



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

## **The State Education Department**

**State Review Officer**

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**No. 25-084**

**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 Mordechai Buls, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene B. Dimoh, 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 to be reimbursed for her son's tuition at the Big and Little Ziv Hatorah School (Ziv Hatorah) for the 2023-24 and 2024-25 school years. The appeal must be sustained.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[j]).

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

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

### **III. Facts and Procedural History**

A CSE convened on May 16, 2023, determined that the student was eligible for special education as a student with autism, and developed an individualized education services program (IESP) for the student with an implementation date of September 1, 2023 (Parent Ex. B at p. 1).<sup>1</sup> At the time of the meeting, the IESP stated that the student, who was five years old, was attending the Ziv Hatorah program in "[g]rade K" and receiving related services (id.). The May CSE recommended that the student receive ten periods per week of individual special education teacher

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

support services (SETSS), two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual counseling, and one 30-minute session per week of group counseling, as well as daily ("0.8"), individual paraprofessional services for behavioral support (*id.* at pp. 13-14). The May 2023 IESP reflected a placement recommendation indicating that the student would be "[p]arentally [p]laced in a [n]on[p]ublic [s]chool" (*id.* at p. 16).

On June 16, 2023, in a letter that was transmitted to the district by the parent's attorney, the parent requested that the district reevaluate the student and reconvene the CSE to develop an IEP placing the student "in a full-time special education classroom for the upcoming twelve-month 2023-2024 school year" as she did not feel the student's academic, social and behavioral needs could be met in a general education classroom (Parent Ex. C at pp. 1, 2). The letter indicated that, "if these issues [we]re not timely addressed," the parent intended to unilaterally place the student in a private special education program for the extended 2023-24 school year and would commence proceedings to seek tuition funding and/or reimbursement from the district (*id.* at p. 2).

On June 29, 2023, the parent signed a contract for the student to attend Ziv Hatorah for the 2023-24 school year from July 2023 to June 2024 (see Parent Ex. E).<sup>2</sup> Tuition for the 2023-24 extended school year was set at \$144,000.00 (*id.* at p. 1).

In a second letter to the district, again transmitted by the parent's attorney, dated August 16, 2023, identified in boldface type as a "FOLLOW UP TEN DAY NOTICE," the parent indicated that, despite her June 2023 letter, "to date" the district had not evaluated the student or "provided him with an IEP, nor offered him any placement" (Parent Ex. D at pp. 1, 2). The letter again requested that the district "provide [the student] with an IEP and place him in a full-time special education classroom for the twelve-month 2023-2024 school year" and notified the district that, unless the issue was resolved, the parent intended to unilaterally place the student in the private special education program of the Ziv Hatorah (*id.* at p. 2). The student attended Ziv Hatorah for the 12-month 2023-24 school year (Parent Exs. F; H).

On April 22, 2024, in a letter that was transmitted to the district by the parent's attorney, the parent requested that the district reevaluate the student and reconvene the CSE to develop an IEP and place him in a "full-time special education classroom" for the twelve-month 2024-25 school year (Parent Ex. J at pp. 1, 2). The letter reflected the parent's previous concerns that the student's academic, social, and behavioral needs could not be met in a general education classroom and stated that, unless timely addressed, she intended to unilaterally place the student in a private special education program for the 2024-2025 school year and commence proceedings to seek tuition funding and/or reimbursement from the district (*id.* at p. 2).

The parent, through her attorney, sent a subsequent letter to the district on June 21, 2024, both via email and facsimile, identified in boldface type as "10-DAY NOTICE," which indicated her disagreement with the recommendations set forth in the student's May 2023 IESP; noted that, despite her request from the previous April 2024 letter, the district had not reevaluated the student

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<sup>2</sup> Ziv Hatorah has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

or convened the CSE to develop an IEP; reiterated her request for a full-time special education classroom for the student; and notified the district of her intent to unilaterally place the student at Ziv Hatorah for the 2024-25 school year and seek the costs of such placement from the district (Parent Exs. K; L).

On July 1, 2024, the parent signed a contract for the student to attend Ziv Hatorah for the 2024-25 school year from July 2024 to June 2025 (see Parent Ex. N). Tuition for the 2024-25 extended school year was set at \$144,000.00 (id. at p. 1).

On August 27, 2024, in another "10 DAY NOTICE" letter that was transmitted to the district by the parent's attorney, the parent restated her previous requests and concerns and noted that "to date," the district had not responded, and she advised the district again that if the issues were not resolved, she intended to unilaterally place her student at Ziv Hatorah for the 12-month 2024-25 school year (Parent Ex. M at pp. 1, 2).

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

In a due process complaint notice dated September 19, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years (see Parent Ex. A). Specifically, for both school years the parent alleged that the district ignored her multiple requests for a public school placement for the student (id. at pp. 3-5). As a result of the district's failure to act on her requests, the parent argued that she was compelled to unilaterally place the student at Ziv Hatorah (id.). By way of relief, the parent sought "prospective tuition payment" for the full time 12-month 2023-24 and 2024-25 school years (id. at p. 5).

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

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on November 20, 2024 (Tr. pp. 1-55). In a decision dated January 3, 2025, the IHO found that the district failed to meet its burden to show that it offered the student a FAPE for the 2023-24 and 2024-25 school years, given that the district representative conceded that no IEP was developed for the 2023-24 school year and the student's IEP for the 2024-25 school year was still a draft (IHO Decision at p. 6). Next, the IHO found that the parent failed to meet her burden to show that Ziv Hatorah provided the student with a program designed to meet his unique needs or meaningful educational benefit due to the student's regression (id. at pp. 6-8). Based on her findings, the IHO declined to address the existence of any equitable considerations which might bear on the parent's claim for relief (id. at p. 8).

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

The parent appeals, alleging that the IHO erred in finding that the parent failed to meet her burden of proving that Ziv Hatorah was an appropriate unilateral placement for the student. The parent asserts that the IHO erred in finding that the student's unilateral placement was inappropriate due solely to the student's regression. The parent further argues that her claim for relief is supported by equitable considerations including that she sent the district multiple requests for a public school placement, and that she was cooperative throughout the CSE process.

In its answer, the district denies the material allegations contained in the request for review and seeks affirmance of the IHO's decision, arguing that Ziv Hatorah is not an appropriate unilateral placement for the student. The district contends that regression alone can be sufficient to determine that a unilateral placement is inappropriate. The district does not advance any arguments regarding the existence of equitable considerations bearing on the parent's requested relief but does not concede this point. 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]).<sup>3</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

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<sup>3</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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**

Neither party has appealed from the IHO's decision that the district did not offer the student a FAPE for the 2023-24 and 2024-25 school years (IHO Decision at p. 6). 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 [S.D.N.Y. Mar. 21, 2013]).

### **A. Unilateral Placement**

Turning to the appropriateness of the unilateral placement, the IHO determined that the parent did not meet her burden to show that the student's programming at Ziv Hatorah was specially designed to meet the unique needs of the student (see IHO Decision at p. 7). Specifically, the IHO reasoned that Ziv Hatorah did not provide meaningful educational benefit to the student, as he was "regularly losing skills during all the school breaks and over the weekend, then taking one to two weeks to regain those skills" (id.). Therefore, the IHO determined that the student was "not going to be able to make academic progress in the program [Ziv Hatorah] [was] providing since the [s]tudent would only be regaining lost skills and not obtaining new ones" (id.). As discussed herein, the IHO erred by finding the student's Ziv Hatorah program for the 2023-24 and 2024-25 extended school years was not appropriate due solely to regression and lack of progress.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d

at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

### **1. 2023-24 School Year**

Prior to addressing the adequacy of the unilateral placement, a brief discussion of the student's needs is necessary. The hearing record included information provided by Ziv Hatorah relating to the student's needs during the 2023-24 school year such as a functional behavioral assessment (FBA), a behavior intervention plan (BIP), an assessment of functioning using the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), a treatment plan, teacher progress reports, related service progress reports, and report cards (Parent Ex. I).

Information prepared by Ziv Hatorah regarding the 2023-24 school year indicated that the student was "cognitively delayed" and exhibited difficulty with auditory learning and recalling and retaining information accurately (Parent Ex. I at p. 12). According to the treatment plan, the student struggled to maintain joint attention across all settings, was easily distracted and "fidget[ed] constantly" during classroom lessons, needed frequent redirection, and required prompts to refocus and follow directions (id.). The student had difficulty with academic skills



including number comprehension, counting "higher" numbers, pre-reading, identifying letters, sounds, vowels, and rhyming words, using capital and lowercase letters appropriately when writing, and in writing his name and numbers 1 to 20 (Parent Exs. I at p. 13; U ¶ 13).

Regarding communication skills, the student struggled with expressive and receptive language, as well as articulation, which affected his ability to be understood (Parent Ex. I at p. 12). The student had difficulty "ordering words correctly," struggled with word retrieval, and frequently needed to repeat himself to be understood (id.). The treatment plan indicated that the student's social skills were "lacking," he struggled to express his anger and frustration toward others in an appropriate way, he engaged in physical aggression towards peers, and he required "constant prompts" to regulate his emotions (id.). According to the 2023-24 FBA, some of the student's problem behaviors included off-task behaviors, fidgeting, lack of joint attention, disrespectful speech, "[w]ild" behavior, inappropriate language, latency to perform, physical aggression, verbal aggression, kicking, hitting, biting, screaming/shouting, impulsivity, "purposeful disturbances," and distractibility (id. at pp. 2-3). As part of the 2023 FBA, the student was assessed using the Vineland-3 Comprehensive Parent/Caregiver Form, which measured adaptive behavior (id. at p. 7). Assessment results yielded standard scores in three domains: communication (76), daily living skills (73), and socialization (78), with an overall adaptive behavior composite (ABC) of 74 (fourth percentile), falling "well below the normative mean of 100" (id.).

Turning to the unilateral placement, the student attended Ziv Hatorah for the 2023-24 school year (Parent Ex. U ¶ 10). According to the program supervisor at Ziv Hatorah, during the 2023-24 school year, the student was in a 12-month "Pre1A" special class with up to 12 students, all receiving special education services (id. ¶ 17). The supervisor testified that the classroom had a special education teacher and an assistant present at all times during secular instruction (id.). In addition, the program supervisor testified that the student received speech-language therapy, PT, OT, counseling services, and behavior support from a fulltime paraprofessional (id.). The program supervisor also stated that the student had a BIP in place, which was implemented and supervised by a board certified behavior analyst (BCBA) (id.). Additionally, the program supervisor testified that all of the student's providers were "appropriately licensed and certified professionals in their respective fields in the State of New York" (id.).

The student's BIP identified and outlined strategies for addressing the student's targeted problem behaviors, which consisted of elopement, defiance, prompt dependency, off-task behavior, disrespectful speech, "wild behavior," and physical aggression (Parent Ex. I at p. 8). The BIP included the function of the behavior, prevention strategies, instructional plans for alternate behavior, and behavior management strategies for each identified problem behavior, indicating that data would be collected "for instances and duration of target behavior" (id. at pp. 9-11). The BIP identified prevention strategies such as breaks, verbal praise, social skills groups, social stories, inclusion of student's preferred activities, adult supervision during unstructured play, games and toys, encouragement of self-sufficiency, modeling, and role play (id. at pp. 9-10). Instructional plans for alternative behaviors included reinforcing the student when he maintained attention or initiated and completed a task, engaged in appropriate play, and used words rather than aggression (id.). Behavior management strategies included reinforcing appropriate behaviors, redirection, planned ignoring, encouraging independence from prompting, modeling calm behavior, and using the "safe" corner (id.). The student's identified reinforcers included toy cars, action figures, edibles, trucks, and music (id. at p. 10). The BIP identified techniques being

implemented, including positive reinforcement (praise, "money," attention, access to favorable activity/toy, and scheduled breaks), sensory toys, FCT (functional communication training), manding for breaks, coping mechanisms, prompting, "DRI," "DRA," scaffolding, graphic organizers, "Premack Principle," redirection, social stories, sensory breaks, and sensory activities (*id.*).<sup>4</sup> A release of information was requested from all instructors working with the student, and the BIP indicated that the teacher would be available to discuss the student's program and progress with the other instructors (*id.*). The BIP noted that the student's teachers had created goals to assist him in learning alternative behaviors, the behaviors were reinforced differently, and progress toward these goals was to be regularly assessed using various means (*id.* at p. 11). As the student progressed, the objectives were to be modified and, as he mastered goals and increased replacement behaviors, the BIP noted that the student would be transitioned to a less restrictive educational setting and services would be faded (*id.*).

The student's 2023-24 treatment plan included communication and social goals, with reports of the initiation and progress towards the goals noted at varying points in time, generally throughout the school year (*see* Parent Ex. I at pp. 14-17).<sup>5</sup> Review of the student's communication goals shows that they focused on increasing the student's expressive communication skills, intraverbal skills, tacting skills, listener responding skills, expressive vocabulary, joint attention, and receptive skills for following a two-step unrelated command (*id.* at pp. 14-15). The student's socialization goals focused on increasing his initiation and social skills for playing with peers, sharing skills, ability to identify emotions and engage in flexible behavior, demonstrate functional play skills and appropriate interactions with peers, and the ability to follow social group rules, take his peers perspectives, and express his needs appropriately (*id.* at pp. 16-17). By May 2024, the special education teacher progress report reflected that the student "demonstrated a work-in-progress in both receptive and expressive language skills," and a "tenacity and willingness to persevere in the face of challenges" (*id.* at pp. 23, 26). At that time, the student "[f]or the most part" interacted well with his teachers, but at times became frustrated and also aggressive toward peers (*id.* at p. 26).

Review of the July 2023 Ziv Hatorah treatment plan shows that it also included annual goals for the student in mathematics, English language arts (ELA), communication, and social skills, which included specific targets for improvement in skills such as addition, subtraction, letter identification, pre-reading, expressive and receptive language, social awareness, and functional play (Parent Ex. I at pp. 12-17).

According to a November 2023 special education teacher progress report, in reading, the student had made "commendable strides," successfully recognizing and forming upper- and lower-case letters A-I (Parent Ex. I at p. 19). The student had a "solid understanding of the corresponding letter sounds" and was "actively working on enhancing his fluency with these sounds" (*id.*). The progress report noted that the student struggled to remember and pronounce the sounds, and "to sustain focus during mental exertion, particularly in sound drills," as he became easily distracted

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<sup>4</sup> The acronyms "DRI" and "DRA" were not further explained in the hearing record but commonly refer to "differential reinforcement of incompatible behavior," and "differential reinforcement of alternative behavior," respectively (*see* Parent Ex. I at p. 10).

<sup>5</sup> Some of the student's communication goals reflected a "Baseline" of July 2021 (Parent Ex. I at pp. 14-15).

(id.). To address these challenges, the student received reading instruction in a small group setting (2:1), with the teacher ensuring that he remained prompted and focused throughout instruction (id.). In May 2024, the progress report indicated that the student benefited from "positive reinforcement, one on one practice and step by step instructions" (id. at pp. 32, 24). The May 2024 special education teacher progress report also indicated that the student improved his ability to decode words, read basic sight words, name all vowels and identify the sound of each, could identify all alphabet letters with 80 percent accuracy, and had mastered his ability to answer reading comprehension questions (id.).

In writing, the November 2023 special education teacher progress report reflected that the student was demonstrating a "growing proficiency in fundamental writing techniques" (Parent Ex. I at pp. 19-20). The progress report stated that the student had difficulty summarizing and sequencing events in a story, and benefited from positive reinforcement, small group instruction, repetition, and multisensory modalities (id. at p. 20). Mastered writing goals included writing some letters, labeling pictures using inventive spelling, and sequencing story pictures (id.). By May 2024, the student's special education teacher reported that the student had "shown significant improvement" in his writing, such as the ability to express himself in writing through drawing, to punctuate a sentence, and write his first and last name (id. at pp. 23, 25). The May 2024 progress report noted that the student struggled in his spelling and grammar skills and continued to have difficulty writing within the lines provided (id. at p. 25).

The November 2023 special education teacher progress report indicated that, in mathematics, the student had made "notable progress in recognizing, writing, and counting numbers one through five, and developing an understanding of how to compare numbers within this set (Parent Ex. I at p. 18). However, the report indicated that the student displayed challenges when counting with one-to-one correspondence, and counting numbers beyond the number 10 (id.). To address the student's math needs, the special education teacher provided small group instruction, "multi-sensory modalities, step-by-step guidance, prompting, and repetitive exercises" to assist the student retain information (id.). The student had mastered math goals including identification of numbers 1-10, "show[ing] numbers on a ten frame as dictated by the teacher," completion of a four-part pattern, and sorting items by size (id.). A May 2024 special education teacher progress report noted that the student had "shown proficiency" in counting to 50 and counting by tens and twenties up to 100, and had mastered goals such as the ability to successfully identify greater or lesser numbers, write and represent numbers from zero to 20, fluently add and subtract within five, and answer quantity-based questions (id. at p. 23). The May 2024 progress report noted the student's continued challenges with maintaining focus and attention, but with frequent prompting and redirection to stay on task, stated that he had made progress (id.).

The hearing record includes related service progress reports for the student for the 2023-24 school year (see Parent Ex. I at pp. 28-38). A May 2024 speech-language progress report noted that the student had mastered the ability to produce several sounds without prompts, arrange a story sequence with pictures, and "identify characters, setting, and events within a story given verbal and visual prompts" (id. at p. 29). A May 2024 OT progress report indicated that the student presented with deficits in sensory processing, fine motor skills, coordination, spatial awareness and visual motor skills, and that the student had been making steady progress towards his goals as demonstrated by a reduction in "w" sitting, increased wrist extension when writing, and improved visual motor skills (id. at p. 32). The student's school counselor reported in May 2024 that the

student followed a classroom reward system, identified different emotions and feelings, and improved his ability to prolong conversations (id. at p. 35). Additionally, the student had made progress "not becoming defiant," and mastered" recognizing his angry emotions" (id.). A May 2024 PT progress report noted that the student had made some progress improving his tolerance to exercise and physical activity during sessions, and while he was described as performing most skills "inconsistently" the student maintained balance during some activities, walked backward and sideways, walked on a balance beam, and walked down a few steps without holding the rail (id. at pp. 37, 38).

According to the Ziv Hatorah program supervisor, in the 2023-24 school year, the student demonstrated progress in receptive and expressive language skills including responding to prompts and articulating his needs and desires (Parent Ex. U ¶ 21). According to the program supervisor, the student also demonstrated progress in his foundational mathematical skills, ability to focus, and in decoding words, reading basic sight words, and using fundamental writing techniques (id.). Additionally, the student had shown improvement in his communication and social skills and was "working on developing positive interactions with both peers and teachers" (id.). The parent testified that the student received behavioral support from a paraprofessional "with a behavioral intervention plan" and that she had seen progress in his behaviors (Tr. p. 44).

The hearing record includes the student's completed Pre 1A Ziv Hatorah report card which indicated the student's developing or proficient skills in ELA and math for three terms for the 2023-24 school year (see generally Parent Ex. I at pp. 39-47).

Based on the foregoing, the evidence in the hearing record shows that the parent met her burden to prove that Ziv Hatorah identified the student's special education needs, developed goals that addressed those needs, and provided specially designed instruction in programming specifically tailored to the student in which he benefited and demonstrated progress during the 2023-24 school year.

## **2. 2024-25 School Year**

The student continued to attend Ziv Hatorah for the 2024-25 school year and, according to Ziv Hatorah's program supervisor, the student was in a 12-month first grade special class with up to 12 students (Parent Ex. U ¶ 17). The program supervisor indicated that the student again received related services through Ziv Hatorah, which included speech-language therapy, PT, OT, counseling and fulltime paraprofessional services for behavior (id.).

As for the student's needs, the program supervisor indicated that the student "began the 24-25 school year with delays in multiple domains," including having "difficulty following multi-step directions and understanding complex instructions," and "often needing repeated prompts or additional clarification to complete tasks" (Parent Ex. U ¶ 14). The student continued to become frustrated, resulting in off-task behavior and "aggressive responses," and he "struggled to communicate his thoughts and feelings appropriately" (id.). The program supervisor indicated that the student had difficulty interacting appropriately with peers, frequently responded to conflicts with physical or verbal aggression, and struggled to interpret social cues (id.). According to the program supervisor, the student's "cognitive skills were below grade level" specifically in problem-solving and focus, and he had difficulty understanding and applying new concepts, with critical

thinking, and with attending (id.). Additionally, the program supervisor testified that the student was performing below grade level in math and ELA, struggled with foundational math and literacy skills, and he "often require[ed] additional support to complete tasks" (id.).

In addition to the program supervisor's description of the student, the hearing record includes information provided by Ziv Hatorah relating to the student's needs during the 2024-25 school year such as an FBA, a BIP, results of administration of the Vineland-3, a treatment plan, teacher progress reports, related service progress reports, and report cards (Parent Ex. R). The 2024 administration of the Vineland-3 yielded an overall standard ABC score of 75 (id. at p. 7). In June 2024 Ziv Hatorah conducted an FBA of the student and, in July 2024, developed a BIP (id. at pp. 2-6, 8-10). The BIP focused on five of the student's behaviors including being off-task, "wild behavior," prompt dependency, and both physical and verbal aggression (id. at pp. 8-9). The BIP identified the antecedents, function of the behavior, baseline data and "current status" data as of November 2024, and replacement behavior/techniques used to address the behaviors (id. at p. 8). Strategies to address these behaviors included many of the same strategies identified in the student's 2023 BIP such as positive reinforcement, sensory toys, "Premack Principle," redirection, social stories, sensory breaks, and sensory activities (compare Parent Ex. I at p. 10, with Parent Ex. R at p. 10).

The July 2024 treatment plan identified the student's current functioning and areas of need in communication, social skills, maladaptive behaviors, cognitive skills, attention, math, and ELA (Parent Ex. R at pp. 11-12). Ziv Hatorah developed individual goals for the student to improve his communication, social, math, and ELA skills (id. at pp. 12-16).

The July 2024 treatment plan indicated that the student was performing "below grade level" in his ELA skills and that he struggled with foundational literacy skills, including recognizing and naming uppercase and lowercase letters, and producing the primary sound of consonants and vowels (Parent Ex. R at p. 12). The student had difficulty blending sounds to form simple words and identifying high-frequency sight words, which impacted his reading fluency and comprehension (id.). The student benefitted from structured, hands-on activities, such as tracing letters and using phonics games, to help reinforce letter recognition and sound awareness (id.). The November 2024 teacher progress report indicated that the student had mastered reading goals which included identifying all upper-and lower-case letters, answering some "wh" questions after a story, and retelling "a familiar story using picture cues to support key details" (id. at pp. 17, 18). In writing, the November 2024 progress report stated that the student was able to form all upper-case and lower-case alphabet letters, he could spell CVC words, and his handwriting had improved (id. at p. 19). The student did not write sentences or know when to use capital letters, and struggled with letter formation, letter spacing, word spacing and required verbal prompting to assist with spelling (id.). The November 2024 progress report stated that the student had mastered the following writing goals: to correctly form lower- and upper-case letters, write his first name accurately, begin sentences with a capital letter, and end a sentence with a period (id.). Additionally, the student required "charts, guiding questions, [and] modeling to guide him in brainstorming ideas," and his new goals identified that the student would be provided with guidance and support from adults, "mini-lesson direct instruction," copying, modeling and use of peer writings to address his writing needs (id. at pp. 19-20). In math, the July 2024 treatment plan reflected that the student was functioning "below grade level," and that he had difficulty with counting to 50, identifying numbers to 20, and recognizing basic addition and subtraction within

10 (id. at pp. 11, 12). The November 2024 teacher progress report noted that "[r]elated addition facts, number lines, word problems were most difficult" for the student, and that he benefited from visual models, reteaching, songs, and anchor charts in math (id. at p. 17). The November 2024 progress report identified that the student had mastered math goals in counting aloud from 1 to 50, recognizing and writing numbers from 1-20, identifying and naming common shapes, ordering numbers 1 to 10, and completing simple patterns (id.).

In terms of communication, the two speech-language progress reports from August 2024 and November 2024 reflected the student's delays in various speech and language skills, including that he struggled to use grammatically correct sentences, adequately express his wants and needs, recall sentences, sequence pictures in order, and follow two-step directions, additionally, he demonstrated difficulty with articulation and phonology (see Parent Ex. R at pp. 21, 23). In August 2024 the speech-language therapy provider listed interventions including shared book reading, structured grammar activities, language development software, structured listening activities, frequent prompting, visual supports and "auditory bombardment" activities (id. at p. 21). To assist with the student's social pragmatics, the August 2024 progress report reflected that the provider used role-play, social stories, turn taking, and conversation scripts (id.). By November 2024, the student was reported to have made progress across several areas including the ability to categorize objects and pictures, increase phonological awareness, sequence stories using visual cues, improve the ability to recount personal experiences, and increase his use of descriptive language (id. at p. 23).

Turning to OT, a November 2024 progress report indicated that the student had difficulty with fine motor skills, handwriting, core and upper extremity strength, and visual motor skills (Parent Ex. R at p. 25). The occupational therapist reported that the student made gains in his writing skills, with a focus on "letter sizing and adherence to the line," and had participated in various hand strengthening exercises and activities to increase wrist extension and promote a more functional grasp (id.). The occupational therapist indicated that the student had difficulty using a static tripod/quadruped grasp on writing instruments during graphomotor activities without verbal prompts or tactile prompts and continued to struggle with letter sizing and placement (id.). Additionally, the therapist noted that the student would benefit from core and upper extremity strengthening to improve his fine motor development and would benefit from improving his visual motor skills (id.).

The student's August 2024 counseling progress report reflected areas of concern including the student's difficulty communicating his feelings, "confront[ing] his anger," and being able to stay seated for instruction (Parent Ex. R at p. 27). The counselor indicated that interventions to assist the student included role modeling positive behaviors, play therapy, positive praise and reinforcement, and teaching self-regulating strategies along with mindfulness techniques (id.). The counselor noted that the student had made some progress in staying seated, and the student's goals focused on maintaining eye contact with others when speaking, improving emotional regulation, and communicating to an adult appropriately when a peer was "bothering him" (id.).

The program supervisor testified in an affidavit that for both the 2023-24 and 2024-25 school years, strategies used with the student included "DTT, NET, Premack Principle, positive reinforcement (e.g. ., praises, attention, access to favorable activity/toy, and scheduled breaks), tact, listener, and social skills training, as well as prompt hierarchy, shaping, prompt fading, and

task analysis" (Parent Ex. U ¶ 19). Further, she indicated that the "intense and comprehensive supports" provided to the student enabled him to make "meaningful and functional progress" (*id.* ¶ 20). Additionally, the hearing record included the student's first term Ziv Hatorah report card, which indicated the student's developing or proficient skills in ELA and math for the first term of the 2024-25 school year (see generally Parent Ex. R at pp. 28-33).

Given the above discussion, review of the evidence in the hearing record shows that the parent met her burden to prove that Ziv Hatorah provided the student with specially designed instruction to meet the student's unique needs during the 2024-25 school year.

### **3. Regression**

In her decision, the IHO found that Ziv Hatorah was not designed to meet the student's educational needs and did not provide meaningful educational benefit to the student solely because the student experienced regression following school breaks, which led the IHO to conclude that the student would not "be able to make academic progress in the program" at Ziv Hatorah (IHO Decision at pp. 7-8). As discussed below, the IHO applied flawed legal analysis, and her decision on this ground must therefore be reversed.

In this instance, the IHO based her findings on the Ziv Hatorah program supervisor's description of the student's regression, elicited after questioning as to why the student required 12-month programming (Tr. p. 34; Parent Ex. U ¶ 3; see IHO Decision at pp. 7-8). State regulation provides that, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a "period of eight weeks or more upon return to school" (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated Sept. 2024], available at <https://www.nysed.gov/special-education/extended-school-year-programs-and-services-questions-and-answers>).

The program supervisor testified that "prior to mastery and based on the level of repetition [the student] need[ed] to [achieve] mastery, anytime [the student] was off or any break that [Ziv Hatorah] had, particularly holidays," the student exhibited "a large level of regression" (Tr. p. 34). Therefore, according to the program supervisor, Ziv Hatorah "recommended that [the student] get the full-time program based on the level of regression that occurred with any holidays or breaks" (*id.*). When asked how long the student would take to regain the skills he had lost, the program supervisor responded that it would take the student anywhere from "one to two weeks depending on how long the break was" (*id.*). As described in State guidance as noted above, one to two weeks to recoup skills does not amount to substantial regression in the context of a public school's obligation to provide 12-month services; accordingly, the IHO erred in imposing a significantly higher standard upon the parent in the context of the unilateral placement when the evidence revealed a more modest regression that the student experienced during breaks, one that I would not characterize as substantial. Accordingly, the IHO erred in weighing the evidence of regression

during school breaks so heavily that it warranted a finding that the unilateral placement was not appropriate. Moreover, when a student with a disability experiences regression, 12-month programming is an appropriate response, which is what the Ziv Hatorah provided the student in the present matter.<sup>6</sup> It appears that the IHO conflated the testimony regarding regression and need for extended school year services with the student's ability "to make academic progress" (IHO Decision at p. 7).<sup>7</sup>

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

Aside from the testimony regarding regression, the IHO's decision contained little to no analysis of the evidence regarding the student's programming at Ziv Hatorah. Based on the foregoing, I find that the IHO erred in finding the student's unilateral placement at Ziv Hatorah was inappropriate. Review of the evidence in the hearing record shows that the parent met her burden to prove that Ziv Hatorah provided the student with specially designed instruction to meet the student's unique needs, and the IHO's decision to the contrary, specifically regarding the inappropriateness of the unilateral placement due to the student's regression, is not supported by the hearing record (see Parent Exs. I at pp. 8, 14-20, 23-25, 29, 32, 35; R at pp. 8, 14-15, 17-19, 23, 25, 27). Rather, the evidence reflects that Ziv Hatorah conducted an FBA, developed a BIP and individual academic, social, physical and communication goals, and provided specially designed instruction to address those goals during the 2023-24 and 2024-25 school years. While the student did experience some regression during breaks, that is not uncommon, especially for students with significant needs, and given the totality of the circumstances, the hearing record shows that the unilateral placement in this case was appropriate.

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<sup>6</sup> At times parties argue whether 12-services are necessary in order for a student with a disability to receive a FAPE, but that kind of dispute is not present in this proceeding.

<sup>7</sup> The IHO acknowledged the supervisor's testimony that the student made academic and functional progress at Ziv Hatorah during the school years at issue but did not discuss it in her analysis (IHO Decision at p. 5).



## B. Equitable Considerations

Having found that the unilateral placement was appropriate, I next turn to whether equitable considerations warrant an award or reduction of the parent's requested relief.<sup>8</sup>

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"])).

As noted above, on appeal, the parent asserts that she cooperated with the district and provided several notices to the district regarding her request for a public school placement for the student, which the district ignored. In its answer, the district raises no basis to find equitable considerations weigh against the parent's requested relief, opting instead to state that it "does not concede" the question and requesting remand in the event the unilateral placement is found appropriate. While the district seeks a remand for a determination on the weighing of the equities, it should be noted that the district had a full and fair opportunity to make its case at the impartial hearing and again in its response to the parent's appeal. However, the district offered neither testimony nor documentary evidence at the impartial hearing (IHO Decision at p. 4; Tr. p. 4) and declined its opportunity to present in its answer any grounds for reducing or denying the parents' requested relief on equitable grounds.

Turning to the evidence available to the IHO, equitable considerations favor granting the relief requested by the parent. Firstly, the student's mother participated in the CSE process and contributed information regarding the student's history and behavior (Parent Ex. B at pp. 2-3, 6). Next, prior to enrolling the student at Ziv Hatorah for the 2023-24 school year, the parent sent the district a notice of her intention to unilaterally place the student as well as her request for the CSE to reconvene and reevaluate the student (Parent Ex. C at p. 2). Having no response from the

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<sup>8</sup> Having found that the unilateral placement was inappropriate, the IHO did not consider the equities (IHO Decision at p. 8).

district, the parent sent a follow up notice approximately two months later (Parent Ex. D at p. 2). On April 22, 2024, in anticipation of the 2024-25 school year, the parent sent the district notice of her intention to once again unilaterally place the student (Parent Ex. J at p. 2). Then, on June 21, 2024, the parent sent a follow up request alleging that the district had not responded to her notice and requests (Parent Exs. K at p. 2; L at pp. 1, 4). Thus, the record reflects that the parent participated in the CSE process and made multiple attempts to raise her concerns with the student's educational programming with the district. Given this unrefuted evidence of parental cooperation, as well as the district's pattern of non-responsiveness to the parent, I find that equitable considerations weigh against the district and support granting the relief requested by the parent.

## **VII. Conclusion**

The hearing record demonstrates that the parent met her burden of proving the appropriateness of the student's unilateral placement at Ziv Hatorah. Further, there are no equitable considerations that justify a reduction in her requested relief. Accordingly, the portion of the IHO decision regarding the appropriateness of the unilateral placement must be reversed.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated January 3, 2025, is modified by reversing those portions which determined that the parent failed to meet her burden of proving the appropriateness of Ziv Hatorah during the 2023-24 and 2024-25 school years; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for the full tuition of the student's placement at Ziv Hatorah for the 2023-24 and 2024-25 extended school years.

**Dated:**            **Albany, New York**  
                      **July 30, 2025**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**