The University of the State of New York

The State Education Department
State Review Officer
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No. 23-248

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Harleigh S. Tensen, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Bais Frieda Child Care Center Inc. (Bais Frieda) for summer 2022. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) or a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 4402, 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3; 200.4[d][2]; 200.16). 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 here. The CPSE convened on August 16, 2021, found the student eligible for special education services as a preschool student with a disability, and developed the student's IEP for the 2021-22 school year (see generally Parent Ex. B).[1] The CPSE recommended a 10-month program beginning September 2021 consisting of seven and a half hours per week of group (2:1) special education itinerant teacher (SEIT) services together with the related services of two 30-minute sessions per week of individual speech-

[1] The student's eligibility for special education as a preschool student with a disability is not in dispute (8 NYCRR 200.1[mm]).

language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and three 30-minute sessions per week of individual physical therapy (PT) (id. at pp. 1, 16).[2] The August 2021 CPSE recommended that the program and related services be provided at an early childhood program selected by the parent (id.). The parent disagreed with the recommendations contained in the August 2021 IEP, and, in a letter dated November 4, 2021, notified the district of her intent to unilaterally place the student at Bais Frieda for the 2021-22 school year (see Parent Ex. H).[3] By letter dated June 20, 2022, the parent notified the district that she had not received an appropriate educational and school placement for the student for the 2022-23 school year (see Parent Ex. I). The parent also notified the district of her intent to unilaterally place the student at Bais Frieda for July and August 2022 and seek tuition funding for the costs of that program (id.).

In a due process complaint notice dated August 18, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for July and August 2022 (see Parent Ex. A).[4] In particular, the parent alleged that the August 2021 IEP was not appropriate for the student to make "meaningful academic and functional progress" (id. at p. 1). The parent asserted that the student required a "full-time special education class" "for the summer months of the 2022-[23] school year" (id. at p. 2). As relief, the parent requested direct tuition payment by the district to Bais Frieda for the student's summer 2022 programming (id. at p. 3).

After a prehearing conference on July 27, 2023, an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on September 11, 2023 (Tr. pp. 1-84). In a decision dated October 3, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, but that Bais Frieda was not an appropriate unilateral placement and that equitable considerations would not support a full award of tuition (IHO Decision at pp. 5-9). Accordingly, the IHO denied the parent's request for direct funding of tuition at Bais Frieda for July and August 2022 and dismissed the matter with prejudice (id. at p. 10).

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[2] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]).

[3] Bais Freida 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] According to the parent, the due process complaint notice was originally sent to the district on August 18, 2022; however, due to a lack of response from the district, the parent refiled the same August 18, 2022 due process complaint notice with the district again on June 25, 2023 (Parent Ex. A at p. 5).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here.[5] The main issue presented on appeal is whether the IHO erred in finding that the parent failed to meet her burden to demonstrate that Bais Frieda was an appropriate unilateral placement for the student during July and August 2022. Additionally, the parent asserts that the IHO erred in finding that equitable considerations would warrant a reduction in the amount of tuition funding, if awarded. The parent contends that the Bais Frieda director testified credibly regarding the student's needs and the program developed for summer 2022 to enable the student to "make meaningful and appropriate progress." Additionally, the parent argues that she cooperated with the district and the untimely notice of the unilateral placement should not be a bar to tuition reimbursement/direct funding.

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

[5] The district does not appeal the IHO's determination that it denied the student a FAPE for the 2022-23 school year; as such, the IHO's determination is final and binding on the parties and will not be further discussed (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]).

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]).[6]

[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

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

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

VI. Discussion

A. Unilateral Placement

On appeal the parent asserts that she met her burden to show that the student's program at Bais Frieda during summer 2022 was appropriate to meet his needs. In an answer, the district argues to uphold the IHO's determination that the unilateral placement was not appropriate.

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

chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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).

In his analysis of the appropriateness of the parent's unilateral placement, the IHO determined that "[t]he threshold question when considering whether an Extended School Year ("ESY") of twelve (12) months is appropriate is whether such a program is necessary to prevent substantial regression," cited the State regulation to that effect, and also cited to State Education Department policy guidance for the definition of "substantial regression" (IHO Decision at p. 6). The IHO went on to find that there was no evidence that the student met the eligibility criteria for 12-month services, and that "[w]ith respect to [the s]tudent's risk of substantial regression, the only evidence in the record [wa]s through the testimony of [the d]irector," which he determined was insufficient because "[i]n order to establish substantial regression, there must be data related to a particular skill or particular knowledge that [the s]tudent had previously mastered that took an inordinate amount of time to re-learn," and the hearing record was "devoid of any such data" (id. at p. 7). However, State regulation places the burden of determining whether or not students are at risk for substantial regression such that they require 12-month services on public school districts, not parents (8 NYCRR 200.16[i][3][v]). The standard for parents to meet their burden to show that the unilaterally-obtained special education services are appropriate is whether 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). Therefore, the IHO's findings with respect to evidence of the risk for substantial regression and the student's need for 12-month services as a basis to determine that the unilateral placement was not appropriate must be overturned.

Next, the IHO stated "[t]he fact that [the s]tudent was below grade level and was struggling in a Kindergarten program when they were three (3) years old raises further concerns with the appropriateness" of the unilateral placement, and that the student "was inappropriately placed in a program too advanced for a typical student of the same age as [the s]tudent, and certainly too advanced for a preschool child with documented special education needs" (IHO Decision at p. 6). The IHO took "official notice" that in the district, "students begin Kindergarten in September of the calendar year in which they turn five (5)," that the student was three years old during the period of time in dispute, and that he did not turn four years old until September 2022 (id.). However, during questioning by the IHO, the director testified that she knew the student turned four years old in September 2022, and confirmed that "the four-year old level" was "when [Bais Frieda's] kindergarteners start" (Tr. pp. 62-63). Therefore, the IHO's conclusion that the Bais Frieda program was too advanced for the student because of its Kindergarten designation, based on what the district may define as Kindergarten, is not particularly useful in this instance. Rather, the relevant inquiry is whether Bais Frieda provided specially designed instruction to meet the student's unique special education needs.

Turning to the student's unilateral placement, the director of Bais Frieda (director) testified that the school was comprised of three general education classrooms, as well as two special education classrooms designed for students with language delays and behavioral challenges (Tr. pp. 34, 35). The director testified that the program at Bais Frieda followed the common core curriculum, which was modified and accommodated using applied behavior analysis (ABA) methodology to meet students' individualized needs (Tr. p. 35; see Parent Ex. C). According to the director, the student's class was composed of 11 other students, all with special needs, and "one special education teacher full-time and assistants" (Tr. pp. 36-37).[7] The student received speech-language, OT, and PT at Bais Frieda (Parent Ex. G at p. 13).

Regarding the student's needs and how they were addressed, the hearing record included a report from Bais Frieda for July and August 2022 which contained a functional behavioral assessment (FBA), an assessment of current functioning in the area of adaptive behavior, a BIP, a July 2022 treatment plan, an August 2022 teacher progress report, and speech-language, OT, and PT checklists (see Parent Ex. G).[8]

The July 2022 treatment plan indicated that the student struggled with social interactions and regulation of emotions, described the student as "self-absorbed" and noted that he initiated play but did not include others or share (Parent Ex. G at p. 13). As related to social/emotional functioning, the August 2022 teacher report stated that the student "struggle[d] to maintain positive social interactions," demonstrated aggressive behavior, used inappropriate language, struggled to follow classroom rules, and was reported to be defiant (id. at p. 19).[9] The FBA identified a number

[7] The director of Bais Frieda did not specify how many assistants were in the classroom or whether they provided full-time or part-time support (see Tr. p. 37).

[8] The speech-language, OT and PT checklists as included within the July to August 2022 student information packet from Bais Frieda appear to have been dated in error as August 2023 rather than August 2022 (compare Parent Ex. G at p. 1, with Parent Ex. G at pp. 20, 25, 27).

[9] Within his decision, the IHO found the information on the student's BIP regarding mastery and improvement as related to the student's defiant and aggressive speech behaviors to be contradictory to the August 2022 teacher

of specific targeted problem behaviors the student exhibited, (tantrum, defiance, fidgeting, irrelevant responses/statements, aggressive speech, aggression, baby voice, rigid behaviors, and wandering), sources of direct and indirect data, influencing factors (setting events), descriptions of antecedents and consequences, functions of the behaviors, skill deficits related to problem behaviors, functional hypotheses, behavioral supports and interventions previously tried and those currently in place, interests and possible reinforcers, and replacement behaviors (id. at pp. 1-6). The student's BIP provided information about the student's specific behaviors, maintaining consequence/function, comparison of baseline data from July 2021 to August 2022, and replacement behaviors/techniques and reinforcers used (id. at pp. 8-12). Additionally, the BIP provided a "checklist" of questions for the student's instructors as to how they approached providing instruction to the student to improve his behavior (id. at p. 11).

The July 2022 treatment plan included information about the student's skills and needs in the areas of language, communication, social functioning, behavior, math, reading, and writing (Parent Ex. G at pp. 13-16). The student's treatment plan included checklists of the frequency of observed skills in the areas addressed by speech-language therapy, OT, and PT (id. at pp. 13, 20-29).[10] The director and the treatment plan noted the student's difficulties with attention, understanding concepts, and basic readiness skills (Tr. pp. 41-45, 47; Parent Ex. G at p. 14). The treatment plan reported the student had cognitive challenges with grasping and processing information and working memory, and that he needed "frequent repetition and consistent guidance to comprehend tasks" (Parent Ex. G at p. 14). The director and the treatment plan noted the student's challenges with receptive language and following directions, and that he exhibited limited eye contact and poor vocabulary skills (Tr. pp. 41-43; Parent Ex. G at pp. 13-14). In addition, the director testified that the student used repetitive statements, forgot parts of sentences, had a loud vocal intensity, and exhibited task completion difficulties, difficulty transitioning from one activity to the next, and poor joint attention skills (Tr. pp. 42-43). According to the Bais Frieda report, a standardized assessment of the student's adaptive behavior functioning yielded an overall score "well below the normative mean" (Parent Ex. G at p. 7).

Regarding academic skills in the area of ELA, the director and the July 2022 treatment plan described the student's abilities as "significantly compromised"; reporting the student's unfamiliarity with letters of the alphabet, absence of basic print awareness skills, poor comprehension skills, and inability to formulate responses to basic questions after a read aloud, nor did the student ask questions or display interest during a read aloud (Tr. pp. 44-45; Parent Ex. G at p. 14). Goals for ELA in the treatment plan included pointing to upper and lowercase letters in grade level texts; forming upper case letters for 20 out of the 26 letters; answering questions by retelling the beginning, middle and end of stories; and pointing to the letter and stating the name of the letter that made a given sound for 12 out of 15 letters (id. at pp. 14-15). According to the treatment plan, the student's math skills were below grade level, and he struggled to recognize numbers, count fluently, and complete basic computation (id. at pp. 14). The treatment plan

report noting the student's continued aggressive behavior and inappropriate language (see IHO Decision at p. 8; compare Parent Ex. G at p. 8, with Parent Ex. G at p. 19).

[10] The student's undated kindergarten daily schedule noted that the student received three 30-minute sessions of individual OT, three 30-minute sessions of individual PT, and two 30-minute sessions of individual speech-language therapy (Parent Ex. E at p. 2; see Parent Ex. G at pp. 20-29).

included goals in math for counting to 10 using 1:1 correspondence, completing patterns, saying and writing numbers in sequence, drawing shapes, and identifying the larger or smaller number given two numbers between one and 10 (id.).

The August 2022 teacher report indicated that the student's reading levels were "[s]ignificantly below grade level," he identified three letters of the alphabet, had poor comprehension skills, and did not follow a storyline or answer questions (Parent Ex. G at p. 18). In the area of writing, the teacher report noted that the student could scribble with a crayon and shape three letters with sticks; however, "[could]not express himself in writing at this time," or use a tripod grasp (id.). In math, the teacher report indicated that the student's skills were "[b]elow grade level," and he had difficulty showing numbers with cubes, representing numbers in pictures, and putting numbers in counting order (id. at p. 17).

To the extent that the IHO was concerned that some of the July 2022 treatment plan academic goals may have been overly ambitious given the student's skills as of summer 2022, the completion date for those goals was "[b]y next term" and not necessarily by the end of summer programming (see Parent Ex. G at pp. 14-15). Additionally, review of the August 2022 teacher progress report described what skills the student had been working on "over the second term" and provided updated goals for the "next term" that were appropriate to the student's skill levels described in the teacher progress report at that time (see id. at pp. 17-19). Further, regarding the IHO's determination to afford "little weight" to the summer 2022 Bais Frieda progress reports because they did not provide information about the student's progress specifically made over July and August 2022 (IHO Decision at pp. 7-8; see Parent Ex. G at pp. 8-9, 15, 16), 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]).

Therefore, review of the evidence in the hearing record shows that Bais Frieda identified the student's behavior, communication, motor, and academic needs, developed a BIP and goals to address those needs, and provided the student with specially designed instruction and related services (Parent Exs. E; G). As such, the IHO's determination that the student's unilateral placement at Bais Frieda during July and August 2022 was not appropriate must be overturned.

B. 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. 10-Day Notice

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).

By letter dated June 20, 2022, the parent notified the district that she had not received an appropriate educational and school placement for the student for the 2022-23 school year and that she intended to unilaterally place the student at Bais Frieda for July and August 2022 and seek public funding for the costs of that program (Parent Ex. I). The IHO found that a nominal reduction in the amount of tuition awarded would be warranted given that the parent's June 20, 2022 letter was dated nine business days, rather than 10 business days, prior to July 1, 2022, the first day of the summer portion of the school year (see IHO Decision at p. 9). On appeal, the parent does not dispute that the letter was one day late but argues that the delay should not result in a reduction of an award of tuition. In addition, the parent argues that the district failed to provide her with a procedural safeguards notice. An award of tuition shall not be reduced or denied for failure to provide 10-day notice if parents did not receive the procedural safeguards notice informing them

of the 10-day notice requirement (20 U.S.C. § 1412[a][10][C][iv][I]; see 34 CFR 300.148[e][1]). Here, the IHO noted that the parent had provided the district with 10 day notice prior to June 2022 demonstrating her knowledge of the requirement (IHO Decision at p. 9). On appeal, the parent does not argue that the IHO erred in this regard. Accordingly, I will not disturb the IHO's finding that the purported lack of a procedural safeguards notice did not foreclose a reduction of an award of tuition funding based on the delayed 10-day notice. As to the reduction, I agree with the IHO that a nominal reduction is warranted and, therefore, I will reduce the tuition owed by $500.

2. Excessive Costs

Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; 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., 674 Fed. App'x at 101; 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 school or agency was unreasonable or regarding any segregable costs charged by the private school or 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 parent argues that the district did not offer documentary or testimonial evidence regarding the costs of the unilateral placement and that no evidence reflected that the costs were unreasonable. However, in finding the costs excessive, the IHO relied on evidence in the hearing record, including the contract and the number of days of instruction. As the IHO found, Bais Frieda did not charge a flat tuition fee for the summer program and, instead, the contract broke down the tuition by month (Parent Exs. C at p. 1; D at p. 1; see IHO Decision at p. 10). Based on this finding, the IHO determined that the cost of instruction for August was excessive compared to July 2022 given the number of days for instruction (15 versus 21 days) (IHO Decision p. 10, citing Parent Ex. F). As the IHO set forth a record basis for the finding that the costs of the summer program at Bais Frieda were excessive, I decline to disturb the IHO's discretionary finding that a reduction of $4,000 was warranted.

VII. Conclusion

Contrary to the IHO's determination, the evidence in the hearing record reflects that the student's placement at Bais Frieda for summer 2022 was an appropriate unilateral placement. However, there is no basis to disturb the IHO's determination that a reduction in the amount of tuition awarded is warranted on equitable grounds.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated October 3, 2023, is modified by reversing that portion which determined that Bais Frieda was not an appropriate unilateral placement for the student for summer 2022 and denied the parent's request for tuition funding;

IT IS FURTHER ORDERED that the district shall fund the costs of the student's attendance at Bais Frieda for summer 2022 less $4,500.

Dated: **Albany, New York**
January 16, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER