



The University of the State of New York

The State Education Department

State Review Officer

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No. 25-101

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, P.C., attorneys for petitioner, by Mordechai Buls, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 N Little: Ziv Hatorah Program (Ziv Hatorah) for the 2024-25 school year. 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]-[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 in detail.

Briefly, a CSE convened on October 11, 2023, found the student eligible for special education as a student with a speech or language impairment, and developed an IEP for the student with a projected implementation date of October 25, 2023 (Parent Ex. B at pp. 1, 19-20).¹ The

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

CSE recommended the student attend a 10-month program consisting of 30 periods per week of 12:1+1 special class instruction in core academic classes, along with related services of one 40-minute session per week of individual counseling services, one 40-minute session per week of group counseling services, one 40-minute session per week of individual speech-language therapy, and one 40-minute session per week of group speech-language therapy (*id.* at pp. 13-14). The October 2023 IEP indicated that the student did not need positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or that of others or a behavioral intervention plan (BIP) (*id.* at p. 5). However, the management needs section of the IEP listed behavioral strategies that included the use of differential reinforcement and a token economy (*id.* at p. 4).

By email dated June 21, 2024, the parent advised the district that the student "had not received a proper or adequate educational and school placement for the twelve-month 2024-2025 school year" and "unless this issue c[oukd] be resolved," she intended to unilaterally place the student at Ziv Hatorah and seek tuition funding or reimbursement from the district (Parent Ex. H at p. 2). On July 1, 2024, the parent signed an enrollment contract with Ziv Hatorah for the student's attendance from July 2024 through June 2025 at a total cost of \$144,000 for the 2024-25 school year (Parent Ex. C at pp. 1-3).

On August 22, 2024, the district sent the parent a prior written notice summarizing the October 2023 CSE's recommendations for the student for the 10-month 2023-24 school year (Dist. Ex. 1). In addition, the district sent the parent a school location letter bearing the same date as the prior written notice (Dist. Ex. 2).

In a letter dated August 26, 2024, the parent informed the district that the student had not received any public school placement or an appropriate IEP for the 12-month 2024-25 school year and stated she intended to unilaterally place the student at Ziv Hatorah and commence proceedings to seek tuition funding or reimbursement from the district for the student's program at Ziv Hatorah, less the religious portion of instruction, "unless this issue c[could] be resolved" (see Parent Exs. I; L ¶¶ 2-3, 6-7).²

A. Due Process Complaint Notice

In a due process complaint notice dated September 23, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A).³ The parent indicated that the student needed to remain at Ziv Hatorah, further asserting the student required placement in a 12:1+1 special class on a 12-month basis, along with a "behavioral plan," to meet his academic, social, and behavioral needs, and to "avoid regression" (*id.* at pp. 3-4). The parent alleged that the district failed to recommend an appropriate program

² 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).

³ Both parties entered a copy of the parent's September 23, 2024 due process complaint notice into the hearing record (compare Parent Ex. A, with Dist. Ex. 6). For purposes of this decision only the parent exhibit will be cited to. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

and placement for the student (*id.* at p. 4). As relief, the parent requested an impartial hearing and an order for "the [s]tudent to remain placed [at] Big N Little: Ziv Hatorah"; for the district to directly fund or reimburse tuition for the 2024-25 school year; and "prospective tuition payment for the full-time 12 month extended 2024-2025 school year for the placement of the [s]tudent by the [p]arent in the [described] program" (*id.* at p. 5).⁴

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on November 14, 2024 and concluded the same day (Tr. pp. 1-41). In a decision dated January 6, 2025, the IHO found that the district denied the student a FAPE for the 2024-25 school year based on the district's concession during the impartial hearing that it did not provide the student a FAPE (IHO Decision at pp. 3, 6; see Tr. pp. 33-34). The IHO further found that the parent failed to meet her burden of showing that the unilateral placement she selected was appropriate to meet the student's needs (*id.* at pp. 3, 7). The IHO determined that Ziv Hatorah was not designed to meet the student's educational needs because the student was not making progress in the program (*id.* at p. 7). The IHO found that the student was regularly losing skills during school breaks and over the weekend, and then was taking one week to regain those same skills (*id.*). Based on that finding, the IHO determined the student was not going to be able to make "functional" progress in the program Ziv Hatorah was providing because he would only be regaining skills lost over the weekend and not obtaining new skills (*id.*). The IHO denied the parent's request for tuition funding and dismissed her due process complaint notice with prejudice (*id.*).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that she failed to demonstrate that Ziv Hatorah was appropriate. The parent argues that Ziv Hatorah provided educational instruction specially designed to meet the student's unique needs and the IHO's reliance on the student's regression alone was not proof that Ziv Hatorah was inappropriate. The parent argues that the IHO misinterpreted testimony which described the student's regression during school breaks and weekends and further argues that such testimony was based on the student's performance during the prior school year and did not reflect the student's then-current progress at Ziv Hatorah. The parent also argues that the IHO should have considered the totality of the circumstances when determining whether the student's program at Ziv Hatorah was appropriate. Finally, the parent argues that the IHO erred by not addressing equitable considerations and they weigh in favor of granting the requested relief because the district failed to provide an appropriate placement despite her multiple requests and because the district did not present any evidence that she was uncooperative in the process. The parent requests that the district be required to fund the student's tuition for the Ziv Hatorah program for the extended 2024-25 school year.

In an answer, the district generally denies the material allegations contained in the request for review. At the outset, the district argues the parent's request for review does not conform to practice regulations governing appeals before the Office of State Review because the request for

⁴ The parent also requested pendency or, in the alternative, for the IHO to schedule a pendency hearing and issue a pendency order (Parent Ex. A at p. 5).

review bears a conformed signature and because the verification was signed and notarized before the date indicated on the request for review. Then, the district argues the IHO correctly determined the student's unilateral placement at Ziv Hatorah was inappropriate. Lastly, the district argues that equitable considerations do not favor any award of relief because the parent's 10-day letters were insufficient. The district also argues, in the alternative, that if it is determined that equitable considerations favor awarding relief, any award should be reduced by \$5,000 for the portion of the student's program that was religious in nature. The district requests a dismissal of the parent's request for review.

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]).⁵

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

⁵ 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).

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

At the outset, the district does not appeal from the IHO's decision that it failed to offer the student a FAPE for the 2024-25 school year (IHO Decision at p. 6). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Preliminary Matters

The district contends that the parent's request for review should be dismissed for failure to comply with State regulations governing practice before the Office of State Review. Specifically, the district alleges the request for review improperly bears a conformed signature of the parent's attorney and was not properly verified by the parent.

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

The district concedes that the request for review was timely served within 40 days after the date of the IHO's decision (see 8 NYCRR 279.4[a]).

According to practice regulations, all pleadings and papers submitted to an SRO must "be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]).

Regarding the district's allegation that the request for review improperly bears the conformed signature of the parent's attorney, upon review of the parent's pleadings, the parent's attorney signed the request for review, the notice of intention to seek review, notice of request for review and both affidavit of services with a conformed signature "/s/" followed by the typed name of the attorney; the case information statement also bore the typed name of the parent's attorney. It should be noted that the practice regulations do not specifically state whether a conformed signature is an acceptable method for meeting the requirement that all pleadings must be signed (8

NYCRR 279.8[a][4]). However, regardless of whether the conformed signature meets the requirements, in an exercise of my discretion, I will not dismiss the parent's request for review given that the parent's attorney endorsed the pleadings with his name, mailing address, and telephone number, consistent with practice regulations and there is nothing indicating that the district was in any way prejudiced by the use of a conformed signature in this instance (see 8 NYCRR 279.7[a]).

I turn now to the district's argument that the parent's verification was improperly signed and notarized before the date on the request for review, or, more concerning, was altered to the date on the request for review so it would appear to be completed on the same day.

The practice regulations require verification of all pleadings submitted to an SRO in connection with an appeal (see 8 NYCRR 279.7[b]). When the appeal is taken by the student's parent or parents, "[t]he request for review shall be verified by the oath of at least one" such petitioner (see id.). Verification of a document entails a sworn statement that the affiant knows the contents of the document and knows the contents of the document to be true; or, with respect to allegations made "upon information and belief," the affiant believes the allegations to be true (see 8 NYCRR 279.7[b][1]).

A review of the parent's verification does not lead the undersigned to agree with the district's allegations. The verification was signed by the parent and notarized on February 14, 2025, the same date that appears on the request for review (compare Affidavit of Verification, with Req. for Rev.). There is nothing that appears on the verification that would lead to the conclusion that the notarization date was altered to match the date reflected on the request for review. The district does not elaborate on why it believes the date was altered. Accordingly, as the parent submitted a proper verification on its face, and the district has not presented a sufficient argument to challenge the veracity of the verification, the district has not presented a basis for rejecting the request for review.

Although not explicitly raised by the district as a reason for the district's overall assertion that the request for review is not in compliance with the practice regulations, it is worth noting that the request for review contains vague allegations and generally lacks citations to the hearing record.

State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, a request for review must provide a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). Additionally, the practice regulations require that the request for review contain "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[c][3]). In this case the request for review includes general arguments that regression alone is not proof of a program's inappropriateness and that the totality of the circumstances must be

considered without citation to the hearing record (see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).⁶ Overall, the parent only cites to two pieces of documentary evidence in the hearing record to support her argument that she met her burden of proving the appropriateness of Ziv Hatorah. Similarly, the parent cites twice to the IHO's decision and twice to the documentary evidence to support her argument that equitable considerations favor awarding relief (see Req. for Rev. at pp. 4-6).

While I decline to reject the request for review based on noncompliance in this instance, parent's counsel is cautioned that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review (8 NYCRR 279.8[a]), an SRO may be more inclined to do so after a party's or his or her attorney have repeatedly failed to comply with the practice requirements. Additionally, while the request for review is not dismissed, the scope of the appeal is limited to those issues explicitly raised within the request for review.

B. Unilateral Placement

The IHO determined that the student's program at Ziv Hatorah was not designed to meet the student's educational needs (IHO Decision at p. 7). More specifically, the IHO found that based on the testimony of the Ziv Hatorah program supervisor, Ziv Hatorah was not providing a meaningful educational benefit to the student because he was regularly losing skills during school breaks and over weekends and then he took a week to regain his lost skills, which showed the student was unable to make academic progress in the Ziv Hatorah program (id.). The IHO determined that since the student would only be regaining skills lost over the weekend and not obtaining new skills, the student would not be able to make functional progress (id.). As a result, the IHO found that the parent had not met her burden of demonstrating that Ziv Hatorah was appropriate (id.).

The parent asserts that the IHO erred in finding that she failed to meet her burden of demonstrating Ziv Hatorah was an appropriate unilateral placement. The parent argues that under the totality of the circumstances Ziv Hatorah provided educational instruction specially designed to meet the student's unique needs. The parent also argues that the IHO erroneously determined that Ziv Hatorah did not provide a meaningful educational benefit based solely on the student's regression and further that regression alone was not proof of inappropriateness of the student's program at Ziv Hatorah.

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'

⁶ Also, a request for review could be up to 10-pages in length; however, the parent opted to only submit a 6-page request for review (see 8 NYCRR 279.8[b]).

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. Student's Needs

While not in dispute, a discussion of the student's needs provides context for the issue to be resolved, namely, whether Ziv Hatorah delivered specially designed instruction to the student which addressed his unique needs during the 2024-25 school year.

The student's needs are described in assessments, plans, and progress reports completed by Ziv Hatorah, including a treatment plan dated July 9, 2024; an August 2024 teacher progress report; an August 2024 occupational therapy (OT) progress report; and an August 2024 counseling progress report (see Parent Ex. G at pp. 13; 18-25).

According to the program director at Ziv Hatorah, the student presented with behavioral, social, cognitive, and academic delays (Parent Ex. K ¶ 12). With regard to cognitive development, the July 2024 treatment plan described the student as "cognitively challenged," and indicated he had difficulty processing information and required external assistance to complete tasks (Parent Ex. G at p. 13). The July 2024 treatment plan noted the student struggled to recall and retain information and was performing below grade level in math, reading, and writing (*id.*). According to the treatment plan, the student had difficulty maintaining joint attention, was easily distracted, and required prompting and redirection to refocus (*id.*). The Ziv Hatorah "[a]ssessment of [c]urrent [f]unctioning" indicated the student's adaptive behavior was assessed using the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) comprehensive parent/caregiver form (*id.* at p. 7). According to the document, the respondent's answers yielded an adaptive behavior composite score of 73, which was "well below the normative mean of 100" (*id.*). The treatment plan indicated that based on the respondent's answers socialization was a relative weakness for the student while daily living skills and communication were relative strengths for him (*id.*).

With respect to academic development, the August 2024 Ziv Hatorah teacher progress report reflected that the student's reading and comprehension were below grade level, and he tried to read quickly, which resulted in "many" decoding errors, which in turn affected his fluency (Parent Ex. G at p. 19; see Parent Ex. G at p. 14). In math, the July 2024 treatment plan and August 2024 teacher progress report noted the student struggled with number comprehension, adding and subtracting numbers, and grasping quantitative concepts (*id.* at pp. 14, 18). Turning to writing, the July 2024 treatment plan and August 2024 teacher progress report reflected the student had difficulty with grammar and proper sentence structure but could produce basic sentences and express simple ideas (*id.* at pp. 14, 20). Additionally, the teacher progress report indicated the student had mastered the ability to spell basic words with short vowels, blends, digraphs, and some vowel-consonant-e words (*id.* at p. 20).

With regard to social/emotional development, the Ziv Hatorah treatment plan noted the student had difficulty relating to his peers and did not maintain appropriate boundaries, often resorted to verbal and physical aggression when in a social setting, was socially unaware and struggled to pick up on basic social cues, had difficulty taking the perspective of other, had difficulty regulating emotions, and was generally indifferent to the emotions of others (Parent Ex. G at p. 13). The August 2024 teacher progress report and the August 2024 counseling progress report indicated the student showed variability in interactions with teachers and peers, sometimes respectful and kind, but other times disrespectful and impolite (*id.* at pp. 21, 24). In terms of behavior, the July 2024 treatment plan indicated the student presented with maladaptive behaviors, including difficulty maintaining joint attention, fidgeting, and non-compliance (*id.* at pp. 2-3, 13). The July 2024 treatment plan noted the student was prompt dependent and easily distracted by environmental stimuli, often overstepped boundaries in social interactions, and engaged in aggressive behavior (*id.*).

In terms of physical development, the August 2024 OT progress report revealed the student had deficits in his fine motor skills, visual perceptual skills, and graphomotor skills, which impacted his academic and social functioning (Parent Ex. G at p. 22). In addition, the progress report noted the student wrote with poor alignment and spacing, fatigued easily during writing, and had difficulty with complex shapes in cutting activities (*id.*).

2. Program at Ziv Hatorah

A review of the IHO's decision shows that she determined the parent's unilateral placement at Ziv Hatorah for the 2024-25 school year was not appropriate based on the program supervisor's testimony regarding student regression during the 2023-24 school year. In doing so, she failed to consider additional evidence in the hearing record that showed Ziv Hatorah designed an educational program for the student for the 2024-25 school year that addressed his identified needs, and provided him with specially designed instruction. Additionally, the IHO overlooked evidence in the hearing record showing that the student made progress at Ziv Hatorah during both the 2023-24 and the 2024-25 school year. Accordingly, the parent is correct in that the IHO erred by focusing solely on the program supervisor's testimony on regression and not on the totality of the student's program at Ziv Hatorah for the 2024-25 school year.

Initially, the IHO's finding as to the student's lack of progress relates to the student's performance during the 2023-24 school year and it does not fully capture the evidence of the student's performance during that school year. The IHO restated the program supervisor's testimony regarding the student's regression during the 2023-24 school year, noting that the student would forget skills over weekend and holiday breaks if the mastery criteria of 80 percent was not met the week prior (see IHO Decision at p. 7). Review of the affidavit testimony of the Ziv Hatorah program supervisor shows that she testified that due to the student's underlying behaviors, he required a consistent and regimented program (Parent Ex. K ¶ 20). She opined that the student would experience "severe regression if his education w[as] interrupted for two months during the summer" as he "require[d] the constant infusion of specialized instruction and reinforcement" (Parent Ex. K ¶ 20). During the hearing, the IHO questioned the Ziv Hatorah program supervisor as to how the school determined the student's need for 12-month services and the supervisor testified that based on the school's tracking of the student's achievement during the 2023-24 school year, it determined he required summer services based on regression experienced during holidays or weekends (Tr. pp. 22-23). The program supervisor reported that when the student was unable to attend school, due to "holidays or weekends," Ziv Hatorah staff observed regression in his performance on individual goals, particularly as compared to peers (Tr. pp. 22-23). Thus, the student was "invited" to the summer program based on the "weekend and holiday regression" that he displayed (Tr. pp. 22-23). When asked to explain the regression, the program supervisor further elaborated that the student would have times when he would master specific targets and goals, or come close to mastery prior to the weekend and when he came back, "he'd be blank [and] we would start all over again, reintroducing the goal or target or letter that we were working on from the prior school week" (Tr. pp. 23-24). The program supervisor testified the "weekend break caused [the student] to lose [] information that wasn't completely mastered and generalized" and the student would regress "back down to his baseline, which would be 20-30 percent" (*id.* at pp. 23-24). However, according to the program supervisor, if the school was able to get the student to 80 percent accuracy on his goals or skills within the school week, "he would be okay" (Tr. pp. 23-24).

Noticeably, the hearing record lacks evidence regarding the 2023-24 school year particularly with respect to how often the student met mastery criteria of the skills that were being worked on prior to the end of the week. However, a comparison of the Ziv Hatorah summer 2024 progress reports with the October 2023 IEP shows the student made progress in the Ziv Hatorah program during the 2023-24 school year (compare Parent Ex. G, with Parent Ex. B). For example, the October 2023 IEP present levels of performance reflected that in math, the student had a hard time with basic addition and subtraction and that he had difficulty counting numbers that exceeded ten, but the August 2024 Ziv Hatorah teacher progress report noted the student mastered a goal to solve simple addition and subtraction problems within 10 and mastered another goal to count aloud from one to 20 and recognize written numbers up to 20 (compare Parent Ex. B at p. 2, with Parent Ex. G at p. 18). The October 2023 IEP indicated the student struggled with his reading fluency and did not know the sound of all letters; however, the August 2024 teacher progress report reflected the student was able to accurately produce the primary sound for each consonant and short vowel in isolation (compare Parent Ex. B at p. 2, with Parent Ex. G at p. 19). With regard to writing, the October 2023 IEP noted the student was unable to write letters in their appropriate form while the August 2024 Ziv Hatorah OT progress report revealed the student had shown improvements with letter formation as well as more consistent sizing, although he still required cueing and struggled with alignment of letters (compare Parent Ex. B at p. 2, with Parent Ex. G at p. 22). In terms of social/emotional skills, the October 2023 IEP indicated the student struggled with identifying or expressing his emotions, whereas the Ziv Hatorah August 2024 school counselor progress report noted the student made moderate progress on a goal targeting his ability to label his emotion and why he felt that way when asked (compare Parent Ex. B at p. 3, with Parent Ex. G at p. 24). Further, the Ziv Hatorah July 2024 treatment plan indicated the student improved in his latency and was less distracted during lessons, and that he had improved in his social interactions and learned to respect boundaries (see Parent Ex. G at p. 15).

Based on the above, the IHO's reliance on the Ziv Hatorah's program supervisor's testimony as to the student's regression over weekends and holidays was in error as in order to find that the program did not provide the student with a meaningful educational benefit, the IHO made an assumption as to how frequently the student was unable to achieve mastery of skills during the week. Additionally, as noted above, although the hearing record lacked specific information regarding the student's mastery of skills each week, a comparison of the information available in the hearing record shows that the student made progress in academic and social skills during the 2023-24 school year, such that the IHO's reliance on a lack of progress during the 2023-24 school year for finding a continuation of the student's program at Ziv Hatorah inappropriate was not justified.

Turning to the program specifically recommended for the student for the 2024-25 school year, the district argues that the testimony of the Ziv Hatorah program supervisor lacked sufficient detail with respect to the elements of instruction the student's teachers employed and how these strategies and techniques might have addressed the student's needs. The district further argues that the Ziv Hatorah progress reports lacked a description of instruction provided to the student and whether the student benefited from that instruction.

However, a review of the 2024-25 functional behavioral analysis (FBA), treatment plan, and progress reports produced by Ziv Hatorah staff supports a conclusion that the student's teacher,

occupational therapist, and school counselor identified the student's needs and provided him with specially designed instruction.

During the 2024-25 school year, the student was eight years old and in third grade at Ziv Hatorah (see Parent Exs. C; F; G; L). According to the Ziv Hatorah program supervisor, the student was in a classroom of up to 12 students, staffed by a special education teacher and an assistant at all times during secular instruction (Parent Ex. K ¶ 16). The student also received related services including one 40-minute session per week of individual counseling services; one 40-minute session per week of group counseling services; one 40-minute session per week of individual speech-language therapy; one 40-minute session per week of group speech-language therapy; and two 40-minute sessions per week of individual OT (see Parent Exs. K ¶ 16; E at p. 1; Tr. pp. 20-21). The program supervisor testified by affidavit that the student's "limited ability to express himself often led to aggressive behavior" (Parent Ex. K ¶ 13). According to the program supervisor, for the 2024-25 school year, Ziv Hatorah conducted an FBA to identify the student's problem behaviors and their functions and generated and implemented an individualized behavior plan for the student (*id.* at ¶ 11). The student's behavior plan was directly supervised and implemented by a board-certified behavior analyst (BCBA) (*id.* ¶ 16).

According to the Ziv Hatorah 2024-25 curriculum schedule, the student attended the following subjects: Hebrew, literacy, social skills/sports program, social studies, writing workshop, mealtime: social integration, mathematics, specials including music/media and art, library, current events, English language arts (ELA), and science (see Parent Ex. E). The program supervisor testified that the student received speech-language therapy during ELA counseling during social skills group, and OT during writing workshop (see Tr. pp. 20-21). In addition to the curriculum schedule, the hearing record includes a program description and curriculum outline for the school's general studies subjects (Parent Ex. C at pp. 4-15).

With regard to academics, the July 2024 treatment plan included annual goals to address the student's identified needs in the areas of mathematics and ELA (see Parent Ex. G at pp. 14-15). With respect to math, the August 2024 teacher progress report indicated that, during the term covered by the report, the student was working on skip counting, adding and subtracting numbers up to the 100s place, and place value up to 1000 (Parent Ex. G at p. 18). The August 2024 teacher progress report noted that the student had mastered several math goals including goals to count aloud from 1 to 20 and recognize written numbers up to 20; to solve simple addition and subtraction problems within 10; to compare numbers within 10, correctly using terms such as "more," "less," and "equal,"; to recognize and extend simple AB and ABC patterns with colors, shapes, or objects; and to count the sides and vertices of basic shapes (*id.*). The teacher progress report further reflected that math manipulatives, individualized attention, and visual aids were used to help the student progress in his math skills (*id.*). The August 2024 teacher progress report identified goals for the following three months that targeted the student's ability to skip count up to 100; correctly identify the value of each digit in the hundreds and thousands places when given a three-or-four digit number; to accurately solve subtraction problems with regrouping for two-digit numbers; to solve one-step addition and subtraction word problems; and to read analog clocks to the nearest five minutes (*id.* at pp. 18-19). Turning to reading, the August 2024 teacher progress report indicated the student mastered reading goals related to his ability to correctly identify all uppercase and lowercase letters, to accurately produce the primary sound for each consonant and short vowel in isolation; to recognize and read basic sight words such as the, is, and, you, and my;

to read familiar environmental print such as stop signs, store logos, and school labels; and to read simple sentences such as "[t]he cat is big" (id. at p. 19). The teacher progress report noted the student had made progress overall in his accuracy, and ability to read blends, and vowel-consonant-e words (id.). In addition, the progress report identified reading goals for the following three months designed to improve the student's ability to answer inferential questions using context clues and background knowledge; to read grade level texts aloud with proper expression and intonation; to cite at least one piece of text evidence to support an answer or claim; to recognize and read common phonics patterns, such as consonant blends, diagraphs, and vowel teams; and to accurately decode two-and-three syllable words in grade-level texts (id.).

Turning to writing, the August 2024 teacher progress report reflected that the student had mastered the ability to produce basic sentences on his own, as well as to express simple ideas and thoughts, but he struggled with grammar and proper sentence structure (Parent Ex. G at p. 20). The progress report further indicated that the student had made progress on brainstorming ideas and writing them down on his own (id. at p. 20). The teacher progress report reflected that the student had mastered writing goals to correctly form uppercase and lowercase letters; to correctly write his first name with proper letter formation and capitalization; to write simple consonant-vowel-consonant (CVC) words such as cat and dog; to label his drawings with at least one word or a short phrase such as sun or big dog; and to accuracy copy simple sentences such as "I like dogs" from a model (id.).

The August 2024 teacher progress report included goals for the three months following the report that targeted the student's ability to write compound sentences using conjunctions; to correctly spell unfamiliar grade-level words in independent writing assignments; to write sentences with consistent spacing between letters and words when using lined paper and given visual prompts; to write complete sentences with a subject and predicate, using capitalization and punctuation correctly; and to expand simple sentences by adding descriptive details (Parent Ex. G at pp. 20-21). The progress report indicated that the goals would be addressed using sentence starters; mini-lesson direct instruction; as well as copying, modeling, and using peer's writings (id. at p. 20).

The Ziv Hatorah treatment plan for the 2024-25 school year also included objectives tailored to the student's communication and social skills needs, along with baseline data, criteria for mastery, November 2024 mastery levels, and target dates for mastery (see Parent Ex. G at pp. 15-17). In addition, the July 2024 treatment plan identified the student's speech-language needs and included communication goals to target the student's receptive and expressive language needs (id. at pp. 15-16). According to the July 2024 treatment plan, the student mastered several communication related goals to increase his intraverbal skills and respond with a reciprocal statement using a full sentence during discrete trial training; to increase his expressive vocabulary by communicating his feelings during discrete trial training using visual emotion cue cards as prompts; to increase his intraverbal skills and respond to a "wh" question from a story read aloud with verbal prompts during discrete trial training; to increase his intraverbal skills by engaging in a reciprocal conversation of at least three exchanges with a peer; to increase his expressive vocabulary by manding for a break with least to most prompting; and to increase his intraverbal skills by sequencing events by retelling using sequential order using manipulatives with prompts during discrete trial training (Parent Ex. G at pp. 15-16). The July 2024 treatment plan included several communication goals which noted a target date for mastery of "[six] months upon

implementation" and targeted the student's ability to increase his intraverbal skills and respond with a reciprocal statement using a full sentence during discrete trial training; to increase his receptive communication skills and follow a two-step unrelated command; to increase his listener speaker skills by staying on topic for one comment; to tact 10 sets of opposite cards through modeling and role play; to increase his receptive language and follow two-step instructions; and to tact the location of an object with a visual prompt (*id.* at p. 16).

In terms of social/emotional development, the August 2024 counseling progress report reflected that the student had shown notable progress engaging in meaningful conversations (Parent Ex. G at p. 24). The counselor indicated that the student transitioned with ease to counseling and appeared more comfortable engaging in conversations and sharing personal experiences with her (*id.*). The counselor noted that the student required frequent and explicit reminders to wait for his turn to speak if he tried to talk over another peer; in response, the counselor avoided eye contact with the student, used gestures to tell him to wait if he tried to get her attention when she was speaking to another student, and pointed to his behavior management chart to indicate the importance of self-regulation (*id.*).

According to the August 2024 counseling progress report, the student made moderate progress following rules to a game and playing interactively with his peers, but reported that sometimes, the student stopped playing midway through the game or refused to participate (Parent Ex. G at p. 24). The counselor reported that the student needed encouragement to follow the group plan, otherwise he would engage in mischievous behavior such as throwing small pieces of paper over the room divider (*id.*). The student would not apologize for his "misdemeanor" when caught and insisted that it was not him or abruptly said "ok!" to acknowledge the action but did not show any remorse (*id.*). The counselor noted that when the student was caught engaging in "mischievous behavior" she modeled the desirable response for him and reminded the student of the importance of taking responsibility for his actions (*id.*).

According to the August 2024 counseling progress report, the student was more forthcoming with using emotion words, especially if he was excited or bothered (Parent Ex. G at p. 24). The student would tell his peers about his frustration and what they needed to do differently (*id.*). The counselor reported that the student "would occasionally push or punch his peer" (*id.*). The student got very upset if someone teased him (*id.*). According to the counseling progress report, the student benefited from proximity control and going to a "cool down spot" to calm down if he did not like what he heard instead of reacting to it (*id.*). The counseling progress report noted that for the 2024-25 school year, the student was to continue to work on goals targeting his ability to label his emotions and explain why he felt that way when asked, to communicate his challenge and learn to ask for help, to increase his social skills by engaging in three conversational exchanges with his peers on a topic of interest; and to increase his play skills by following the rules of a game, going on his turn, and focusing on the game until completion (*id.* at pp. 24-25). In addition, the student's counselor recommended new goals designed to improve the student's ability to regulate his impulses by keeping his hands and feet to himself when things did not go his way or when his peers engaged in "friendly teasing" and to admit his mistake by saying "[I am] sorry" to peers and adults, especially when an authority figure gave him corrective feedback (*id.* at p. 25).

Regarding behavior, to address the student's specific needs and challenges, Ziv Hatorah conducted an FBA in June 2024 to assess the student's problem behaviors and their functions

(Parent Ex. K ¶ 11; see Parent Ex. G). The June 2024 FBA indicated the student presented with skill deficits across all domains, lacked the ability to communicate efficiently and instead, engaged in problem behaviors (see Parent Ex. G at p. 4). The June 2024 FBA noted that the student lacked independent skills and required prompts "to complete all tasks" and assistance when completing a task (Parent Ex. G at p. 4). The FBA reflected that the student lacked attention skills and fidgeted continually during lessons (id.). According to the June 2024 FBA, the student was easily distracted and lacked the skills necessary to benefit from social settings (Parent Ex. G at p. 4). The June 2024 FBA indicated that the student often overstepped boundaries and engaged in aggressive behavior (id.).

According to the program director, with the collaboration of the student's parent, teachers, and providers, Ziv Hatorah generated and implemented an individualized behavior plan for the student and monitored his progress through careful and consistent data collection (Parent Ex. K ¶ 11; see Parent Ex. G at pp. 8-12). The program supervisor explained that this allowed all members of the student's education team at Ziv Hatorah to monitor and update his areas of deficiency and to ensure that he was making progress (Parent Ex. K ¶ 11). Behaviors targeted in the student's July 2024 BIP included non-compliance; latency; lack of boundaries; distractness; fidgeting; prompt dependence (need for teacher assistance); aggression; and lack of joint attention (Parent Ex. G at pp. 8-12).

The July 2024 BIP reflected the function, a prevention strategy, an instructional plan for alternative behavior, a behavior management strategy, and a data collection strategy for each identified behavior (Parent Ex. G at pp. 8-12). The BIP also included an instructional checklist for staff, a list of the student's reinforcers, a description of techniques being implemented, considerations for coordination with other instructors, and a curriculum plan to include behavior intervention (see Parent Ex. G at pp. 8-12). According to the July 2024 BIP, techniques being implemented at the time included the use of positive reinforcement, e.g., praises, money, attention, access to favorable activity/toy, and scheduled breaks; sensory toys; functional communication training; mand (request) for break; coping mechanisms; prompting; differential reinforcement of incompatible behaviors; differential reinforcement of alternative behaviors; scaffolding; graphic organizer; Premack principle; redirection; social stories; sensory breaks; and sensory activities (Parent Ex. G at p. 12). The BIP included antecedent, behavior, behavior consequence/function baseline data from September 2022, along with updated data from June 2023, and November 2024 for each of the student's target behaviors (see Parent Ex. G at pp. 8-9).

With respect to physical development, the August 2024 OT progress report reflected that at the start of the 2024-25 school year, the student was making "slow and steady progress towards his goals" (Parent Ex. G at p. 22). According to the OT progress report, the student had difficulty transitioning into sessions and was often reluctant to participate in certain activities (id.). The OT progress report reflected that the student made some improvements in spacing between words, although he struggled with alignment of letters (id.). According to the OT progress report, the student had mastered his ability to cut out basic shapes with accuracy (id.). The student had shown improvements in visual perceptual activities such as puzzles and was able to complete a 20-piece interlocking puzzle with minimal verbal cues (id.). According to the OT progress report, the student continued to have difficulty sustaining attention to activities and was easily distracted; however, he had improved his ability to remain seated during tabletop activities (id.).

In the progress report, the occupational therapist noted that although the student had shown some progress towards his goals, he continued to exhibit deficits in the areas of fine motor skills, visual perceptual skills, graphomotor skills, and attention (Parent Ex. G at p. 22). The occupational therapist opined that it was strongly recommended that the student receive OT services at his then-current mandate in order to promote further growth towards his goals (id.). The occupational therapist recommended several goals to address the student's need to correctly form upper and lower case letters with correct directionality; to write two sentences (five words each) with adequate alignment; to complete an eight-to-10 minute writing/coloring activity without fatiguing; to focus on a 10-minute tabletop activity without getting distracted; to remain seated during an eight-to-10 minute tabletop activity; to improve visual motor coordination and visual perceptual skills needed to participate in educational activities; and to transition smoothly between two activities (see Parent Ex. G at pp. 22-23).

In addition to the information above, according to the program supervisor's testimony, the strategies to instruct the student during the 2024-2025 school year included discrete trial training, natural environment teaching, use of the Premack Principle, positive reinforcement (e.g., praises, attention, access to a 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. K ¶ 18).

Based on the above, contrary to the district's argument in its answer that the information contained in the hearing record was vague and too general to establish that Ziv Hatorah provided specially designed instruction to meet the student's needs, there is significant information regarding the strategies used and how the student responded to those strategies. Accordingly, the evidence in the hearing record supports a conclusion that the parent met her burden to show that Ziv Hatorah delivered was an appropriate unilateral placement for the student for the 2024-25 school year.

C. Equitable Considerations

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

that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"").

As the IHO found the parent did not meet her burden to prove that Ziv Hatorah was an appropriate placement, the IHO did not address whether the equitable considerations favored the parent's claims. On appeal, the parent argues that equitable considerations favor granting her requested relief, specifically district funding of the costs of the student's tuition at Ziv Hatorah.

The district argues that equitable considerations do not favor awarding the parent's requested relief because the letters dated June 21, 2024 and August 26, 2024 were insufficient to provide the district with proper notice of the parent's disagreement with the district's recommended educational program for the student. The district asserts that the June 2024 letter was "so vague as to be essentially meaningless" and the later August letter, although "somewhat less vague," only included allegations contradicted by evidence in the hearing record and was sent too late to provide proper notice of the parent's unilateral placement.

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice 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, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

It should be noted that the district does not allege that it did not receive either the June 21, 2024 or the August 26, 2024 letters and conceded during the impartial hearing that the parent did submit a 10-day notice, objecting to the substance of the notice (Tr. p. 32).

According to the June 21, 2024 letter, the parent indicated that the student had not received a proper or adequate educational and school placement for the 12-month 2024-25 school year and advised the district that if the issues could not be resolved, she intended to unilaterally place the student at a private education program at Ziv Hatorah and commence proceedings to seek tuition funding and reimbursement from the district (Parent Ex. H). The subsequent letter dated August 26, 2024, informed the district that the student had not received "any public school placement and an appropriate [IEP]" for the 12-month 2024-25 school year and further notified the district of the parent's intention to unilaterally place the student at Ziv Hatorah and commence proceedings to seek tuition funding or reimbursement from the district for the student's program at Ziv Hatorah "unless this issue can be resolved" (see Parent Ex. I).

The district contends that the hearing record contradicts the statements made in the August 26, 2024 letter, because it includes a prior written notice and a school location letter sent from the district to the parent on August 22, 2024 (see Dist. Exs. 1; 2). Although the district takes the position that it addressed the concerns raised in the parent's August 22, 2024 letter as a matter weighing on equitable considerations, the merits of such a dispute goes to whether the district offered the student a FAPE for the 2024-25 school year, an issue that the district conceded. Additionally, the district appears to misread the parent's August 22, 2024 letter as it explicitly stated that the parent's had not received "an appropriate [IEP]" not that they did not receive one at all (Parent Ex. I). Similarly, the June 2024 letter indicated that the student had not received "a proper or adequate educational and school placement" (Parent Ex. H). As noted above, the purpose of the 10-day written notice is to give the district an opportunity, before the student is removed from public school, to evaluate the student, convene a CSE, and develop an appropriate program. The district had such an opportunity here, but appears to have decided not to attempt to hold a CSE meeting to determine the parent's concerns as to the appropriateness of the student's IEP. Accordingly, the lack of detail in the June 2024 and subsequent August 2024 letters do not weigh against granting the requested relief based on equity.

The district also argued the August 2024 10-day notice letter was sent after the parent signed the enrollment contract for the student to attend Ziv Hatorah on July 1, 2024 (Tr. p. 32). However, this argument fails to acknowledge that the parent sent a 10-day notice letter first on June 21, 2024 and the district did not raise an argument that the June 2024 10-day notice letter was not timely during the impartial hearing.

The district has not pointed to any instances in which the parent failed to cooperate with the CSE and the hearing record shows that the parent participated in the October 2023 CSE meeting. Accordingly, there is no basis that warrants a reduction to the tuition relief awarded based on the 10-day notice letters.

Finally, the district argues that any relief awarded should be reduced by \$5,000.00 based on the proportion of tuition that the parent acknowledges is religious in nature and for which she does not seek public funding. Regarding religious instruction, during the impartial hearing the parent's attorney stated in his opening statement that the parent was seeking tuition expenses less the cost of religious instruction (Tr. p. 11). The parent's attorney conceded the parent was seeking tuition funding of \$139,000 of the \$144,000 total tuition cost and that the cost of tuition could be reduced for religious instruction placing a value of \$5,000 on that portion of the program (*id.*). Though the parent in her request for review requests tuition reimbursement for the full cost of the student's placement at Ziv Hatorah, given the parent's attorney's concessions during the impartial hearing, the tuition award shall be reduced by \$5,000 for the portion dedicated to religious instruction.

VII. Conclusion

As neither party appealed from the IHO's finding that the district denied the student a FAPE for the 2024-25 school year and having determined that the parent met her burden of showing that the program provided to the student at Ziv Hatorah during the 2024-25 extended school year was appropriate, and that equitable considerations weigh in favor of granting the parent's requested

relief for funding of the student's tuition at Ziv Hatorah in the amount of \$139,000 the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find they are without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 6, 2025, is modified by reversing those portions which found that the parent did not meet her burden of proving that Big N Little: Ziv Hatorah was an appropriate unilateral placement for the student for the 2024-25 school year;

IT IS FURTHER ORDERED that the district shall fund the cost of the student's tuition at Big N Little: Ziv Hatorah for the 2024-25 school year in the amount of \$139,000.

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

STEVEN KROLAK
STATE REVIEW OFFICER