The University of the State of New York

The State Education Department
State Review Officer
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No. 24-281

Application of a STUDENT WITH A DISABILITY, by her 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, P.C., attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah Pourhosseini, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's tuition at the Big N Little: Bnos Menachem Program (Bnos Menachem) for the 2023-24 school year. The district cross-appeals the IHO's equitable determinations finding. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

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

On May 31, 2022, a CSE convened to discuss the results of a turning five reevaluation and found the student eligible for special education services as a student with a speech or language

impairment (see Dist. Exs. 3, 4).[1, 2] As a result of its review, the CSE developed an IESP for the student with an implementation date of September 6, 2022 (id. at pp. 1, 5). As indicated in the IESP, the CSE recommended the student receive seven periods per week of direct group special education teacher support services (SETSS) along with four 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT,) and two 30-minute sessions per week of individual physical therapy (PT) (id. at p. 5). The IESP noted that the student was parentally placed in a nonpublic school (id. at p. 7).

A June 2, 2022 prior written notice indicated that the May 2022 CSE "reviewed and discussed" a pre-school IEP, dated June 21, 2021, when making its recommendations for the student (Dist. Ex. 5 at pp. 1-2).

The parent filed a due process complaint notice on August 20, 2023 (see Dist. Ex. 6). In her complaint, the parent asserted that the district failed to provide the student with a free appropriate public education (FAPE) for the 2023-24 school year because it failed to develop an IESP for the student for the 2023-24 school year, the parent notified the district that the student continued to require special education, and the district failed to implement SETSS for the student (id. at pp. 1-2). For the 2023-24 school year, the parent requested an order of pendency, prospective/direct funding of SETSS, and related service authorizations (RSAs) for all related services (id. at pp. 2-3).

On August 24, 2023 the parent entered into a contract with Bnos Menachem for the student to attend the school for the 2023-24 school year (Parent Ex. C at pp. 1-3). Attached to the contract was the curriculum and program description for Bnos Menachem (id. at pp. 4-26).

On August 28, 2023 the student participated in a psychoeducational evaluation, conducted for the stated purpose of determining the student's developmental status and defining her educational and therapeutic needs (Parent Ex. H at p. 1). The evaluator recommended that the student be placed in a 12:1+1 special class and receive related services of speech-language therapy, OT. PT, and counseling (id. at p. 9).

In a letter dated October 17, 2023, the parent notified the district that she did not believe the student's needs could be met in a general education classroom (Dist. Ex. 11 at p. 2).[3] The parent requested the district reevaluate the student, reconvene the CSE, and place the student in a full-time special education classroom for the 2023-24 school year (id.). The parent advised the district that if these issues were not timely addressed, he intended "to unilaterally place [the

[1] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only district exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] The first page of the letter was a facsimile cover sheet from the parent's attorney (Dist. Ex. 11 at p. 1).

student] in a private special education program for the 2023-2024 school year" and "seek tuition funding and/or reimbursement from the District for this program" (id.).

On October 20, 2023, the parent's August 20, 2023 due process complaint was withdrawn without prejudice (see Dist. Ex. 7).

The August 2023 psychoeducational evaluation report was modified in November 2023, notably the student's standard score for socialization on the Vineland -3 was changed from 77 to 91, although it does not appear that the assessment was readministered (compare Parent Ex. H at p. 3, with Dist. Ex. 10 at p. 3).

In a December 20, 2023 letter titled "Ten Day Notice", the parent advised the district that she had previously requested it reevaluate the student, reconvene the CSE and place the student in a full-time special educational classroom; however, the district had not yet evaluated the student, provided her with an IEP, or offered her any placement (id. at p. 2 Dist. Ex. 12).[4] The parent reiterated her request for an evaluation and IEP for the 2023-24 school year (id.). The parent "advised that unless this issue can be resolved, [she] intend[ed] to unilaterally place [the student] in the private special education program "at Bnos Menachem and would "commence proceedings to seek tuition funding and/or reimbursement from the District for this program" (id.).

On or around December 19, 2023, the district issued a prior written notice in response to the parent's request for a reevaluation (Dist. Ex. 13). The notice indicated that the district reviewed staff member reports from August 29, 2023 including a functional behavioral assessment (FBA), behavioral intervention plan (BIP), and teacher, OT and speech reports and "determined that no additional assessments [we]re needed as part of this reevaluation" (id. at p. 2).

A. Due Process Complaint Notice & Facts Subsequent

In a due process complaint notice dated January 11, 2024, the parent alleged that the district denied the student a FAPE for the 2023-24 school year (Parent Ex. A at pp. 3-4). The parent asserted that the May 2022 IESP was the last educational program developed for the student and that it recommended seven periods of SETSS per week, four 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, and two 30-minute sessions of individual PT per week (id. at p. 3). The parent argued that the May 2022 IESP was inadequate and improper as the student needed a full-time special education program to address all of her academic, social, and behavioral needs (id.). The parent asserted that the student required a full-time special education class of no more than twelve students with one teacher and one assistant (id. at pp. 3-4). The parent also contended that the student required specific strategies and resources to address her management needs, as well as a behavioral plan, in order to make meaningful progress (id. at p. 4). The parent then asserted that, on October 17, 2023, she notified the district that the student's needs could not be met in a general education classroom and requested that the district reevaluate the student, reconvene the CSE, and place the student in a full-time special education class for the 2023-24 school year (id.). In that letter, the parent indicated that she intended to unilaterally place the student in a private special education program and seek funding/reimbursement, if the district did not timely address the student's needs (id.). The parent

[4] The first page of the letter was a facsimile cover sheet from the parent's attorney (Dist. Ex. 12 at p. 1).

contended that on December 20, 2023, she reiterated her request for the student to be reevaluated and for the CSE to reconvene to create an IEP (id.). The parent asserted that as of the date of her December 20, 2023 letter, the student had not been evaluated or provided with an IEP and that she would unilaterally place the student at Bnos Menachem and seek funding (id.).

By notice dated February 7, 2024, the district advised the parent of a CSE meeting scheduled for that same day to review the results of the reevaluation (Dist. Ex. 15).

A CSE convened on February 7, 2024 and found that the student continued to be eligible for special education services as a student with a speech or language impairment (Dist. Ex. 16 at pp. 1, 16).[5] The resultant IEP reflected the results of the November 2023 psychoeducational evaluation (id.). Based on its review, the CSE recommended that the student receive 10 periods per week of integrated co-teaching (ICT) services in English-language arts (ELA), 10 periods per week of ICT services in math, three periods per week of ICT services in social studies, and two periods per week of ICT services in sciences (id. at p. 12). In addition, the CSE recommended that the student receive related services of one 30-minute session of group counseling services per week, three 30-minute sessions of individual OT per week, two 30-minute sessions of individual PT per week, two 30-minute sessions of individual speech-language therapy services per week, and one 30-minute session of group speech-language therapy per week (id. at pp. 12-13). The CSE did not recommend extended school year services or special transportation services (id. at pp. 13, 15). The IEP identified the recommended placement for the student as a district non-specialized school (id. at pp. 13, 15-16).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on February 12, 2024 and concluded on April 11, 2024 after three days of proceedings (see Tr. pp. 1-173). In a decision dated May 25, 2024, the IHO found that the parent "requested a FAPE on October 17, 2023" and that the district had until January 18, 2024 to evaluate the student, develop a program, and recommend a placement (IHO Decision at pp. 5, 8). The IHO further found that the parent filed the due process complaint notice on January 11, 2024, which was "school day 54 of 60," claiming a denial of FAPE (id.). The IHO held that the district was still in compliance when the due process complaint notice was filed and that after considering the record as a whole, the district did not deprive the student of a FAPE (id. at pp. 5-6).

The IHO noted that the parent placed the student at the private school in September 2023 in a 12:1+1 special class (IHO Decision at p. 6). The IHO determined that the weight of the evidence established that the student's individual educational needs were being addressed by Bnos Menachem and that if the student was denied a FAPE Bnos Menachem would have been capable of addressing the student's needs (id.).

[5] According to the IEP attendance page, the parent participated in the meeting by telephone, along with a related service provider/special education teacher who also served as district representative, a teacher, an agency representative, and a school psychologist (Dist. Ex. 16 at p. 18).

Regarding equitable considerations, the IHO noted that the parent signed the enrollment contract in August 2023 and filed a 10-day notice on October 17, 2023 (IHO Decision at p. 8).[6] The IHO held that when the parent filed the 10-day notice, the student was already enrolled at Bnos Menachem and it was clear that the parent did not provide timely notice to the district, which deprived the district of the opportunity to devise an appropriate placement before the parent removed the student from public school (id.). The IHO held that while the 10-day notice alone was not enough necessarily to bar reimbursement, this action in conjunction with the filing of two contradictory due process complaint notices, "raise[d] questions that [we]re not to be answered in this forum" (id.). The IHO found that the parent was not entitled to any relief and dismissed the claims with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals. While the parent's request for review is not particularly easy to follow in that it shifts between allegations related to FAPE and the development and implementation of an IEP for the 2023-24 school year and allegations related to equitable services under Education Law ¶3602-c, the general substance of the parent's argument is that the IHO erred by not finding the student was denied a FAPE for the 2023-24 school year as the district failed to explain the appropriateness of its program, failed to show that it implemented the program, and failed to timely respond to the parent's notices. Woven into the parent's argument is an allegation that the May 2022 IESP failed to recommend a full time special education program for the student and that the district failed to explain the appropriateness of that IESP for the student for the 2023-24 school year.

The parent also argues that the IHO erred in her equitable consideration determination, asserting the IHO did not make a complete decision on the issue. The parent requests a finding that equitable considerations favor the parent's request for relief. According to the parent, she cooperated with the CSE and did not interfere with its ability to offer the student a FAPE, and therefore, there are no equitable bars to preclude funding. The parent requests a finding that the district did not offer the student a FAPE for the 2023-24 school year, a finding that equities favor the parent, and an order for the district to directly fund the full cost of the student's tuition at Bnos Menachem in the amount of $120,000 for the 2023-24 school year.

The district submits an answer and cross-appeal. Initially, the district asserts that any allegations related to the February 2024 IEP were not raised in the due process complaint notice, which was filed prior to the February 2024 CSE meeting, and that the IHO was therefore correct in finding it was outside the scope of this proceeding. The district further argues that the parent failed to appeal the IHO's finding that the district was in compliance with the time period for responding to the parent's October 2023 letter. The district requests that the IHO's findings be upheld, and the appeal dismissed. Regarding equities, the district contends that the parent did not appeal the IHO's finding that the 10-day notice was not timely and that should be found final and

[6] The IHO decision identified the date of the notice as October 17, 2024; however, it is presumed that the date cited by the IHO was a typographical error as the hearing record includes a letter dated October 17, 2023 (see IHO Decision at p. 8; Dist. Ex. 11).

binding. Moreover, the district asserts that the IHO should have found that equities disfavor the parent and warrant a total bar from relief.

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]).[7]

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

[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).

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. Annual Review

Initially, I note that the district asserts that state regulations require the request for review to identify the precise rulings being appealed from, that mere assertions of district error should be disregarded, and that the parent failed to appeal from the IHO's finding that the district did not deny the student a FAPE due to the timing of the filing of her due process complaint notice. The district argues that the parent's failure to appeal this finding should be found to be final and binding as to the district's offer of a FAPE to the student, and, on this basis alone, the appeal should be dismissed.

However, a review of the request for review demonstrates that the parent objected to the IHO's finding that the student was offered a FAPE. Additionally, as discussed below, regardless of the IHO's finding as to the timing of the district's obligations after the parent sent the October 2023 letter, the district was required to have an educational program in place for the student at the start of the 2023-24 school year. Additionally, although the request for review is not a model of clarity, it does assert that the student required placement in a special class and that the May 2022 IESP failed to recommend placement in a special class for the student (Req. for Rev. ¶ 16). As such, I decline to dismiss the parent's claims for failure to comply with the practice regulations.

Turning to the merits of the dispute, it must be determined when the district's obligation of FAPE for the 2023-24 school year began. A school district has a continuing statutory requirement to meet and revise a student's IEP periodically, but not less than annually. The IDEA and State regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that a district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

Prior to the start of the 2023-24 school year, the district last convened to create an IESP for the student on May 31, 2022 (see Dist. Ex. 4). The IESP indicated that the projected date for the student's annual review was May 31, 2023 (id. at p. 1). However, the CSE did not convene the CSE for development of either an IEP or an IESP for the student until February 2024, more than one year after the May 2022 IESP. The mere fact that the student last had an IESP for implementation at the student's nonpublic school does not negate the district's requirement to annually convene a CSE and create a special education program for the student. In fact, as the district is aware, if the parent desired equitable services for the student for the 2023-24 school year, the parent was required to request such services from the district by June 1, 2023 (see Educ. Law § 3602-c[2][a] [a request for equitable services must be filed "on or before the first of June preceding the school year for which the request is made"]).[8] As there is no indication in the hearing record that the parent made such a request, and there is no indication in the hearing record that the student no longer required special education services at the start of the 2023-24 school year, the district was required to convene the CSE for an annual review meeting and was also required to have an IEP in place for the student by the start of the 2023-24 school year. Since the district failed to do so, the student was denied a FAPE.[9, 10]

B. Unilateral Placement

Neither party appealed from the IHO's finding that Bnos Menachem was an appropriate placement for the student for the 2023-24 school year (IHO Decision at p. 6). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[8] The statute does not differentiate between students already identified and receiving services pursuant to an IESP during the prior school year and those who are not; however, the law does make exceptions for students first identified as students with disabilities after the June first deadline (Educ. Law § 3602-c[2][a]). Accordingly, to satisfy the statutory notice requirement, parents must make the request each year for which they seek dual enrollment services.

[9] The IHO's finding that the 60-school day timeline had not run out when the due process complaint notice was filed, while technically correct when counting from the October 17, 2023 letter, did not address the fact that the district did not have a program in place for the student at the start of the 2023-24 school year in September 2023. In this instance, although the timing of the October 2023 letter and the parent's actions prior to and during the 2023-24 school year are relevant to the weighing of equitable considerations, the parent was entitled to rely on the educational program in place at the time of the parent's placement decision for the 2023-24 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; R.E., 694 F.3d at 187-88), which in this instance was when she placed the student at Bnos Menachem in August 2023 (see Parent Ex. C.

[10] It is noted that the district is correct in contending that the February 2024 IEP was outside the scope of review in this case and is not at issue before me. The February 2024 IEP was created after the start of the school year and after the due process complaint notice was filed. The district is free to defend that IEP in the future, should it continue to be in place for the student when the parent makes her placement decision for the 2024-25 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 indicated that the equitable considerations did not favor the parent, as the parent did not file a timely 10-day notice and the prior due process complaint notice raised questions that the IHO would not further address in this proceeding (IHO Decision at pp. 7-8). However, the IHO did not make a specific finding on equitable considerations, as the IHO had noted the parent was not entitled to funding due to finding that the district did not deny the student a FAPE (id. at p. 8).

The parent asserts the IHO erred by not make a finding on equities and contends that she cooperated with the CSE and sent timely notices to the district; and therefore, there are no equitable

factors that preclude funding. The district cross-appeals and asserts that the IHO did find the 10-day notice was untimely, and the parent failed to directly appeal that finding, and that based on the untimely notice, the parent's request for funding should be fully denied.[11]

Here, the IHO correctly pointed out that the parent did not provide a timely 10-day notice of her intent to place the student at Bnos Menachem for the 2023-24 school year at district expense as the parent signed the enrollment contract in August 2023 and the first notice from the parent to the district included in the hearing record was dated October 17, 2023 (IHO Decision at p. 7; see also Parent Ex. C; Dist. Ex. 11). Review of the October 17, 2023 letter shows that although the parent requested a reconvene of the CSE for the district to develop an IEP for the student, the letter also included the required elements of a 10-day notice, namely that the parent was rejecting the placement proposed by the district, that the parent stated her concern that the student's needs could not be met in a general education classroom, and that the parent intended to enroll the student in a nonpublic school at district expense for the 2023-24 school year (Parent Ex. I at p. 2).

The district has not pointed to any instances, other than the lack of a timely 10-day notice, in which the parent failed to cooperate with the CSE. The parent participated in the May 2022 and February 2024 CSE meetings and provided the district with copies of the private evaluations. It is also noted that the parent does not contend that she filed a 10-day notice prior to enrolling the student at Bnos Menachem.

Since, the parent failed to submit a timely 10-day notice, a reduction in the requested relief is warranted on that basis. As the 10-day notice was submitted on October 17, 2023, I will reduce the request for funding by 10%. Therefore, I order the district to fund Bnos Menachem for the 2023-24 school year in the amount of $108,000, a reduction of 10% from the contracted for $120,000 tuition.

VII. Conclusion

The hearing record supports finding that the district failed to offer the student a FAPE for the 2023-24 school year as it failed to have an IEP in place for the student by the start of the school year and neither party has appealed from the IHO's finding that Bnos Menachem was an appropriate placement for the student for the 2023-24 school year. In weighing equitable considerations, they warrant a partial reduction of 10% from the requested amount as the parent failed to timely send the district a 10-day notice of her intent to unilaterally place the student at Bnos Menachem.

[11] While not addressed directly by either party on appeal, I note that while the IHO obliquely referred to "contradictory" due process complaint notices filed by the parent as a factor that "raise[d] questions" with respect to the 10-day notice, she did not explicitly consider this discrepancy as an equitable factor but rather determined that the questions raised were not to be "answered in this forum" (IHO Decision at p. 8). Accordingly, given the absence of any further findings on the issue, including a lack of any credibility findings related to the parent's explanation of the discrepancy between the two due process complaint notices and the timing and nature of her representation, at various times, by either a parent advocate or her counsel at the impartial hearing, I have not considered such factors in addressing the parent's request for a finding that equitable considerations weighed in her favor or the district's cross-appeal on the issue of equitable considerations which was limited to the lack of a timely 10-day notice.

I have considered the parties' remaining contentions and find them to be without merit or unnecessary to address in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the May 25, 2024 IHO decision is modified to find that the district failed to offer the student a FAPE for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district directly fund the cost of the student's tuition at Bnos Menachem for the 2023-24 school year, less 10% of the contracted rate, for a total of $108,000.

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

CAROL H. HAUGE
STATE REVIEW OFFICER