The University of the State of New York

The State Education Department
State Review Officer
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No. 25-015

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 Abigail Hoglund-Shen, 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 Big N Little: Stars of Israel Program (Stars of Israel) 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]). In addition, when a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (Educ. Law § 4402; see 20 U.S.C.

§ 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts relating to IESPs, 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 of the IDEA 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 this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

For the 2018-19 and 2019-20 school years (kindergarten and first grade), the student attended a public school in a different school district (Parent Exs. B at p. 1; H at p. 1). For the 2020-21 school year through the beginning of the 2023-24 school year (second through fifth grades), the student attended a religious nonpublic school where he received applied behavior analysis (ABA) "support" (Parent Exs. B at p. 1; H at p. 1).

On January 11, 2024, a CSE convened, determined the student was eligible for services as a student with a learning disability, and developed an IESP with a projected implementation date of February 9, 2024 (see Parent Ex. B).[1] The January 2023 CSE recommended that the student receive seven periods per week of group special education teacher support services (SETSS); three 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of individual counseling services (Parent Ex. B at pp. 1, 15).

Although the date was not provided, the student was expelled from the religious nonpublic school in or around January 2024, after the January 2024 CSE meeting (see Nov. 6, 2024 Tr. pp. 66, 69; Parent Ex. H at p. 1). On February 20, 2024, the parent signed an enrollment contract with Stars of Israel for the student's attendance from February 2024 through June 2024 (Parent Ex. C at pp. 1-3).

The student began attending Stars of Isreal on February 21, 2024 (see Parent Ex. F). On February 21, 2024, by letter bearing the typed name of the parent in place of a written signature and referencing the parent's attorney as being authorized to proceed on the parent's behalf, the district was advised that the parent was requesting a reevaluation and a reconvene of the CSE and that the student be placed in a full-time special education classroom for the 2023-24 school year (Parent Ex. J at p. 2). The letter further provided that, "unless this issue c[ould] be resolved," the parent intended to unilaterally place the student in the private special education program at Stars of Israel and seek funding and/or reimbursement from the district for the costs of the student's attendance (id.).

Subsequently, in a letter dated April 22, 2024, again bearing the typed name of the parent, the parent reiterated that the district had not evaluated the student, issued an IEP, or provided any placement for the student (Parent Ex. K at p. 2). The letter requested an IEP for the student and placement in a full-time special education classroom for the 2023-24 school year and advised that, if the issue was not resolved, the parent would place the student at Stars of Israel and seek tuition funding or reimbursement (id.).[2]

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[1] 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]).

[2] Both the February and April 2024 letters were titled "TEN DAY NOTICE" (Parent Exs. J at p. 2; K at p. 2). In addition, both letters were accompanied by fax cover sheets reflecting they were sent from the attorney's office;

A. Due Process Complaint Notice

In a due process complaint notice dated July 16, 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 pp. 3-4). The parent alleged that she disagreed with the IESP developed in January 2024 (id. at p. 3). In addition, the parent contended that, for the 2023-24 school year, the student needed "an educational program that placed him in a full time special education class" with individualized supports and accommodations, and a behavioral plan (id. at pp. 3-4). The parent also 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 2023-24 school year or to implement the program it recommended (id. at p. 4). The parent indicated that she requested that the district reevaluate the student, reconvene the CSE to create an IEP recommending a full-time special education class because the student's needs could not be met in a general education classroom, but that the district failed to respond (id. at pp. 3-4).

The parent further claimed that, due to the district's failures, she unilaterally placed the student at Stars of Israel, a private special education program, for the 2023-24 school year 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 for the district to directly fund or reimburse the student's tuition costs at Stars of Israel for the 2023-24 school year (id.).

In a response to the due process complaint notice, the district raised several defenses (Due Process Response at pp. 1-2). Attached to the response, the district submitted a copy of a June 27, 2024 prior written notice, which summarized the recommendations made at the January 2024 CSE meeting (id. at pp. 3-5).

B. Impartial Hearing Officer Decision

After a prehearing conference on October 9, 2024, at which the district did not appear (Oct. 9, 2024 Tr. pp. 2-10), an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on November 6, 2024 (Nov. 9, 2024 Tr. pp. 4-83). The IHO admitted the parties' proffered documentary evidence into the record, including the direct testimony by affidavit of the parent and an administrator from Stars of Israel who were cross-examined by the district. (Nov. 9, 2024 Tr. pp. 23, 25, 33-76; see Parent Exs. A-M; Dist. Exs. 1-3).

In a decision dated November 28, 2024, the IHO found that the district had not denied the student a FAPE for the 2023-24 school year, that the parent's unilateral placement was inappropriate for the student, and that equitable considerations did not favor the parent (IHO Decision at pp. 12, 14-15).

The IHO initially summarized the procedural posture and positions of the parties, noting that the parent argued that the district denied the student a FAPE by failing to reevaluate the student and reconvene the CSE to develop an IEP for the student for the 2023-24 school year (IHO Decision at p. 3). The IHO noted that the district did not present any testimonial evidence at the

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the letters were not accompanied by fax confirmation sheets (see Parent Exs. J at p. 1; K at p. 1).

hearing, resting its case solely on the documentary evidence it submitted, and that it argued that the IESP provided the student with an appropriate program and that the parent did not establish that the unilateral placement was appropriate (id.).

In her summary of the facts, the IHO noted that the student attended public school during the 2020-21 school year and was parentally placed at a nonpublic school and "remained there until January 2024" (IHO Decision at p. 4). The IHO noted that the IESP submitted by the parent included several examples of progress particularly with math, reading, and language (id. at pp. 4-5). The IHO also noted that the IESP indicated the parent was present at the meeting and "at no time during the meeting did the [p]arent express disagreement with the CSE or the IESP" (id. at p. 5). The IHO found that after the January 2024 IESP meeting the student was expelled from the religious nonpublic school he had been attending due to misbehavior (id. at p. 6). According to the IHO, subsequent to the expulsion, the student underwent a functional behavior assessment (FBA), psychoeducational, and occupational therapy (OT) evaluations at Stars of Israel in February 2024 (id. at p. 6). The IHO noted that the parent did not mention that she had had the student reevaluated in either of the letters sent to the district (id. at p. 8).

Next, the IHO addressed the district's obligation to offer the student a FAPE for the 2023-24 school year. The IHO determined that the operative plan in place at the time of the parent's decision to unilaterally place the student at Stars of Israel was the January 2024 IESP (IHO Decision at p. 10). The IHO found that, as of the date the parent entered the enrollment contract with Stars of Israel, the district "bore no obligation to develop an IEP for the [s]tudent" as the student had been parentally placed (id.). The IHO found that the student "had no individual entitlement to special education and related services" because the parent's request that district evaluate the student and convene the CSE to develop an IEP was made the day after she executed a contract with Stars of Israel (id. at p. 11). The IHO concluded that the absence of an IEP at the time of the student's placement did not establish the district denied the student a FAPE for the 2023-24 school year (id.). The IHO also found that the January 2024 IESP offered the student "appropriate equitable services" and that, once the student was expelled from his prior religious nonpublic school, the district "had no reasonable way to implement the [January 2024] IESP" (id. at pp. 11-12).

Although the IHO found that there was not a denial of a FAPE or equitable services to the student for the 2023-24 school year, the IHO made further findings with regard to the appropriateness of the parent's unilateral placement at Stars of Israel and whether equitable considerations weighed in favor of the parent's requested relief. First, the IHO reviewed the documentation submitted by the parent and concluded that the materials provided by the Stars of Israel program were largely "general information" and were not examples of how the program was "specifically tailored to the [s]tudent" (IHO Decision at p. 13). The IHO identified shortcomings with the student's schedule, specifically, that it did not show that any provision was made during the school day for the student to receive related services that he was supposed to receive (id.). The IHO gave the student's treatment plan little weight as the plan reflected no discernable author, made broad conclusions, and did not indicate how the plan would facilitate the student reaching identified goals (id. at pp. 13-14). Ultimately, the IHO concluded that the documentation did not demonstrate that the unilateral placement was appropriate to meet the student's individual needs (id. at p. 14).

Next, the IHO made additional findings regarding equitable considerations. The IHO took issue primarily with the timeline of the parent's notification sent to the district in February 2024, particularly where the parent indicated that, unless the district could resolve her purported grievances, the student would be enrolled in another school and the parent would seek tuition funding (IHO Decision p. 15). The IHO found that these representations by the parent were disingenuous as the student was enrolled in Stars of Israel before the letters were even sent (id.). Moreover, the IHO found that the parent did not advise the district that she had obtained a reevaluation and assessment, the results of which were never provided to the district (id.). The IHO concluded that the parent's request for an IEP was not made in good faith and that it appeared that the notification was made for the purposes of seeking tuition funding from the district (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding the district did not deny the student a FAPE, finding the parent failed to meet her burden to demonstrate the unilateral placement was appropriate, finding that equitable considerations did not weigh in favor of the parent's requested relief, and dismissing the parent's due process complaint notice. The parent argues that the district failed to present evidence and testimony that demonstrated the IESP developed by the district was appropriate, that the district failed to respond to the parent's request to reconvene the CSE, and the district failed to demonstrate why an IEP was not developed for the student. The parent argues that the unilateral placement was appropriate and created an individualized program to meet the student's unique needs and that the record demonstrated there were no equitable factors to preclude an award of funding to the parent. As relief, the parent seeks an award of tuition funding for that portion of the 2023-24 school year the student attended Stars of Israel.

In an answer, the district denies the material allegations contained in the request for review and seeks an affirmance of the IHO's decision, arguing that the district did not deny the student a FAPE or equitable services, the parent did not meet her burden of proving the appropriateness of the unilateral placement, and that equitable considerations do not favor the parent. The district references a "cross-appeal" in several instances in its own pleading, attempting to "cross-appeal" from the favorable aspects of the IHO's decision; however, the district was not aggrieved by the IHO's decision and, for that matter, did not allege any error by the IHO. Accordingly, the undersigned has treated the pleading as an answer with defenses; however, the district is cautioned to review the practice regulations in Part 279 and should not expect excusal for future failures to comply with the practice regulations in Part 279.

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]).[3]

With respect to students who are enrolled by their parents in nonpublic schools, the IDEA confers no individual entitlement to special education or related services (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]). However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "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.).[5] Thus, under State law an eligible New York State resident student may

[3] 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).

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

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter

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, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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. 2023-24 School Year

Initially, there is no dispute regarding any IEP or IESP in place before the January 2024 IESP or regarding any actions or lack thereof on the part of the district for the beginning of the 2023-24 school year (see Oct. 9, 2024 Tr. p. 4; Nov. 6, 2024 Tr. pp. 14-15; Parent Ex. A). With respect to the January 2024 IESP, the parent did not allege that the CSE should have developed an IEP for the student at that time.[6] Rather the issues presented during the impartial hearing and on

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

[6] As discussed further below, the parent does state in her request for review that the district failed to explain the reason the January 2024 CSE developed an IESP instead of an IEP (see Req. for Rev. 11); however, the parent did not include such a claim in the due process complaint notice (see Parent Ex. A), and I decline to consider the issue raised for the first time on appeal.

appeal relate to the appropriateness of the January 2024 IESP and the district's obligation to reconvene the CSE to develop an IEP for the student after the parent requested the same.[7]

1. January 2024 IESP

Regarding the parent's IESP design claims, as the district did not present any documentary or testimonial evidence in response to the parent's claims, the January 2024 IESP, which the parent offered into evidence, stands as the only evidence relevant to the addressing the claims. Relying on the document itself, the IHO found that the January 2024 IESP documented the student's present levels of performance and academic achievement, provided for the use of appropriate special education services, indicated the district revaluated the student and provided those results, contained behavioral observations and progress reports, established annual goals designed to meet the student's needs that correlated with the student's academic delays in reading, writing, comprehension, and math, and also identified "targeted interventions and behavioral supports" that were similar to those recommended by Stars of Israel (IHO Decision pp. 11-12). Moreover, the IHO also found that the district recommended the same program as the previous IESP where the student progressed despite his academic and behavioral challenges (id. at p. 12).

On appeal, the parent alleges that the IHO erred in finding that the January 2024 IESP was appropriate for the student notwithstanding that the district did not defend the IESP. In Endrew F., the Supreme Court held that the "reviewing court may fairly expect [school] authorities . . . to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"(580 U.S. at 404). The district's burden does not require that the district call witnesses. If the district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). Here, the district did not offer documentary or testimonial evidence to defend the January 2024 IESP but, as the parent offered the plan into evidence, the document was available for the IHO to consider and, while the IESP alone may not have been enough to establish the appropriateness of the program recommended by the CSE as discussed below, the IHO did not err in considering the same.

With this in mind, I note that, on appeal, the parent has not challenged the IHO's specific findings that the district reevaluated the student and that the IESP documented the student's present levels of performance and academic achievement and developed annual goals designed to meet the student's needs (IHO Decision at pp. 11-12). Accordingly, these findings have 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

[7] Although the parent also alleges on appeal that the district did not implement the IESP, she does not specifically grapple with the IHO's finding that, once the student was expelled from his prior religious nonpublic school, the district "had no reasonable way to implement the [January 2024] IESP" (IHO Decision at p. 11). Accordingly, the parent has not identified a basis to depart from the IHO's decision. Further, an independent review of the hearing record supports the IHO's view that, given the circumstances, no implementation claim could stand.

[S.D.N.Y. Mar. 21, 2013]). Rather, the parent's appeal is narrowly focused on the CSE's failure to recommend a sufficiently supportive program (i.e., a special class) and sufficient behavioral supports.

a. The Student's Needs

Although the student's present levels of performance within the January 2024 IESP are not in contention, a brief discussion of the student's needs provides context for the issue to be addressed. At the time of the January 2024 IESP, the student was 10 years old, had a diagnosis of attention deficit hyperactivity disorder (ADHD), and was attending fifth grade at a religious nonpublic school and receiving special education services pursuant to an IESP consisting of SETSS, speech-language therapy, and counseling services (Parent Ex. B at pp. 1, 4, 9).

The January 2024 IESP included evaluative information from a March 2022 psychoeducational evaluation, as well as information obtained through OT and speech-language therapy evaluations (Parent Ex. B at pp. 1-4).[8] The IESP also summarized information from a December 2023 SETSS progress report and a January 2, 2024 speech-language therapy progress report (id. at pp. 4-8).

First, as included in the January 2024 IESP, the March 2022 psychoeducational evaluation highlighted the student's history of resisting teacher support and exhibiting defiant behaviors due to frustration or anxiety, with the student reporting that school was "okay" but that he had been "kicked out" for being disrespectful to his teacher and an incident in which the student talked back to the Rabbi at school (Parent Ex. B at p. 1).[9] As set forth in the IESP, during the psychoeducational evaluation, the student needed encouragement to engage in testing and demonstrated fleeting focus, although he showed more compliance at the beginning of the session, and during cognitive evaluation tasks (id. at p. 2). The IESP indicated that on cognitive testing, the student's performance yielded average results with a full-scale intelligence quotient (FSIQ) of 91, and a relative strength in perceptual reasoning (id.). The IESP reported information from the psychoeducational evaluation that the student appeared combative and argumentative during academic testing as evidenced by his protesting and pushing paper and pencil away during math testing and needing encouragement to continue academic tests (id.).

Turning to the student's academic functioning, as reported on the IESP in the area of reading, he struggled during decoding and sight word tasks and scored in the low average range on listening comprehension testing (Parent Ex. B at p. 2). In the area of writing, the student

[8] The hearing record does not include copies of the March 2022 psychoeducational evaluation or the OT and speech-language therapy evaluations (see generally Parent Exs. A-I; Dist. Exs. 1-3). The January 2024 IESP indicated that the March 2022 psychoeducational evaluation was a reevaluation conducted as part of a triennial evaluation of the student and that the parent had requested the CSE conduct speech-language therapy and OT evaluations due to current concerns in those areas (Parent Ex. B at p. 1). According to the prior written notice appended to the district's response to the parent's due process complaint notice, the OT evaluation was dated February 21, 2022 and the speech-language therapy evaluation was dated March 14, 2022 (Due Process Response at p. 4).

[9] It is unclear if the student was describing being removed from the class or whether the student had been suspended or expelled from the school for the behavior described.

reportedly was not able to be assessed, although it was noted the student could write his name and numbers, albeit his writing appeared larger than normal (id.). Results of testing indicated the student demonstrated a relative strength in math (id.). The student's testing results for reading were reportedly lower than those attained during previous academic testing (id.).

As related to social/emotional functioning, the IESP reported that previous testing administered in November 2022 using the Behavior Assessment System for Children, Third Edition (BASC-3) Parent Rating Scale provided a profile of scaled scores that did not indicate significant elevations in problem behaviors of externalizing, internalizing or attention (Parent Ex. B at p. 3).

In the area of OT, the IESP included evaluative information that noted the student's awkward grasp and inconsistent letter sizing; however, it was reported the student wrote with appropriate pressure and could write uppercase letters, 25/26 lower case letters, his name, and numbers through 15 correctly and legibly (Parent Ex. B at p. 3). The student scored in the average range on the Test of Visual Motor Integration (TVMI), receiving a standard score of 92 (id.). As related to speech-language skills testing, the January 2024 IESP included formal testing results on the Clinical Evaluation of Language fundamentals, Fifth Edition (CELF-5), that reflected a receptive language index standard score of 85, and an expressive language index standard score of 80, and that the student attained his lowest scores on subtests of linguistic concepts, following directions, understanding spoken paragraphs, and word structure (id. at p. 4).

The IESP included information from a December 2023 SETSS progress report that, at the time, the student received seven hours per week of SETSS that addressed the student's needs in the areas of reading and comprehension, mathematics, writing, and spelling (Parent Ex. B at pp. 5-7). Supports used by the SETSS provider included use of multisensory instruction, visual aids, organizers, and language skills instruction to develop writing skills (id. at pp. 5, 7). Specific to reading, the IESP included information from the December 2023 SETSS progress report that indicated the student performed four grades below his expected level and struggled with unfamiliar sight words, decoding, and comprehending grade-level texts (id. at p. 5). Interventions included providing explicit phonics instructions, participating in leveled reading activities, guided practice, teacher modeling, worksheets to reinforce these skills, as well as highlighting while reading passages (id. at pp. 5-6). In the area of math, the January 2024 IESP reported the student demonstrated needs related to subtracting double digits, fluency in multiplication tables, and solving word problems, and that the various strategies were used to address the student's needs such as manipulatives, whiteboard practice, instructor modeling, customized worksheets, and positive reinforcement (id. at p. 6).

As memorialized in the IESP, the January 2024 speech-language therapy provider report stated the student had weaknesses in expressive and receptive language skills, as well as social pragmatics (Parent Ex. B at pp. 4, 7). The student received three individual speech-language therapy sessions per week with therapy focused on improving the student's decoding skills, reading comprehension, following directions, expanding his vocabulary, and problem solving (id. at p. 7). The provider indicated that the student's delays were also addressed using the supports of visual and verbal prompting, modeling, cues, and language supports (id. at p. 8).

As related to social development, the January 2024 IESP reported strengths in the student's social skills such as maintaining eye contact and responding appropriately and staying on topic when asked questions; however, the IESP also reported the student's difficulties in following directions and adapting to classroom routines (Parent Ex. B at p. 8). Behaviors such as defying teachers and being uncooperative were addressed through providing additional breaks as needed, role playing, providing incentives for good behavior, and modeling "the correct way to follow directions" (id. at p. 9). In the area of physical development, the January 2024 IESP included the student's diagnosis of ADHD, and noted his difficulties staying focused and on task (id.). The IESP included the statement of the SETSS provider that she addressed the student's needs during sessions and through role-playing (id.).

b. SETSS with Related Services

As noted, the parent argues that the IESP was inadequate because it did not include a recommendation for a full-time special class or sufficient supports for the student's behaviors. With respect to the special class, although the parent alleges on appeal that, as of the January 2024 CSE meeting, she wanted an IEP instead of an IESP, the parent did not make such an allegation in her due process complaint notice, in her testimony by affidavit, or at any time during the impartial hearing (see Parent Exs. A; M; see also Nov. 6, 2024 Tr. pp, 1-84). 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]).[10]

Accordingly, the issue as presented is whether the January 2024 CSE's recommendation for SETSS and related services was reasonably calculated to enable the student to receive educational benefits. The parent does not articulate how a special class to be provided by the district would be plausible given that, at the time of the January 2024 CSE meeting, the student was parentally placed a religious nonpublic school.[11] In any event, however, it is only necessary

[10] 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, the district did not present any witnesses so could not be said to have opened the door to the issue.

[11] If the student required the special class to receive educational benefit, it may be that the district would have to offer a special class at a location other than the nonpublic school. In interpreting a prior version of § 3602-c, the

to consider whether the CSE's recommendation was sufficiently supportive and not whether the CSE should have recommended a special class instead.

In finding the January 2024 CSE's recommendations appropriate, the IHO noted that the IESP reflected that the student had made progress with SETSS and related services in the student's previous IESP (see IHO Decision at pp. 4-5, 12). It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Revised Sept. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

Initially, as the hearing record does not include a copy of the student's IESP in place before the January 2024 IESP, a true comparison of the January 2024 IESP to the program in place leading up to the January 2024 CSE meeting is not possible. However, consistent with the recommendations ultimately made by the January 2024 CSE, the IESP indicated that leading up to the meeting, the student was receiving sever hours per week of SETSS "in a mix of push in and pull out sessions" and three 30-minute sessions per week of speech-language therapy (compare Parent Ex. B at pp. 5, 7, with Parent Ex. B at p. 15). The IESP indicated the student had been

New York Court of Appeals addressed the question of whether a district must provide special education programs and services to a student with a disability at the nonpublic school a student attends, and found that the location in which services are provided to a parentally-placed nonpublic school student with a disability pursuant to § 3602-c should be determined based on what is appropriate to address the individual educational needs of the student, with consideration given to LRE principles (Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293-94 [2010]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 183-88 [1988]).

mandated for counseling but did not specify the frequency or duration and reflected that the parent was "not sure" if the student was receiving the counseling services (see Parent Ex. B at pp. 4, 9).

The IESP reflected that, historically, the student had not made progress toward achieving IEP annual goals when attending a general education class placement in a public school in another school district and receiving resource room services (Parent Ex. B at p. 1). Further, although, as summarized above, the IESP reflected information from a SETSS progress report that the student had, for example, shown "some improvement in math" and "improvement in his reading skills," it also described the student's "significant challenges in the areas of reading and comprehension" and in decoding multisyllable words and his struggles completing assignments in math, noting that the student was performing four grades below the expected level (id. at pp. 5-8). The hearing record does not include annual goal progress reports or report cards. Given this limited information, which offers a mixed picture of the student's progress, the hearing record does not support the appropriateness of the CSE's recommendations based on the student's progress under a similar program. For example, there is no evidence in the hearing record regarding how the January 2024 weighed the information about the student's progress and continued struggles to conclude that continuation of similar programming would be appropriate.

Further, the IHO noted that the parent did not object to the recommendation of the January 2024 CSE during the meeting (IHO Decision at pp. 5, 12). According to the January 2024 IESP, the parent stated her agreement "with the progress reports and information stated during the IESP meeting" but does not reflect either agreement or disagreement with the CSE's recommendations (Parent Ex. B at p. 8). Ultimately, however, the parent's objection or lack thereof during the meeting would not be determinative because, even if the parent preferred continuation of the SETSS and related services, the parent's expressed preference would not relieve the district of its obligation to ensure that the student's special education program and related services aligned with the student's needs (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . . , the IDEA does not require school districts simply to accede to parents' demands"]; cf. Loretta P. v. Bd. of Educ. of the Cheektowaga Cent. Sch. Dist., 2007 WL 1012511, at *6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"]).

With respect to the student's behaviors, the IHO found that the IESP "included behavioral observations" and "identifie[d] a number of targeted interventions and behavioral supports" similar to those recommend at Stars of Israel (IHO Decision at p. 12). The IHO's comparison of the strategies used at Stars of Israel was not an appropriate consideration in that comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather, it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP by its CSE through the IDEA's procedures—or, here, the IESP developed pursuant to the dual enrollment statute—was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E, 694 F.3d at 189-90; M.H.,

685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public-school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

As summarized above, while the IESP acknowledged that a November 2022 administration of the BASC had not indicated elevated scores on internalizing or externalizing problems or attention scales, more recent descriptions of the student's behaviors referenced that he had refused to comply with rules, had trouble following directions and adopting to classroom routines, responded defiantly when feeling frustrated or anxious, had been disrespectful to adults, and could be aggressive towards peers (Parent Ex. B at pp. 1-4). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a behavioral intervention plan (BIP) for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). The IESP did not include a section in which the CSE identified whether or not the student's behaviors interfered with his learning or that of others despite consistently implemented general school-wide or classroom-wide interventions (see 8 NYCRR 200.22[b][1]). To address the student's social/emotional and behavioral needs, the IESP recommended counseling and included an annual goal for the student to come up with a solution to a program with minimal prompts (Parent Ex. B at pp. 11, 15). In addition, strategies to address the student's academic difficulties and behavioral supports included providing directions repeated and broken down, preferential and special seating arrangements, positive reinforcement, visual/orthographic cues, breaks, reteaching of materials, and refocusing and redirection (id. at p. 10). Absent further indication of what was before the CSE or what conclusion the CSE reached with respect to the degree to which the student's behaviors interfered with his learning or that of others, it is difficult to discern whether the supports included in the IESP were sufficient to meet the student's needs.

Taking into account the foregoing, I agree with the parent that, given the claims presented, the information set forth in the IESP was not sufficient to establish that the January 2024 CSE's recommendation for SETSS with related services was reasonably calculated to enable a child to make progress. Accordingly, the IHO erred in finding that the district met its burden to establish the appropriateness of the January 2024 IESP.

2. Request for an IEP

I now turn to the parent's argument that the IHO erred in finding that the district did not deny the student a FAPE for the 2023-24 school year as a result of the district's failure to respond to the parent's request for an IEP for the student.

As discussed above, the parent alleges that the IHO erred by failing to address the district's lack of response to her request to reconvene the CSE to develop an IEP for the 2023-24 school year. Upon review of the hearing record, this allegation was contained in the parent's due process complaint notice and thus was properly before the IHO at the time of the hearing (see Parent Ex. A at p. 2). Likewise, review of the hearing record indicates that it was undisputed that the parent requested the district reconvene to develop an IEP in February 2024 and again in April 2024 (Parent Exs. J; K); however, in her decision, the IHO did not directly address the district's obligation to reconvene the CSE (compare Req. for Rev. ¶ 3, with Answer ¶ 6; see generally IHO Decision).

Notably, in analyzing the district's obligation to offer the student a FAPE, the IHO primarily focused on the parent's conduct, particularly the timing and circumstances of the student's enrollment at Stars of Israel and the timing of the parent's request for an IEP (IHO Decision at pp. 9-12). The timing of the student's enrollment at Stars of Israel and of the parent's letters to the district 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]); however, they did not relieve the district of its obligation to prepare an educational program for the student in response to the parent's specific request.[12]

Relevant to the district's obligation to offer the student a FAPE after having developed the IESP, the United States Department of Education noted in its Official Analysis to Comments in the Federal Register 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]).[13] 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

[12] While the IHO overlooked the district's obligation to convene a CSE and reevaluate the student upon the parent's request in her discussion of FAPE, the IHO did, however, further address the timing of the parent's purported 10-day notices in her analysis of equitable considerations (IHO Decision at pp. 14-15). The IHO found that the parent had not "sought in good faith to obtain a public program and placement" by notifying the district after enrolling the student at Stars of Israel (id. at p. 15). The IHO's findings in this regard are discussed further below.

[13] Here, the district is both the district of residence and the district of location.

> 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 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]).[14]

[14] 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

Here, the hearing record indicates that in a February 21, 2024 letter, the parent asserted that the student's needs could not be met in a general education classroom, and she requested that the district reevaluate the student, reconvene the CSE, and offer the student a placement for the 2023-24 school year (Parent Ex. J). Notwithstanding the IHO's characterization of the parent's intent, the February 2024 letter placed the district on notice that the parent no longer wanted an IESP and triggered the district's obligation to convene the CSE to develop an IEP (see IHO Decision at p. 15). 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]).[15] In the instant matter, the parent's February 2024 letter triggered the district's 60-day timeline, which means, taking into account school vacations and days off, by approximately June 6, 2024, the district should have convened the CSE to develop an IEP for the student. The hearing record, however, contains no evidence that the district reconvened the CSE, explained its refusal to do so, or responded to the parent's February 2024 or April 2024 letters in any way. Further, there are no mitigating factors in this matter that would indicate that the procedural violation did not impede the student's right to a FAPE, impede the parent's opportunity to participate in the decision-making process, or deprive the student of educational benefits (see Y.S., 2024 WL 4355049, at *18 [finding that, despite the lack of an IEP, the student was "incontrovertibly receiving special education services"]). Therefore, contrary to the IHO's findings, the district denied the student a FAPE for the 2023-24 school year by failing to convene a CSE to develop an IEP for the student after the parent's February 2024 request therefor.

B. Unilateral Placement

Having found that the district failed to meet its burden to prove that the January 2024 IESP was reasonably calculated to enable the student to make progress and that it, subsequently, failed to convene to develop an IEP for the student after the parent's request, I now turn to the parent's requested relief. At some point after the January 2024 CSE, the student was expelled from the parental placement at which the January 2024 IESP was intended to be implemented (see Nov. 6, 2024 Tr. pp. 66, 69; Parent Ex. H at p. 1). At that point, rather than enrolling the student in another general education nonpublic school at her own expense or in the public school, the parent engaged in a self-help remedy by unilaterally placing the student at Stars of Israel without the consent of the school district officials, and then commenced due process to obtain renumeration for the costs thereof. For purposes of relief, notwithstanding that it was an IESP in place at the time of unilateral placement, the parent's request for district funding for Stars of Isreal must be assessed under the Burlington-Carter framework.

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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.

[15] 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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

As noted by the IHO, the hearing record includes a February 2024 psychoeducational evaluation and a February 2024 OT evaluation, a 2023-24 program description, a curriculum outline, the student's 2023-24 schedule and attendance report, a February 2024 FBA, a February 2024 BIP, a February 2024 treatment plan, a May 2024 speech-language therapy progress report, a May 2024 counseling progress report, a June 2024 teacher progress report and the student's fifth grade report card from Stars of Israel (Parent Exs. C at pp. 4-19; E-F; G at pp. 2-26; see IHO Decision at pp. 12-13).

The updated February 2024 psychoeducational evaluation provided similar information to the testing available to the January 2024 CSE from March 2022 as related to the student's cognitive and academic present levels and needs, although the new testing additionally included academic standardized scores that fell in the extremely low range for word reading and spelling, and in the low average range in math (compare Parent Ex. B at pp. 1-3, with Parent Ex. H at pp. 2-3, 6). The February 2024 psychoeducational evaluation further provided standardized scores on adaptive functioning obtained using the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) parent/caregiver form that indicated the student had internalizing (i.e., emotional) behavior that fell in the average range, and externalizing (i.e., acting-out) problem behaviors that fell in the elevated range (Parent Ex. H at pp. 6-7).

The February 2024 OT evaluation, like the OT testing information in the January 2024 IESP, provided information on the student's fine motor skills (compare Parent Ex. B at p. 3, with Parent Ex. I). According to February 2024 motor testing using the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), the student received average scores in areas of fine motor skills, body coordination, and strength and agility (Parent Ex. I at p. 3). However, visual motor integration testing on the Beery-Buktenica Test of Visual Motor Integration (Beery VMI) yielded below average standard scores (id. at p. 5). This is not consistent with testing reported on the January 2024 IESP, as the student received average testing scores in OT in the area of visual motor integration on the TVMI (compare Parent Ex. I at p. 5, with Parent Ex. B at p. 3). The February 2024 OT evaluation of function and participation included a recommendation for OT services to address the student's writing skills, fine motor skills, and visual perceptual skills (Parent Ex. I at pp. 1, 7).

Attached to the Stars of Israel program contract, is a description of the program and philosophy at Stars of Israel with a general description of each subject, activities, and where applicable, core curriculum standards or targeted skills (see Parent Ex. C at pp. 4-19). While, as the IHO observed, the program description did not offer information specific to the student (see IHO Decision at p. 13), other documents in the hearing record identify more specifically the student programming at Stars of Israel. For the 2023-24 school year, Stars of Israel attendance records show that the student started attending the school on February 21, 2024 and remained there through June 19, 2024 (Parent Ex. F). A class schedule reflected the student's daily courses and indicated the student received three 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week of OT, and one 30-minute session per week of counseling (Parent Ex. E).

According to the program supervisor at Stars of Israel (program supervisor), the student was provided instruction in a class with nine other students, and one "licensed" teacher and two assistants (Nov. 6, 2024 Tr. pp. 45-46). The teacher of the program had special education

"licensure," and the teacher assistants had certification as registered behavior technicians (Nov. 6, 2024 Tr. pp. 47-48). The program supervisor described creation of a treatment plan for the student, use of data collection software to adjust prompt levels, and instruction provided in a concrete 3D format (Nov. 6, 2024 Tr. pp. 38-39). The supervisor described the program that included "shared instruction" with the student grouped with other students on his level depending on the subject; and "independent, and follow-up" instruction completed on the student's iPad (Nov. 6, 2024 Tr. p. 39). The program supervisor reported that the program provided the student direct instruction and a multisensory approach such as the use of Orton-Gillingham for reading (Nov. 6, 2024 Tr. p. 40).

The program supervisor testified that the student received related services of speech-language therapy, OT, and counseling in the program and identified the providers of such services by name, noting that the that they were "qualified and licensed" by the State in their respective disciplines (Nov. 6, 2024 Tr. pp. 49-50; Parent Ex. L ¶ 20; see Parent Ex. E). The hearing record included progress reports in areas of speech-language therapy and counseling; however, a progress report in the area of OT was not offered into evidence (see Parent Ex. G at pp. 22-24; see generally Parent Exs. A-F; G at pp. 1-21, 25-26; H-M; Dist. Exs. 1-3). The May 2024 speech-language therapy and counseling progress reports listed goals addressed or to be addressed (see Parent Ex. G at pp. 22-24). While the IHO seemed to question whether or when the student received related services (see IHO Decision at p. at p. 13), the program supervisor's testimony that the student received the services is unrebutted (see Nov. 6, 2024 Tr. pp. 49-50; Parent Ex. L ¶ 20).[16]

The February 2024 FBA/BIP, treatment plan, and the teacher progress report identified the student's communication, behavior, social, attention, math, and ELA needs, and included goals in these areas (Parent Ex. G at pp. 2-7; 9-21). The BIP outlined prevention strategies, instructional plans for alternative behavior, and behavior management strategies; the treatment plan listed communication and socialization behavior objectives for the student (compare Parent Ex. G at pp. 9-12, with Parent Ex. G at pp. 15-17). The treatment plan, in addition to laying out the student's needs, provided baseline February 2024 data with updated June 2024 data for communication and socialization that showed increases in the student's percentage of mastery, in some cases from 5 to to 60 percent, as well as mastery of some objectives (Parent Ex. G at pp. 15-17).

Although the IHO found that the February 28, 2024 treatment plan made broad conclusions about the student's progress over a small time period, the IHO did not account for notations on the plan that indicated it was updated quarterly (Parent Ex. G at pp. 2, 9, 13).[17] The treatment plan tracked approximately 12 communication objectives and approximately 12 socialization objectives, with mastery recorded for two communication objectives and two socialization objectives (id. at pp. 16-17). Review of the treatment plan indicated that, in general, the majority of the communication and socialization objectives showed increased mastery percentages from baseline recorded in February 2024 to then-current level in June 2024 (id. at pp. 15-17). On the other hand, three socialization objectives were repeated but provided different baseline

[16] On this point, the district argues that the parent testified that the student was not receiving related services consistently; however, the testimony cited related to the student's services under an IESP prior to the unilateral placement of the student at Stars of Israel (Nov. 6, 2024 Tr. p. 72).

[17] While the date of the treatment plan indicated that it was created one week after the student began attending Stars of Israel, the plan also included updated "[c]urrent [l]evel June 2024" data (Parent Ex. G at pp. 13, 15-17).

measurements and mastery levels, raising questions about the accuracy of the progress reporting (id. at p. 17).[18] Nevertheless, while 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]), 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). Accordingly, I do not find the errors in the progress reporting fatal to a finding of appropriateness.[19]

Also included in the hearing record, Stars of Israel provided the June 2023 teacher progress report that identified the student's needs in reading, writing, and math (Parent Ex. G at pp. 18-19, 20). The progress report noted that the student had self-deprecating thoughts towards reading and writing and as a result often shut down, hindering progress in these areas (id. at pp. 18-19). Whereas in math, the student presented with confidence and strength in computation skills (id. at p. 20). In relation to the student's reading and writing needs, the report provided that the student "demonstrate[ed] great progress" in areas of blending, manipulating letters sounds as words, and segmenting into syllables with the "provision of individualized support" (id. at p. 18). Further the teacher progress report indicated that the student "demonstrate[ed] an increased ability to process

[18] Specifically, the treatment plan indicated that the student had mastered two objectives in the area of socialization, specifically squeezing a squishy ball and take deep breaths when frustrated; and saying positive statements and asking caring questions to peers when provided prompts (Parent Ex. G at pp. 16-17). The student's objective to say positive statements was reported as mastered in June 2024, however, three rows below the reported mastery, the treatment plan repeated the same objective with no baseline data reported in February 2024, and with the student's performance in June 2024 reported as five percent rather than as mastered (id. at p. 17). An additional objective for the student to initiate a conversation with peers about a preferred topic during a social group setting initially reported a February 2024 baseline performance of 10 percent mastery, and a June 2024 performance of 60 percent mastery (id.). The same objective was repeated three rows below with no baseline data reported for February 2024, and performance data reported in June 2024 indicated 10 percent achievement (id.). Yet a third objective was reported twice with differing results; specifically, an objective related to measuring the student's ability to increase his social manners by looking at peers and making eye contact was first listed as a baseline of 15 percent mastery in February 2024, and in June 2024 had reportedly increased to 70 percent mastery; while three rows below, the same objective reported no data for February 2024 and five percent achievement by June 2024 (id.).

[19] With respect to progress, also included in the hearing record was the student's fifth grade report card, which listed reading, writing, and math standards, as well as the subject areas of social studies, science and physical education for the third marking period (Parent Ex. G at pp. 25-26). According to the student's report card, he received a 1 in most skills, which indicated the student was "emerging" and did "not demonstrate an understanding of concepts/skills taught this reporting period" (id.). The student received a 2 in ELA for eight skill areas, and in math for five skill areas, which indicated the student was "developing" and was "not yet consistent in demonstrating understanding of concepts/skills taught this reporting period" (id.).

and explain what he ha[d] read with individualized support" (id.). In the area of reading, the teacher progress report stated the student was provided "intense verbal prompts and repeated cues" and in writing the student was provided "constant redirection, and lots of positive reinforcement" to complete all writing tasks (id. at pp. 18, 19). In addition, the June 2023 progress report indicated that the student continued to need strategies to build his confidence and prompts and redirection to address challenging behaviors (id. at p. 21). Additional academic management needs within the teacher progress report included: "frontal" seating; social skills training; social stories; self-regulation methods; planned ignoring; modeling; role playing; initiation starters; turn-taking skills; prompting; reinforcement; verbal praise; token/point system; and tangible reinforcers (id.).

Taking into account the totality of the circumstances, the parent met her burden to demonstrate that Stars of Israel was an appropriate unilateral placement for the student for the 2023-24 school year.

C. Equitable Considerations

Having found that Stars of Israel was appropriate, I turn to consider 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"]).

The parent argues that the equitable considerations favor the parent as the parent "cooperated with [the district] and did not interfere with the [district's] obligation to provide a FAPE" to the student. Further, the parent argues that the fact that the student was enrolled in a nonpublic school while "the IEP process [wa]s underway" was not in and of itself proof of bad faith "so long as [the] parent[] participate[d] in the development of an IEP and placement" (Req. for Rev. ¶ 21).

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 with Stars of Israel 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 10 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, 348 F.3d at 523-24; 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).

Here, the parent attended and participated in the January 2024 CSE meeting, at which time the CSE developed an IESP for the student with a projected implementation date of February 9, 2024 because the student was parentally placed in a nonpublic school (Parent Ex. B at pp. 1, 18). There is no indication in the IESP, or elsewhere in the hearing record, that the parent expressed disagreement with the IESP or any intent during that meeting for the student to attend a public school or a unilateral placement.

The first notification to the district occurred with the letter dated February 21, 2024, on the same date that the student began attending Stars of Israel and one day after the parent unconditionally obligated herself to enroll the student and pay tuition to the nonpublic school (compare Parent Ex. J, with Parent Exs. C; F). Accordingly, the notice was untimely. Further, in the February 21, 2024 letter, the parent requested a reevaluation and a reconvene of the CSE and only indicated that "[i]f the [district] cannot offer [the student] an evaluation and placement for the 2023-2024 school year, [she] intend[ed] to unilaterally place [the student] in the private special education program" (Parent Ex. J at p. 2). The IHO found the parent's reference to a future intent to unilaterally place the student disingenuous given that the parent had already enrolled the student at Stars of Israel (IHO Decision p. 15). Further, in the February 2024 letter, while requesting that the district conduct an evaluation, the parent made no mention of the fact that she also had already had the student evaluated in February 2024, and there is no evidence that the parent disclosed those evaluations or provided them to the district for consideration (see Nov. 6, 2024 Tr. p 54; Parent Exs. C; J). The IHO also weighed this omission relating to the evaluations (IHO Decision at p. 15).

The IHO also noted the student had been expelled from his prior placement for misbehavior and was placed at Stars of Isreal shortly thereafter (Nov. 6, 2024 Tr. pp. 64-65; IHO Decision at p. 6). While this alone does not absolve the district from its obligations, it at least appears that the parent did not share the information as no mention was made in the February 21, 2024 letter of the student's expulsion (see Nov. 6, 2024 Tr. pp. 68-69; see also Parent Exs. J, K). This indicates that the parent was not completely engaged in the process as evidenced by her withholding pertinent information from the district.

Based on the foregoing, the IHO did not err in finding that the parent's failure to timely and accurately communicate her intent or her disagreement to the district weighed against a full award of tuition funding. The IHO's findings regarding equitable considerations were made in the alternative, and the IHO did not indicate whether the considerations warranted a full or partial denial of relief and, if partial, how much. Weighing the foregoing, I find that equitable considerations warrant an award of 50 percent of the student's tuition at Starts of Israel for the period of February 21, 2024 through June 19, 2024

VII. Conclusion

In conclusion, I find that the district failed to meet its burden to prove that the January 2024 IESP was reasonably calculated to enable the student to make progress and, therefore, failed to establish that it offered the student appropriate equitable services. I further find that the district violated the procedural requirements of the IDEA by failing to respond to the parent's request to reconvene a CSE to conduct a reevaluation of the student and timely develop an IEP and that such violation resulted in a denial of a FAPE to the student for June 2024. The parent demonstrated the appropriateness of her unilateral placement of the student at Stars of Israel for the period of February through June 2024. However, I find that equitable considerations warrant a 50 percent reduction of the parent's request for district funding of the costs of the student's tuition at Stars of Isreal for the period of February 2024 through June 2024.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated November 28, 2024, is modified by reversing those portions which determined that the district offered the student a FAPE and/or appropriate equitable services for the portion of the 2023-24 school year between February and June 2024 and found that the parent's unilateral placement of the student at Stars of Israel for a portion of the 2023-24 school year was not appropriate; and

IT IS FURTHER ORDERED the district shall reimburse the parent for or directly fund the costs of 50 percent of the student's tuition at Stars of Israel for the period of February 21, 2024 through June 19, 2024.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER