The University of the State of New York

The State Education Department
State Review Officer
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No. 24-324

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

Appearances:
Law Office of Noelle Boostani, attorneys for petitioner, by Noelle Boostani, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) reimburse the parent for her son's tuition costs at the Vincent Smith School (Vincent Smith) for services delivered during the extended (12-month) 2022-23 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has received diagnoses of a language disorder – receptive and expressive language delays; specific learning disorder with impairment in reading (dyslexia); specific learning disorder with impairment in written expression; specific learning disorder with impairment in math; developmental coordination disorder; concussion sequela; and acute stress disorder; adjustment disorder with mixed anxiety and depressed mood (Parent Ex. D at pp. 21-22). Additionally, the student was at risk for attention difficulties and he received a rule out diagnosis

of attention deficit hyperactivity disorder (ADHD) – predominantly inattentive type (id. at pp. 19, 21). In 2017 the student sustained a "severe concussion" and subsequently experienced severe migraines, floaters in his eyes, marked sensitivity to light, and memory difficulties (id. at p. 2).

According to the parent, the student began attending Vincent Smith for eighth grade during the 2020-21 school year (March 12, 2024 Tr. p. 174; see Parent Ex. O at p. 5). On November 9, 2020, the CSE convened and found the student eligible for special education services as a student with a traumatic brain injury (TBI) for the 2020-21 school year (see generally Parent Ex. O). The November 2020 CSE recommended a 12:1+1 special class in a State approved nonpublic day school and two 40-minute sessions per week of group speech-language therapy (id. at pp. 15, 21).

The student attended Vincent Smith during the 2021-22 school year (ninth grade) (Dist. Ex. 9). On October 19, 2021, the CSE convened and found the student eligible for special education services as a student with a speech or language impairment (Parent Ex. C at pp. 1, 30).[1] The October 2021 CSE recommended integrated co-teaching (ICT) services in math, English language arts (ELA), social studies, and science together with four periods per week of individual special education teacher support services (SETSS) in ELA, and one period per week of individual SETSS in math (id. at pp. 24, 30-31). Additionally, the October 2021 CSE recommended one 30-minute session per week of group counseling services, one 30-minute session per week of individual occupational therapy (OT), and two 30-minute sessions per week of group speech-language therapy (id. at pp. 23, 31).

On June 16, 2022, the parent notified the district of her disagreement with the October 2021 IEP and her intent to unilaterally place the student at Vincent Smith for the 2022-23 school year and seek "pendency and direct funding for this placement" (see Parent Ex. B).[2]

On July 7, 2022, the parent signed an enrollment agreement for the student's attendance at Vincent Smith from July 5, 2022 through August 5, 2022 (see Parent Ex. M). Also, on July 7, 2022, the parent signed an enrollment contract with Vincent Smith for the student's attendance for the 2022-23 school year beginning on September 6, 2022 and ending on June 16, 2023 (see Parent Exs. K; L). The student attended Vincent Smith for the 12-month 2022-23 school year (10th grade) (Parent Exs. H-M).

A. Due Process Complaint Notice

In a due process complaint notice dated September 6, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 12-month 2022-23 school year (see generally Parent Ex. A). The parent alleged that the student's pendency was in a

[1] 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]).

[2] Vincent Smith has not been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

10-month program at Vincent Smith based upon a prior unappealed IHO decision dated September 24, 2021 (id. at p. 2).

In connection with the parent's claims of a denial of a FAPE, the parent alleged with respect to the October 2021 IEP that the district failed to sufficiently evaluate and review available evaluative information; reduced the "intensity" of the student's services; that the assigned school could not implement the SETSS; and the district also failed to determine the student's post-secondary transition needs (Parent Ex. A at pp. 5-6). As relief, the parent sought an interim order of pendency; a declaration that the district failed to offer the student a FAPE for the 2022-23 school year; a declaration that Vincent Smith was an appropriate unilateral placement; and an order of direct funding/reimbursement for the costs of the student's tuition at Vincent Smith and costs of transporting the student to and from Vincent Smith (id. at pp. 6-7).

On September 28, 2022, the district electronically signed a pendency implementation form, in which it agreed that the student's pendency arose from a prior unappealed IHO decision dated September 24, 2021 and consisted of placement at Vincent Smith for the 10-month 2022-23 school year together with transportation services (Pendency Impl. Form).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing before an IHO assigned by the Office of Administrative Trials and Hearings (OATH).[3] A prehearing conference was held on February 16, 2024 and a hearing was completed on March 12, 2024 (Feb. 16, 2024 Tr. pp. 1-43; March 12, 2024 Tr. pp. 44-251).[4]

In a decision dated June 24, 2024, the IHO found that the district denied the student a FAPE for the 2022-23 school year and that Vincent Smith was an appropriate unilateral placement for the 10-month 2022-23 school year (IHO Decision at pp. 8-9, 11, 13-14).[5] Based upon her review of the hearing record, the IHO found with respect to the unilateral placement that Vincent Smith provided the student multisensory instruction with speech-language therapy, pull-out reading instruction, and various modifications and accommodations (id. at p. 14). The IHO further found that the student made "meaningful progress" at Vincent Smith for the 2022-23 school year (id.).

[3] A different IHO was previously appointed on September 27, 2022 and held seven status conferences and denied a motion for consolidation (see Nov. 3, 2022 Tr. pp. 1-5; Jan. 12, 2023 Tr. pp. 6-12; April 5, 2023 Tr. pp. 13-20; June 14, 2023 Tr. pp. 21-26; Aug. 28, 2023 Tr. pp. 27-36; Sept. 28, 2023 Tr. pp. 37-43; Nov. 6, 2023 Tr. pp. 44-48; Interim IHO Decision). On January 11, 2024, the first IHO recused himself and a second IHO was appointed to hear the merits of the case and render a decision (see IHO Decision at p. 2).

[4] The OATH IHO issued a prehearing conference summary and order on February 16, 2024 (see IHO Ex. I).

[5] Although the IHO found that the district failed to meet its burden of proof to show that it offered the student a FAPE, the IHO incorrectly stated that the district did not present any documentary evidence (see Dist. Exs. 1-11) and conceded that it failed to offer the student a FAPE (IHO Decision at p. 11). The district elected not to call any witnesses at the impartial hearing and stated that it would withdraw its concession of failing to offer a FAPE (March 12, 2024 Tr. pp. 48, 74, 242-43).

However, the IHO held that the parent failed to demonstrate that a 12-month program was appropriate for the student (id. at pp. 9-11).

In connection with equitable considerations, the IHO found that the district failed to show that the parent was obstructive or uncooperative in the development of the IEP (IHO Decision at p. 15). However, the IHO questioned the parent's ten-day notice of unilateral placement which was sent approximately eight months after the October 2021 CSE meeting (id.). The IHO also noted that the parent did not sign enrollment agreements with Vincent Smith until July 7, 2022, which was after the student's start date on July 5, 2022 for the 12-month program (id.). In an exercise of her "equitable authority," the IHO reduced the 10-month tuition award by five percent (id. at p. 16). Accordingly, as relief, the IHO awarded the parent direct funding of the Vincent Smith tuition at the reduced amount of $61,607.50 (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent first argues that the IHO miscalculated the amount of tuition to be funded by the district as the IHO reduced the tuition by 5 percent ($3,242.50) for an award of $61,607.50 (see IHO Decision at p. 16). However, the parent states that the 10-month tuition at Vincent Smith for the 2022-23 school year totaled $64,850 and the cost of the 12-month program was $3,950. Accordingly, the parent argues that the total tuition cost for the 2022-23 school year was $68,800, and therefore, a five percent reduction of the total cost would equal $3,440 which would lead to a final award of $65,360 for the 12-month 2022-23 school year.

The second issue raised by the parent is that the IHO's findings were inconsistent with the hearing record. Specifically, the parent argues that the IHO erred in finding that she waited eight months to notify the district of her disagreement with the October 2021 IEP because the hearing record demonstrates that she timely raised her concerns during the October 2021 CSE meeting. As another example of the IHO issuing inconsistent findings, the parent argues that the IHO found there was no evidence that the student experienced regression, but the district "failed to perform a regression analysis" during the October 2021 meeting.

In addition, the parent argues that the IHO erroneously found that the timing of the parent's ten-day notice and signing of the Vincent Smith enrollment agreements warranted a reduction of five percent of the tuition costs. The parent also contends that the IHO incorrectly shifted the burden to the parent to prove the student's need for extended school year (ESY) services and failed to determine "whether ESY services were necessary to provide a FAPE" for the student (Req. for Rev. at p. 6). The parent requests a finding that the 12-month programming provided by Vincent Smith was appropriate for the student. As relief, the parent seeks a finding that the five percent reduction was improper and an award of the student's full tuition costs for the 12-month program at Vincent Smith in the amount of $68,800.

In an answer, the district generally denies the material allegations contained in the request for review. The district argues that it is not appealing the IHO's finding that it failed to offer the student a FAPE for the 2022-23 school year or that the student's unilateral placement at Vincent

Smith for the 10-month school year was appropriate.[6] The district argues that the IHO's finding that the 12-month program at Vincent Smith was not appropriate should be upheld. In addition, the district asserts that the IHO properly reduced the tuition award because the 10-month tuition at Vincent Smith was $64,850.00, and accordingly, the reduction by five percent ($3,242.50), should result in a total award of $61,607.50.

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

[6] As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CRF 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S. et al., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 - *7, *10 [S.D.N.Y., March 21, 2023]).

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.

[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).

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Unilateral Placement - 12-Month Program at Vincent Smith

On appeal, the parent asserts that the IHO improperly shifted the burden to her to demonstrate that the summer program was appropriate, and even if it is determined that the burden was on the parent, the 12-month program was appropriate for the student. In its answer, the district argues to uphold the IHO's determination that the 12-month program the student received at Vincent Smith was not appropriate.

In her analysis of the appropriateness of the parent's unilateral placement for 12-month programming, the IHO found that the "12-month was not appropriate for the [2022-23] school year" because there was "[n]o showing that a 12-month program was warranted" for the student (IHO Decision at p. 9). The IHO went on to find that "[e]ven if the [p]arent were to show regression on the part of the [s]tudent, the [p]arent failed to show that the summer program was appropriate" (id. at p. 10). Then, the IHO determined that the summer program did not comply with State law and regulations pertaining to the operation of an ESY program for six weeks (id.).[8] Next, the IHO found no evidence of regression nor that the student's "academic skills would regress after summer vacation or an extended break to the point that they could not be recouped in twenty-to-forty school days" (id.). Furthermore, the IHO discussed the testimony of the private neuropsychologist who testified that he had not evaluated the student since 2020 and if he had evaluated the student after that time, the student's needs may have changed (id.). The IHO next discussed the testimony of the Vincent Smith dean of students (dean) who testified that regression was based upon "an informal test 'at the end of each break, before each break, and after each break, at the end of the year, and then again at the beginning of the year'" (id.). The test was "teacher-made," and no report was generated by teachers at Vincent Smith, nor were any records of the tests

[8] According to New York State guidance, a 12-month program "must operate for at least 30 days, five days/week, during the months of July and August" and the length of the school day "shall be not less than five hours of instruction" for students in kindergarten through grade 6. ("Extended School Year Special Education Programs," at p. 7, Office of Special Educ. Mem. [June 2023], available at https://www.nysed.gov/special-education/extended-school-year-programs-and-services-questions-and-answers.).

submitted as evidence into the hearing record (id.). Lastly, the IHO concluded that the "burden of production" rested with the parent for ESY services (id. at p. 11).

Contrary to the IHO's findings, State regulation places the burden of determining whether or not students are at risk for substantial regression such that they require 12-month services on public school districts, not parents (8 NYCRR 200.16[i][3][v]). The standard for parents to meet their burden to show that the unilaterally-obtained special education services are appropriate is whether the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65). Therefore, the IHO erred in finding that the burden of proof regarding the student's risk of substantial regression was on the parent; however, the IHO did correctly find that the parent had the burden to demonstrate that the 12-month program at Vincent Smith was an appropriate unilateral placement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the

> child to receive educational benefits. Grades, test scores, and 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).

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to be resolved on appeal, namely, whether the 12-month programming at Vincent Smith was appropriate to meet the student's needs.

The October 2021 IEP indicated the student's "greatest need[s]" were in the areas of passage comprehension, word comprehension, and oral reading fluency (Parent Ex. C at p. 2). The student, who was in ninth grade at the time of the October 2021 CSE meeting, was reading below grade level and had limited vocabulary (id. at pp. 2-3). The student was noted to have strength in listening comprehension, and it was recommended that content be presented "in audible formats to assist him with reading comprehension" (id. at p. 3). In math, the student was found to become "overwhelmed and anxious" with difficult tasks especially in algebra, but his understanding improved with visual models (id.). The October 2021 IEP indicated that the student continued to work on his expressive and receptive language skills in the areas of writing, vocabulary, and critical thinking (id. at p. 4). It was further noted that the student benefitted from the use of guided notes, graphic organizers, problem repetition, pre-teaching, reteaching, visual models, and breakdown of procedural steps (id. at pp. 6-7). In connection with the student's social development, he was described as "friendly, cooperative and personable" (id. at p. 8). However, the October 2021 IEP detailed that the student suffered from anxiety and required "direct instruction in how to recognize the triggers for his anxiety and how to constructively address those triggers using cognitive and behavioral strategies" (id.).

The October 2021 IEP reflected the private neuropsychologist's report that as a result of the student sustaining a concussion in 2017, "the sequalae of his concussion (TBI) has led to additional educational challenges including increased difficulties with sensory integration, verbal memory, marked sensory concerns, sleep issues and personality changes" (Parent Ex. C at pp. 8-9). The October 2021 IEP recommended that to address the student's slow graphomotor speed he needed additional time for written assignments and needed to learn keyboarding skills (id. at p. 9). For the student's sensory needs, it was noted that noise in the classroom should be kept to a minimum, and the student should be seated away from distractions, and work in a less stimulating area (id.). Strategies to address the student's management needs were teacher modeling and one-on-one assistance, repetition, reminders to look back at notes, study guides, scaffolded lessons

taught at a slow pace, graphic organizers, visual aids, editing checklists, access to a keyboard for written work, access to a calculator, access to written material in audible formats, opportunity to move to a quiet or darker location, and tests read in the classroom (id. at p. 10). In order for the student to access the general education, he required "specialized instruction, classroom accommodations, speech[-]language therapy and group counseling services" (id.).[9]

Turning to the appropriateness of the 12-month program, the Vincent Smith dean testified that the nonpublic school placed the student in a 12-month program because of the student's learning disabilities and because it took him longer to learn (March 12, 2024 Tr. pp. 119, 134). She further testified that the 12-month program gave the student "more time, particularly in math and ELA to learn what he need[ed] to learn to move on" (id.). The Vincent Smith dean also testified that the 12-month program was a "continuance" of the school year's program that included reinforcement of ELA and math to prevent regression as well as the introduction of "new concepts and more practice" (March 12, 2024 Tr. p. 136).

Review of the evidence in the hearing record shows that there was no schedule or description of the 12-month program at Vincent Smith except for testimony from the Vincent Smith dean that while the summer programming was a continuance of the school year program, the schedules for the 10-month and 12-month programs were not the same (March 12, 2024 Tr. pp. 136, 154). Furthermore, upon questioning by the IHO, the Vincent Smith dean stated that informal tests were given by the teachers "at the end of each break, before each break, and after each break, at the end of the year, and then again at the beginning of the year" to measure the student's regression (March 12, 2024 Tr. p. 165). However, no reports were generated from these informal assessments and in fact, no "regression reports" existed in September 2022 (March 12, 2024 Tr. pp. 165, 167). While the parent did not have the burden of demonstrating that the student was at risk of regression during the summer, she did have the burden of establishing that the summer program offered the student specialized instruction to address his unique needs. However, aside from the dean's general testimony about the summer program's structure and purpose, a review of the hearing record reveals a dearth of specific information concerning the instruction provided to the student as part of the summer program, including a lack of any documentary evidence or narrative reports concerning the services the student received at Vincent Smith during summer 2022 (see Parent Exs. A-Q).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed

[9] The student's report card for the 2021-22 school year—leading up to the timeframe in dispute, namely summer 2022—reflects that the student received the following final grades: ELA – 90; Algebra I – 95; Global 2 – 93; Biology – 90; 95 in each term for physical education and passing in both art and music (Parent Ex. P at p. 1). The report card also included narratives for each subject area and none of the teachers mentioned that the student required instruction for the summer 2022 (id. at pp. 2-15). In fact, the student was praised for his hard work during the 2021-22 school year including his teachers noting his active participation in class discussions, his completion of homework, improvement in writing skills, expanding his expressive vocabulary, "becoming a more mindful and active reader," and his overall progress and success in academics (id. at pp. 2-7, 10, 12-15).

instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Based on the above, the evidence in the hearing record does not, under the totality of the circumstances, lead me to the conclusion that the unilaterally obtained services were appropriate, in that there is insufficient evidence that the services were specially designed to address the student's identified needs during summer 2022. Accordingly, the parent failed to meet her burden to prove that the 12-month services she privately obtained from Vincent Smith provided specially designed instruction that was reasonably calculated to enable the student to receive an educational benefit under the totality of the circumstances.

As a result, I find no basis in the hearing record to disturb the IHO's finding that the parent failed to demonstrate the appropriateness of the 12-month program at Vincent Smith.

B. Equitable Considerations

The parent contends that the IHO "miscalculated" the amount of tuition to be funded by the district (see IHO Decision at p. 16). The parent asserts that the correct calculation should have been as follows: the 10-month tuition at Vincent Smith in the amount of $64,850 plus the cost of the 12-month program of $3,950, for a total amount of $68,800, and the five percent reduction of that total cost ($3,440) would have yielded the amount of $65,360. Furthermore, the parent argues that the IHO's finding on equitable considerations which resulted in a reduction in the awarded tuition should be reversed, and she seeks a total award of $68,800.

However, this "miscalculation" argument by the parent is misleading because the IHO found that the 12-month program at Vincent Smith was not appropriate and therefore, the five percent reduction was only for the 10-month tuition at Vincent Smith (IHO Decision at pp. 10, 15-16). Pursuant to the enrollment contract, the tuition for the period of September 6, 2022 through June 16, 2023 was in the amount of $64,850 (Parent Exs. K; L at p. 1). Therefore, the IHO calculated a five percent reduction ($3,242.50) of the $64,850 which resulted in a final award of $61,607.50 (IHO Decision at p. 16).[10]

In light of my findings above, the equitable considerations determination will only be for the 10-month tuition at Vincent Smith in the amount of $64,850.

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

[10] It appears that the IHO did misstate the 10-month 2022-23 school year tuition as $61,607.50; however, that was the calculated reduced amount as the 10-month tuition was in the amount of $64,850 (see IHO Decision at p. 16; see Parent Ex. L).

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 or CPSE 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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 [2d Cir. 2006]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]).

Here, the parent's ten-day notice disagreeing with the October 2021 IEP was dated June 16, 2022 (see Parent Ex. B). The ten-day notice specifically stated that the purpose of the letter was to provide "notice of the [p]arent's intent to place the [s]tudent at the Vincent Smith [School] for the extended 2022-23 school year program" (id. at p. 1). The letter further stated the parent's disagreement with the October 2021 IEP because of "a lack of sufficient data, discussion, and reporting of the [s]tudent's performance levels; generic goals and progress measuring methods; deficient degree of specialization and intensity of services, therapies, supports, modifications and accommodations to address the [s]tudent's academic delays and learning needs; predetermined recommendations in conflict with the evidence of the [s]tudent's regression, and alternative programs were not considered" (id. at pp. 1-2).

The Second Circuit has emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist. v. C.S.,

990 F.3d 152, 171 [2d Cir. 2021]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the 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"]). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

Therefore, contrary to the finding by the IHO, I find that the parent did timely comply with the ten-day notice requirement. The October 2021 IEP had an implementation date of November 2, 2021 with a projected annual review date of October 19, 2022 (Parent Ex. C at pp. 1, 24-25). Therefore, the October 2021 IEP would be the IEP in place at the start of the 2022-23 school year when the parent determined to unilaterally place the student at Vincent Smith.[11] The parent timely expressed her objections to the recommended program for the 2022-23 school set to begin in September 2022. As indicated above, the IDEA provides that parents notify the district "they were rejecting the placement proposed by the public agency to provide a free appropriate public education 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]). Under the circumstances of this matter, equitable considerations do not warrant a reduction based on the lack of a 10-day notice, and the parent is entitled to direct funding of the tuition at Vincent Smith.

Furthermore, although the IHO's finding on the timing of the enrollment contract for the 12-month program is not relevant to this discussion, I will note that the IHO's finding regarding the timing of signing the enrollment contract by the parent is without merit (IHO Decision at p. 15). This argument is in direct contravention of the controlling law found in the holdings of the Second Circuit Court of Appeals, which explain 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. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [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"]).

Based upon the foregoing, the evidence in the hearing record does not support the IHO's reduction of an award of the student's tuition costs at Vincent Smith on equitable grounds.

[11] The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).

VII. Conclusion

The hearing record supports the IHO's determination that the parent was not entitled to reimbursement for the unilaterally obtained 12-month program provided to the student at Vincent Smith during summer 2022. However, the hearing record does not support the IHO's decision to reduce the award by five percent of the costs of the student's tuition for the 10-month program at Vincent Smith on equitable grounds. Accordingly, the parent is entitled to reimbursement for or direct funding of the student's tuition at Vincent Smith for the 10-month 2022-23 school year as reflected in the parent's contract with Vincent Smith, representing a total award of $64,850.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated June 24, 2024, is modified by reversing those portions of the decision that found equitable considerations warranted a 5% reduction of tuition funding for the 10-month 2022-23 school year; and

IT IS FURTHER ORDERED that that the IHO's decision, dated June 24, 2024, is modified by directing the district to directly fund/reimburse the costs of the student's tuition at Vincent Smith for the 10-month 2022-23 school year as reflected in the parent's contract.

Dated: **Albany, New York**
October 23, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER