



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-279

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:

Law Offices of Adam Dayan, PLLC, attorneys for petitioners, by Kelly Bronner, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Reimels, Esq. and Irene B. Dimoh, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Manhattan Star Academy (MSA) for the 2021-22 school year and denied their requests to be reimbursed for out-of-pocket transportation costs, speech-language tutoring, and a neuropsychological evaluation. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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 student received physical therapy (PT) and speech-language therapy through the Early Intervention Program (Parent Ex. AA ¶ 2; Dist. Ex. 3 at p. 27). He was referred by the parent to the Committee on Preschool Special Education (CPSE) in or around September 2021 (see generally Dist. Ex. 3).

A CPSE convened on October 25, 2021, found the student eligible for special education as a preschool student with a disability, and formulated an IEP for the student for the 2021-22 school

year (see generally Dist. Ex. 1).¹ The October 2021 CPSE recommended the student receive five 60-minute sessions per week of individual special education itinerant teacher (SEIT) services at an early childhood program selected by the parent; two 30-minute sessions per week of individual PT; three 30-minute sessions per week of individual occupational therapy (OT); and one 30-minute session per week of individual speech-language therapy (Dist. Ex. 1 at p. 16).

The parents disagreed with the recommendations contained in the October 2021 IEP for the 2021-22 school year and, as a result, notified the district of their intent to unilaterally place the student at MSA via a ten-day notice dated January 20, 2022 (see Parent Ex. B at pp. 2-3). In their letter, the parents indicated that the student had been attending a "mainstream school" that year and had "difficulty keeping pace with other three-year-olds in his class, so he was moved to a classroom for two-year-olds" and they "believe[d] he w[ould] continue to regress with the limited services he'[d] been receiving" (*id.* at p. 3). The parents also requested that the CPSE "conduct or refer [the student] for a comprehensive neuropsychological evaluation" (*id.*).

On January 24, 2022, by email, the SEIT supervisor from the Omni childhood center (Omni) notified the CPSE administrator that the student had not made significant progress in his then-current program and elaborated that "[m]ore services [were] being requested at this time" (Parent Ex. U at p. 3).² In addition, the email reflected that the SEIT supervisor attached documentation "from the clinicians seeing [the student]" (*id.*). By email dated January 25, 2022, the parents requested that the CPSE reconvene to "discuss placement options" for the student and again requested a neuropsychological evaluation (*id.* at p. 1).

On January 31, 2022, the student began attending a full-time special education program at MSA (Parent Exs. AA ¶ 9; C).

A CPSE reconvened on March 31, 2022 and developed an IEP for the student with an implementation date of April 2022 (Dist. Ex. 6 at pp. 3, 27). The March 2022 CPSE reviewed new evaluative information including progress reports from the student's speech-language therapist, SEIT provider, OT provider, and PT provider, along with "anecdotal taken from clinicians working with [the student]" (Parent Ex. N at pp. 1-2). As a result of its review, the CPSE recommended that the student attend a 12:1+2 special class and receive two 45-minute sessions per week of individual PT; three 30-minute sessions per week of individual OT; and three 30-minute sessions per week of speech-language therapy (Dist. Ex. 6 at p. 27).³ The district provided

¹ The hearing record contains duplicative exhibits (compare Parent Exs. K and P, with Dist. Exs. 1, 13, and 14). For purposes of this decision, only district exhibits are cited in instances where both a parent and district exhibit are identical in content.

² Omni is the agency that was selected by the parent to conduct the student's preschool evaluation (Dist. Ex. 3 at p. 7).

³ The March 2022 IEP contains conflicting information in the section titled "recommended special education programs and services" under the "related services" subsection (Dist. Ex. 6 at p. 27). In one portion of the document, it recommended that the student receive speech-language therapy at a frequency of once per week for 30-minutes (*id.*). In another section, it recommended that the student receive speech-language therapy at a frequency of three times per week for 30-minutes (*id.*).

the parents with a prior written notice dated March 31, 2022 summarizing the CPSE's recommendations (Dist. Ex. 7).

By letter dated May 11, 2022, the district sent the parents a notice of final recommendation which identified the particular school location to which the district assigned the student to attend to receive the program and services recommended in the March 2022 IEP (Parent Ex. L at p. 31).

A. Due Process Complaint Notice

In a second amended due process complaint notice dated April 28, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. A).⁴ In particular, the parents asserted that the district failed to develop an IEP prior to the beginning of the 2021-22 school year and failed to refer the student for an auditory processing evaluation and that the October 2021 CPSE's recommendations for SEIT and speech-language therapy services were insufficient (*id.* at pp. 6-7). The parents alleged that because the student was not receiving sufficient speech-language therapy, they independently obtained private services (*id.* at p. 7). Regarding the March 2022 IEP, the parents alleged that the recommendation for the student to move from an 8:1+2 special class at MSA to a 12:1+2 special class in a different school "would have certainly resulted in regression" and that the assigned public school site, which they visited in-person in late April 2022, did not have a seat available for the student for the remainder of the 2021-22 school year (*id.* at p. 8). The parents asserted that the student's placement at MSA was appropriate and requested reimbursement from the district for the student's tuition at MSA, transportation to and from MSA, and speech-language therapy services for which the parents paid out-of-pocket prior to the student's placement at MSA, as well as direct funding or reimbursement for a comprehensive independent neuropsychological evaluation (*id.* at pp. 8-9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 2, 2022 and concluded on August 23, 2023 after 13 days of proceedings (Tr. pp. 5-219).⁵ In a decision dated October 26, 2023, the IHO determined that the district offered the student a FAPE for the 2021-22 school year and therefore there was no need for further inquiry into the appropriateness of MSA as a unilateral placement, nor a need to weigh equitable considerations (IHO Decision at p. 11). The IHO dismissed the parents' due process complaint notice (*id.*).

⁴ The original due process complaint notice was dated February 3, 2022 and set forth allegations challenging the October 2021 IEP (*see* Feb. 3, 2022 Due Process Compl. Not.). On February 8, 2022, the parents filed an amended due process complaint notice containing the same allegations as the earlier due process complaint notice, but additionally requested that the district be ordered to fund an independent neuropsychological evaluation (*see* Feb. 8, 2022 Amended Due Process Compl. Not.). The district responded with a prior written notice dated February 17, 2022, which acknowledged the parents' request for a neuropsychological evaluation and stated that a "neuropsychological evaluation [wa]s not necessary at this time" but that "[a] decision regarding appropriate level of services [ould] be made utilizing evaluations already done on student" (Dist. Ex. 5 at p. 1).

⁵ A pre-hearing conference was held on March 29, 2022 (Tr. pp. 1-4).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is presumed and, therefore, the specifics of the allegations and arguments will not be repeated.⁶ The following issues presented on appeal must be resolved in order to render a decision:

1. Whether the IHO erred in finding that the October 2021 IEP, including the CPSE's recommendation for speech-language therapy, offered the student a FAPE for the 2021-22 school year;
2. Whether the IHO erred in failing to address whether the CPSE should have reconvened prior to March 2022;
3. Whether the IHO erred in not addressing the availability of a school placement to implement the March 2022 IEP;
4. Whether the IHO erred in failing to address the appropriateness of MSA as a unilateral placement for the student and equitable considerations and in failing to order reimbursement for the student's tuition at MSA;
5. Whether the IHO erred in failing to order reimbursement for the costs of privately-obtained speech-language therapy for the student;
6. Whether the IHO erred in failing to award the parents reimbursement for out-of-pocket transportation expenses for the student;
7. Whether the IHO erred in failing to order an independent neuropsychological evaluation of the student at district expense.

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]).

⁶ Although the parents prepared, served, and filed a reply to the district's answer, State regulation limits the scope of the parents' reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent that would trigger the parents' right to compose a reply. As such, the parents' reply fails to comply with the practice regulations and will not be considered.

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The

student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁷

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. October 2021 IEP

As noted above, the IHO found that the district offered the student a FAPE for the 2021-22 school year, making specific findings related to the consideration of the evaluative information available to the October 2021 CPSE (IHO Decision at p. 11). The parents' primary objection to the October 2021 IEP is that it did not include a sufficient level of speech-language therapy. In addition, the parents object to the IHO's decision to the extent that "[t]he IHO did not explain her reasoning as to how the procedures followed translated into a substantively appropriate IEP" (Req. for Rev. at p. 6). Addressing the parents' general allegations regarding the IHO's findings as to the

⁷ 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).

October 2021 IEP requires a review of the evaluative information before the October 2021 CPSE and the student's identified needs.

The parents chose Omni to perform multidisciplinary evaluations for the student prior to the October 2021 CPSE (Dist. Ex. 3 at p. 7). The Omni evaluation yielded a social history and home language survey, both dated September 30, 2021; a psychological evaluation dated October 4, 2021; an OT evaluation, an educational evaluation, and classroom observation, all dated October 7, 2021; a speech-language evaluation dated October 11, 2021; a PT evaluation dated October 12, 2021; a child outcomes summary form, last updated October 12, 2021; and a preschool student evaluation summary report dated October 12, 2021 (*id.* at pp. 12-52).

According to the Omni psychological evaluation report, administration of the Stanford Binet Intelligence Scale—Fifth Edition (SB-5) to the student yielded a full scale IQ of 72 which fell in the borderline impaired range, a nonverbal IQ of 78 which also fell in the borderline impaired range, and a verbal IQ of 68 which fell in the mildly impaired range (Dist. Ex. 3 at p. 28).⁸ In addition, the psychological evaluation report indicated that the student's adaptive behavior composite score, as measured by the Vineland Adaptive Behavior Scales—Third Edition, placed him in the "[m]oderately [l]ow" range of adaptive functioning (*id.* at p. 30). The Omni educational evaluation reflected that the student's performance on the Developmental Assessment for Young Children—Second Edition (DAYC-2), resulted in scores in the poor range in the physical development, adaptive living, and receptive language domains and in the below average range in the cognitive, communication, social/emotional, and expressive language domains (Dist. Ex. 3 at p. 46; *see* Dist. Ex. 1 at p. 3).

According to the Omni speech evaluation, on the Goldman Fristoe Test of Articulation-III, the student obtained a standard score of 115, which fell in the high average range (Dist. Ex. 3 at p. 33; *see* Dist. Ex. 1 at p. 3). In addition, according to the Preschool Language Scales—Fifth Edition (PLS-5), the student presented with below average receptive language skills and average expressive language skills (Dist. Ex. 3 at p. 34; *see* Dist. Ex. 1 at p. 3). However, the evaluator noted that the student's scores on the PLS-5 should be interpreted with caution because the assessment included additional tasks that the student did not perform but did not lose credit for because they were below the basal level; therefore, the student's abilities were judged "to be lower than [his scores] indicate[d]" (*id.*).

The Omni OT evaluation report indicated that with regard to auditory filtering, the student's scores on the Short Sensory Profile were 2.0 standard deviations below the mean and the student demonstrated poor auditory filtering skills (Dist. Ex. 3 at p. 39; *see* Dist. Ex. 1 at p. 3). With regard to fine and gross motor development, the evaluation report indicated the student's scores on the Peabody Developmental Motor Scales—Second Edition (PDMS-II) placed his functioning in grasp and visual motor integration skills 2.0 standard deviations below the mean (Dist. Ex. 3 at pp. 38-39; *see* Dist. Ex. 1 at p. 3). The Omni PT evaluation report indicated that with respect to the student's gross motor skills, the sum of the student's standard scores was 15, which yielded a gross

⁸ The evaluator noted that there was a significant difference between the student's verbal and nonverbal abilities (Dist. Ex. 3 at p. 29).

motor quotient of 68 and placed the student over 20. Standard deviations below the mean and in the first percentile (Dist. Ex. 3 at pp. 42-43; see Dist. Ex. 1 at p. 3).

With respect to preacademic skills, the October 2021 IEP referenced the Omni educational evaluation, psychological evaluation, and OT evaluation, which reported that the student had acquired some basic rote skills: he pointed to, named, and matched primary colors; pointed to some shapes; stacked blocks; and acted out feeding a child (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 3 at pp. 38, 46, 48-49, 62). The IEP stated that the student did not understand how to manage a book independently, comprehend task directions, sing, recite the alphabet, or rote count (Dist. Ex. 1 at p. 4). According to the IEP, the student matched simple items in pictures but could not continue a simple pattern, and he had difficulty copying simple block structures (id.). The IEP noted that the student did not "act out" actions including clapping, waving, washing hands, knocking, or drinking from a cup and did not name any action words (id.). The IEP noted that the student often failed to respond when his name was called, had a hard time working with background noise present, and was easily distracted by auditory stimuli (id. at p. 5).

In the area of speech-language development, the IEP included information from the Omni speech evaluation which indicated that, receptively, the student demonstrated relational and functional play skills, and he identified facial features, body parts, and pictures of objects (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 3 at p. 34). The IEP stated that the student did not differentiate the pronouns "my" and "your" in directions, had difficulty with concepts involving quantities, did not comprehend negatives in sentences, did not understand picture analogies, did not follow verbs in context, and did not make inferences based on pictures shown (Dist. Ex. 1 at p. 4). The IEP reported that according to informal testing, the student followed a few simple directions, named pictures of objects, expressed more than five words and produced the "verb+ing form"; however, the IEP noted that the student demonstrated "very limited" comprehension of questions, had trouble following two step directions, did not use language for a variety of pragmatic functions, and could not answer questions about a picture or name described objects (id.). According to the IEP, the student could not answer questions which required logical reasoning skills; on an informal assessment, the student did not respond to many questions presented to him or he repeated part of the question back to the evaluator (id.). The IEP indicated that the student's ability to participate in simple communicative exchanges was "severely limited" (id.). In the area of social/emotional development, the IEP stated that the student presented with "below age appropriate levels in his interpersonal, play, and social coping skills" (id.). The IEP indicated that the student did not interact much with peers and played mostly by himself (id.). According to the IEP, the student's teacher reported that he did not participate in circle time without "maximum assistance" (id. at p. 5). Further, he imitated some simple motions but did not imitate many relatively complex actions (id.).

Regarding fine motor development, the IEP reported that the student presented with significant delays in his grasping and visual motor skills (Dist. Ex. 1 at p. 5). For example, the IEP stated that the student demonstrated an awkward grasp on writing utensils, struggled with graphomotor and copying tasks, and had difficulty with cutting activities and using crayons (id.). With respect to gross motor development, the IEP indicated that the student presented with delays which inhibited his ability to participate in class activities, such as jumping and dancing, he was unable to climb on playground equipment, and he appeared unsure and cautious when ascending and descending stairs or walking (id.). Regarding activities of daily living, the IEP noted that the

student was not toilet trained, was messy when using a spoon, did not put on or take off clothing by himself, was not always careful around hot objects, and even opened the oven at times (*id.* at p. 5). In addition, the October 2021 IEP included the parent's concerns and additional information about the student that was discussed during the CPSE meeting (*id.* at pp. 4-6).

The October 2021 IEP detailed the strategies and resources needed to address the student's management needs including verbal and visual cuing, positive reinforcement, repetition, chunking and simplification of directives, small group instruction, and verbal preparation and modeling (Dist. Ex. 1 at p. 6). Additionally, the IEP noted that the student was able to participate in all classroom activities in the general education curriculum with supports as needed (*id.*). The IEP included annual goals targeting the student's expressive and receptive language and comprehension skills, fine motor and gross motor skills, social/emotional and cooperative play skills, academic skills in math, attending and auditory filtering skills, executive functioning skills, and sensory processing skills (*id.* at pp. 6-15). For example, the IEP included an annual goal which targeted the student's expressive language skills and noted short term instructional objectives which targeted increasing the variety and complexity of verbalizations, spontaneously producing a variety of nouns, verbs, and pronouns, using language to share, take turns, express thanks, and apologize (*id.* at p. 13).

As summarized above, the October 2021 CPSE found the student eligible for special education as a preschool student with a disability and recommended one hour per day of SEIT services; two 30-minute sessions per week of individual PT; three 30-minute sessions per week of individual OT; and one 30-minute session per week of individual speech-language therapy (Dist. Ex. 1 at pp. 3, 16).

According to the October 2021 IEP summary page, other programs considered were "no speech" and the stated reason for rejection was that the student was "informally" presenting with significant delays and the parent reported that the student could not follow directions "in [the] 1-2 year old range," and that the student's general education teacher reported that the student was not talking or following directions (Dist. Ex. 1 at p. 1). To this point, although the student demonstrated needs in his receptive language skills and his auditory processing skills, the CPSE administrator testified that, based on the student's scores on testing, the student "did not meet the eligibility criteria" for speech-language therapy services, the CPSE recommended speech-language therapy services specifically due to the parent's concerns as raised at the October 2021 CPSE meeting (Tr. pp. 205-07).

Having reviewed the evaluative information before the October 2021 CPSE, the district had detailed information regarding the student's needs current with the October 2021 CSE meeting and, at the time it was created, the October 2021 IEP sufficiently addressed the student's needs and provided the student with a FAPE.⁹ Although the district's reasoning for recommending one session of speech-language therapy per week, as opposed to the three sessions per week, as requested by the parents, may have placed more importance on the student's testing results rather than the student's in-class performance, the CPSE had sufficient evaluative information regarding

⁹ The parents did not request a neuropsychological evaluation of the student until January 2022 (Parent Exs. B; U at p. 1).

the student and identified the student's present levels of performance and included speech-language therapy as a related service to address the student's identified needs. Accordingly, while it is understandable that the parents disagreed with the district's recommendations, as in their view, the recommendations did not adequately address the student's speech-language needs given the student's performance in the classroom, the CPSE's decision to recommend one session per week of speech-language therapy as of October 2021 was not unreasonable and did not result in a denial of FAPE to the student.

B. CPSE Reconvene

In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address any lack of expected progress toward annual goals, information provided by a student's parents, the student's needs, or other matters (20 U.S.C. § 1414[d][4][A][ii]; 34 CFR 300.324[b][1][ii]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that 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]). A district's failure to comply with the procedural requirements related to a parent's request to reconvene may constitute a denial of FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that the district violated the IDEA by failing to either reconvene the CSE in response to the parents' request or respond with a written notice stating the reasons why the district did not believe a reconvene was necessary and such violation contributed to a denial of FAPE]; see also Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; 34 CFR 300.503; 8 NYCRR 200.5[a]; Application of a Student with a Disability, Appeal No. 13-172; Application of the Dep't of Educ., Appeal No. 12-128). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Turning to the relevant facts in this matter occurring after the October 2021 CPSE meeting, the student's SEIT provider began logging the student's performance on various tasks in a document entitled "classroom functioning" beginning on November 1, 2021 and continuing through November 15, 2021 (Dist. Ex. 9). The SEIT provider reported that the student required "constant repetition and redirection," was unable to follow directions, had difficulties responding to his peers, and was unable to give verbal responses to his teacher (id.). The student's general education teacher also logged her observations of the student's classroom functioning during this same time period (Dist. Ex. 14). Among other things, the student's teacher reported that the student was unable to follow instructions, did not understand the classroom routine, and was unable to recognize a picture of himself (id. at pp. 1-2). The parent emailed the district on November 5, 2021 requesting another CPSE meeting with the presence of the student's early intervention therapists and teacher (Dist. Ex. 17). The parent further stated that she had a letter from a

neurologist to show the district and that she believed that "we may need to reevaluate the frequency of some of the services [the student] was mandated" to receive (id.).¹⁰ The CPSE administrator responded by email on November 8, 2021, in which she indicated that the district attempted to include the participation of the student's teacher in the first meeting but the teacher did not respond when called and further indicated that she needed to know the purpose of having a second meeting (id.). An email exchange indicates that, following the parent's request for a reevaluation, the CPSE administrator attempted to have the speech evaluator speak with the parent to discuss the speech-language evaluation, but the parent did not want to speak with her (Parent Ex. U at pp. 5-8). On November 18, 2021, the CPSE administrator also sent an email to staff at Omni indicating the CPSE could reconvene for a requested review if "providers feel it is necessary" (id. at p. 4).

A classroom observation was conducted on November 30, 2021 by a board certified behavior analyst (BCBA) at Omni (Dist. Ex. 13 at p. 1; see Parent Ex. U at pp. 2-3). The observer noted that the student had been moved from a classroom of three-year-old students to a class of two-year-olds "due to his inability to keep up with the classroom routine and demands" (id.). The observer recorded that, "[t]hroughout the course of the observation, there was no language or interaction observed. The teacher reported that this is typical for [the student]" (id. at p. 2). The observer reported that "there [we]re significant concerns regarding [the student's] cognitive, social, and language development" and "[t]here seem[ed] to be delays that [we]re greatly affecting [the student's] ability to function in the classroom" (id.). The observer recommended that "[c]onsideration should be made regarding additional support in order to address the delays noted in this report" (id.).

Accordingly, at that point, the district should have begun the process for reconvening the CPSE to review the student's performance up to that point in the school year, or, at the very least, provided the parent with notice as to why the district declined to hold a meeting to review the student's educational programming after the parent's request.

It was only following the receipt of the parent's 10-day notice that the CPSE gathered a speech-language therapy progress report, a SEIT progress report, and an OT progress report and reconvened the CPSE on March 31, 2022 to create a new IEP for the student (see Parent Ex. N). Notably, the CPSE did not reconvene until the end of March 2022 despite knowing as early as November 2021 that the student was failing to make expected progress under the October 2021 IEP. In this instance, considering that the parent had requested a reconvene of the CPSE to review the student's educational programming in light of the student's perceived lack of progress, the CPSE administrator's acknowledgment that the CPSE should be reconvened if the Omni providers felt it was necessary, and the observation conducted by Omni recommending that additional supports should be considered given the student's functioning within the classroom, the delay from

¹⁰ The hearing record includes an October 28, 2021 letter from the student's neurologist addressed to the student's pediatrician (Parent Ex. Z). In that letter the neurologist opined that the services recommended by the district were "extremely inadequate" and recommended that the student receive two hours of SEIT services per day, as well as three sessions of speech-language therapy per week (id. at p. 2). On November 15, 2021, another neurologist wrote a letter addressed "to Whom It May Concern," in which he stated that the student was his patient and the student had "very significant expressive and receptive language deficits . . . [and had] a great deal of difficulty processing language, and ha[d] difficulty communicating his wants and needs" (Parent Ex. Y). The neurologist opined that the student "clearly needs [s]peechee [t]herapy at least 3 times per week" (id.).

late November 2021 to the end of March 2022, denied the student a FAPE for the 2021-22 school year.¹¹

C. Relief

1. Unilaterally Obtained Services

Having determined that the district failed to offer the student a FAPE for the 2021-22 school year, the next inquiry focuses on whether the parents' unilaterally obtained services, including speech-language therapy services provided between November through January 2021 followed by the placement of the student at MSA, were 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 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

¹¹ Having determined that a FAPE was denied to the student for the 2021-22 school year based on the delay of the CPSE in reconvening after being made aware of the student's need for additional supports, an analysis of the appropriateness of the March 2022 IEP is not necessary and I will next turn to appropriate relief for the denial of FAPE.

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).

a. Speech-Language

The parents allege in their appeal that they obtained private speech-language tutoring sessions for the student from November 5, 2021 through January 14, 2022 and requested reimbursement for their out-of-pocket expenses (Req. for Rev. at pp. 3, 8). The parents argue that given the student's speech-language delays it was appropriate to retain the services of a private speech-language therapist to prevent regression (Req. for Rev. at p. 8).

The parent testified that the student needed more than the one session per week of speech-language therapy recommended in the October 2021 IEP in order to make progress (Parent Ex. AA ¶ 7). The parent's testimony is consistent with the October 28, 2021 and November 15, 2021 letters from the student's neurologists, which both indicated that the student required at least three sessions per week of speech-language therapy services (Parent Exs. Y; Z). The hearing record includes an invoice of a speech-language therapist recording twelve speech-language tutoring sessions provided between November 5, 2021 and January 14, 2022 (Parent Ex. T). However, the hearing record lacks evidence regarding the speech-language therapist's services or how they addressed the student's needs. While the parent testified that the student's private speech-language therapist was a licensed speech therapist (Tr. p. 162; see Parent Exs. AA ¶ 7; T), there is no evidence regarding the services provided by the therapist to the student.¹²

In this instance, the parents did not meet their burden to prove that the private speech-language sessions obtained between November 5, 2021 and January 14, 2022 were appropriate for the student during the 2021-22 school year. Accordingly, the parents' request for reimbursement for privately obtained speech-language services is denied.

¹² The private speech-language therapist did not testify during the hearing, the hearing record does not include any information regarding what goals the speech-language therapist worked on with the student, nor does the hearing record include a progress report prepared by the private speech-language therapist identifying the student's performance.

b. Placement at MSA

The hearing record shows that the student began attending MSA on January 31, 2022 (Parent Exs. AA ¶ 9; BB ¶¶ 17-18; see Parent Ex. C). The director of the lower school (director) at MSA explained that MSA students were grouped based on a combination of factors including their diagnoses, the level of support they require, social/emotional needs, and age (Parent Ex. BB ¶ 15; see Tr. p. 174). For the portion of the 2021-22 school year that the student attended MSA, he was in a class with eight other students between ages three to six years old along with "a lead teacher, [two] teacher's assistants, and [four] paraprofessionals assigned to individual students in the classroom" (Parent Ex. BB ¶ 20). According to the MSA program brochure, MSA offered an individualized curriculum for children ages five to 12 years old who had received diagnoses of global developmental delays, autism, speech delays, or who had neurodevelopmental disabilities (Parent Ex. G at p. 2). The MSA program brochure described the related services offered at MSA, which included OT, PT, speech-language therapy, art, music therapy, and adapted physical education (id.). In addition, the MSA program brochure specified that the school used a multisensory approach, environmental design strategies, smaller class sizes, and emphasized parent communication to meet the unique learning needs of students with disabilities (id.). The director at MSA testified, by affidavit, that MSA assessed student's strengths and deficits using the Verbal Behavioral Milestones Assessment and Placement Program (VB-MAPP), set benchmarks to establish individualized goals for each student, and utilized the Greenspan floor time method, as well as behavioral approaches such as ABA methodology and BCBA-style learning (Parent Ex. BB ¶ 6). In addition to attending an MSA 8:1:2 special class during the 2021-22 school year, the director at MSA testified, by affidavit, that the student received three 30-minute sessions per week of both OT and speech-language therapy (Parent Exs. BB ¶ 21; CC ¶ 5).¹³

To address the student's identified needs, MSA developed individualized instructional goals for the 2021-22 school year that targeted the student's weaknesses in reading, math, writing, receptive and expressive language skills, prewriting skills, motor planning, social/emotional development, and activities of daily living (Parent Ex. I).¹⁴ Further, the special education teacher

¹³ According to the student's MSA schedule, the student attended MSA from 8:45 to 2:00 pm (Parent Ex. J). At MSA, the student attended morning meeting; physical fitness; math; reading; social studies; writing; recess; yoga; science; social skills; art; centers; and music (id.). The student's teacher testified that the student received reading and math instruction daily; writing instruction three times per week; science, social studies, and social skills instruction two times per week; and special subject instruction (Parent Ex. CC ¶ 7).

¹⁴ According to the 2021-22 MSA learning plan, at the time that the student attended MSA during the 2021-22 school year, the student did not receive PT services; however, the plan noted that "[o]nce a PT [was] available, goals [would] be established and targeted" to meet the student's PT related needs (Parent Ex. I at p. 3). Testimony from the special education teacher established that MSA was unable to provide the student with PT due to a provider shortage (Tr. p. 177). It is noteworthy that the student started MSA at the end of January, more than midway through the school year (Tr. p. 158). In weighing the appropriateness of MSA as a unilateral placement, the timing of the parent's placement in response to the district's denial of a FAPE to the student, as well as the provision of yoga, physical fitness, and certain aspects of OT as shown in the OT goals mitigate the school's failure to deliver PT to the student as a necessary related service. It is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). However, a lack of evidence as to how a student's significant area of need was addressed by the unilateral placement could result in a finding that the unilateral placement was

testified that data was collected to monitor the student's progress toward his instructional goals (Tr. p. 175).

With respect to academics, the special education teacher testified by affidavit that the student demonstrated deficits in his preacademic readiness skills (Parent Ex. CC ¶ 9). For example, the student was working on recognizing his name, identifying uppercase letters, counting objects, identifying numbers, and copying lines and shapes (*id.* ¶ 8). With respect to the student's math needs, the special education teacher testified that the student sometimes skipped numbers out of order, needed a lot of redirection and prompting, and benefited from the use of visual supports to learn one to one correspondence (Tr. p. 177).¹⁵ Regarding speech-language development, by affidavit, the special education teacher testified that the student exhibited receptive and expressive language delays (Parent Ex. CC ¶ 9). For example, the student had difficulty responding to questions and instructions, needed more time than his same aged peers to process a question, and often repeated back a question to a speaker instead of answering it (*id.*). According to the MSA director, the student's speech-language pathologist focused on improving the student's expressive communication, i.e., using pronouns and age-appropriate syntax, understanding "wh" questions, and self-advocacy skills, i.e., requesting help (Parent Ex. BB ¶ 23). He reported that with prompting and visual reminders, the student had developed pragmatic communication skills such as asking peers to play, requesting items, and asking for help (Parent Ex. BB ¶ 23).

Turning to OT, the MSA director reported that the student's occupational therapist focused on improving the student's prewriting skills and activities of daily living (Parent Ex. BB ¶ 22). More specifically, the occupational therapist worked with the student on drawing and copying skills, dressing and clothing management, and following directions (*id.*).¹⁶ The director reported that the student made notable progress donning and doffing his shoes and socks, had learned to independently copy a vertical and horizontal lines, improved his ability to feed himself using a fork, and demonstrated emerging skills in clothing management, such as pulling his pants up and down (*id.*). With respect to social/emotional skills, the special education teacher testified that the student was very verbal and social and interactive with other children (Tr. p. 177). He noted that the student was learning to share, take turns, and play creatively with his peers (*id.*).

The district argued that the parent failed to demonstrate that MSA met the student's unique needs. As noted above, the special education teacher explained that, to address the student's needs, MSA provided him with small group instruction with students who were working on the same

not appropriate (see *R.S. v. Lakeland Cent. Sch. Dist.*, 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [finding a unilateral placement was not appropriate where it was undisputed that speech-language therapy was "critical" to remediate the student's language needs, the private placement chosen by the parents did not provide speech-language therapy and, although the parents claimed the student received private speech-language therapy, they "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], *aff'd*, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]). Moving forward, if the student continues to demonstrate a need for PT and MSA does not address the student's gross motor needs, MSA may not meet the threshold as an appropriate unilateral placement to address the student's unique needs.

¹⁵ The special education teacher testified that the student could identify numbers (Tr. p. 177).

¹⁶ MSA also included an area of focus for OT aimed at the student completing an obstacle course with various textures and activities (Parent Ex. I at p. 3).

skills (Parent Ex. CC ¶ 13). In addition, the school individually assessed students' needs and developed individual goals, tracked students' progress toward their goals, and had the flexibility to change goals as the need arose (*id.*). The individual goals MSA worked on with the student were identified in the hearing record and matched up with the student's need areas (*see* Parent Ex. I). The special education teacher opined that the student made progress at MSA during the 2021-22 school year "with individualized attention and an individualized curriculum" (Parent Ex. CC ¶ 12). The special education teacher also explained that, for academics, MSA employed the Strategies for Children based on Autism Research (STAR) (Parent Ex. BB ¶ 16). The teacher further testified that the school utilized principles of ABA, token boards, first/then boards, strategies for positive reinforcement, and behavior reinforcement (Tr. p. 176). In addition, the special education teacher confirmed that the student received speech-language therapy and OT services at MSA during the 2021-22 school year, although the student did not receive PT (Tr. pp. 177-78; 187-88; *see* Parent Ex. BB ¶ 21).

The hearing record indicates that the student made progress in his preacademic, language, social/emotional, and daily living skills while attending MSA during the second half of the 2021-22 school year (Parent Ex. BB ¶¶ 22, 23; CC ¶¶ 10, 11; *see* Tr. pp. 173-74). According to the special education teacher, with respect to classroom participation and routines, the student benefited from the use of visual supports and had done well with following classroom routines (Parent Ex. CC ¶ 10). In addition, the teacher reported that the student showed improvement in his activities of daily living such as toilet training and donning clothing (*id.*). Regarding preacademic skills, the special education teacher testified that the student was able to spell his own name, improved in counting with 1:1 correspondence, and identified more letters of the alphabet (*id.* ¶ 11). In terms of social/emotional skills, the special education teacher testified that the student became "very social and ha[d] become comfortable asking for help from teachers when he [could not] do something independently" (*id.* ¶ 10). The student had also begun to initiate play (*id.*).

Based on the foregoing, the hearing record supports finding that overall, given the totality of the circumstances, MSA was an appropriate placement for the student for the 2021-22 school year as it provided the student with individualized instruction to meet his identified needs.

c. Transportation

On appeal, the parents allege that they are entitled to reimbursement for the out-of-pocket transportation costs incurred in transporting the student to and from MSA (Req. for Rev. at p. 9). Initially, it is worth noting that while the parents initially requested reimbursement for transportation expenses "based on mileage," this request changed into a request for "transportation reimbursement" without addressing mileage (Parent Ex. AA ¶16; Req. for Rev. at p. 9). Accordingly, any request for expenses based on mileage is deemed abandoned at this juncture of this proceeding.

Turning to the facts at issue, the October 2021 CSE did not recommend special transportation for the student (Dist. Ex. 1 at p. 20). The parent testified that she had asked for transportation on the student's IEP, but wasn't able to get it, and she had to drive the student to school herself (Tr. pp. 168-69). The parent testified that, at some point, she hired a driver because the length of the trip "imped[ed] on [her] personal quality of life" (Tr. p. 169). The hearing record reflects that the parent emailed the CPSE administrator on March 4, 2022 to request transportation

for the student (Parent Ex. X at pp. 1-2). When the CPSE reconvened in March 2022, the CPSE recommended that the student receive special transportation, identified as "small bus to and from school" (Dist. Ex. 6 at p. 30).

The parent estimated that the transportation costs were "around \$10,000" as she paid \$860 per week for transportation (Tr. pp. 166-67). The parent admitted that she had not entered the receipts for the private driver into evidence (Tr. p. 167).

In review of the above, the hearing record supports finding that the student's needs would have justified special transportation services to get the student to and from MSA during the 2021-22 school year; however, there is insufficient evidence of the transportation provided to the student to determine if it constituted an appropriate service for the student. The hearing record is devoid of any description of the private transportation services used to transport the student to and from MSA. In fact, there are no receipts for transportation services, nor is there a contract for transportation services, or even a name of the company or individual used to transport the student. Accordingly, I decline to award the parent reimbursement for the cost of transportation services to and from MSA during the 2021-22 school year.

2. Neuropsychological Evaluation

The parents appeal from the IHO's denial of their request for reimbursement for an independent educational evaluation (IEE), indicating that the parents requested a neuropsychological evaluation of the student during the 2021-22 school year. The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]).

Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

In this instance, the parents included a request for the district to conduct a neuropsychological evaluation of the student in their 10-day notice, dated January 20, 2022 (Parent Ex. B). In a January 25, 2022 email to the CPSE administrator, the parents again requested that the district conduct a neuropsychological evaluation of the student (Parent Ex. U at p. 1).

Prior to the district responding to the parents' request for the district to conduct a neuropsychological evaluation of the student, the parents initiated this proceeding, and as early as the February 8, 2022 amended due process complaint notice, requested that the district fund the cost of a comprehensive neuropsychological evaluation.

In response to the parent's request for the district to conduct a neuropsychological evaluation, the district provided prior written notice, dated February 17, 2022, to the parents indicating that a neuropsychological evaluation was not necessary as the student was recently evaluated, including psychological, OT, PT, educational, and speech evaluations, and a decision regarding the appropriate levels of services could be made using the existing evaluations (Parent Ex. M at p. 1; Dist. 18 at p. 1).¹⁷ However, the prior written notice also indicated that a second psychological evaluation would be administered if the parents were in agreement (*id.*).

After the district decided not to conduct a neuropsychological evaluation of the student, the parents sent the CPSE administrator an email, dated February 17, 2022, indicating that the parents disagreed with the district's decision not to conduct a neuropsychological evaluation of the student and further indicating that the parents intended to seek an IEE at district expense (Parent Ex. V at p. 1).

In this instance, the district has taken the opportunity to defend its evaluation process as a part of this proceeding. Additionally, as discussed in more detail above, the hearing record shows that Omni conducted a comprehensive evaluation of the student including a September 30, 2021 social history, an October 4, 2021 psychological evaluation, an October 7, 2021 educational evaluation, an October 7, 2021 classroom observation, an October 7, 2021 OT evaluation, an October 10, 2021 home-language survey, an October 11, 2021 speech-language evaluation, and an October 12, 2021 PT evaluation (Dist. Ex. 3 at pp. 11-52). The hearing record supports finding that the initial evaluation of the student was sufficient when conducted. The CPSE administrator testified that she denied the parents' request for a neuropsychological evaluation because she "felt that, with all of the evaluations that had just been done on [the student], that a neuropsychological evaluation was not necessary to determine the appropriate level of service for him" (Tr. p. 208). The CPSE administrator further emphasized the student's age as he was just switching from early intervention to preschool services and opined that she didn't "think that the evaluation results of a

¹⁷ The initial evaluation of the student was conducted pursuant to regulations regarding educational programs for preschool students, which allow for the parent to select an approved evaluator to conduct the evaluation (*see* 8 NYCRR 200.16[c]). If a parent disagrees with the evaluation, the parent may obtain an independent educational evaluation at public expense in accordance with the regulation addressing IEE's (8 NYCRR 200.16[d][3]; *see* 8 NYCRR 200.5[g]).

neuropsychological would have given [her] different information than what [she] already had" (id.). Based on this, the district established the appropriateness of its initial evaluation of the student such that the district is not responsible for the cost of an IEE. Therefore, the parents' request for reimbursement or direct funding for an independent neuropsychological evaluation is denied.

D. Equitable Considerations

The IHO did not address whether equitable considerations weighed in favor of the parents' request for reimbursement at MSA (see IHO Decision). The district argues that, if equitable considerations were addressed, they would not favor the parents for reasons related to the parents' request for reimbursement for speech-language therapy services and for an IEE. However, the district has not presented any specific argument as to why equitable considerations should weigh against the parents' request for reimbursement for the cost of the student's tuition at MSA.

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"]).

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).

The parents allege that they fully participated in the CPSE and IEP process, visited the assigned public school, and provided the requisite 10-day notice of their intent to unilaterally place the student at MSA for the latter half of the 2021-22 school year (Req. for Rev. pp. 3-4, 8-9). Although the district argues that the parents did not sign their consent to evaluations before September 30, 2021, the remainder of the record reflects that the parents were cooperative with the CPSE and the IEP process and actively kept communication open between the CPSE and the student's providers and evaluators (Answer at p. 10). The hearing record reflects that the equities favor the parents and their request for full tuition reimbursement for MSA.

VII. Conclusion

The evidence in the hearing record demonstrates that the district failed to offer the student a FAPE for the 2021-22 school year, that the parents' unilateral placement of the student at MSA was appropriate, and that equitable considerations favored the parent to the extent indicated above; accordingly, the IHO's decision denying the parents' relief must be reversed in part. However, as discussed above, the hearing record does not support finding that the speech-language therapy services obtained by the parents for the period from November 2021 through January 2022 or any special transportation services obtained for the student were appropriate. In addition, the district presented sufficient evidence during the hearing to defend its initial evaluation of the student, such that the district is not responsible for the costs of an IEE for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated October 26, 2023, is modified by reversing that portion which found that the district offered the student a FAPE for the 2021-22 school year;

IT IS FURTHER ORDERED that the district shall reimburse the parents for the costs of the student's tuition at MSA from January 2022 through the end of the 2021-22 school year.

Dated: Albany, New York
February 12, 2024

STEVEN KROLAK
STATE REVIEW OFFICER