The University of the State of New York

The State Education Department
State Review Officer
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No. 23-237

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Mayerson & Associates, attorneys for petitioners, by Gary S. Mayerson, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which found that respondent (the district) offered an appropriate educational program to their son and denied their request to be reimbursed for their son's tuition costs at the Tribeca Community School (Tribeca) and additional special education services for the 2022-23 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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications

of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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 here in detail. Briefly, a CPSE

convened on December 8, 2021, to conduct the student's initial review, found the student eligible for special education as a preschool student with a disability, and recommended a 6:1+2 special class in a State-approved preschool program, along with related services of speech-language therapy, occupational therapy (OT), and parent counseling and training (see generally Dist. Ex. 2).[1, 2] On January 6, 2022, the parents signed an enrollment contract with Tribeca for the student's attendance during the 2022-23 school year (Parent Ex. G).[3]

In a notice to the parents dated June 21, 2022, the district identified a preschool location for the student to attend for the 2022-23 school year to receive the program and services set forth in the December 2021 IEP (see Dist. Ex. 11; see also Dist. Ex. 8-10).

The parents disagreed with the recommendations contained in the December 2021 IEP, as well as with the recommended preschool that the district assigned the student to attend for the 2022-23 school year, and, as a result, notified the district in an email dated July 16, 2022 that the student was, at that time, "attending a mainstream pre-school with behavioral support" and receiving applied behavior analysis (ABA) services and parent counseling and training "in the home" and that the parents intended to seek district funding for the costs of the student's tuition, special education iterant teacher (SEIT)/ABA services, related services, assistive technology, and transportation (see Parent Ex. B).[4]

In a due process complaint notice, dated May 12, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year

[1] The hearing record includes a district "Notice of Eligibility for Partial Services" dated December 8, 2021, which indicated that the district could not identify a preschool where the student could receive all of the programming and services recommended on the IEP but could deliver the recommended speech-language therapy and OT services at a location selected by the parents (Dist. Ex. 2 at p. 1).

[2] In January 2021, at the age of two years old, the student was eligible for services through the Early Intervention Program (EIP) including special instruction, speech-language therapy, and occupational therapy (OT) (Dist. Exs. 5 at pp. 5-6; 6 at p. 6; 7 at pp. 4-5). During the 2021-22 school year, the parents "ultimately decided to pursue alternative private services, including" 25 hours of applied behavior analysis (ABA) per week and two sessions per week of speech-language therapy (Tr. p. 65; Parent Ex. C at p. 2). According to the December 2021 IEP, at the time of the meeting, the parents elected for the student to continue receiving services through the EIP (Dist. Ex. 2 at p. 3); however, it is unclear from the hearing record if the parents meant that the student would continue to receive the private services the parents had obtained. Generally, a student's eligibility for early intervention services ends as of his or her third birthday (see 20 U.S.C. § 1432[5][A]; 34 CFR 303.211[a]); however, State law provides that a child in an EIP who is evaluated by the district's CPSE before his or her third birthday and found to be eligible for preschool educational services under the IDEA, and turns three years of age on or after the first day of September, is eligible to continue receiving early intervention services until the second day of January of the following calendar year if their parents so elect (see Pub. Health Law § 2541[8][a][ii]). Accordingly, the student would only have been eligible to receive early intervention services through January 2, 2022.

[3] Tribeca 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).

[4] The hearing record contains duplicative exhibits (compare Parent Exs. A, and B, with Dist. Exs. 1, and 12). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content.

(see Parent Ex. A). The parents raised many issues including but not limited to the district's and/or CPSE's failure to: conduct a triennial evaluation, ensure the parents' opportunity to meaningfully participate in the process, recommend appropriate related services, address the student's need for 1:1 services, recommend appropriate annual goals, or identify a school location for the student to attend (see generally id. at pp. 2-5). For relief, the parents sought reimbursement and/or funding of tuition and related costs at Tribeca, approximately 25 hours per week of SEIT/ABA, 15 hours per week of in-home "teaching support," four hours per week of speech-language therapy, four hours per week of OT, the cost of an augmentative and alternative communication (AAC) program, transportation costs, and up to two hours per week of parent counseling and training (id. at p. 6).

After a prehearing conference on June 21, 2023, the parties proceeded to impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) which convened on July 20, 2023 and concluded on August 10, 2023 after three days of proceedings (see Tr. pp. 1-286; IHO Ex. I). In a decision dated September 22, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year (IHO Decision at p. 24). The IHO found that the December 2021 IEP was "in effect at the start of the 2022-2023 school year" and "would have remained in place for the entire school year" and offered a placement in the student's least restrictive environment (LRE), that the lack of an functional behavior assessment (FBA) and an assistive technology evaluation did not render the IEP inadequate, and that the annual goals were appropriate for the student (id. at pp. 17-22). The IHO did not make a finding regarding whether the unilateral placement was appropriate but did hold that the hearing record suggested the parent did not intend to place the student in the public-school setting (id. at p. 23). Lastly, the IHO denied the parents' request for compensatory education services as relief for the period of December 2021 through July 2022 as the parents did not raise claims related to that time frame in the due process complaint notice (id. at p. 24). Based on the foregoing, the IHO dismissed the parents' due process complaint notice (id.).

IV. Appeal for State-Level Review

The parents appeal.[5] The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore,

[5] Before I turn the issues on dispute, I note that the parents' request for review in this case fails to fully comply with the practice regulations. State regulations 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]). Further, State regulations require that the parties set forth in their pleadings: "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" (8 NYCRR 279.8[c][2] [emphasis added]). Here, the parents do not number the issues presented for review. Further, the request for review in several instances fails to identify the IHO's precise rulings, failures to rule, or refusals to rule presented for review, opting instead to list a mixture of factual allegations and allegations of district wrongdoing together, without, for the most part, describing how the IHO erred on specific issues. Additionally, other allegations of IHO error are broadly stated without citations to the portions of the IHO's decision which the parent appeals and without stating the grounds for reversal or modification of the IHO's decision. 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 a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y.

the allegations and arguments will not be recited here in detail. Generally, the parents contend that the IHO erred in failing to address the district's failure to implement the IEP during the 2021-22 school year and in finding that the district offered the student a FAPE for the 2022-23 school year. The parents seek reimbursement for the costs of the student's tuition at Tribeca and private services and compensatory education.

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'

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]; 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]). While I decline to reject the request for review based upon noncompliance in this instance, the parents' 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's repeated failure to comply with the practice requirements.

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 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]).[6]

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

[6] 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).

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

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

VI. Discussion

A. Scope of the Impartial Hearing

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

On appeal, the parents argue that the IHO erred in failing to award compensatory education to remedy the district's failure to provide the student services under the December 2021 IEP from December 2021 through June 2022. However, review of the due process complaint notice shows that the parent raised no complaints with any school year other than the 2022-23 school year, and the parents concede this in their request for review (see Parent Ex. A; Req. for Rev. ¶¶ 12, 15). Further, the IHO's prehearing conference summary and order demonstrates that the parties and IHO thereafter clarified the issues for hearing at the June 21, 2023 prehearing conference (IHO Ex. I ¶¶ 3, 21). Specifically, the parties agreed that the issues included whether there was "a denial of FAPE for the 2022-23 school year" and the parents' allegation that the district "did not convene an IEP meeting" for the 2022-23 school year" (id.). Further, the summary and order reflected that relief sought was "tuition reimbursement plus reimbursement for additional supports and services Student received during the 2022-2023 school year" with no mention of compensatory education (id.). Although the prehearing conference summary and order provided that either party could object to anything contained in the summary and order that may have been misstated or overlooked, the parent did not do so in this proceeding (id. ¶ 31).

In the request for review, the parents argue that the district opened the door to claims pertaining to the 2021-22 school year during the impartial hearing because the district defended the December 2021 IEP (Req. for Rev. at ¶ 15). The Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]).

However, the December 2021 IEP was the operative IEP in place at the time of the parent's placement decision for the 2022-23 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; R.E., 694 F.3d at 187-88). Therefore, the district's defense of the December 2021 IEP that was in place at the beginning of the 2022-23 school year was appropriate to address the issues within the scope of the impartial hearing and did not effectuate an expansion of those issues.[7] Accordingly, the parents' allegation that the IHO erred in failing to address the district's alleged failure to implement the December 2021 IEP during the 2021-22 school year is without merit.

B. 2022-23 School Year

1. Student's Needs

As reported by the CPSE chairperson, the December 2021 CPSE relied on a January 2021 psychological assessment, a January 2021 developmental evaluation, a January 2021 speech-

[7] Relatedly, the parents argue on appeal that the district failed to reconvene the CPSE after the December 2021 meeting but prior to the beginning of the 2022-23 school year to update the student's present levels of performance and annual goals and to review the student's progress in the private mainstream setting. As a general matter, in addition to a district's obligation to review the IEP of a student with a disability periodically but at least annually, the IDEA and federal and State regulations also require a CSE, upon review, to revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). In a guidance letter, the United States Department of Special Education Programs (OSEP) indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). OSEP has also indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]). Here, the parents do not allege that they requested a reconvene or provided information about the student to the district which would have triggered the district's obligation to reconvene before the required annual review. The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). The December 2021 IEP was in effect at the beginning of the school year and, therefore, the district met its obligation in this regard.

language assessment, and a January 2021 OT assessment when developing the student's IEP (Tr. p. 63; Dist. Exs. 2 at pp. 4-7; 4; 5; 6; 7; 14 ¶ 11).[8] All of these evaluations were conducted via telehealth (Dist. Exs. 4 at p. 2; 5 at p. 1; 6 at p. 1; 7 at p. 1). The December 2021 IEP reflected these evaluations were conducted when the student was two years old and presented as nonverbal with global developmental delays (compare Dist. Ex. 2 at pp. 4-7, with Dist. Ex. 6 at pp. 3-6).

Consistent with the January 2021 psychological evaluation, the December 2021 IEP stated that an assessment of the student's intellectual development could not be completed formally but based on the evaluator's clinical opinion the student demonstrated at least a 25 percent delay in cognitive development (Dist. Ex. 2 at p. 4; also Dist. Ex. 4 at pp. 4, 7).[9] According to the December 2021 IEP, the January 2021 psychological evaluation also indicated that the student presented with socialization delays greater than 33 percent (Dist. Ex. 2 at p. 5; see Dist. Ex. 4 at p. 5). The IEP stated that, based on parent report, observation, and the student's performance in relation to the Child Autism Rating Scale, Second Edition (CARS-2), the student qualified to receive a diagnosis of "ASD, Level 2" (compare Dist. Ex. 2 at p. 6, with Dist. Ex. 4 at pp. 6-7). The IEP further stated that in comparing the student's performance to age-typical skills on the Receptive-Expressive Emergent Language Test – Third Edition (REEL-3) he demonstrated significant receptive and expressive language delays (Dist. Ex. 2 at p. 5). The OT evaluator indicated that a comparison of the student's performance to his same aged peers given the administration of the HELP Strands indicated that the student demonstrated up to a 33 percent delay in both his fine motor and visual motor development (Dist. Ex. 7 at p. 4).

With respect to preacademic skills, consistent with the January 2021 developmental evaluation, the IEP stated that the student did not demonstrate pretend play skills and needed assistance pointing to familiar objects in picture books, following routine directives, and responding to his name (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 5).[10] In addition, the IEP reflected that the student used to identify body parts independently but no longer did so (Dist. Ex. 2 at p. 4; see Dist. Ex. 5 at p. 3).

Regarding the student's expressive and receptive language delays, the IEP indicated that the student was not responsive to his name, could not point to request items, and did not demonstrate verbal language or communicative intent (compare Dist. Ex. 2 at p. 6, with Dist. Ex. 4 at p. 3, and Dist. Ex. 6 at pp. 5-6). In addition, the IEP reflected that the student showed significant regression in his vocabulary and his ability to purposefully communicate with others (Dist. Ex. 2 at p. 5). According to the IEP, the student did not demonstrate understanding of names and labels for familiar people and objects in his environment (id.). In addition, the student did not

[8] According to the December 2021 IEP, the CPSE also considered an undated social history as part of the evaluative information used to develop the student's IEP (Dist. Ex. 2 at p. 5).

[9] The January 2021 developmental evaluation also indicated that "according to clinical opinion and using the HELP Strands [Curriculum Based Assessment Birth to Three] as a guide, [the student] . . . demonstrate[ed] a greater than 25% delay in cognition . . . as well as a 33% delay in language, fine motor and socialization skills" (Dist. Ex. 5 at p. 5).

[10] The IEP appeared to state that the January 2021 developmental evaluation was the January 2021 educational evaluation (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 5 at p. 1).

say any words consistently or imitate words produced by others, but he sometimes gestured to make requests and he strung sounds and syllables together in babbling (id.).

Regarding social/emotional development, consistent with the January 2021 psychological evaluation, the IEP indicated that the student demonstrated poor joint attention and social reciprocity, but that he loved being around his parents and was affectionate with them (compare Dist. Ex. 2 at pp. 5-6, with Dist. Ex. 4 at p. 6). In addition, the IEP stated that the student was not interested in peers, but he sometimes smiled when praised (Dist. Ex. 2 at pp. 4-5).

With respect to the student's behavior, the IEP stated that, according to the social history, the student tended to head butt when frustrated, and at times, he also threw things or "hit" (Dist. Ex. 2 at p. 5). Consistent with the January 2021 psychological evaluation, the IEP indicated that the student demonstrated vocal behaviors such as repetitive noises, became upset if items he sorted or organized were moved, and liked to spin, run back and forth in circles, open and close doors, and turn lights on and off (compare Dist. Ex. 2 at p. 6, with Dist. Ex. 4 at p. 7). The IEP noted that the student's sensory seeking behaviors included head butting and visual stimulation, as manifested by finding all the "cords" to hide them, uncover them, and then hide them again (Dist. Ex. 2 at p. 7). The IEP further noted that the student walked in circles, squinted his eyes, flapped his hands, and needed to keep a toy in his left hand (id.).

Turning to the student's physical development, consistent with the OT evaluation, the IEP noted that the student was able to flip the pages of a book, but he was not able to isolate or coordinate finger patterns in isolation; instead, he used all of his fingers as a whole to grasp objects (compare Dist. Ex. 2 at p. 7, with Dist. Ex. 7 at pp. 2-3). The IEP noted that the student showed limited use of bilateral integration skills and needed prompting to use both hands (Dist. Ex. 2 at p. 7). The student was unable to form any pre-writing strokes (id.). In addition, the IEP stated that the student showed "good" gross motor skills (id.). Regarding adaptive skills, the IEP indicated that the student was not able to assist with dressing and undressing due to his poor muscle tone, and he preferred short sleeve clothing due to difficulty tolerating articles of clothing which covered the area from his elbow to his wrist, although this was "no longer such an issue" (id.). The student was able to use eating utensils and drink primarily from a sippy cup (id.). The IEP stated that the student's diet was becoming more limited (id.). The IEP noted the parents' concerns that the student was primarily nonverbal, demonstrated increased annunciations, echoing, and head banging, and he regressed in his ability to express about 20 words (id. at p. 5). According to the IEP, the parents indicated that the student had a decreased interest in peers, was sensory seeking, and became frustrated by his limited language (id. at p. 6).

2. December 2021 IEP

On appeal the parents raise several issues regarding the December 2021 CPSE meeting and the resultant IEP. A review of the evidence in the hearing record shows that, although the program included in the December 2021 IEP may have included many aspects which were aligned with the student's needs, the district failed to articulate a "cogent and responsive rationale" for its recommendations sufficient to find that the program, as a whole, was appropriate (see Endrew F.,

580 U.S. at 404).[11] For example, despite the maladaptive behaviors described in the early intervention evaluations and mentioned in the present levels of performance, the special factors section of the IEP indicated that the student did not need strategies, including positive behavioral interventions supports and other strategies to address behaviors that impeded his learning or that of others and that the student did not need BIP (Dist. Ex. 2 at p. 8).[12] Further, the CPSE declined to recommend more adult support to meet the student's needs. To explain the CPSEs determinations that the student did not require a BIP or paraprofessional support, the CPSE chairperson cited, among other things, the lack of sufficient data and the need for the student to first attend a less restrictive program before the CPSE would consider more supports (Tr. pp. 71-73). Whether such testimony was merely a poor explanation during the impartial hearing or if the witness intended to say something else is not clear,[13] but with the statements regarding a lack of data, it was the district's obligation to ensure the student was evaluated in all areas of suspected disability, so the district cannot justify minimizing support to a student that has considerable deficits in skills and then point to a lack of information to justify its recommendations, especially if no further, reasonable explanation is provided regarding the lack of information or data. As to the latter restrictiveness rationale, the chairperson appeared to improperly conflate the student's need for additional support within a classroom compared to the student's placement in the LRE, which relates to the disabled student's opportunities to interact with nondisabled peers (see R.B. v. New York City Dep't of Educ., 603 F. App'x 36, 40 [2d Cir. 2015] [explaining that the requirement that students be educated in the LRE applies to the type of classroom setting, not the level of additional support a student receives within a placement with the goal of integrating children with disabilities into the same classrooms as children without disabilities]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7 [S.D.N.Y. Mar. 30, 2016] [noting that 'restrictiveness' pertains to the extent to which disabled students are educated with non-disabled students, not to the size of the student-staff ratio in special classes]). As discussed below, the even if the CPSE properly determined that removal from a general education setting was appropriate and that a special class in a specialized setting was the student's LRE, the evidence in the hearing record does not convince me that the programming offered enough support to meet the student's needs.

While the district did not meet its burden to prove that it offered the student a FAPE, further discussion of the parents' contention that the district should have placed the student in a mainstream preschool with one-to-one support is warranted. The IDEA requires that a student's recommended

[11] In finding that the district offered a FAPE, the IHO determined that the recommended program was consistent with the recommendations made in the September 2022 neurodevelopmental evaluation in which "the evaluator recommended placement 'in a specialized, small school setting for children with ASD that c[ould] provide [the student] with [the] structure and support he w[ould] need to make appropriate progress . . . and prevent regression'" (IHO Decision at p. 19); however, that evaluation was not available to the CPSE. In addition to the recommendation cited by the IHO, the neuropsychological report indicated that the student would require an educational program based on the principles of applied behavior analysis (ABA) that incorporated one to one support in addition to center/school based approaches (Parent Ex. C at p. 12).

[12] Although the district argues that the parents did not allege in their due process complaint notice that the district failed to conduct an FBA or develop a BIP, it appears during the impartial hearing that the district treated the issue as having been raised (see Tr. p. 196).

[13] The district failed to clarify or rehabilitate the testimony and the documentary evidence was unilluminating on this point.

program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

The LRE requirement in the IDEA does not distinguish between school-age and preschool-aged children (Dear Colleague, 69 IDELR 106 [OSERS 2017]). Specific to preschool students with disabilities, State regulation provides that:

> prior to recommending the provision of special education services in a setting which includes only preschool children with disabilities, the committee shall first consider providing special education services in a setting where age-appropriate peers without disabilities are typically found. Provision of special education services in a setting with no regular contact with age-appropriate peers without disabilities shall be documented on the child's IEP and shall only be considered when the nature or severity of the child's disability is such that education in a less restrictive environment with the use of supplementary aids and services cannot be achieved satisfactorily

(8 NYCRR 200.16[e][3][i]). The continuum of preschool placements includes special classes, residential programs and services, or related services and/or special education itinerant teacher (SEIT) services, which may be provided "at a site determined by the board including but not limited to an approved or licensed prekindergarten or head start program; the student's home; a

hospital; a state facility; or a child care location" (8 NYCRR 200.16[i][3][i]-[iv]). State guidance further provides that preschool students with disabilities enrolled in prekindergarten programs operated or administered by the State or school district may receive special education support via group or individual SEIT services and that such programs "must . . . be designed to support preschool students with disabilities with moderate to intensive program and service needs which may be accomplished via a special class in an integrated setting (SCIS) program within the [prekindergarten] classroom" ("School District Responsibilities for Preschool Inclusion in Publicly Funded Prekindergarten Programs," at p. 2, Office of Special Educ. Mem. [July 2021], available at https://www.nysed.gov/sites/default/files/programs/special-education/school-district-responsibilities-for-preschool-inclusion-in-publicly-funded-prekindergarten-.pdf)

Here, with respect to the effect of student needs on participation in appropriate activities, the IEP noted that "[a]t th[at] time [the student's] educational needs could not be met without the support of special educational services" to address the student's delays in his preacademic, speech-language, and OT skills and to provide targeted interventions to support nonverbal students on the "ASD spectrum" (Dist. Ex. 2 at p. 8). The IEP further indicated that the student would not participate in activities with nondisabled peers "at th[at] time" (id. at p. 16).

In his written testimony, the CPSE chairperson stated that the 6:1+2 special class was a specialized class setting which served students "with very high needs in most or all areas" including students demonstrating global delays in preacademic readiness skills, social/emotional skills, daily living skills, and severe delays in language and social development, e.g., nonverbal students (Dist. Ex. 14 ¶ 13).

In response to a question from the parent's attorney regarding procedures for parents who were interested in enrolling their student in a "mainstream setting with neurotypical students," the CPSE chairperson testified that CPSE offered special education and "not enrollment" (Tr. pp. 52-53, 63).[14] In addition, on cross examination, the CPSE chairperson elaborated that the CPSE was

[14] In their memorandum of law, the parents mischaracterize testimony of the CPSE chairperson that "[a] mainstream school or any school . . . is not on our continuum" as meaning that the CPSE did not consider settings that would provide the student access to nondisabled peers, whereas the chairperson went on to further explain that the continuum consisted of the special education program and services, not the school (Tr. pp. 52-53, 62-63). In discussing the distinction between enrollment in a preschool program versus the CPSE's recommendations, the chairperson was likely alluding to what State guidance describes as a student's "dual-enrollment in PreK and preschool special education" whereby a student has "satisfie[d] the enrollment and selection requirements applicable to other resident children for the district's PreK program" and the CPSE thereafter "must develop or review the student's IEP to identify the appropriate supplementary supports and services and special education services to support the child within the PreK program" (School District Responsibilities for Preschool Inclusion in Publicly Funded Prekindergarten Programs," at p. 2). The policies and procedures that the district in this case uses to match preschool students (both disabled and nondisabled) with preschool sites and service providers was not made part of the evidentiary record. For example, State regulations explain that certain preschool programs must have random selection processes when the number of students who apply exceed the number of seats available (see 8 NYCRR 151-1.4). The State has recently initiated significant changes to foster a greater number of public and/or publicly funded preschool and early learning opportunities (see, e.g., Matter of DeVera, 32 N.Y.3d 423, 427-31 [2018] [detailing the history of the "legacy" universal prekindergarten statute (Education Law § 3602-e), the changes effectuated by the "statewide" universal prekindergarten legislation codified in Education Law § 3602-ee and the intervening addition of the Charter School Act]). It was recently reported to the New York State Board of Regents that there were seven separate early learning programs for three- and or four-year-olds with unique funding streams and requirements attendant to each program (see "New York State

"relegated" to the continuum of services and LRE based on the data (id.). Next, the CPSE chairperson testified that other program options, although not all noted on the IEP, were considered and rejected for the student at the time of the December 2021 CPSE meeting including related services, SEIT services only, SEIT and related services, an SCIS, a special class size of 12:1+2, and a special class size of 8:1+2 (Tr. pp. 33-34; see Dist. Ex. 2 at p. 1 [reflecting the CPSE's consideration of an SCIS]). Further, the CPSE chairperson explained that an SCIS was different from a special class in that there were different student-to-teacher ratios, and different student profiles in terms of performance on evaluation measures and noted that the CPSE looked at students' skill sets and "an entry point into the classroom" and what was considered the LRE within the continuum of the district's programs and supports (Tr. pp. 33-34).

The student's mother testified that the parents wanted the student to receive education in a setting with nondisabled peers so the student would have "neurotypical models" but acknowledged that the student needed one-to-one support from a Board Certified Behavior Analyst (BCBA) in that setting to receive benefit (Tr. pp. 234-35, 256). In this instance, given that the district failed to meet its burden to prove the December 2021 IEP recommendations were appropriate, it is unnecessary to determine whether the recommendations constitute the student's LRE. However, I note that the assignment of a one-to-one teacher or BCBA in order for a student to attend a general education classroom would likely exceed what LRE requires (particularly if it resulted in the student receiving primary instruction separately from and without engaging with the nondisabled students in a meaningful way) and would, instead, tend toward maximation of services, which is not required under the IDEA (Grim, 346 F.3d at 379 [quoting Rowley and noting that a school district need "not . . . furnish every special service necessary to maximize each handicapped child's potential"]; see Rowley, 458 U.S. at 199). Further, "the IDEA does not require regular education instructors 'to modify the regular education program beyond recognition'" (Killoran v. Westhampton Beach Sch. Dist., 2021 WL 4776720, at *11 [E.D.N.Y. Oct. 11, 2021], aff'd, 2023 WL 4503151 [2d Cir. July 13, 2023], quoting P. v. Newington Bd. of Educ., 512 F. Supp. 2d 89, 107, [D. Conn. 2007]; see Daniel R.R., 874 F.2d at 1048-49 ["[M]ainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student."]).

While the district may not have been required to offer a mainstream setting for the student with one-to-one adult support, that does not mean that the parents were then precluded from unilaterally obtain such a program and obtain district funding therefor, so long as they establish that the placement was specially designed to meet the student's needs. It is to that question that I now turn .

Education Department Proposal to Align Prekindergarten Programs in New York State" [Jan. 2017], available at https://www.regents.nysed.gov/sites/regents/files/Proposal%20to%20Align%20Prekindergarten%20Programs%20in%20New%20York%20State.pdf), and many providers, both public and nonpublic, administer multiple programs alongside one another simultaneously, adding to the administrative complexity of placing students (see "New York State Prekindergarten Program Directory," available at http://www.p12.nysed.gov/upk/documents/2018-2019NYSPre-KProgramDirectory.pdf).

C. Unilateral Placement

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). 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 (Carter, 510 U.S. 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. v. Bd. of Educ. of Hyde Park, 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). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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 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. Specially Designed Instruction

As for a unilateral placement for the 2022-23 school year, the parents combined this preschool student's attendance at Tribeca, a general education nonpublic school, with a constellation of special education services, including ABA and parent counseling and training delivered in the classroom at Tribeca and in the student's home by a private agency, Children First Speech Language Pathology and Psychology (Children First), and private speech-language therapy and OT (see Parent Exs. F; L; N; P).

According to the program description, Tribeca is a program "founded on the theories and principles of constructivism, social constructivism, and the approaches used in the highly regarded preschools in Reggio Emilia, Italy" (Parent Ex. F at p. 1; see Tr. p. 142). The philosophy of the program at Tribeca is centered around the belief that children learn through active and intentional experiences that are relevant to them and that they deepen their understanding of the world through meaningful social interactions and processes of social reflections with their peers and adults (Parent Ex. F at p. 1). The program description states that, consistent with Tribeca's learning approach, the goal of the program is to create conditions for learning that will benefit a student's "powers of thinking" by creating opportunities for self-expression and self-actualization, accomplished through a combination of principles and practices with an emphasis on problem-solving, collaboration, documentation of students work, and the ongoing involvement of parents and community (id.). According to the program director, the curriculum at Tribeca is centered around students' interests and each project and experience has multiple points of entry for the students to engage and experience the curriculum at his or her own individual level and learning style (Tr. p. 142; see Tr. p. 221; Parent Ex. F at p. 2). The program description notes that the teachers at Tribeca view themselves "as the [students'] partners" and support independent peer learning to facilitate the development of problem solving and critical thinking skills among the student population (Parent Ex. F at p. 2).

According to the January 2022 Tribeca enrollment contract, Tribeca's program was "not designed for children who have specific learning difficulties or emotional or psychological problems" (Parent Ex. G at p. 1). The enrollment contract further noted that Tribeca applicants were "accepted on the basis of maturity of judgment in keeping with age and mental capacity, no evidence of neurological impairment and good social adjustment skills" (id.).

Review of the student's 2022-23 sample schedule for Tribeca indicated that the student attended Tribeca Tuesdays through Fridays for three hours in the morning and followed the following schedule in sequential order: arrival, morning meeting, classroom work time, snack, small group projects, reflection meeting, outside or movement time, and goodbye meeting (Parent Ex. H at p. 1; see Tr. pp. 12, 220). The schedule indicated that, during classroom work time, students openly explored different areas of the classroom to work on projects of interest to them, either in a group or individually, at their own pace (id.). Content areas included: dramatic play, small manipulatives for math and fine motor work, art projects, large scale building in the block area, and reading/literacy work (id.).

The hearing record includes a May 2023 ABA treatment plan and progress report developed by Children First for services dates April 1, 2023 through October 2023 (Parent Ex. N). The report indicated that the agency had been delivering services to the student since February

2021 (id. at p. 1). According to the treatment plan, the ABA services were delivered in the home and community (id.). The plan specified that the following quantity of services for the student: 12 hours (48 units) per week of reassessment and evaluation; 35 hours per week of "direct ABA"; four hours per week of direct supervision and programming by a BCBA; and two hours (8 weekly units) per week of parent training (id.). The student attended "private preschool" for two and one half to three hours for four days per week accompanied by "Children First BCBA therapists" (id. at p. 3).[15] In addition, the student received seven additional ABA sessions per week at home (id.).

The evidence in the hearing record indicates that the student received private speech-language therapy services at home, two 60-minute sessions (or two to three 45-minute sessions) of OT per week at the occupational therapist's outside location, and three 60-minute sessions of speech-language therapy per week in school (Parent Exs. L at p. 4; N at p. 3; P at p. 2). The plan stated that the parents completed four 60-minute sessions of parent training per month, observed four 60-minute ABA therapy sessions per month, and attended one team meeting per month (id. at p. 4).

The ABA treatment plan indicated that the ABA services were intended to facilitate and generalize skills across settings and provide the student with support within his integrated preschool class (Parent Ex. N at p. 3). In addition, another function of the student's ABA services was to aid the student's engagement in social and communication skills with his peers and to "mitigate [his] maladaptive behaviors" (id.). The May 2022 ABA treatment plan included goals across multiple developmental domains: communication, socialization, social/emotional, adaptive, and behavior (id. at pp. 1-2, 12-45). Each goal included in the plan included progressively challenging objectives (see id. at pp. 12-45). According to a September 2022 neuropsychological evaluation of the student, the director of the ABA agency that provided services to the student stated that a primary focus of the student's services was "to support toilet training in addition to maintenance and generalization of other skills" (Parent Ex. C at p. 4). The student's ABA sessions often included play and movement-based activities (id.). The neuropsychological evaluation reported that the student's private speech-language therapist worked on functional communication and foundational social skills with the student (id. at p. 10).

The program director for Tribeca testified that the student would have been accepted at Tribeca even without the "outside supports" his parents provided (Tr. p. 152). She explained that when Tribeca invited or enrolled children in its program, they were sometimes a year and a half or two years old and it was not easy to see where they were developmentally before they entered the program (Tr. p. 153). However, she indicated that when the student was first admitted to the school the parents had already engaged outside providers to come with him (Tr. p. 152). Moreover, she stated that once the student came to the program Tribeca determined that a support teacher would be most beneficial (Tr. p. 153). The program director reported that she was aware the student was "largely nonverbal" and understood the student's "development" and his then-presenting needs based on a discussion with his parents during their tour of Tribeca (Tr. p. 143). The program director testified that she discussed with the parents what the student's support would look like in

[15] The student's case supervisor from the private ABA agency testified that she provided the student with direct services and in addition managed three other therapists who worked with the student (Tr. pp. 102-03). She indicated that each of the providers were BCBAs and were licensed as licensed behavior analysts (LBAs) (Tr. p. 103; see Tr. p. 225; Parent Ex. O).

the classroom during his three hours in that setting and the parents shared with her the various types of supports the student would receive outside the classroom (Tr. pp. 143-44). According to the Tribeca program director, when the student attended Tribeca, he was accompanied by a support person but she could not recall any of the student's support persons names (Tr. pp. 144-45). The program director for Tribeca clarified that it was the school's plan that the student would need support to attend the school and he rarely attended the school without it (Tr. p. 146).

The student's collaborative teacher at Tribeca testified that the student attended school with a "support" person daily (Tr. p. 216).[16] According to the collaborative teacher, the student's support person provided him with refocusing prompts such as prompts to respond to a peer asking the student for a toy animal because the student would forget or lose focus during the interaction (id.). She noted that the student would be able to follow through with the task with a reminder (Tr. p. 216). The collaborative teacher further testified that the student's support person gave him prompts "all the time" to help clean up or to initiate "self-soothing" skills if he was overstimulated or there was a change in routine, and he appeared "really overwhelmed" (Tr. pp. 216-17). In addition, the collaborative teacher stated that the student's support person helped with the introduction and the implementation of his AAC device (Tr. pp. 217,224; see Tr. pp. 237-38).[17]

The student's mother testified that she spoke with the ABA therapists on an almost daily basis and that two of the classroom therapists also did home sessions (Tr. p. 238). She indicated that she had a monthly team meeting with all of the therapists to discuss the student's progress and things he was struggling with (Tr. pp. 238-39). She reported that at school the student worked on socialization, finding new interests, and playing alongside peers, while at home he worked on counting, identifying body parts, and toilet training (Tr. pp. 239-400).

The district's main argument regarding the unilateral placement is that Tribeca did not provide specially designed instruction; however, viewing the program as under the totality of the circumstances, the district's position is without merit. When assessing a unilateral placement, a parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365).

The foregoing demonstrates that, although the district may not have been required to place the student in a general education class with one-to-one support, I find the unilateral placement included both specially designed instruction to address the student's needs with some appropriate access to nondisabled peers and was therefore appropriate when taking into account the totality of the circumstances and the fact that parents are not held as strictly to full compliance with the IDEA

[16] The preschool teacher reported that the individual support person provided an "entry point" for the student (Tr. p. 216).

[17] The preschool teacher indicated that the student had minimal verbal capacity and could not string along more than one word answers (Tr. p 219). She noted that he could sometimes express a greeting or a farewell or ask for objects (Tr. pp. 219-20). She reported that the student used the device "at all times" and opined that it "offered astounding assistance" (Tr. pp. 219-20).

when seeking reimbursement for a private placement. Further, the evidence in the hearing record shows that the student made progress during the 2022-23 school year as discussed below.

2. Progress

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]).

The Tribeca program director testified that, based on her observation and experience, the student made meaningful progress at Tribeca given support (Tr. pp. 146-47). Specifically, she stated that as part of her role, she often was present in classes at Tribeca to support and observe the teachers and the students (Tr. p. 147). With respect to the student, the program director for Tribeca testified that she spent "a good amount of time in the classroom observing his progress with support" and observing him without support if, due to a schedule change, his support person was not present (id.). The Tribeca program director testified that the benefit of the student being exposed to neurotypical models was he was "able to be part of conversations" among his peers and his teachers, able to participate in projects and "exciting and engaging" curriculum topics and experiences, and able to observe "behavioral models" (Tr. p. 148). The Tribeca program director reported that based on her observation of the student from when he started at Tribeca as a two year old to his most recent school year as a preschool age student he made meaningful gains in his ability to participate in scheduled activities, to be an active member of the classroom community, and to engage and participate in all areas of the curriculum, i.e., fine motor, gross motor (Tr. pp. 150-51).

Similarly, according to the student's collaborative teacher at Tribeca, the student benefited from "being in a mainstream classroom" during the 2022-23 school year (Tr. pp. 214-15).[18] Specifically, the student's Tribeca collaborative teacher testified that the student benefited from opportunities to interact with his 15 peers and noted that the other students "accepted more invitations in his world of play and his interests" (Tr. pp. 214-15, 224). She elaborated that, by the middle to the end of the school year, the student shared a lot more freely with his peers (Tr. p. 215). According to the collaborative teacher, the student worked alongside his peers (id.). She reported that another benefit of the student attending a class of neurotypical students was that he developed an interest in looking at books by himself or alongside one or two peers and he sustained

[18] The preschool teacher reported that she had two collaborative teachers working with her (Tr. p. 232).

his focus for "a little bit of time enjoying a book" with his peers (Tr. pp. 215, 224-25). In addition, the Tribeca preschool teacher opined that the student learned classroom routines because he was in a class of 15 with peer models who "served" to help him remember when it was time to use the bathroom, go outside, go to the large gross motor room, clean up, or end an activity and the student was more likely to join in if he saw his peers transitioning from one activity to another (Tr. pp. 215-16). In terms of meaningful progress, the preschool teacher testified that, socially, the student was very open to playing with other peers and he thrived in one-on one settings (Tr. pp. 222-23). She noted that the student was more apt to share objects that were desirable to him (Tr. p. 223). The collaborative teacher noted that the student's self-help skills improved, and he could clean up and wash his hands with fewer prompts (id.). She reported that some of the student's greatest growth was in his handwriting and fine motor skills (Tr. p. 223). The preschool teacher also reported that the student could work at a table with four or five other students and could sustain focus for 10-15 minutes (Tr. p. 223). According to the testimony Tribeca collaborative teacher, as a result of his consistent educational team, especially his support person, the student showed "tremendous growth" in his ability to use his AAC device (Tr. p. 217). For example, the student required less prompts throughout the year to request the bathroom, a snack, or a break (id.). The collaborative teacher reported that she communicated with the student's ABA providers and parents daily (Tr. p. 225-27). She opined that the 2022-23 school year was a very positive experience for the student (Tr. p. 227-28). The collaborative teacher reported that the student had specific classroom goals, but she did not monitor the student's progress toward these goals (Tr. pp. 229-30). However, she indicated that the student's one-to-one support people monitored the student's progress (Tr. p. 230). With regard to the student's behavior during the 2022-23 school year, the preschool teacher reported that he could get overstimulated but that it "never created a very big upset or change in [the] routine" (Tr. p. 232).

The student's mother opined that he made "tremendous progress" during the 2022-23 school year in his understanding of commands and cues, working alongside other children, and interest in age appropriate activities (Tr. pp. 246-47).

Regarding the student's progress between February 2022 and March 2023, the May 2023 ABA progress report indicated that the student made progress and mastered short term objectives in the following domains: behavior development, receptive and expressive language skills, social skills, play skills, executive functioning skills, gross motor, fine motor, and adaptive skills (see Parent Ex. N at pp. 6-9). For example, in October 2022, the student mastered the skill to engage in eye contact while manding (id. at p. 7). In January 2023, the student mastered the ability to drink from an open cup (id. at p. 8). In February 2023, the student mastered a short term objective to match 10 non identical objects in an array of three objects (id. at p. 7).

The parent's private occupational therapist confirmed that the student's progress as detailed in her July 2023 progress report was made within the past year and that she considered it to be meaningful (Tr. p. 263; see Parent Ex. P). She indicated that the student could complete numerous activities independently or with minimal verbal/visual cueing, some of which included doffing shoes with Velcro fasteners, navigating a familiar crowded space with fair safety awareness, jumping on a trampoline with effective gross motor and postural control, and imitating vertical and horizontal strokes during coloring/drawing (Tr. p. 263; Parent Ex. P at p. 2). She described her work with the student on proprioceptive and vestibular processing, as well as the improvement the student had made in his fine and gross motor skills (Tr. pp. 263-67; see Parent Ex. P). The

occupational therapist reported that she conversed with the student's mother once or twice a week (Tr. pp. 267-68). She reported that the student needed to continue to work on sensory processing, multi-step sequencing, and goal oriented and self-directed activities (Tr. p. 268).

The parents' private speech-language pathologist testified that augmentative communication was her specialty and described her experience relative to augmentative communication systems (Tr. pp. 273-74; Parent Ex. L). The speech-language pathologist reported that the student had made significant progress since she first started working with the student (February 2022) (Tr. p. 276; see Parent Ex. L). She stated that initially the student did not have a functional means to communicate his wants and needs and primarily communicated using physical communication such as pulling a communication partner by the hand or engaging in self-injurious or aggressive behavior (Tr. pp. 176-77). She reported that the frequency of the student's self-injurious and aggressive behaviors had been significantly reduced, which she attributed to the student developing a functional means of communication that included verbal speech and the use of a speech-generating device (Tr. p. 277; Parent Ex. L at p. 2). The speech-language pathologist reported that the student had made "significant leaps and bounds" in using his device to make requests, ask for more and refuse activities (Tr. p. 277). She reported that the student's biggest communication challenges were the frustration that ensued after a communication breakdown and expanding his communication functions beyond requesting (Tr. p. 279). The speech-language pathologist reported that she spoke with the student's parents after every session to update her on goals and progress (Tr. p. 279). May 2023 speech-language therapy progress report noted that between July 2022 and February 2023, the student had mastered goals including the ability to produce a vocalization, word, or gesture to complete familiar sequences, the ability to use a core vocabulary word, i.e., help, open to request assistance using his SGD or a verbal approximation, and the ability to use a core vocabulary word, i.e., give, more, go, to request desired objects or activities using his SGD or a verbal approximation for three novel core vocabulary words (id. at p. 4).

While the evidence of the student's progress is not dispositive, in this instance it lends further support to a finding that, based on the totality of the circumstances, the unilateral placement of the student at Tribeca with the addition of the private ABA, speech-language therapy, and OT was appropriate for the 2022-23 school year.

D. 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"]).

1. Excessive Services

Although framing it as an issue underlying the appropriateness of the unilateral placement, the district's argument that the privately obtained home-based ABA services constituted maximization is an issue that must be examined as an equitable consideration. Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

The district argues that the home-based ABA services were for the purpose of generalizing the student's skills to the home setting. In discussing generalization of skills, courts have indicated that school districts are not required, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]).

Here, this is not a student that has reached full-time school-aged programming, and taking into account that the student's attendance at preschool at Tribeca was part-time for approximately 12 hours per week, the delivery of additional services in the home was not excessive. Further, contrary to the district's position, the fact that the home-based ABA services focused on daily living skills, including toileting, handwashing, and chores, does not, without more, show that the services were for the sole purpose of generalizing skills to the home or otherwise exceeded what the student required to receive a FAPE. Indeed, the testimony of the CPSE chairperson noted the student need for ongoing support with activities of daily living (Dist. Ex. 4 ¶ 13).

Accordingly, the evidence in the hearing record does not support the district's argument that the home-based component of the student's unilateral placement for this preschool student with a disability was excessive under the circumstances of this case, especially when the student only attended the preschool program part time.

2. 10-Day Notice

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

Here, the district does not dispute that the parents' July 16, 2022 email, which provided the district with notice of their intent to unilaterally place the student, was timely (Parent Ex. B). Instead, the district asserts that the notice was vague in terms of the parents' reasons for rejecting the December 2021 IEP. The letter stated the parents' desire for the student to be educated in a less restrictive environment (e.g. in a mainstream preschool) with supports (such as SEIT/ABA) and indicated that this was "not how the CPSE pre-k programs [they] visited [we]re set up" (id.). In addition to this email, in an exchange with the district regarding sites at which the December 2021 IEP could be implemented, on July 11, 2022, the parents informed the district of their view that the IEP did not offer "the help that [the student] need[ed] (Dist. Ex. 13 at p. 7). In particular, the parents noted that the student was nonverbal, and "speech 3 times a week [wa]s not enough for him to develop the skills needed" (id.). The parents further expressed that the IEP had not been implemented since it was developed in December, which was "unacceptable" (id.). There is no indication in the hearing record that the district requested the parents to explain or provide elaboration about their disagreements with the proposed programming.

Accordingly, the notice identified the parent's areas of concern and district's argument that it was not sufficiently on notice about the parents' concerns with the IEP or their intention to unilaterally place the student is without merit.

Finally, regarding the IHO's observation that the parents had no intention to place the student in a public school setting (IHO Decision at p. 23), this would not be a basis for a reduction or denial of relief. The Second Circuit Court of Appeals has explained that, so long as the parents cooperate with the district and do not impede the district's efforts to offer a FAPE, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that their plan to unilaterally place a student, by itself, is not a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

Based on the foregoing, there are no equitable considerations that would warrant a reduction or denial of an award of reimbursement to the parents of the out-of-pocket costs of the Tribeca tuition and private ABA, parent counseling and training, speech-language therapy, and OT services.[19]

VII. Conclusion

In summary, the parents' arguments about the 2021-22 school year were outside the scope of the impartial hearing and, therefore, the IHO did not err in denying the parents' request for compensatory education. Regarding the 2022-23 school year, contrary to the IHO's determination, the district failed to meet its burden to prove that the December 2021 IEP offered the student a FAPE. The parents met their burden to prove that the unilateral placement of the student at Tribeca with private ABA, parent counseling and training, speech-language therapy, and OT services was appropriate for the student, and no equitable considerations warrant a reduction or denial of the relief sought by the parent.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 22, 2023, is modified by reversing those portions which found that the district met its burden to prove that it offered the student a FAPE for the 2022-23 school year and denied the parents request for reimbursement for the costs of the unilateral placement; and

IT IS FURTHER ORDERED that, upon the parents' submission of proof of out-of-pocket costs, the district shall reimburse the parents for the costs of the student's tuition at Tribeca and private ABA, parent counseling and training, speech-language therapy, and OT services delivered during the 2022-23 school year.

Dated: **Albany, New York**
January 2, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[19] According to the parent, she was able to obtain about 70-80 percent of the costs of the private services from insurance (Tr. p. 237).