The University of the State of New York

The State Education Department
State Review Officer
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No. 24-146

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied in part her request for funding of her son's tuition costs at the Big N Little: Stars of Israel Program (Stars of Israel) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for the 2023-24 school year and that the parent's unilateral placement was appropriate. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail.

A private psychoeducational evaluation of the student was conducted over several dates in August, September, and October 2021 (Parent Ex. H at p. 1). At the time of the evaluation, the

student was attending fifth grade at Stars of Israel (id.).[1] The report indicated that prior to this private placement, the student attended public school for kindergarten through fourth grade (id.).

In a letter addressed to the district's CSE, dated June 26, 2023, the parent asserted that the student's needs could not be met in the general education classroom (Parent Ex. B at p. 2). The parent requested that the district evaluate the student and "place him in a full-time special education classroom" for the 12-month 2023-24 school year (id.). The parent indicated that if the district did not address her concerns, she intended to unilaterally place the student and seek tuition funding and/or reimbursement of the costs of that placement from the district (id.).[2]

On June 27, 2023 the parent signed a contract with Stars of Israel for the student's attendance from July 2023 to June 2024 at a total cost of $144,000 for the 2023-24 school year (see Parent Ex. C at pp. 1-3).

In a letter dated August 29, 2023, the parent notified the district of her intent to unilaterally place the student at Stars of Israel for the 12-month 2023-24 school year and seek tuition funding and/or reimbursement from the district (Parent Ex. I at p. 2). The parent referenced her June 26, 2023 letter and indicated the district had not yet evaluated the student or offered him any placement (id.). The parent further asserted that the student required a full-time special education classroom and noted that she was again requesting that the district evaluate the student, provide him with an IEP, and place him in a full-time special education classroom for the 12-month school year (id.).[3]

A. Due Process Complaint Notice

In a due process complaint notice, dated November 2, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A).

Prior to reaching the school year at issue, the parent indicated that for the 2021-22 school year, the parent sought funding of the student's tuition at Stars of Israel as part of a prior due process proceeding and, according to the parent, the district was ordered to pay for the full cost of the student's tuition (Parent Ex. A at p. 1).

Turning to the 2023-4 school year, the parent noted that she requested the district to evaluate the student twice (id. at p. 2). The parent argued that the district failed to convene a CSE and recommend a program for the student (id. at pp. 1-2). The parent asserted that she unilaterally enrolled the student in a full-time special education school to address his academic, social and behavioral needs and he needed a full-time special education program, as well as implementation

[1] The Commissioner of Education has not approved Stars of Israel as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[2] A facsimile cover letter dated June 26, 2023 was included with the letter; the cover letter identifies a telephone number to which it was purportedly sent and indicates that it was sent from the law firm representing the parent (Parent Ex. B at p. 1).

[3] The August 29, 2023 letter includes a similar facsimile cover letter as was included with the June 26, 2023 letter (Parent Ex. I at p. 1; see Parent Ex. B at p. 1).

of a behavioral intervention plan (BIP), to make academic and functional progress (id.). The parent requested funding for the student's placement at Stars of Israel for the 2023-24 school year (id. at pp. 2-3).[4]

B. Impartial Hearing Officer Decision

The parties met for a preliminary conference on December 8, 2023 and an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 16, 2024 and concluded on February 6, 2024 after three total days of proceedings (see Tr. pp. 1-66). In a decision dated March 19, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that the unilateral placement was an appropriate placement for the student, and that equitable considerations weighed against the parent's request for an award of tuition funding (IHO Decision at pp. 7-18).

Regarding FAPE, the IHO noted that the district claimed it was not obligated to offer the Student a FAPE for 2023-24 school year because the parent did not take affirmative steps to request reevaluation for that school year and that the parent had previously failed to appear for prior evaluations (IHO Decision at p. 7). The IHO held that the district did not produce any evidence to support its assertions at the impartial hearing (id.) Accordingly, the IHO found that she was "constrained to find that the [district] has failed to meet" its burden and, as such, found that the district did not offer the student a FAPE for the 2023-24 school year (id.).

Next, the IHO held that the parent had met her burden that Stars of Israel was an appropriate unilateral placement for the student (IHO Decision at p. 8). However, the IHO held that the credibility of the Stars of Israel supervisor was limited and her testimony should be given "somewhat limited weight" (id. at pp. 10-11). Further, the IHO gave limited weight to the 2021 psychoeducational evaluation noting that the evaluator did not testify and no evidence in the hearing record explained the recommendations o the evaluator's credentials or experience (id. at p. 11). After reviewing the student's needs and the program offered by Stars of Israel, including the student's BIP and a treatment plan, the IHO went on to discuss extended school year services, noting that there was no evidence in the hearing record of regression and the only indication regarding the need for extended school year services came from the 2021 psychoeducational evaluation (id. at pp. 11-15). The IHO then determined that there was evidence to support a finding that the student made or was likely to make progress at Stars of Israel (id.). Overall, the IHO determined that Stars of Israel provided the student with educational instruction designed to meet his unique needs and that the parent met her burden with respect to the private program (id. at pp. 15-16).

As to equitable considerations, the IHO held that the parent's 10-day notices were late, and the parent did not provide any evidence that she ever communicated personally with the district (IHO Decision at p. 18). The IHO found that based on the parent's contract with Stars of Israel and the parent's notices to the district, the parent did not cooperate with the CSE to develop an IEP or recommend an appropriate placement as "the unilateral placement process seem[ed] to have been designed to avoid giving [the district] a bona fide opportunity to offer a FAPE" (id. at pp. 18-

[4] The parent also requested pendency but did not specifically assert what she was arguing the student's pendency placement was (Parent Ex. A at p. 2).

19).[5] For these reasons, the IHO determined that equitable considerations required a substantial reduction and reduced tuition by 50%, awarding direct funding of $69,500 (id. at pp. 19-20).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in reducing the amount of direct funding for the unilateral placement based on equitable considerations.[6] The district answers and cross-appeals asserting that the IHO erred in finding that the student was denied a FAPE for the 2023-24 school year, that the unilateral placement was appropriate, and in not reducing tuition funding for the 12-month portion of the school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

[5] The IHO also noted that the parent conceded that tuition should be reduced by $5,000 as that portion of tuition was allocated to the religious portion of the student's program at Stars of Israel (IHO Decision at p. 19).

[6] The parent does not appeal from the reduction for the portion of the program allocated to religious instruction and requests an award of tuition in the amount of $139,000.

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]

[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).

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. FAPE for 2023-24 School Year

The district argues that it was not obligated to evaluate the student or develop an IEP for the student for the 2023-24 school year. The district contends that the parent's letters did not constitute a written referral which triggered the district's obligation to evaluate the student as the letters were sent to communicate the parent's dissatisfaction with the district's alleged failure to provide the student with an educational placement and inform the district of her decision to unilaterally place the student, not to request an evaluation or IEP. Moreover, the district argues that the hearing record lacks evidence that the parent successfully transmitted those faxes to the district. The district contends that the parent did not personally communicate with the district, and it was not obligated to evaluate the student or offer the student a FAPE for the 2023-24 school year.

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1][i]), a professional staff member of the school district or a student's private school and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a][2][i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's "consent to initiate the evaluation" of the student (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5]; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]). Any such meeting must

be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]). Once a referral is received by the CSE chairperson, the chairperson must provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]).

Initially, the district's argument, which is essentially an argument that it had no reason to suspect that the student may have a qualifying disability under the IDEA, is not convincing because at some point parents sought special education services from the district, the student appeared to have been found eligible for special education, the parent brought a due process proceeding regarding the 2021-22 school year, and an IHO awarded the parent the cost of the student's tuition at Stars of Israel for the 2021-22 school year as well as the cost of a private psychoeducational evaluation (see SRO Ex. 1).[8]

Additionally, in both the June 2023 and August 2023 letters, the parent expressly stated that she was requesting that the district evaluate the student (Parent Exs. B at p. 2; I at p. 2). The parent testified that she requested that the district develop an IEP for the student in both June and August 2023 (Tr. p. 51).

Here, the district offered no testimonial or documentary evidence at the impartial hearing, including evidence to rebut the parent's assertion that she requested an IEP and evaluation from the district prior to the 2023-24 school year (Tr. p. 24). Notably, the district's attorney reserved its opening statement, waived its closing statement, and waived its opportunity to cross-examine either of the parent's witnesses (Tr. pp. 21, 58-59). The only information from the district regarding the parent's evaluation request came from unsworn statements from the district's attorney at the impartial hearing which do not constitute evidence. When the IHO asked the district's attorney if there were any arguments he would like to make on the district's behalf, initially the attorney responded that he did not at that time (Tr. p. 24). The IHO next asked if the district was conceding that it failed to offer the student a FAPE, to which the attorney replied "[n]o" and then asserted that the district was maintaining that it was not obligated to offer a FAPE to the student because an evaluation request was not sent to the CSE for the 2023-24 school year (Tr. p. 24). The attorney contended that the student's case was "inactive" because the parent failed to present the student for two prior evaluations and the parent was "notified that the case would be closed" (Tr. pp. 24-25). Additionally, the district's attorney argued that "the [p]arent stated that she no longer wished to proceed with the evaluations in 2022" and that she would have had to "take affirmative steps" in order to "restart the IEP process" (Tr. p. 25). The district's attorney asserted that the student was not classified because the parent failed to appear for the evaluations in 2022 and, therefore, the district was not obligated to conduct an annual IEP meeting as the student was not classified (id.). However, the district did not produce any documentary or testimonial evidence to support these assertions. Further, even if the district had presented evidence that the parent refused

[8] As the parent's due process complaint notice referenced an IHO decision made as part of a prior proceeding, a copy of that order was requested and the parties were given the opportunity to object to its consideration on appeal. Neither party objected and the document is accepted into evidence as SRO Exhibit 1. In that decision, the prior IHO noted that the district argued that it had offered the student a FAPE, but held that the district failed to offer the student a FAPE for the 2021-22 school year and awarded direct funding for Stars of Israel for that school year (SRO Ex. 1 at pp. 8, 10-11). The hearing record does not establish what happened procedurally, if anything, during the 2022-23 school year.

consent for an evaluation in 2022, the district has not sufficiently rebutted the parent's assertion that she requested an evaluation in 2023 (see Tr. p. 51; Parent Exs. B; I). Although the district asserts on appeal that the hearing record does not support finding that the parent's letters, dated June 26 and August 2023, were receive by the district, the district does not point to anything other than the district attorney's general statement that a "reevaluation was not sent to the CSE for the 2023-24 school year" and the district did not elaborate beyond that during the hearing or offer any evidence to support that general statement (Tr. p. 24; Answer with Cross-Appeal at ¶11). To the extent that statement was the district asserting it did not receive the faxes from the parent, that argument was not supported by any evidence. An unsworn statement from the district's attorney during the impartial hearing implying that the district did not receive a document is not sufficient evidence to support its claim. If the district believes it never received critical documents such as a referral for special education evaluation or an eligibility determination, it was required to disclose and offer some kind of evidence to support that assertion, one example of which would be an employee of the district who is a custodian of the relevant records who can aver that he or she found no such records after conducting a diligent search and who can describe the district's business practices relevant to such records. Although one could hypothesize possible explanations for why the district would not be required to act in light of the parent's communications, theories alone are insufficient and the more likely explanations that come to mind are that the district either did not act on the parent's communications, failed to examine its own records with regard to this student in a timely fashion, and/or failed to prepare for the impartial hearing by offering its own version of events that were grounded in evidence.

Based on the above, the district's argument is lacking in merit and the IHO correctly held that the district failed to meet its burden of proof and failed to offer the student a FAPE for the 2023-24 school year.

B. Unilateral Placement

Turning to the unilateral placement, the IHO determined that "overall and based on the totality of the circumstances," the student's program at Stars of Israel provided instruction designed to meet the student's unique needs (IHO Decision at pp. 15-16). On appeal, the district argues that the parent did not meet her burden to show that the programming provided to the student by Stars of Israel was appropriate to meet his needs.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. Of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is

appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

Prior to addressing the adequacy of the unilateral placement, a brief discussion of the evidence related to the student's needs is necessary. Over four dates between August and October 2021, a private school psychologist conducted a psychoeducational evaluation of the student (Parent Ex. H). At the time of the evaluation, the student was in fifth grade at Stars of Israel and results of cognitive assessments indicated "scattered performance," including relative strength in visual spatial ability, relative weakness in processing speed, and an overall full scale IQ in the borderline range (id. at p. 6). Achievement test results indicated that the student's reading and math skills were in the borderline range, and his writing ability was in the "mildly impaired range" (id. at p. 7). Measures of adaptive functioning yielded scores below the first percentile in the areas of communication, daily living skills, and socialization (id. at pp. 5-6). Regarding maladaptive behavior, the school psychologist indicated that the student's "[i]nternalizing" score was in the "[e]levated" range, and his "[e]xternalizing" score was in the clinically significant range (id. at p. 6). The parent reported that the student "ha[d] anger management struggles," he "engage[d] in

aggressive behaviors, use[d] inappropriate language" and was "very rigid and he need[ed] everything to be as he desire[d]" (id. at p. 1).

The Stars of Israel program supervisor (supervisor) testified that the student's social/emotional and behavioral needs during the 2023-24 school year included impulsivity, lack of self-regulation, pragmatic and social skill deficits, display of attention seeking behaviors, and difficulty appropriately expressing himself, recognizing boundaries, delaying gratification, being flexible, and following rules and directions (Tr. pp. 26, 32-34). According to the supervisor, the student's receptive language skills were "far poorer" than his expressive language skills, it took "a very long time" for the student to process instruction, and he exhibited difficulty with decoding, reading comprehension, writing, visual motor tasks, and math (Tr. pp. 34-37).

Turning to the parent's unilateral placement of the student at Stars of Israel, the evidence in the hearing record shows that the program was "housed in a general education school" and provided "special education techniques" to students with learning disabilities, behavioral issues, and attention deficit disorders in a "self-contained environment" with "[s]mall structured classes" (Tr. p. 29; Parent Ex. C at p. 1). The program used a "modified general education curriculum" that provided students with "appropriate instruction and needed accommodations" in both secular and religious studies (Parent Ex. C at p. 1). The supervisor testified that Stars of Israel modified and accommodated instruction to an individual student's needs, "aligning with the [applied behavior analysis] ABA methodology" (Tr. p. 29). Additionally, the program included a "data collection component" to ensure that students made progress (Tr. p. 29).

During the 2023-24 school year, the student was in seventh grade in a class of up to 12 students with disabilities, one "licensed special education teacher at all times and assistants" (Tr. pp. 30-31).[9] In addition to classroom instruction, the student received two 30-minute sessions per week each of individual counseling, occupational therapy (OT), and speech-language therapy (Parent Exs. D at p. 2; E).

To address the student's needs, the hearing record shows that, in June 2023, Stars of Israel conducted an "updated" functional behavioral assessment (FBA) of the student and developed a BIP (Tr. p. 38; Parent Ex. G at pp. 1-7, 8-12). Review of the FBA shows that it incorporated State regulations regarding the conduct of FBAs including the identification and definition of the target behavior, data sources, setting events, antecedents and consequences, skill deficits related to the behaviors, baseline data, functional hypothesis, behavioral supports and interventions, reinforcers, and replacement behaviors (Parent Ex. G at pp. 1-7). In July 2023, Stars of Israel developed the student's BIP, which identified seven target behaviors, baseline data from January 2021 and July 2023, and the "current status" as of January 2024 (id. at pp. 9-10).[10] The supervisor testified that in addition to the updated FBA, and as part of the BIP, Stars of Israel "updated [the student's] reinforcer program, token economy" and developed a treatment plan which included "small incremental goals in each and every targeted area of his social, communication, behavior . . . [and]

[9] At the time the supervisor testified in January 2024, there were "approximately" nine students in the student's class (Tr. p. 30).

[10] Review of the student's treatment plan as a whole indicates that the designation "[c]urrent status January 2023" was a typographical error regarding the year (see Parent Ex. G at pp. 9, 15, 17).

academic areas of instruction" (Tr. p. 38; see Parent Ex. G at pp. 13-19). Stars of Israel also identified the academic curriculum goals the student would work toward during the year (Parent Ex. C at pp. 11-17; see Parent Ex. E).

The supervisor testified that all of the student's goals were "inputted into Rethink" which she described as a "platform created specifically to align the ABA methodology with academic instruction in the classroom" and that on an hourly basis, teachers, assistants, and related service providers "input data aligning with [the student's] progress, or lack thereof," to ensure that he was making consistent, meaningful academic and social/behavioral "acquisition" (Tr. pp. 38-39).[11] She testified that based on her knowledge of the student, he was "definitely . . . making meaningful progress" during the 2023-24 school year, and she provided specific examples of his behavioral, social/emotional, and academic progress (see Tr. pp. 39-45, 47). Review of the student's treatment plan reflects documentation of the student's progress toward his communication and socialization goals from baseline (June 2022), July 2023, to the "[c]urrent [l]evel" in January 2024, and teacher reports that the student had made improvements in reading comprehension and written language (Parent Ex. G at pp. 15-20). Additionally, the supervisor testified that the student's math computation skills were the "fastest" area of gain (Tr. pp. 43-44).

With regard to the unilateral placement, the district specifically asserts on appeal that the hearing record lacked evidence that the student was eligible to receive special education services as a student with a disability, a claim which as discussed above, lacks merit. The district has confused the legal standards, and its point only underscores its own failures in this case and is not relevant to whether Stars of Israel is an appropriate unilateral placement. The district also asserts that the hearing record lacked district evaluations of the student, which, while factually accurate, is the fault of the district and not the parent as it is the district's obligation to evaluate students, and the district further claims that despite the behavioral assessments and teacher reports in the hearing record, Stars of Israel failed to conduct then-current academic assessments of the student. Such a rationale has been found to improperly switch the responsibility for identifying the student's needs from the district to the parent (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). The district's strategy of repeatedly casting blame on the parent for its own nonfeasance with respect to its duties under IDEA misses the mark by a wide margin.

To the extent the district argues on appeal that the student's schedule did not reflect the allotted time for the student's related services sessions, Stars of Israel completed speech-language

[11] It is well settled that, although a relevant factor (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]), 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).

and OT "[c]hecklist[s]" that identified the student's areas of skill and deficits, and a counseling checklist that reflected the frequency with which the student exhibited specified behaviors (Parent Exs. E; G at pp. 22-27). Additionally, the supervisor testified that the student was receiving speech-language therapy, OT, and counseling provided by "appropriately licensed and certified professionals in their respective fields" (Tr. p. 47). Although provided with an additional hearing date to cross-examine the supervisor, at which time the district could have posed questions about the student's schedule and thereby attempt to undermine or rebut some of the parent's proof, during that hearing the district explicitly declined to do so (Tr. pp. 52-53, 56-58). While the district may have preferred a more comprehensive presentation of evidence including detailed class schedules, the argument does not render the parent's evidence deficient in this case and, furthermore, "[t]he test for the private placement is that it is appropriate, and not that it is perfect" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877-78 (2d Cir. 2016]). Accordingly, the district's argument is without merit.

Finally, the district asserts that the hearing record lacked evidence that the student required a 12-month school year program during summer 2023, as there was no indication that the student demonstrated regression. 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). While the district may have an argument that the 12-month services were excessive, which is further addressed below, the district has not rebutted the parent's evidence that the unilateral services were beneficial for the student. Therefore, the district's arguments 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 is not persuasive.

As such, review of the evidence in the hearing record supports the IHO's finding that Stars of Israel provided appropriate programming specially designed to meet the student's identified needs during the 2023-24 school year.

C. Equitable Considerations

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

equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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 IHO found that the parent was not entitled to full funding as equitable considerations weighed against her, and the IHO reduced the awarded relief by 50 percent (IHO Decision at p. 19). Specifically, the IHO found that the both 10-day notices were "late" and that the wording and timing of the notices were "disingenuous" and "opportunistic" (id. at p. 18). The IHO noted that the parent did not provide any evidence that she ever personally communicated with the CSE, and that the parent signed the agreement with Stars of Israel on June 27, 2023, only one day after sending the first letter to the district requesting an evaluation (id.). Additionally, the IHO specifically noted that the parent knew the student was not classified and that she had the entirety of the 2022-23 school year to submit a request for an evaluation of the student but did not do so until a few days prior to the start of the 2023-24 school year (id.). Based on those factors, the IHO held that she was "unable to find that the [p]arent cooperated with the CSE to develop an IEP and recommend a program and placement for the 2023-24 school year" (id. at pp. 18-19). The IHO held that the parent's actions seemed "to have been designed to avoid giving the [district] a bona fide opportunity to offer a FAPE" (id. at p. 19).

On appeal, the parent focuses solely on the IHO's findings regarding the 10-day notices (Req. for Rev. at ¶¶ 16-25). If the untimeliness of the 10-day notices were the sole issue raised by the IHO, I may have been inclined to agree with the parent that the IHO's reduction was inflated. The parent's first notice to the district was sent on June 26, 2023 (Parent Ex. B). In that notice, the parent asserted that the student's needs "cannot be met in a general education classroom" and indicated her intent to place the student "in a private special education program for the extended 2023-2024 school year" and that she would seek district funding for the cost of the program (id. at p. 2). The student then began attending the private school on July 3, 2023 (Parent Ex. F). Accordingly, the notice was untimely as the student began attending the private school five

business days after the notice was sent. The parent's second notice was sent on August 29, 2023 and the student began attending the private school for the 10-month portion of the school year on September 6, 2023 (Parent Exs. F; I at p. 2). Although it is unclear if this notice was necessary, as the parent had previously provided the June 26, 2023 notice, and the follow-up notice indicated an intention to "continue to unilaterally place [the student] in the private special education program," as the IHO determined, it was not sent more than 10 business days prior to the student's removal from the public school program and placement at the private school for the 10-month portion of the 2023-24 school year (see Parent Ex. I at p. 2).

Turning to the parent's specific arguments, the parent contends that the failure to provide a full 10 business days of notice pertaining to the 2023-24 school year should not serve as a basis for a fifty percent reduction in tuition funding. However, the IHO's finding was not solely focused on the lateness of the 10-day notices, but also on the unreasonableness of the parent's actions in waiting through the entirety of the 2022-23 school year prior to requesting an initial evaluation of the student (see IHO Decision at p. 18). In particular, the IHO noted that the student has been attending a nonpublic special education school since the 2021-22 school year, the parent knew the student was not classified, and the parent waited until days prior to the start of the 2023-24 school year before requesting an evaluation of the student—a timeline that led the IHO determined was "opportunistic" and "designed to obtain [district] funding via a due process complaint" (IHO Decision at pp. 18, 19). As the parent's request for review does not address these findings made by the IHO, they must be counted in the computation of a reduction of tuition on equitable grounds (see 20 USC § 1412[a][10][C][iii][III] [reimbursement may be reduced or denied "upon a judicial finding of unreasonableness with respect to actions taken by the parent"]).

The parent further contends that the prior IHO finding of fact demonstrates that the district already had knowledge of the student. As noted above, a prior IHO decision dated April 2023 awarded the parent direct funding for the cost of the student's tuition at Stars of Israel for the 2021-22 school year (SRO Ex. 1 at pp. 8, 10-11). Although that decision was issued partly through the 2022-23 school year, the hearing record is silent as to what transpired with the student during the 2022-23 school year.[12] Accordingly, while the prior due process proceeding is evidence of the parent's belief that the student required placement in a special education school and that she placed the student at Stars of Israel for the 2021-22 school year, it does not provide any light as to what occurred in the lead up to the 2023-24 school year.

Turning back to the 10-day notices, the parent argues that a failure to provide timely 10-day notice should not serve as a basis for a reduction in tuition funding because the district did not provide a copy of the 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]). Additionally, under

[12] During the hearing counsel for the parent indicated that a due process complaint notice may have been filed for the 2022-23 school year or it may have "fallen through the cracks" (Tr. pp. 4-5), while counsel for the district indicated that the parent "stated that she no longer wished to proceed with the evaluations in 2022" (Tr. p. 25). However, no evidence was presented to support either of these positions and the hearing record is entirely unclear as to what occurred with the student during the 2022-23 school year.

the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

In this instance, the parent testified that she did not receive the procedural safeguards notice (Tr. pp. 51-52). However, the parent was represented by counsel during the prior impartial hearing and during this impartial hearing (see Apr. 22, 2023 IHO Decision; see also Tr. pp. 1-65; Parent Ex. A). Additionally, both the June 2023 and August 2023 letters were sent by the parent's law firm (see Parent Exs. B; I). As such, the parent's knowledge of her substantive rights can be inferred through participation the prior proceeding and the fact that she was represented.[13] Having found that the parent had actual knowledge of her procedural rights, I cannot find that the IHO's decision to find equitable considerations weighed against full tuition funding unreasonable.

Turning to the district's cross-appeal, the district contends that tuition should be reduced both because the district's obligation to offer the student a FAPE did not accrue until August 18, 2023, 60 days after the parent's June 26, 2023 letter requesting an evaluation, and because there is no evidence of regression entitling the student to 12-month services. Therefore, the district requests a further reduction of the tuition paid for July and August 2023. With respect to the accrual of the district's obligation, the IHO's reduction in tuition already factored the parent's actions causing a delay in the evaluation process into the overall reduction and accordingly, a further reduction is not warranted.

To the extent that the district asserts the student should not receive reimbursement for 12-month services, this argument appears to be an allegation that the 12-month services were in excess of what the student would have received as part of a FAPE. While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a

[13] In R.B. v. New York City Department of Educ., 2011 WL 4375694 at *7 (SDNY 2011), the court held that a parent was not denied the ability to participate when procedural safeguards were not provided. Specifically, the court held that the fact suggested the parents were aware of their substantive rights throughout the development of the IEP and that "even if the [district] had violated the regulation by failing to provide [parent] with a copy of the procedural safeguards … there is little chance that such a failure did anything to undermine Plaintiff's participation in the decision-making process" (id. at *7).

unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Nevertheless, in this instance, as with the district's argument as to the timing of the evaluation process, the IHO's decision already incorporates a reduction for the 12-month services, and I decline to reduce the award further.

Accordingly, I decline to modify the IHO's decision regarding equitable considerations or the reduction of direct funding for tuition at Stars of Israel for the 2023-24 school year.

VII. Conclusion

The evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year, that the unilateral placement, Stars of Israel, was appropriate to meet his special education needs, and that equitable considerations warrant a reduction in direct funding.

The district's strategy of addressing this student's need for special education through the due process system in the first instance is clearly not working. If it has not already done so, the district is strongly encouraged to follow the procedural requirements of the IDEA by convening the CSE, examining the evaluative information gathered in conformity with State regulations, and determining the student's eligibility for special education.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 13, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER