



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-150

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 Steven L. Goldstein, attorneys for petitioners, by Steven L Goldstein, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 a decision of an impartial hearing officer (IHO) which denied their request for funding or reimbursement for the cost of their son's tuition at Academics West for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it offered the student an appropriate educational program for the 2022-23 and 2023-24 school years and that Academics West, LLC (Academics West) was an appropriate placement for the 2022-23 school year. The appeal must be sustained. 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 student has received diagnoses of dyslexia, attention deficit hyperactivity disorder, and mood dysregulation (Dist. Ex. 13 at p. 1). The district determined he was eligible for special education and the parents unilaterally placed the student at Academics West for the 2019-20, 2020-

21, and 2021-22 school years (Parent Ex. Y ¶¶ 12, 13-15, 17).¹ On March 18, 2022, the parents signed an enrollment agreement with Academics West for the student's attendance during the 2022-23 school year (see Parent Ex. N).² Via letter dated August 16, 2022, the parents informed the district that they believed the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year and that they would be unilaterally placing the student at Academics West and seeking reimbursement and/or direct funding from the district (Parent Ex. C). In a letter dated September 6, 2022, the district confirmed receipt of the parents' 10-day notice and requested further documentation and information from the parents regarding their reimbursement request (Parent Ex. D).

On September 21, 2022, the CSE convened, and finding the student was eligible for special education as a student with an other health-impairment, developed an IEP for the 2022-23 school year (Dist. Ex. 9).³ The September 2022 CSE recommended a 12:1+1 special class placement along with the following related services: two 40-minute sessions per week of individual counseling; one 40-minute session per week of group occupational therapy (OT); one 40-minute session per week of group speech-language therapy; and one 40-minute session per week of individual speech-language therapy (id. at p. 24). The district sent the parents a school location letter dated September 28, 2022 informing them of the public school site where the September 2022 IEP would have been implemented during the 2022-23 school year (Dist. Ex. 8). The student attended Academics West for the 2022-23 school year (Parent Ex. M).

On March 21, 2023, the parents signed an enrollment contract with Academics West for the student's attendance during the 2023-24 school year (see Parent Ex. S). Via letter dated August 16, 2023, the parents notified the district that they believed the district failed to offer the student a FAPE for the 2023-24 school year, and that they were enrolling the student in Academics West and would be seeking tuition reimbursement and/or funding for the 2023-24 school year (see Parent Ex. E). The district confirmed on September 12, 2023 that it received the parents' 10-day notice but determined that the "unilateral placement claim [wa]s not appropriate for settlement" (Parent Ex. F).

The CSE convened on September 21, 2023, to conduct an annual review and develop an IEP for the student with an implementation date of October 4, 2023 (see Dist. Ex. 4). The September 2023 CSE recommended a 12:1+1 special class placement and the following related services: one 40-minute session per week of individual counseling; one 40-minute session per week of group counseling; one 40-minute session per week of individual OT; one 40-minute session per week of individual speech-language therapy; and one 40-minute session per week of group speech-language therapy (id. at p. 18). In a school location letter dated October 5, 2023, the district notified the parents of the public school site where the September 2023 IEP would be

¹ According to the parents, the student was the subject of prior due process proceedings regarding those school years (Parent Ex. A at pp. 3-4).

² The Commissioner of Education has not approved Academics West as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

³ The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 8 NYCRR 200.1[zz][10]).

implemented during the 2023-24 school year (Dist. Ex. 2). The student attended Academics West for the 2023-24 school year (see Parent Ex. R).

A. Due Process Complaint Notice

In a due process complaint notice dated November 2, 2023, the parents alleged that the district denied the student a FAPE for the 2022-23 and 2023-24 school years (see Parent Ex. A). The parents raised allegations related to the district's failure to evaluate the student in all areas of suspected disability, failure to provide the student with an IEP and school location prior to the beginning of both school years, and failure to provide prior written notice in response to the parents' expressed concerns, as well as allegations that the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student, that the district failed to provide the parents with meeting notices and copies of the student's IEPs, that the CSE was not properly composed, that the CSE predetermined the student's educational program and made decisions based on district resources rather than the student's needs, that the CSE denied the parents' the right to meaningfully participate in the CSE meetings, that the CSE failed to recommend a transition plan to transition the student back to a public school setting, that the recommended annual goals were not sufficient or appropriate, that any recommended program was not appropriate for the student, and that the potential grouping of the student was not appropriate (id. at pp. 3-10). The parents also raised allegations related to the provision of information in the event that the student must attend school remotely (id. at pp. 10-11). The parents further argued that Academics West was an appropriate unilateral placement for the student for the 2022-23 and 2023-24 school years and that equitable considerations supported the parents' claims for reimbursement and direct funding (id. at pp. 11-12). As relief, the parents requested reimbursement for money paid to Academics West for the 2022-23 and 2023-24 school years, direct funding for any outstanding amount owed to Academics West for the same school years, appropriate round-trip special education transportation between the student's home and Academics West, compensation for all costs associated with transportation of the student to and from Academics West during the 2022-23 and 2023-24 school years, and compensatory education for any days of school the student missed based on the district's failure to provide the student with transportation (id. at pp. 14, 15).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 11, 2024 and concluded on the same day (Tr. pp. 1-118). In a decision dated March 14, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years, that Academics West was an appropriate unilateral placement for the student for the 2022-23 school year but not for the 2023-24 school year, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement for the 2022-23 school year (IHO Decision at pp. 10, 12, 14, 19-23, 25). The IHO reasoned that there was a decrease in reading supports offered to the student during the 2023-24 school year from the 2022-23 school year, as well as a lack of evidence of the student's needs and objective measures of progress, as her basis for finding that the 2023-24 school year was not appropriate for the student (id. at pp. 21-23). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Academics West for the 2022-23 school year (id. at p. 28).

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 also presumed and, therefore, the allegations and arguments will not be repeated in detail. The gravamen of the parents' dispute on appeal is whether the IHO erred in finding that the parents failed to meet their burden that Academics West provided the student with educational instruction specially designed to meet the unique needs of the student for the 2023-24 school year.

The district cross-appeals, arguing that the IHO erred in holding that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years. The district requests that the IHO's determination that the parents failed to prove that Academics West was an appropriate unilateral placement for the student for the 2023-24 school year be affirmed and asks that the IHO's determination that the parents proved that Academics West was an appropriate unilateral placement for the student for the 2022-23 school year be reversed. In addition, the district asserts that equitable considerations favor a reduction or denial of any award of tuition.

In an answer to the district's cross-appeal, the parents assert that the district cannot assert equitable considerations weigh in its favor because of the district's inequitable conduct including its failure to convene the CSE and offer school placements prior to the start of the school years at issue. The parents further assert that the district denied the student a FAPE for both school years and the hearing record establishes that Academics West was an appropriate unilateral placement for the student for the 2022-23 and 2023-24 school years.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the

Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁴

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. IEPs and Public School Offerings

In her decision, the IHO held that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 and 2023-24 school years based on the documents it provided (IHO Decision at pp. 10, 14). The district appeals from the IHO decision asserting that the IEPs developed for the 2022-23 and 2023-24 school years were appropriate to meet the student's needs. In particular, the district asserts that the IHO erred in finding that the district failed to meet its burden because it presented only documentary evidence. For the reasons that follow, I concur with the IHO's conclusions that the district failed to prove that it offered the student a FAPE for the two school years at issue.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Ordinarily, however, which party bore the burden of persuasion in the impartial hearing becomes

⁴ 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).

relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

In this matter, the parents challenged the district's failure to convene a CSE and develop an IEP for the student prior to the start of each school year, as well as the district's failure to notify the parents of the school location the student would attend prior to the start of the school years (Parent Ex. A at pp. 5-6).

Although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented. This analysis also fits with the competing notions that, while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v. New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v. New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

In this instance, the earliest IEP for the student contained in the hearing record is dated September 21, 2022, and the earliest school location letter contained in the hearing record is dated September 28, 2022, both dated weeks after the start of the 2022-23 school year (Dist. Exs. 8; 9).⁵

⁵ The student began the 2022-23 school year at Academics West on September 8, 2022 (Parent Ex. M).

Despite being aware of the parents' allegation in their due process complaint that the district failed to offer the student an educational program and school placement before the start of the 2022-23 school year, the district did not enter into the hearing record any evidence of an IEP or a school location letter created by the district that would have been in effect at the start of the 2022-23 school year, or any other information indicating the parents were aware of what the student's educational program would have been at the start of the 2022-23 school year or what school the student was assigned to attend (Parent Ex. A; see Dist. Exs. 1-13). Thus the district left an evidentiary gap in its case that it was responsible to explain, and the district failed to do so when it had the opportunity.

Turning to the 2023-24 school year, the CSE convened on September 21, 2023 to develop the student's IEP for the 2023-24 school year (to be implemented beginning October 4, 2023) and issued a school location letter for the 2023-24 school year dated October 5, 2023 (see Dist. Exs. 2; 4). While the hearing record does include the student's September 2022 IEP, which would have been in effect at the start of the 2022-23 school year, notably, the October 2023 school location letter assigned the student to attend a school with a different public school number at a different address than the school the district assigned the student to attend during the prior school year, as noted in the September 2022 school location letter (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 8 at p. 1). Accordingly, at the time the parent made their decision to place the student at Academics West for the 2023-24 school year—prior to the start of the school year—the evidence in the hearing record does not show that they were aware of the school location the student would have attended (see Parent Exs. A-Y; Dist. Exs. 1-13). Ultimately, the district failed to prove that it informed the parent of the student's assigned school location where the student could access the special education services prior to the commencement of the 2023-24 school year.

As the district failed to show that there was an IEP or school location in place prior to the start of the 2022-23 school year and further failed to show that the parents were informed of the school the student was assigned to attend for the 2023-24 school year, I will not disturb the IHO's ultimate determination that the district failed to prove that it provided the student with a FAPE for the 2022-23 and 2023-24 school years. Here, the district had the burden to demonstrate that it provided the student with both an IEP developed for the 2022-23 school year and that it informed the parents of an assigned public school site prior to the start of the 2022-23 school year. I reach this conclusion on different grounds than the reasoning of the IHO. While that burden did not require the district to call witnesses, it did require the district to produce evidence to counter the assertions raised in the parents' due process complaint notice and, in this instance, the district's documentary evidence was insufficient to meet its burden on the issues identified above.

B. Unilateral Placement

Having found that the district failed to meet its burden of proving that it provided the student with a FAPE for the 2022-23 and 2023-24 school years, I next turn to parties' dispute regarding whether Academics West was an appropriate unilateral placement for the student for the 2022-23 and 2023-24 school years.

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; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). 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., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. The Student's Needs

A district assessment of the student's cognitive skills conducted in 2019 indicated that his "[o]verall intellectual functioning [wa]s roughly average" (Dist. Ex. 12 at p. 6). At that time, standardized measures of the student's academic achievement indicated that he "experience[d] very serious academic problems that include[d] impairment in reading and writing" (*id.*). The student has received diagnoses including dyslexia, attention deficit hyperactivity disorder—combined type, and "other learning challenges" (Parent Ex. X at pp. 4-5 ¶¶ 9, 13; Dist. Ex. 4 at p. 6).⁶ As noted above, the parents had already privately placed the student at Academics West several years prior to the school years in dispute in this proceeding. Leading up to the 2022-23 school year, the student's June 2022 report card from Academics West reflected that in reading, the student had demonstrated improvement and grew more confident as he had practiced decoding and sight word recognition (Parent Ex. U at p. 2). According to the report card, the student should continue to be challenged with higher level reading texts, to work on decoding and sight word recognition, and staying on "track" when sequencing a story (*id.*). In writing, the report card indicated that the student made "great strides with writing endurance and spelling," and next steps for the student were to reread his work to see "if it ma[de] sense," and work on revising and editing his written work with the reader in mind (*id.* at pp. 2-3). The teacher recommended that the student develop and use a word wall, use visuals when writing (highlighters, pre-drawn lines), and refer to the "writing process" when he forgot "what to do next" (*id.*). The student demonstrated "significant growth" in math over the 2021-22 school year, and he needed to continue working on regrouping and multi-digit multiplication, and basic math facts to achieve "higher fluency" (*id.* at p. 3).

The Academics West director of education (director) reported that the student was prone to bouts of hyperactivity, could be rigid in his thinking, and had poor attentional skills, low self-esteem in relation to academics, and behavioral challenges (Parent Ex. X at p. 5 ¶ 12). The June 2022 report card reflected that during individual therapy sessions, the student had "made improvements in communicating his anxieties about academics rather than demonstrating externalizing behaviors" (Parent Ex. U at p. 4). The clinician recommended that the student continue to explore his thoughts and feelings to cope with "transitional" periods, work on social/emotional skills, and learn and practice "coping mechanisms to alleviate frustrations and anxieties" (*id.*).

2. Academics West

According to the program description, Academics West is "an accredited high-support college preparatory school that provides customized educational and social-emotional support for children and adolescents who need an intimate and nurturing environment" (Parent Ex. P at p. 1). The program description noted that the profile for students attending Academics West included that they are neurodiverse, college-bound, and in need of an alternative pathway to a college/vocational setting, and experience chronic social/emotional struggles, mild to moderate learning differences, and school avoidance (*id.*). The program description further described that students at Academics West may also need social/emotional support, executive functioning

⁶ The Academics West director of education's affidavit contains numbered paragraphs wherein some numbers are repeated (see, e.g. Parent Ex. X at pp. 1, 2, 3). For ease of reference, the exhibit page number and paragraph will be cited to when necessary.

remediation, a small class structure, after-care placement, credit recovery, a flexible academic program, and a gender-affirming environment (*id.*). Additionally, at Academics West, "students receive a unique academic support plan that enables them to learn at their own pace while learning compensatory strategies, which are based on Academics West's proprietary "Clinically Informed Academics" [CIA] approach" (*id.*). The program description indicated that at Academics West, the "curricula meets the objectives of the Common Core Standards but is tailored to fit the unique profile of the student," with the high-support program providing "small group academic instruction in combination with a variety of support services" (*id.* at p. 2).

Supports offered at Academics West include: executive functioning coaching, art therapy/mindfulness, individual and group therapy, OT, speech-language therapy, individual and group personal training, standardized test preparation, CIA instruction, expressive and fine arts, robotics and STEAM, clubs and sports, internships, volunteer opportunities, independent study, college guidance, and leadership development (Parent Ex. P at p. 2). The director testified by affidavit that the average classroom size in the lower school (kindergarten through fifth grade) is three to five students and the average class size in the middle (sixth through eighth grade) and the upper school (ninth through twelfth grade) is five to ten students (Parent Ex. X at p. 3 ¶ 10). The program description indicated that the format of the high-support plan at Academics West offers a responsive student to teacher ratio (lower school classroom ratio of 5:1:1 and upper school classroom ratio of 10:1:1), approximately six hours of instruction per day, multiple staff to teach students, and an academic team assigned to each student which includes an educational clinic (Parent Ex. P at p. 2). According to the director, Academics West offers individual therapy, group social skills therapy, on-call clinical support, and group physical education to all students and individual and/or group OT and speech-language therapy, and individual or group art therapy to students who required further therapy (Parent Ex. X at pp. 2-3 ¶ 9). To support character development, Academics West offers academic content individualized to foster moral development, integrated prosocial activities into learning, and program structure to reinforce adaptive behavior patterns (Parent Ex. P at p. 2).

At Academics West, the CIA model provides students with neuropsychological assessments used to generate effective individualized learning tools, along with compensatory skills practiced by the student to increase fluency and academic independence (Parent Ex. P at p. 3). According to the program description, each student at Academics West is paired with an educational psychologist to ensure best practice drives learning, and areas of weakness are remediated using research-based methods (*id.*). General academic content at Academics West is described as using the school's curriculum or providing comprehensive instruction using other accredited educational sources and student progress is consistently monitored (*id.*). Staff profiles at Academics West include certified teachers, certified special educators, and content specialists who typically possess an advanced degree in content area; staff are consistently evaluated and trained to ensure adherence to Academics West's model, and all student-facing staff are Crisis Prevention Intervention (CPI) certified (*id.*).⁷

⁷ According to the program description, as part of administrative support at Academics West, Academics West participates in IEP or related meetings, works with schools to sustain curriculum for credit recovery, collaborates with all outside providers, provides a portfolio of work completed, and furnishes a final transcript for each student (Parent Ex. P at p. 3).

3. 2022-23 School Year

The IHO determined that Academics West was an appropriate unilateral placement for the student for the 2022-23 school year (IHO Decision at p. 14). On appeal, the district argues that the IHO erred in that finding insofar as during the 2022-23 school year Academics West placed the student in a seventh-grade class even though his IEP suggested that he needed a second-grade through third-grade instructional level. The district further argues that Academics West's seventh-grade curriculum was far too advanced for the student, rendering the unilateral placement inappropriate to meet the student's unique needs.

The evidence in the hearing record shows that the student attended seventh grade at Academics West during the 2022-23 school year although he was reading at a late second-grade level, writing at a late second-grade/early third grade level, and was performing at a middle-to-late third-grade level in mathematics (Tr. p. 63; Parent Ex. V at p. 1; Dist. Ex. 9 at p. 1). According to the director, although the student "was at a 7th grade level age wise," . . . "the class that he was in was not being taught at a typical 7th grade level" (Tr. p. 64). The director testified that the other students in the class "were within a year or so" of the student, but the class "was being taught at an academic level that was closer to where [the student] and the other students were at academically, which was below a typical 7th grade level" (*id.*).

The student's 2022-23 report card from Academics West indicated that the student's reading skills were assessed during the school year using the "CORE Phonics Survey" and Fountas & Pinnell (Parent Ex. V at p. 5). The report card noted the student was receiving targeted support in phonics and word recognition to improve his decoding skills and enhance his overall reading comprehension (*id.* at p. 2). To address the student's reading needs, the report card reflected the student attended both English language arts (ELA) and response to intervention (RTI) in ELA (*id.* at pp. 2, 5, 9-10; *see* Tr. p. 56). According to the report card, the student worked on foundational reading skills, e.g., letter patterns and sounds in isolation/within words, vowel diphthongs, "r-controlled" vowels, word families, various multisyllabic words and syllable types, sight words, word endings "le," oral reading, spelling rules, reading comprehension, prefixes and suffixes, silent letter rules, and beginning and ending consonant clusters (*see* Parent Ex. V at pp. 5, 9). In math, the report card indicated that the student worked on factoring, fractions, mixed numbers, solving multi-step equations, and adding/subtracting decimals (*id.* at p. 3). Strategies to assist the student in visualizing abstract concepts included visual aids, manipulatives, and hands on resources such as decimal grids and fraction tiles (*id.*). Additionally, I note that the director testified that Academics West used a school-wide behavior plan, which the student also used, and that "a big part of his individual therapy [wa]s focused around controlling those emotions and dealing with that academic anxiety" (Tr. pp. 66-67).

Next, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). The IHO found that the student's academic "delays decreased by half a grade level in some areas during 2022-23" (IHO Decision at p. 21). The hearing record supports the IHO's finding that the student made some progress during the 2022-23 school year (*see* Parent Ex. V). For example, the evidence in the hearing record reflects that between September 2022 and September 2023 the student's reading level advanced from late second grade to mid-fourth grade;

his writing level increased from late second grade to early third grade up to mid-fourth grade; and his mathematics level increased from middle to late third grade to mid to late fourth grade (compare Dist. Ex. 9 at p. 1, with Dist. Ex. 4 at p. 1; see Tr. pp. 63, 68). The 2022-23 report card revealed teacher comments that the student had made progress in areas such as confidence with and understanding of ELA material, improved CORE Phonics Survey and Fountas & Pinnell scores, ability to engage with the text and successfully complete a compare and contrast essay, and mathematical skills (Parent Ex. V at pp. 2, 3, 5). Further, the report card indicated that the student had made "significant progress across all areas" of counseling including improving his ability to be flexible and tolerate transitions more easily, identifying coping skills to target academic anxiety, social anxiety, and emotional distress, and improving his ability to recognize and navigate instances of peer pressure and peer conflict (id. at pp. 5-6).

Therefore, the evidence in the hearing record does not provide a basis to overturn the IHO's finding that "overall and on balance, the weight of the evidence is just sufficient to support a finding that [p]arents have met their burden with respect to the 2022-23 school year" (IHO Decision at p. 22).

4. 2023-24 School Year

Regarding the 2023-24 school year, the IHO held that the parents failed to meet their burden to show that Academics West was an appropriate unilateral placement for the student, finding that Academics West "removed most of [the student's] dyslexia supports" . . . "even though he was still far below grade level in reading and writing," and the student's dyslexia was considered to be "the root cause of his behavioral problems" (IHO Decision at pp. 22-23). The IHO further held that Academics West reported that the student was "receiving at least some RTI in ELA for 2023-24" but "this d[id] not appear in his schedule" and the student's schedule reflected that "the periods where he had RTI for ELA in 2022-23 [we]re replaced by CIA" for the 2023-24 school year (id. at pp. 21-22). The parents appeal and argue that the IHO erred in finding that Academics West reduced the supports to address the student's needs related to dyslexia and that his RTI, targeted reading instruction, classes were replaced by CIA classes during the 2023-24 school year.

First, the IHO is correct that the student's 2023-24 weekly schedule entered into the hearing record did not reflect that he received RTI-ELA instruction, as had been indicated on the student's schedule for the prior school year (compare Parent Ex. Q, with Parent Ex. L). However, the IHO failed to address further evidence that was in the hearing record on that topic. During the impartial hearing, the director testified that the student's 2023-24 schedule had been updated since the time it was submitted for the hearing, and that twice weekly the student was pulled out individually or with one other student to receive instruction to "target those specific reading deficits related to dyslexia" (Tr. p. 61). Additionally, the student's report card indicated that Academics West provided ELA and RTI-ELA instruction to the student during the 2023-24 school year (Parent Ex. W at pp. 1, 3, 5, 7-8, 9, 12). To address the student's reading needs, among other things, the student's ELA and RTI-ELA instruction focused on long and short vowel recognition; vowel team review, e.g., vcv, vccv, and vcccv syllable patterns; blends; key vocabulary; foundational skills; word study; syllable types; decoding skills; literary elements; encoding skills; decoding long and short vowels a, i, and e; and compound words (id. at pp. 3, 5, 8, 9, 12). Furthermore, the director testified that in ELA during the 2023-24 school year, the student worked hard on an ELA placement assessment and was noted to be on task during classroom activities (Parent Ex. X at p.

10 ¶ 39). In addition, the director testified that the student continued to work on sight word accuracy, fluency, spelling, long and short vowels, reviewing key vocabulary terms, reading and listening comprehension skills, and analyzing key details (*id.* at p. 10 ¶¶ 40-45). As such, the evidence in the hearing record shows that during the 2023-24 school year Academics West provided specially designed instruction to the student to meet his reading needs, and the IHO's determination to the contrary was inadequately supported by the evidence.

Next, the IHO was also concerned that, during the 2023-24 school year, the supports available to address the student's needs related to dyslexia were further reduced because the student's lead teacher did not have Orton-Gillingham training (IHO Decision at p. 22). The IHO noted that the student's 2022-23 lead teacher "had Orton-Gillingham training" while the "[s]tudent's lead teacher for 2023-24 ha[d] a master's level license in special education with a focus on literacy" (*id.*). While this is accurate recounting of the teacher credentials, the evidence in the hearing record did not specify that the student required instruction solely from an Orton-Gillingham certified provider, his lead teacher was certified in special education and, as discussed above, the student received twice weekly reading instruction from an Orton-Gillingham associate to target specific reading deficits related to dyslexia (Tr. pp. 59-61).⁸

Turning to the IHO's findings related to the student's progress at Academics West, the IHO found that the only evaluations in the record were those the district had conducted, which were "out of date," and that the report cards prepared by Academics West did "not add meaningful clinical information and their narrative discussions of [s]tudent's progress [we]re not objectively based" (IHO Decision at pp. 22-23). To the extent that the IHO questioned the evaluative information, it is the district's responsibility to identify the student's needs through the evaluation process and its burden to present evidence regarding the student's needs during the impartial hearing, particularly in light of the parents' allegations that the district failed to sufficiently evaluate the student (*see* Parent Ex. A at pp. 3, 5; *see also* 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 IHO discounted the holding from A.D., noting that unlike in the A.D. case, the evaluative information submitted by the parent in this matter, specifically the report cards, were not objectively based and were therefore insufficient to meet the parent's burden (IHO Decision at p. 23). The IHO is correct to the extent that objective evidence of progress is preferable to subjective statements made by the student's teachers (*see* R.H. v. Bd. of Educ. Saugerties C. Sch. Dist., 2018 WL 2304740, at *7 [N.D.N.Y. May 21, 2018], *aff'd*, 776 Fed. Appx. 719 [2d Cir.

⁸ Notably, neither the September 2022 IEP or the September 2023 IEP recommended that the student's teachers utilize Orton-Gillingham or any other specific reading and writing methodology (*see* Dist. Exs. 4; 9). State guidance specific to students with disabilities resulting from dyslexia, dysgraphia, and dyscalculia emphasizes that "[t]he specially designed instruction that is appropriate to the unique needs of each student with a disability resulting from dyslexia, dysgraphia, and/or dyscalculia may vary across individual students with each of these specific learning disabilities" and that "[b]ecause of this, there is no single approach, product, or method of delivering specially designed instruction to such students that is required in federal or State law and regulations" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers, at p. 6, Office of Special Educ. [Aug. 2018], available at <https://www.nysed.gov/sites/default/files/programs/special-education/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf>; *see generally* Educ. Law § 305[56]; Dear Colleague Letter, 66 IDELR 188 [OSERS 2015]).

2019] [finding insufficient evidence of a student's progress at a unilateral placement where the hearing record did not include objective evidence, such as report cards, progress notes, work samples, standardized assessments, or progress towards written goals]). However, the report cards were not entirely subjective, as they identified the specific areas the student was working on and the progress the student made in those areas (see Parent Ex. W). The mere fact that the reports were made by the student's teacher should not be used as a basis for disregarding them completely; in refusing to accept the uncontested reporting from the teachers educating the student, the IHO required the parent to present evidence from "assessments" or "clinicians" (IHO Decision at p. 23). This is where the IHO erred in discounting the holding in A.D., as it is the district's responsibility to evaluate the student. As the IHO correctly held, the "2023 IEP does not cite any newer evaluations [than late 2019 and early 2020], and the CSE effectively admitted the evaluative materials were out of date, noting in its prior written notice for the 2023-24 school year that an updated psychoeducational assessment and social history had not been completed" (IHO Decision at p. 12; Dist. Ex. 3 at p. 2). Certainly, the fact that the teachers who completed the report cards did not testify at the impartial hearing could be used as a reason for attributing less weight to the submitted and accepted evidence; however, the evidence presented is uncontroverted and should not be outright dismissed.⁹

Finally, while evidence of progress may be a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), it is not required for a determination that a unilateral placement is appropriate (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]). Regardless, the director's written testimony indicated that the student made steady progress, did well in his decoding lessons, steadily improved his reading fluency, read with greater accuracy and at an appropriate pace, and increased both his confidence and expression while reading (Parent Ex. X at p. 10 ¶¶ 40-41). The director also testified that the student "made pretty significant strides" in his reading, writing, and math abilities "over the last couple of years" and he learned to control some of his negative behaviors (Tr. pp. 65-66). Further, the director testified that despite the student's academic delays, he continued to progress throughout his time at Academics West (Tr. pp. 69-70).

Overall, under the totality of the circumstances, the evidence in the hearing record reflects that the parents met their burden of proving that Academics West provided the student with

⁹ It should not be overlooked that the scheme set forth by Congress in the IDEA is one that favors the documentary approach. For example, public school IEPs are to include written descriptions of student needs, written goals and/or objectives, and a written description of the special education services to be provided. Congress also required that periodic written reports regarding the student's progress on annual goals be provided to parents each year at specified frequencies, which reports support and provides context for the next annual review process and revision of the IEP (see 20 U.S.C. § 1414 [d][1][A][i][III]). The Academics West report cards in evidence in this case accomplish similar objectives in that they describe the particular special education services being provided to the student during the relevant time period, describe how the student is performing, and provide this information to the parents. Unlike a public school IEP, the Academics West report cards are not prepared before the services are delivered; however meticulous compliance with the IEP procedures is not required of parents when seeking reimbursement for a private unilateral placement under Carter.

educational instruction specifically designed to meet the unique needs of the student of the 2023-24 school year.

C. Equitable Considerations

The IHO held that equitable considerations favored the parents and would not result in a bar or reduction in relief (IHO Decision at p. 25). The IHO specifically found that the parents cooperated with the CSE's efforts to develop and implement an educational program for the student for both the 2022-23 and 2023-24 school years and that the costs of the nonpublic school were not unreasonable. In its cross-appeal, the district asserts that the IHO's findings regarding equitable considerations were in error because the parents signed an enrollment contract with Academics West for both school years months before they notified the district that they were removing the student from public school and placing him at Academics West. The district also argues that the parents elected not to visit either of the proposed schools and it appeared as though the parents had no intention of placing the student in a public school for either the 2022-23 or 2023-24 school years.

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 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial

of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger 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).

Initially, the hearing record supports the IHO's finding that the parents provided the district with timely ten-day notices for both the 2022-23 and 2023-23 school years, which detailed the parents' concerns with the district's actions and their intent to place the student at Academics West for each school year at district expense (Parent Exs. C; E). Additionally, while the parents provided timely notice of their intent to remove the student from the public schools, the district responded to each of those notices but did not attempt to assemble a team, evaluate the student, devise an appropriate plan, determine whether a FAPE could be provided to the student in the public schools within the ten-business-day period, or otherwise offer information that would contrast from or mitigate the parents' concerns (Parent Exs. D; F). Rather, the district waited until after the school years had begun to convene the CSE, develop educational programs for the student, and identify the schools the student was assigned to attend (see Dist. Exs. 2; 4; 8-9). Accordingly, based on the information available in the hearing record, the IHO correctly held that the parents did not interfere or obstruct the district's efforts to develop IEPs for the student or impede the district's ability to offer the student appropriate placements.

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

Although the hearing record shows that the parent did not obstruct the district's development of an IEP for the student, the district also argues that the parent's conduct during the hearing should contribute to a reduction of relief based on equitable considerations. The district argues that the student's mother "denied the existence of a 22/23 CSE meeting, an operative 22/23 IEP or receiving a 22/23 school location letter" but that "during testimony, [p]arent testified that she did in fact attend the meeting and receive the 22/23 [school location letter] (Req. for Rev. ¶ 17). According to the district, the IHO "wisely professed the [s]tudent's mother was not fully credible and 'accorded diminished weight to her testimony" (id.). My review of the record confirms this allegation (see IHO Decision at p. 10).

In the mother's sworn affidavit, she affirms that "the [district] did not invite me or convene a CSE meeting after the July 28, 2020, CSE meeting until after the start of the 2023-2023 school year, on September 21, 2023" (Parent Ex. Y ¶ 18). During the mother's direct examination, she testified that she signed her affidavit in front of a notary and that at the time she signed the affidavit she believed that what she had stated in her affidavit was true (Tr. p. 77). She then testified that she "would like to change that the IEP meeting in 2022, that it did happen and that [she] was there"

and explained that she "completely missed that" portion of her affidavit regarding the September 2022 CSE and "[i]t's entirely [her] fault" (*id.*). The parent testified that she realized her mistake when her attorney "sent [her] the notice from the [district] that the meeting did happen, and [she] went back to [her] notes... and [she] was able to see that [the meeting] did happen" (Tr. pp. 78-79).

Because the parent identified and admitted the mistake in her affidavit, there is insufficient basis to find that her actions during the hearing should contribute to a reduction in relief awarded based on equitable considerations. However, it is worth noting that making sworn statements that are not true in an affidavit may be a basis for finding a reduction in relief to be awarded based on equitable considerations or could even result in an outright denial of relief depending on the egregiousness or materiality of the sworn misstatement. However, self-correction of a genuine mistake does not warrant a reduction in this instance considering the mother's admission of error. Accordingly, I decline to reduce or deny an award of tuition funding at Academics West for the 2022-23 and 2023-24 school years.

VII. Conclusion

Having determined that the evidence in the hearing record: supports the IHO's determination that the district failed to provide the student a FAPE for the 2022-23 and 2023-24 school years; supports the IHO's finding that Academics West was an appropriate unilateral placement for the 2022-23 school year; does not support the IHO's finding that the Academics West was not an appropriate unilateral placement for the 2023-24 school year; and supports the IHO's determination that the equitable considerations favor the parents, the necessary inquiry is at an end. The IHO's denial of relief in the form of district funding for the student's unilateral placement at Academics West for the 2023-24 school year is reversed.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated March 14, 2024 is modified by reversing those portions which found that the parents did not meet their burden to prove that Academics West was an appropriate unilateral placement for the student for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall directly fund the costs of the student's attendance at Academics West for the 2023-24 school year up to the total amount of \$144,950.

Dated: **Albany, New York**
 July 29, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER