearing record, she focused on the program description in determining the appropriateness of the unilateral placement (see Parent Exs. D; F; G; H). A review of the entire hearing record provides additional information on the student's program at Bnos Menachem. The student's August 2023 FBA identified "targeted problem behaviors" based on informal data collection, developed a functional hypothesis, and identified replacement behaviors, and the resulting September 5, 2023 BIP defined the target behaviors identified in the FBA and described replacement behaviors that were consistent with the functional hypothesis in the FBA (Parent Ex. H at pp. 2-5, 9). The BIP also included specific strategies for prevention, an instructional plan for teaching alternate behaviors, behavior management strategies, and data collection strategies (id. at pp. 10-11). The student's September 2023 treatment plan identified the student's needs related to communication, social skills, behavior, cognition, and attention, and goals for math and ELA, and included a chart that identified skills areas, objectives, baseline data, and mastery criteria for identified communication and social skills goals (id. at p. 13).

The student's needs in math, reading and literature, writing, social/emotional functioning, classroom behavior, attention, and motivation were also described in the November 2023 teacher progress report (Parent Ex. H at pp. 20-21). The June 2024 teacher progress report reflected the student's progress toward the math, reading, and writing goals stated in the November 2023 teacher progress report and identified new goals for the next academic term (compare Parent Ex. H at pp. 20-21, with Parent Ex. H at pp. 24-26).

While the district asserts that the November 2023 and June 2024 teacher progress reports failed to explain how Bnos Menachem was addressing the student's needs, a review of these teacher progress reports shows evidence of specially designed instruction (see Parent Ex. H). According to the November 2023 teacher progress report, the student's teacher relied on a modified curriculum which used a multisensory approach, manipulatives, and specialized software for writing instruction (id. at p. 21). The student's teacher used redirection, external assistance to help the student calm down, repeated instructions, modeling, repeated directions, personal reminders, 1:1 support for classroom behavior, external assistance for refocusing, and visuals for attention and motivation, (id. at pp. 21-22). The student's September 2023 BIP and September 2023 treatment plan provided further evidence of specially designed instruction. The September 2023 BIP included strategies such as social skills training, increased supervision, first/then instruction, self-calming strategies, visuals, functional communication training (FCT), differential reinforcement, an emotional identification chart, use of the Premack principle, reinforcement, scheduled breaks, a visual timer, sensory toys, and scaffolding (id. at pp. 9-11). The September

2023 treatment plan identified the use of redirection, prompting, FCT, visual identification chart, contrived setting, discrete trial training, modeling, prompt hierarchy, role playing, and a visual emotional identification chart (*id.* at pp. 15-19). In addition, the program supervisor testified that Bnos Menachem used numerous supports, accommodations, and methods with the student, including positive reinforcement (*e.g.*, praise, money, attention, access to a favorable activity/toy, and scheduled breaks), sensory toys, functional communication training, breaks, coping mechanisms, prompting, differential reinforcement, scaffolding, graphic organizers, the Premack principle, redirection, social stories, sensory breaks, and sensory activities (Parent Ex. L ¶ 17).

Turning next to the adequacy of the student's related services, the student's Monday through Thursday schedule identified that she was scheduled to receive physical therapy (PT) and OT from 10:45 a.m. to 11:15 a.m. Monday through Thursday on "alternate days," (Parent Ex. F at p. 1). The Monday through Thursday schedule also reflected speech-language therapy from 1:30 p.m. to 2:00 p.m., with music therapy during the 1:30 p.m. to 2:00 p.m. timeslot on Thursday (*id.*).¹⁵ The student's schedule did not reflect a scheduled time for individual or group counseling services, nevertheless, the hearing record included a counseling progress report and the program supervisor testified that counseling services were provided to the student (*see* Parent Exs. F; H at pp. 42-43; L ¶ 16). The program supervisor additionally testified that the student received speech-language therapy and OT during the 2023-24 school year (Parent Ex. L ¶ 16). A review of the February 2024 and June 2024 speech-language therapy progress reports showed that these reports identified the student's present levels of performance, annual goals, short-term goals, and recommendations (Parent Ex. H at pp. 28-29).

The February 2024 speech-language therapy progress report described that the student had a "high vocabulary and pick[ed] up on cognitive concepts well," but was "constantly focused on items that interest[ed] her and therefore ha[d] difficulty attending to her teacher and classes" (Parent Ex. H at p. 28). She required redirection and prompting and even with additional support had difficulty following along and keeping up with her peers (*id.*). The student had difficulty accepting things that did not go her way and needed "external assistance calming down" (*id.*). The February 2024 speech-language therapy progress report identified annual goals for following three-step directions, identifying expected and unexpected behaviors in herself and others in a social setting, and listening, gathering materials, and working quietly (*id.*). The February 2024 speech-language therapy progress report identified short-term goals for following one-step directions, looking at a greeter and returning greetings, and looking at the speaker, asking questions when appropriate and not interrupting the speaker during conversation (*id.*).

The June 2024 speech-language therapy progress report reflected present levels of performance that were consistent with those identified in the February 2024 speech-language therapy progress report (Parent Ex. H at p. 29). The student's short term goals for following one-step directions, looking at a greeter and returning greetings, and looking at the speaker, asking questions, and not interrupting the speaker during conversation identified in the February speech-language therapy progress report, remained the same; however, the June speech-language therapy progress report included new annual goals of expanding the use of complete sentences to

¹⁵ Although PT and music therapy were reflected on the student's daily schedule, nothing in the hearing record identified that the student required or was receiving these services.

communicate thoughts and ideas during classroom activities, correctly pronouncing age-appropriate target sounds, and accurately following two-step directions (id.). Here, the short-term goals and annual goals identified in the speech-language therapy progress reports were consistent with the student's needs identified in the May 2022 IESP and the recommended annual goals for improving articulation and improving expressive language skills (see Dist. Ex. 1). Further, while not robust, both the February 2024 and June 2024 speech-language therapy progress reports provided information on the specially designed instruction used to address the student's needs, noting that the student required "external assistance calming down," and redirection and prompting during group activities (id.).

The hearing record also included the student's February 2024 and June 2024 OT progress reports, which consisted of a checklist of motor skills (see Parent Ex. H at pp. 30-41). A comparison of the February 2024 and June 2024 OT progress reports showed variable performance in demonstration of target skills, but the student appeared to demonstrate several skills in June 2024 that she did not demonstrate in February 2024 (compare Parent Ex. H at pp. 30-35, with Parent Ex. H at pp. 36-41). As the IHO noted, the February 2024 and June 2024 OT progress reports did little to clarify what the checklist represented, nevertheless, the skills identified were consistent with the student's physical needs and annual goals for improving fine motor and graphomotor skills and motor planning as recommended in the May 2022 IESP (id. at pp. 30-41; see IHO Decision at p. 7).

Regarding the counseling services provided at Bnos Menachem, the February 2024 and June 2024 counseling progress reports identified that the student had communication difficulties and became frustrated when others did not understand her, had difficulty recalling and retelling information, lacked age appropriate expressive language and vocabulary, and had difficulty following directions (Parent Ex. H at p. 42). Socially, the student had difficulty taking turns, following group instruction, following a peer's play plan, expressing emotions, and recognizing others' emotions (id.). The February 2024 counseling progress report included two new annual goals for increasing functional play and peer interactions for five minutes, and "tact[ing] the meaning of expressions (happy, sad, angry) when modeled to her" (id.). The June 2024 counseling progress report identified two new annual goals that showed progression of skills from the annual goals stated in the February 2024 counseling progress report (id. at p. 43). The counseling progress reports also included evidence of specially designed instruction used with the student in counseling sessions, including verbal prompting, modeling, visual aids, deep breathing, counting to five, using a calm-down space with comforting toys or pictures, role-playing and storytelling (id. at pp. 42-43).

The foregoing demonstrates that the student's placement at Bnos Menachem was appropriate and sufficiently tailored to address the student's needs, contrary to the IHO's determination that the parent's evidence was too generic. When taking into account the totality of the circumstances and the fact that the parent is not held as strictly to full compliance with the IDEA when seeking reimbursement for a private placement, the evidence in the hearing record demonstrates that the student received specially designed instruction to address her needs. In addition, the hearing record demonstrates that the student made progress during the 2022-23 school year as discussed below.

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

Here, the hearing record shows evidence of the student's progress at Bnos Menachem. The program supervisor testified that the student "demonstrated ongoing progress in several areas," including "enhancing her communication skills and improving her abilities in math" and ELA (Parent Ex. L ¶ 18). She identified most shapes; compared items by attributes such as length and weight; had progressed in sorting objects by color, shape, and number; rote counted to 50; understood one-to-one correspondence; and had "made strides" in identifying numbers (*id.*). In ELA, the student improved her ability to identify and label objects in pictures, demonstrated understanding of age-appropriate stories, differentiated between reality and fiction, made inferences based on images, and sequenced events (*id.*). According to the June 2024 teacher progress report, the student had made "steady progress in labeling numbers and had mastered math goals for rote counting by twos, fives, and tens up to 50, identifying the greater number with numbers one to ten, representing the number of objects with a written numeral, identifying and labelling all two-dimensional shapes, and adding numbers one to 20 using cubes (Parent Ex. H at p. 24). In reading, the student had made progress in her ability to find a word that did not rhyme and comprehending grade level vocabulary words read to her (*id.* at pp. 24-25). She could ask and answer questions on stories and learned information, identify characters, setting, and major events in a story, answer "wh" questions on text read to her, read ten sight words, and identify two words beginning with the same initial sound (*id.* at p. 25). The student had mastered goals for exploring a variety of writing materials, identifying a properly formatted sentence including spacing, capitalization, and end punctuation, tracing shapes and letters, and writing numbers one to five (*id.*). The June 2024 speech-language therapy progress report identified that the student demonstrated "improved responsiveness to redirection and a growing awareness of classroom routines, though she continue[d] to struggle with task management" (*id.* at p. 29). While her executive functioning challenges affected her ability to work independently, she showed notable improvement in a one-on-one setting, where she could better manage tasks and follow instructions with greater comprehension and focus" (*id.*). The June 2024 counseling progress report also described the student's progress and noted that she had begun using visual aids and gestures to communicate with peers, was starting to engage in simple turn-taking activities with guidance, showed gradual improvement understanding and following basic directions, and was using more words and phrases in her interactions (*id.* at p. 42). Finally, the student's behavior plan showed decreases in the student's self-directive behavior, impulsive behavior, tantrums, non-compliance, anxious behavior, and joint attention (*id.* at p. 9). Her treatment plan showed progress in all of the 18 communication skills and 19 social skills assessed (*id.* at pp. 15-19).

While the evidence of the student's progress is not dispositive, in this instance it lends further support to a finding that, based upon the totality of the circumstances, the unilateral placement of the student at Bnos Menachem was appropriate for the 2023-24 school year.

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"])).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO indicated that the equitable considerations did not favor the parent, as the parent did not file a timely 10-day notice (IHO Decision at p. 8).¹⁶ The IHO also stated that the parent

¹⁶ The IHO declined to address the parent's contention that she did not receive a procedural safeguards notice,

did not express any intent for the student to attend a public school during the May 2022 CSE meeting, that the parent's request for a reevaluation in her October 17, 2023 10-day notice letter was pretextual, as the student had been privately evaluated on August 28, 2023 and had been enrolled in Bnos Menachem on August 28, 2023 (id.). The IHO found that the "[p]arent was bound by the contract upon signing with no means by which they could be excused, regardless of what [the district] offered [the s]tudent" and that the parent "had no good faith intention to seek a public placement from [the district]" when she sent the 10-day notice letters to the district (id.). The IHO further found "that a balancing of the equities lies entirely in [the d]istrict's favor," that the parent "did not operate in good faith and had no intention to seek or obtain a public placement," and that had she found Bnos Menachem to be an appropriate unilateral placement, she would have found that the parent was not entitled to her requested relief "due to equitable considerations" (id.).

Although the IHO's focus on whether or not the parent intended to enroll the student in a public placement is contrary to Second Circuit case law (see E.M., 758 F.3d at 461), the IHO correctly pointed out that the parent did not provide a timely 10-day notice of her intent to place the student at Bnos Menachem for the 2023-24 school year at district expense as the parent signed the enrollment contract in August 2023 and the first notice from the parent to the district included in the hearing record was dated October 17, 2023 (IHO Decision at p. 8; see also Parent Ex. D at p. 3; Dist. Ex. 3 at p. 2). Review of the October 17, 2023 letter shows that although the parent requested a reconvene of the CSE for the district to develop an IEP for the student, the letter also included the required elements of a 10-day notice, namely that the parent objected to the district's failure to develop a program for the 2023-24 school year, requested a public special education classroom as the student's needs could not be met in a general education classroom, and that if the district failed to address her requests, the parent intended to enroll the student in a nonpublic school at district expense for the 2023-24 school year (Dist. Ex. 3 at p. 2).

The district has not pointed to any instances, other than the lack of a timely 10-day notice, in which the parent failed to cooperate with the CSE. The parent participated in the May 2022 and February 2024 CSE meetings and provided the district with a copy of the private evaluation. It is also noted that the parent does not contend that she filed a 10-day notice prior to enrolling the student at Bnos Menachem.

Since the parent failed to submit a timely 10-day notice, a reduction in the requested relief is warranted on that basis. As the 10-day notice was submitted on October 17, 2023, I will reduce the request for funding by 10%. Therefore, I order the district to fund Bnos Menachem for the 2023-24 school year in the amount of \$108,000, a reduction of 10% from the contracted for \$120,000 tuition.

VII. Conclusion

The hearing record supports findings that the district failed to offer the student a FAPE for the 2023-24 school year as it failed to have an IEP in place for the student by the start of the school year, and that Bnos Menachem was an appropriate placement for the student for the 2023-24 school year. In weighing equitable considerations, a partial reduction of 10% from the requested cost of

finding that the issue was not raised in the due process complaint notice and further finding that it was improperly raised for the first time in the parent's closing statement (IHO Decision at p. 8).

tuition is warranted as the parent failed to timely send the district a 10-day notice of her intent to unilaterally place the student at Bnos Menachem.

I have considered the parties' remaining contentions and find them to be without merit or unnecessary to address in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the November 22, 2024 IHO decision is modified by reversing those portions which found that the district was not obligated to offer the student a FAPE for the 2023-24 school year, that Bnos Menachem was not an appropriate unilateral placement, and that equitable considerations warranted a denial of any direct tuition funding for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district directly fund the cost of the student's tuition at Bnos Menachem for the 2023-24 school year, less 10% of the contracted rate, for a total of \$108,000.

Dated: **Albany, New York**
 April 22, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER