The University of the State of New York

The State Education Department
State Review Officer
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No. 24-477

Application of the BOARD OF EDUCATION OF THE CLARKSTOWN CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Jaspan Schlesinger Narendran LLP, attorneys for petitioner, by Carol A. Melnick, Esq.

Sabharwal, Globus & Lim LLP, attorneys for respondents, by Julie D. Globus, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition at the Windward School (Windward) for the 2023-24 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

Prior to finding the student eligible to receive school-aged special education services, the student received speech-language therapy through early intervention (EI) services and committee on preschool special education (CPSE) services (Parent Ex. K at p. 1). The family moved several times due to needs associated with one of the parent's military career and the student's educational history includes attendance at public and private schools in New York and Florida (Tr. p. 2068 - 71; Parent Exs. B at p. 1, K at p. 1, V at p. 2). The student was enrolled in and attended the district schools in September 2020 (third grade) (Tr. p. 2070; Parent Ex. A at p. 1). According to December 2023 independent neuropsychological evaluation, the student had received diagnoses of a specific learning disorder, with an impairment in reading (dyslexia); specific learning disorder,

with impairment in math; and specific learning disorder, with impairment in written expression (Parent Ex. V at pp. 2, 19; Dist. Ex. 2 at p. 9).[1]

A reevaluation of the student was conducted by the district in December 2020 and January 2021 which resulted in a psycho-educational reevaluation report dated January 20, 2021 (see Parent Ex. J). The reevaluation report indicated that at the time the student received ICT services in math and ELA and received speech language services (id. at p. 1). A social history update was also conducted as part of the reevaluation process (see Dist. Ex. 14). An independent neuropsychological evaluation was conducted in June and July 2021 (see Parent Ex. B).[2] For the 2021-22 (fourth grade) and 2022-23 (fifth grade) school years the CSE developed IEPs for the student; however, those IEPs were not admitted as evidence in the hearing record (see Parent Exs. A-H; J-M; P; V-Y; AA-BB; DD; FF; HH-QQ; see Dist. Exs. 1-18, 20-21). The district purposefully excluded the two IEPs from its evidentiary presentation and successfully argued to the IHO that the student's IEPs marked as Parent Exhibits Q and R should be excluded because the parents' claims related to those school years had been settled by the parties (Tr. pp. 1073-75).[3]

In March 2022, the district undertook an evaluation of the student's executive functioning skills (see Dist. Ex. 4). Later, on September 9, 2022, the district had an assistive technology

[1] The independent educational evaluation noted two diagnoses obtained from an earlier 2021 independent neuropsychological evaluation of the student (see Parent Ex. B at p. 9). The student was diagnosed with a specific learning disorder, with impairment in written expression in the latter December 2023 IEE after the IEP at issue was developed (see Parent Ex. V at p. 19).

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

[3] Regardless of the parties' respective reasons for entering into settlement, the strategy of excluding the student's underlying special education records such as the March 2022 IEP that the June 2023 CSE in question was reviewing —which review of the current IEP in place is among the continuing statutory functions of the CSE during a mandated annual review process— is a chancy strategy at best. The fact that there was prior litigation, and a settlement agreement does not excuse the district from leaving gaps in the evidentiary record. It should not matter because, generally, the courts have been clear that for purposes of a tuition reimbursement claim, the student's needs and the specially designed instruction that is offered each school year must be analyzed separately (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 414-15 [S.D.N.Y. 2005] [holding that parents must "put FAPE at issue" in each school year for which they seek tuition reimbursement by giving notice to the district], aff'd, 192 Fed. App'x 62 [2d Cir. Aug. 9, 2006]; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *7 [N.D.N.Y. Sept. 29, 2010] [noting that reenrollment at a private school does not extinguish analysis of the elements applicable in a tuition reimbursement case]; S.W. v. New York City Dep't of Educ., 646 F .Supp. 2d 346, 366 [S.D.N.Y. 2009]). However, the requirement of a separate analysis does not mean that facts regarding the preceding IEP that is undergoing revision by a CSE should simply be ignored. The resolution of the dispute in this case does not turn on this issue and thus the harm is diminished, but obstruction of the development of the record by omission of the IEP immediately preceding the IEP in question is, generally speaking, a significant problem for the orderly resolution of disputes among parties, especially when they raise substantive disputes over the proper design of an IEP.

evaluation conducted to "explore reading and writing supports" for the student (see District Ex. 6). For the 2022-23 school year the student attended Windward (see Parent Ex. AA; see Dist. Exs. 7-8; 11).[4]

On June 8, 2023, the CSE convened for an annual review and found the student eligible for special education services as a student with a learning disability (see generally Dist. Ex. 9). The CSE recommended the following special education program: 15:1 special class in English language arts (ELA) daily for 45 minutes; integrated coteaching (ICT) services daily in the areas of math, social studies, and science; and a 12:1 special class to develop the student's organizational and study skills for four days out of a six-day cycle (Dist. Ex. 9 at pp. 1, 11-12). For related services, the June 2023 CSE recommended daily 40-minute sessions of an individualized specialized reading program and every other day 45-minute sessions of a small group specialized reading program (id. at pp. 1, 12). In addition, the June 2023 CSE recommended supplementary aids and services consisting of check for understanding, preferential seating, reteaching of materials, refocusing and redirection, additional time to complete assignments, use of a graphic organizer, and copy of class notes (id. at p. 12). For assistive technology devices and services, the June 2023 CSE recommended speech to text and or cowriting software for lengthy assignments and access to a portable word processor for writing assignments in all classes (id. at p. 13). The June 2023 CSE recommended a monthly 30-minute speech-language consultation with teachers with respect to the student's IEP (id.). Lastly, the June 2023 CSE recommended 12-month services consisting of five 60-minute sessions per week of 1:1 special class reading to support the student's decoding and repetition to support her skills (id.).

For sixth grade (2023-24 school year) the student continued to attend Windward (Parent Ex. QQ at pp. 4-7). The parents obtained a private speech and language screening for phonological awareness in July and October 2023 (see Parent Ex. K). In December 2023, the student underwent a second independent neuropsychological evaluation (see Parent Ex. V).

A. Due Process Complaint Notice

In a due process complaint notice dated July 18, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally IHO Ex. IX). The parents filed the due process complaint notice pro se and later retained counsel.

The parents allege that the student attended the district schools for two years "with services that did not appropriately meet her needs" and in which the student did not progress "academically, developed low self-esteem, anxiety, and school avoidance" (IHO Ex. IX at p. 2). The parents allegations are general with respect to the two years at issue and further state that the district failed to provide specialized reading instruction; the reevaluation was conducted by an intern virtually; the district provided inconsistent specialized reading programs; the district "failed to provide a qualified professional for services on her 2021-2023 IEP[s] – after school tutoring;" the district failed to provide extended school year (ESY) services listed on the student's 2023-24 school year

[4] Windward has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

IEP; and the student made no progress which contributed to her anxiety, low self-esteem, and school avoidance (id.).

Additionally, the parents alleged that the student's placement at Windward reduced her anxiety and school avoidance and helped to close the "educational gap" for the student (IHO Ex. IX at p. 3). As relief, the parents requested that the district "be mandated to send" the student to Windward for the 2023-24 school year (id.).

After retaining counsel, the parents attempted to file an amended due process complaint notice, dated October 24, 2023 (see IHO Ex. I). In an email dated October 25, 2023, the district objected to the amended due process complaint notice on the grounds that it was an incomplete document, and some of the allegations were precluded by a settlement agreement (IHO Ex. II). In response to the district's objections, parents' counsel stated that the amended due process complaint notice was based upon "a change in circumstances" pertaining to the extended year services (IHO Ex. III). Further, parents' counsel stated that she

> believe[d] that procedurally the family could file a second [d]ue [p]rocess [c]omplaint to obtain compensatory services for the failure of the [d]istrict to provide ESY services [the student] was entitled to and did not receive from July to August of 2023 and any additional services to which she would be entitled in order to compensate for any regression; and then ask to have those due process complaints merged. However, I am thinking that should be unnecessary

(id.). The IHO responded to the parties on October 26, 2023, stating that the "original complaint while sparse on details did put forth a legally sufficient due process complaint for a tuition reimbursement case for the [20]23-24 school year" (IHO Ex. IV at p. 1). The IHO then conducted an examination of the due process complaint notice and amended due process complaint notice (id.). In particular, the IHO stated that the amended due process complaint notice gave detail as the why the district's recommended program was not appropriate which were "all permissible areas of inquiry for the parents to explore in their attacking the district's" IEP and "do not need to be specifically plead in a [due process complaint notice], but are very much permissible areas of inquiry at this hearing; hence my reasoning for suggesting to proceed on the original DPC as none of these arguments would be precluded even though not specifically plead" (id.).[5]

Next, the IHO offered three options to the amended due process complaint notice issue: First, withdraw the amended due process complaint notice and proceed to the scheduled hearing

[5] Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

on November 7th based upon the original due process complaint notice filed in July 2023; second, allow for parents' counsel to submit an amended due process complaint notice and cancel the November 7th hearing; or third, permit parents' counsel to file a new due process complaint notice and then the IHO would consider consolidation of the two complaints and then proceed under new time lines (IHO Ex. IV at p. 2). In response, parents' counsel stated that the parents would proceed with their case under the July 2023 due process complaint notice, thereby withdrawing the amended due process complaint notice (IHO Ex. VI).[6]

B. Impartial Hearing Officer Decision

Prehearing conferences were held on August 22, 2023; October 19, 2023; and November 6, 2023 (Nov. 6, 2023 Tr. pp. 1-50)[7] (IHO Decision at pp. 1-2).[8] An impartial hearing convened on November 7, 2023 and was completed on April 12, 2024, after eleven days of proceedings (Tr. pp. 1-2477).[9] In a decision dated September 18, 2014, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, that Windward was an appropriate unilateral placement, and that equitable considerations favored the parents for an award of full tuition reimbursement (IHO Decision at pp. 8, 16, 19, 22, 24, 31, 34-35).

In regard to the IHO's conclusion that the district failed to offer the student a FAPE, the IHO discussed the district's psycho-educational reevaluation report dated January 20, 2021, and found that, because the evaluation was conducted virtually and performed by a school psychology intern under the supervision of the school psychologist, it was not reliable but it was nevertheless used to develop the June 2023 IEP (IHO Decision at pp. 9-10). Next, the IHO held that the school psychologist was unqualified to evaluate the student's needs especially as it related to dyslexia, dysgraphia, and dyscalculia (id. at p. 10). The IHO did not find the school psychologist to be "very credible or reliable" (id.). The IHO found that "no specific service addressed the need for consistent and structured routine support, encouragement, modeling, breaking down language and explanation as there was no specially designed instruction offered in the subject IEP to support the generalization of skills taught into the academic setting across the entire curriculum as the district's reliance on the ICT class as being able to provide such was not at all proven by a preponderance of the evidence" (id. at p. 12). The IHO acknowledged that an IEP is not required to include a

[6] The IHO confirmed that the amended due process complaint notice was not in evidence (Nov. 6, 2023 Tr. pp. 8, 22-23). Nevertheless, the IHO did ultimately include a copy of the amended due process complaint notice in the hearing record as IHO Exhibit I , over the objection by the district (see IHO Exs. I, X). The operative due process complaint notice, however, is IHO Exhibit IX dated July 18, 2023.

[7] The prehearing conference transcript dated November 6, 2023 is paginated pages 1-50; however, once the impartial hearing began the pages again start at page 1 and continue through page 2477 (see Nov. 6, 2023 Tr. pp. 1-50; Tr. pp. 1-2477). Since the pages for the prehearing conference and impartial hearing are not all consecutive, and for clarity of the hearing record. the prehearing conference transcript will state the date of November 6, 2023 and be proceeded by the relevant pages. Any citations to the impartial hearing will not be preceded by a date.

[8] Contrary to State regulations, the hearing record does not include a transcript or a written summary of the August 23rd and October 19th prehearing conferences (see 8 NYCRR 200.5 [j][3][xi] [requiring that a "transcript or a written summary of the prehearing conference shall be entered into the record by the [IHO]"]).

[9] The IHO decision failed to list the hearing dates of January 29th and 30th, 2024 (see IHO Decision at p. 2).

specific methodology; however, he nevertheless found that the district did not then offer testimonial evidence regarding the method of instruction that would be used with the student (id. at pp. 12-13). Additionally, the IHO found that because the district failed to provide the parents with the "experience and credentials" of the teachers the parents were denied a meaningful opportunity to participate in the CSE process (id. at p. 13). Although excluding the earlier IEPs from evidence at the request of the district, the IHO found that the 2023-24 IEP was "not that dissimilar" from the 2021-22 IEP, and as such the 2023-24 school year IEP "failed to account for the student's lack of progress or better stated lack of a meaningful educational benefit" (id.). The IHO also found that the failure of the district to implement ESY services for the student during the summer 2023 was a denial of FAPE (id. at p. 12).

Next, the IHO addressed the testimony of the district's speech-language pathologist which the IHO found failed to explain how the IEP recommendations were appropriate for the student (IHO Decision at p. 13). The IHO found that her testimony was not credible, and her body language indicated that her testimony was not "authoritative on the matter" (id. at p. 14). The IHO concluded that "the subject IEP did not provide the appropriate level of specificity of the program offered and required the family to take a blind leap of faith that the subject IEP would have provided an appropriate program" (id.). In his decision the IHO also faulted the district for not providing the parents with a class profile in August 2023 (id. at p. 15). The IHO found that the district failed to present "a scintilla" of evidence that the ICT services were appropriate for the student (id.).

The IHO found that the June 2023 CSE failed to develop measurable annual goals and did not obtain the student's present levels of performance prior to the meeting (IHO Decision at p. 16). In addition, the IHO found that the district's special education teacher in math was unfamiliar with the student and her testimony was unreliable (id. at p. 17). The IHO further found the testimony of the special education teacher and "Wilson Dyslexia Practitioner" as irrelevant because she did not attend the CSE meeting at issue and had no first-hand knowledge of the student (id. at pp. 17-18). Further, the IHO found that the June 2023 CSE did not have a general education teacher present specifically when ICT services were recommended, and thereby denied the student a FAPE (id. at p. 18).

The IHO next discussed the testimony of the parents' witness who was a retired teacher/special education advocate who had previously been employed by the district (IHO Decision at p. 19).[10] The IHO concluded that her testimony "was dispositive" on the issue that the district failed to offer the student a FAPE for the 2023-24 school year (id. at pp. 19-20). He believed her testimony was "worthy of belief" and reliable (id. at p. 19). The IHO also found that the testimony of a former Windward school psychologist, together with the testimony of the retired district teacher/special education advocate, and the literary specialist, made it clear that the June 2023 IEP did not offer the student meaningful educational benefit (id. at pp. 12, 21-22).[11] The IHO found that the June 2023 "IEP seemed more designed to survive a prong one challenge at an

[10] The advocate was not listed as participating in the CSE process (Dist. Ex. 9 at p. 1).

[11] The former Windward employee was the individual who conducted the IEE approximately six months after the CSE in question (Parent Ex. V).

impartial hearing than to actually provide this student with a meaningful educational benefit and a majority of the district's testimony concerning such program must be taken with a very healthy dose of skepticism" (id. at p. 22).

Next, the IHO discussed the appropriateness of Windward and found that the unilateral placement met the unique needs of the student (IHO Decision at pp. 24-31). The IHO relied on the testimony from the student that the instruction was "much better" at Windward (id. at pp. 24-25). The IHO considered the student's improvement in reading, the smaller class sizes offered at Windward, and that the unilateral placement offered programming for students with "specific learning disabilities" similar to the student in this matter (id. at pp. 25-26). Furthermore, the IHO relied on testimony that the student made meaningful progress while at Windward, and therefore, it was an appropriate unilateral placement (id. at p. 29). In reviewing equitable considerations, the IHO found, among other things, that

> [t]he equities in this matter do favor a finding that parents are entitled to tuition reimbursement for the unilateral placement of the student. Neither side was pre-determined in a way that was inappropriate or violative of the law. Both sides wanted to do right by this student within the limitations of the options available to them. It is the system here that pre-determined a bad outcome for this matter as there is no villain here

(IHO Decision at p. 30). The IHO also made findings that if the district wanted to thank the student's parent for military service rendered, the district would have found a way to settle the matter (id. at p. 33-34). The IHO found that the parent's cooperated with the CSE and, consequently, ordered the district to reimburse the parents reimbursement for the student's tuition at Windward for the 2023-24 school year (id. at pp. 30-33).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in finding that the district failed to meet its burden and that it did not offer the student a FAPE for the 2023-24 school year, that Windward was an appropriate unilateral placement, and that equities favored an award of tuition reimbursement to the parents.[12, 13]

The district contends that the IEP was reasonably calculated to offer the student a FAPE as it was based upon "comprehensive assessments." The district asserts that its psycho-educational reevaluation was used with COVID protocols, and the evaluation was similar to the July 2021 independent neuropsychological evaluation. In addition, the district argues that the recommended program was the least restrictive environment (LRE) for the student. The district also asserts that

[12] The district failed to file a notice of request for review as required by State regulations (see 8 NYCRR 279.3; 279.4[e]).

[13] The district filed a "Petition Notice of Request for Review" with the Office of State Review on October 29, 2024. The regulations governing practice before the Office of State Review were amended (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26) to, among other things, align with federal terminology and change the name of the pleading to initiate a review from "petition" to "request for review" (8 NYCRR 279.4[a]; see 34 CFR 300.515[b]).

the IHO erred in finding that the June 2023 CSE was not properly constituted as one of the members was certified in both special education and general education.

The district argues that the IHO placed an "exorbitant" amount of weight on the testimony of a retired district teacher/special education advocate who in fact lacked the qualifications to provide an opinion on the appropriateness of the program recommended for the student. The district claims that the IHO "arbitrarily" discredited the testimony of the district witnesses and the January 2021 reevaluation of the student.

In connection with the findings with respect to Windward, the district argues that the parents failed to have any witness from the unilateral placement testify. The district argues that the IHO did not properly weigh the equitable considerations and that the father's military status "appeared to be a consideration" in his equities analysis. Furthermore, the district contends that the IHO's statements about the father's military status demonstrated the IHO's "extreme bias in favor of the parents." Ultimately, the district seeks a reversal of the IHO's decision.

In an answer, the parents argue that the IHO correctly found that the June 2023 IEP was not reasonably calculated to provide the student with a FAPE. The parents failed to verify the answer. Instead, the parents' attorney executed a purported verification of the "annexed notice of request for review and memorandum of law and knows the contents thereof" (capitalization omitted). Under the practice regulations, the parents were required to verify the request for review in conformity with 8 NYCRR 279.7, not the parents' attorney. Additionally, the attorney verified the wrong pleading in any event. As for the contents of the defective answer, the parents argue that the district did not obtain updated evaluations, failed to obtain the student's present levels of performance, and failed to recommend measurable and relevant annual goals for the student. Additionally, the parents agreed with the IHO that the IEP was based upon "flawed assessments." They contend that the January 2021 reevaluation and June 2021 independent neuropsychological evaluation contained similar results; however, that fact further demonstrates that the student failed to obtain meaningful benefit from the district's program. The parents further argue that the IEP failed to address the student's need for consistency and "homogenous grouping." They contend that the hearing record does not support a finding that the ICT services were appropriate for the student. The parents state that the IHO's credibility findings were properly made.

In opposition to the district, the parents argue to uphold the IHO's findings that Windward was an appropriate unilateral placement and that equitable considerations favored an award of tuition reimbursement. In two separate statements in their answer, the parents contend in one clause in their answer that they should be awarded compensatory educational services for the district's failure to provide the student with all of her 12-month services. However, the parents failed to file a notice of intention to cross-appeal and have not actually set forth a cross-appeal with respect to their request for compensatory education specifically alleging why the IHO erred in his decision.[14] Unsurprisingly the district did not file a responsive pleading since the parent did

[14] State regulations provide that a respondent who disagrees with a portion of an IHO decision must set forth a cross-appeal in an answer that "clearly specif[ies] the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by

not file a cross-appeal with the answer. Therefore, the parents' request for compensatory relief is improperly plead and will not be further discussed.

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

a State Review Officer" (8 NYCRR 279.4[f]; 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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]).[15]

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-

[15] 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).

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. Challenges to the IHO's FAPE Determinations

Turning first to the districts challenges to the IHO's reasons for concluding that the district denied the student a FAPE for the 2023-24 school year, the district challenges many, but not all of them, notwithstanding that the IHO reached the same conclusion repeatedly on numerous grounds. More specifically, the district appeals the IHO's findings with respect to the January 2021 reevaluation, arguing that the IHO should have found that it was a valid and "comprehensive" reevaluation of the student; that the program recommended for the 2023-24 school year "was specifically tailored" to meet the student's academic needs in the least restrictive environment (LRE); that the June 2023 CSE was properly constituted; and, furthermore the district argues that that the IHO should not have "arbitrarily discredited" several of the district witnesses (Req. for Rev. ¶¶ 7-11, 13-16).

However, in the district's notice of intention to seek review, which precedes a forthcoming request for review,[16] the district anticipated that the issues for review would also include 12-month services and IEP implementation, as the IHO included adverse FAPE determinations in his decision on those bases. However, in the district's request for review the IHO's adverse rulings regarding 12-month services and IEP implementation were not raised. Accordingly, the IHO's determination that the district's failure to implement 12-month services was a denial of FAPE to the student for the 2023-24 school year 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]).

Having gone unaddressed, the IHO's unappealed findings on this narrow but significant issue led to a determination of a denial of a FAPE under the circumstances. As noted above, the

[16] The preparation and service of a notice of intention to seek review in the administrative due process forum is quite different from a notice of appeal in a civil action. In this forum, the appeals are commenced by timely service of a request for review, rather than by the service or filing of a notice of intention to seek review, which addresses other administrative necessities related to due process proceedings conducted under IDEA. Thus, under the practice regulations, the failure of a party to serve a notice of intention to seek review in a particular instance is often not fatal, as an SRO has the discretion to overlook that type of defect (8 NYCRR 279.2[f]). However, in accordance with the same set of practice regulations, the failure to raise an adverse ruling in a request for review constitutes the party's abandonment of that issue (8 NYCRR 279.8[c][4]; see Bd. of Educ. of Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *12 [S.D.N.Y. Sept. 20, 2024]).

student had been attending Windward during the 2022-23 school year, but commencing with the 2023-24 school year, the district recommended 12-month services beginning on July 3, 2023 and continuing through to August 11, 2023 (Dist. Ex. 9 at pp. 1-2, 13). The recommended 12-month services consisted of a 1:1 special class of reading daily for one hour (id. at pp. 1, 13). During the impartial hearing, the parties disagree as to whether the parents should have notified the district of their intent to obtain summer services for the student, but the evidence is clear that it was not until August 1, 2023 that the 1:1 special reading class was provided to the student (Tr. pp. 65, 90-92, 99-101, 124-25, 896-98, 2255-56, 2260-63; District Exs. 9 at p. 2; 16; 17 at pp. 1-3; 18 at pp. 6-7; 21).[17] If the 12-month month services were properly implemented the student would have received 30 hours of reading instruction; however, due to the delay in implementation the student only received 12 hours of reading instruction (see Dist. Ex. 17). Here, while the district has not appealed this aspect of the IHO's decision, I note that the implementation of less than half of the 12-month services, in the form of 1:1 specialized reading instruction recommended for the student with an undisputed specific learning disability in reading and writing, would be difficult for the district to prove that the failure to implement the student's ESY services did not result in a denial of FAPE to her for the 2023-24 school year, even if it had been appealed.[18]

As most of the parties' dispute turned on the design of the June 2023 IEP rather than its implementation (and the district focused entirely on the IEP design arguments), I will briefly note

[17] Regardless of whether the parent stated she would notify the district that the student would attend the summer program, once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

[18] The standard to determine whether there is a denial of a FAPE due to non-compliance with the terms of the IEP is whether there was a "material" or "substantial" deviation from the terms of the IEP (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions under the circumstances of therapist absence as a result of the therapist's absence was not a significant failure to implement the student's IEP]; L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; C.M. v. Mount Vernon City Sch. Dist., 2020 WL 3833426, at *26 [S.D.N.Y. July 8, 2020]).

that several discrete factual findings the IHO made in determining that the district also deprived the student of a FAPE on grounds other than the ESY implementation issue were erroneous.

For instance, the IHO's adverse ruling against the district regarding the administration of the January 2021 evaluation to the student virtually as opposed to face-to-face failed to comport with recent state guidance on the subject (IHO Decision at pp. 9-10). According to State guidance issued March 27, 2020 regarding evaluations during the COVID-19 pandemic, any evaluation that did not require face-to-face assessments or observation may take place while schools are closed if the parent consents ("Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at p. 6, Off. Of Spec. Educ. Policy Memo [March 27, 2020], available at https://www.nysed.gov/sites/default/files/programs/coronavirus/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf). Further, the guidelines indicate that a reevaluation may be conducted by reviewing existing evaluation data and such review may occur without a meeting and without obtaining parental consent, unless it is determined that additional assessments are needed (id.). However, later State guidelines encouraged school districts to work with parents to reach mutually agreeable extensions of time; to consider ways to use technology to meet timelines by conducting reevaluations remotely; and to appropriately document any delay in meeting timelines which must be communicated to parents in their preferred language or mode of communication ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State – Additional Questions and Answers," at pp. 4-5, Office of Special Educ. Mem. [Apr. 2020], available at https://www.nysed.gov/sites/default/files/programs/coronavirus/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf). As such, I find that the IHO failed to consider the State guidance regarding the conduct of evaluations during the COVID-19 pandemic when determining whether the June 2023 CSE had sufficient evaluative information before it to make an appropriate recommendation. Furthermore, when criticizing the district's psychoeducational assessment, the IHO failed to consider that the in-person neuropsychological IEE conducted over the course of June and July 2021 contained results similar to the district's January 2021 revaluation (compare Parent Ex. B with Dist Ex. 1).[19] In fact, throughout the decision, the IHO almost entirely relied on the testimonial evidence of the witnesses and did not conduct a meaningful assessment of the documentary evidence submitted by the parties on this issue (see IHO Decision at pp. 9-22). The IHO's findings also focused on the credibility of witnesses and failed to take into account the documents that the June 2023 relied upon in making its recommendations (see generally Dist. Exs. 1-2; 4; 6-9; 11-12; 14). In addition, the IHO found that several of the district witness had no "firsthand" knowledge about the student or her needs and deficits (IHO Decision at p. 17-18). However, this finding was in error insomuch as the standard is not merely a contest of which side has the greatest personal familiarity with the student, and the district staff should be afforded some

[19] The IHO also unreasonably criticized the assessment simply because it was conducted by a school psychologist intern under the supervision of a school psychologist. However, the IHO failed to recognize that such supervised assessment activities are explicitly authorized by State regulation and are, in fact, required in order to continue to have skilled school psychologists enter the profession (8 NYCRR 80-2.3[e]). As mentioned above, the intern's assessment was supervised and on par with the neuropsychologist's IEE, while being conducted under far more difficult circumstances related to the pandemic, and she appropriately noted that its results should be interpreted with caution and the reasons why (Dist. Ex. 1).

deference in being charged with the responsibility of developing the student's IEP after the student had been placed by the parents in a non-public school. Furthermore the IHO neglected to address that several witnesses had direct knowledge about the student and her needs.

The IHO found that the 2023-24 IEP was "not that dissimilar" from the 2021-22 IEP, and as such the 2023-24 school year IEP "failed to account for the student's lack of progress or better stated lack of a meaningful educational benefit" (IHO Decision at p. 13). This conclusion however, assumed facts not in evidence as the 2021-22 IEP was not in the hearing record and there was no evidence pertaining to the recommended program or services during the 2021-22 school year (see Tr. pp. 2339-67). This finding of the IHO should be reversed.

The IHO also found that the district failed to develop measurable annual goals "since they did not obtain their current present levels of functioning prior to such CSE meeting" (IHO Decision at p. 16). However, the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable." Therefore, the IHO's finding with respect to the annual goals also was error because he held the district to requirements that exceeded those found in federal or State regulations.

The IHO further found that that upon request by the parents of a class profile, the district should have "immediately" provided the parents with the information (IHO Decision at p. 15). The IHO determined that the class profiles that were provided by the district and were admitted in the hearing record as evidence were not accurate and not to be relied upon (id. at pp. 15-16). However, the "class profiles" from the district presumably would have been of use in ensuring that there would be an appropriate age and functional grouping for the student in her classes.[20] However, deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be impermissibly speculative in nature (J.C. , 643 Fed. App'x at 33 [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent post M.O. (G.S., 2016 WL 5107039, at *15 [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"], citing M.O., 793 F.3d at 245). Accordingly, the IHO's findings with respect to the classroom profiles in evidence did not adequately take into account the purpose of the profiles or the relevant law concerning how

[20] With regard to what is often called "functional grouping," State regulations provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]).

challenges relying on class profiles where the student did not attend the district school should be construed.

Thus, the district's criticisms of the IHO's decision on appeal are largely correct. As described above, the IHO's educational analysis of the district's programming and his FAPE determinations turned in large part on the body language of the witnesses and factors such as eye contact, thus mainly in terms of credibility, but he then failed, for the most part, to conduct an analysis of the documentary evidence submitted by the parties (see generally IHO Decision at pp. 9-22).[21] For instance, the IHO failed to assess or discuss the content of the June 2021 neuropsychological IEE which contained results similar to the January 2021 revaluation or the evaluative information that the June 2023 relied upon in making its recommendations (see generally Dist. Exs. 1-2; 4; 6-9; 11-12; 14).[22] In addition, the IHO found that several of the district witness had no "firsthand" knowledge about the student or her needs and deficits, despite the inapplicability of that standard (IHO Decision at p. 17-18). However, it is well settled that district staff were the ones charged with developing the student's IEP and several district witnesses had direct knowledge about the student and her educational needs from working with her recently in prior school years.[23, 24] Accordingly, while it is not necessary to reach all of the FAPE

[21] Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). The witness that IHO described as "dispositive" in his FAPE finding may well have firmly believed her viewpoints (IHO Decision at pp. 19-21), but she did not share her views with the CSE or participate in the development of the June 2023 IEP, and while the IHO attempted to connect her testimony to an assessment of the student's progress during the 2021-22 school year, approximately one year prior to the IEP in question, and the witness did not assess the student after retiring from the district.

[22] Moreover, in at least one instance, the IHO relied on a document not in evidence. The IHO found that the 2023-24 IEP was "not that dissimilar" from the 2021-22 IEP, and as such the 2023-24 school year IEP "failed to account for the student's lack of progress or better stated lack of a meaningful educational benefit" (IHO Decision at p. 13). The 2021-22 IEP, however, was not in the hearing record and there was no evidence pertaining to the recommended program or services recommended for the student or provided during the 2021-22 school year (see Tr. pp. 2339-67).

[23] The district cannot be faulted for spending fewer hours with the student given the parents' choice to place the student privately and, generally, judgments of district staff may be afforded some amount of deference (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

[24] The school psychologist assisted in the reevaluation of the student in January 2021; and the district's speech pathologist reevaluated the student in December 2020 and worked with the student during the 2021-22 school year (Tr. pp. 595, 604; see Parent Ex. J; see Dist. Ex. 13).

determinations of the IHO in light of the unappealed findings of the district's failure to implement the student's ESY services, the remainder of the IHO's FAPE determinations stand on much less firm ground due to the IHO's faulty factual determinations, reliance on improper standards, and inadequate assessment and weighing of relevant evidence in the hearing record.

B. Unilateral Placement

Having determined that the IHO correctly found that the district failed to offer the student a FAPE for the 2023-24 school year, the next inquiry focuses on whether the parents' unilateral placement of the student at Windward was appropriate.

The district argues that no one from Windward testified about the student and the program she received during the 2023-24 school year, and therefore, any conclusion that Windward was appropriate was "pure speculation." The district asserts that the IHO erred in relying on the testimony of the retired district teacher/special education advocate because there was a lack of evidence that she had any knowledge of the Windward "upper school" where the student was unilaterally placed. Additionally, the district contends that the IHO improperly relied on the testimony of a former Windward employee for the training and qualifications of the staff at the unilateral placement, stating that "[t]he vital testimony of the private placement cannot be replaced by former employees nor by testimony of the family who are not trained in education and therefore cannot articulate with sufficient detail, the services provided and the progress attained or not."

The parents contend that they provided the testimony of three witnesses: two of which were familiar with the "programming" at Windward. Further, the parents claim that the student's testimony was "compelling" and spoke "volumes to the appropriateness of Windward." Lastly, the parents argue that one of the district's school psychologists observed the student at Windward but did not testify at the impartial hearing.

The IHO concluded that based upon his review of the hearing record, "the education and services provided at the private school m[e]t the unique needs of the student" (IHO Decision at p. 24). The IHO then discussed how no one from Windward testified at the impartial hearing but they cooperated and participated in the CSE process with the district (id.). The IHO relied on the testimony of the retired district teacher/special education advocate that Windward was appropriate for the student (id.). Next, the IHO concluded that the student's testimony was "compelling" to demonstrate the appropriateness of Windward (id. at pp. 24-25, 30). The IHO also relied on the testimony of a former Windward employee that the classes were smaller at Windward and that the school did not rely on assistive technology to remediate the students' deficits (id. at pp. 26-27). The IHO also found evidence of progress based on the testimony of the parents' witnesses (id. at pp. 29-31).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at

11; see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 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). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student Needs

According to assessment results from the 2021 evaluation reports, the student presented with average cognitive functioning with relative strengths identified in the visual spatial index and weaknesses in working memory and processing speed (Parent Exs. B at pp. 5, 9-10, 14; J at pp. 3-5, 7, 10). Academic assessments found the student's achievement ranging from the below average

to the high average range with relative strengths in oral vocabulary, reading comprehension and sentence composition and weaknesses in phonological processing, word reading, decoding, phonemic proficiency, math fluency and problem solving, and spelling (Parent Exs. B at p. 7, 9-10, 15-16; J at pp. 4-5, 7-8, 11, 13-15).

A March 2022 administration of the Behavior Rating Inventory of Executive Functioning - 2nd edition (BRIEF2) found that both parent and teacher ratings placed the student within the normal limits on all indices suggesting that the student exhibited an appropriate ability to self-regulate at a basic level (Dist. Ex. 4 at pp. 1, 3). The student was described as having good ability to adjust well to changes in environment, people, plans, or demands, and react to events appropriately (id. at p. 1). A September 2022 assistive technology evaluation found the student would benefit from using a reading pen when decoding low frequency words in shorter, hard copy passages, math word problems, worksheets or books and access to text to speech options for longer more challenging passages (Dist. Ex. 6 at p. 4). When writing digitally, the examiner suggested standard spelling and grammar options, word prediction software with topic dictionary features for a higher level of spelling support, and for longer assignments the voice to text feature as it could potentially enable the student to generate more complex sentences (id.).

Within the October 2023 speech and language screening for phonological awareness, the speech pathologist reported the student demonstrated age-appropriate pragmatic language skills during the evaluation but had difficulty with phonological awareness skills and spelling (Parent Ex. K at p. 4). In addition, she reported the student struggled with prediction and detail questions, was unable to demonstrate the ability to formulate compound and complex sentences, struggled with spelling and grammar, had difficulty discriminating between /a/ and /e/ vowels, and that her writing was assessed to be "far below grade level" (id.). In sum, the speech pathologist found the student continued to struggle with rapid automatic naming skills, and in areas of phonological awareness skills and in reading and spelling, required an inordinate amount of time to complete reading tasks, had difficulty reading single words in isolation on grade level, demonstrated difficulty hearing sounds in words in isolation, and demonstrated inaccurate and labored oral reading (id. at p. 7). She reported that the student demonstrated many signs of having dyslexia and noted that rapid automatized naming was considered a universal marker of developmental dyslexia (id.).

A December 2023 independent neuropsychological evaluation yielded results that continued to be consistent with the previous testing detailed above (see Parent Exs. J; V; see generally Dist. Ex. 2). Cognitive assessments found the student functioning in the average range with relative strengths found on visual spatial subtests and weaknesses in working memory and processing speed (Parent Ex. V at pp. 5-6, 18). In addition, the psychologist, who conducted the evaluation, found areas of weakness in the areas of attention and concentration (id. at pp. 7-8, 11). The psychologist stated recent testing suggest the student continued to struggle to quickly identify symbols and retrieve stored sounds and demonstrated impaired to low average performance on timed and untimed tests of sight word recognition non-word decoding (id. at pp. 13-15, 19). The psychologist found the student evidenced poor encoding and weaknesses in her automaticity of math facts (id. at pp. 14, 19).

The June 2023 CSE also reviewed a 2022-23 winter progress report that described the focus of the curriculum in language arts, social studies, math, science, art, and physical education during

the first quarter and how the student was performing in each of the subject areas (see Dist. Ex. 7). Much of the information contained in the present levels of performance in the June 2023 IEP was directly from the Windward 2022-23 winter progress report (compare Dist. Ex. 7 at pp. 1-6, with Dist. Ex. 9 at pp. 6-9). A 2022-23 quarter four report card from Windward found the student receiving "Very Good" or "Good" in all academic areas including language arts, social studies, math, and science, as well as in art, physical education, and behavior (Parent Ex. AA at pp. 1-3). The Windward report card also contained descriptions of what social studies and math focused on during the fourth quarter (id. at p. 2).

The parents expressed to the CSE that the student's anxiety was reduced and her "emotional well-being ha[d] increased" and there were no noted social concerns (Dist. Ex. 9 at pp. 1-2). The Windward CSE administrator present at the CSE meeting stated that the student was working on "accuracy and automaticity" using O-G instruction (id. at p. 1). It was estimated that the student was reading at a third to fourth grade level, was an "amazing tracker," attended to punctuation, and benefitted from "teacher modeling with fluency" (id.). It was reported that the student did not receive speech-language therapy at Windward, but that speech was addressed during reading (id. at p. 2). The student's handwriting was described as neat but that she struggled with spelling and "final blends" (id.). The student used "quick outlines" and graphic organizers for writing at Windward (id.). In math the student was described as accurate with computations and could solve single step word problems, but multi-step word problems were difficult for her (id.). The student was noted to be at a fifth-grade level in math (id.). The student was noted to "demonstrate[] good attention," amazing class participation, and had good organizational skills (id.). Based upon the student's stated needs, the June 2023 CSE removed the modifications of "modified work and homework and highlighted work" (id.). The June 2023 CSE did add verbal prompting to allow the student wait time for her to organize her thoughts and "teacher sentence starters/prompting to elaborate upon her oral responses" (id.).

The student's management needs were described as requiring special education services to be successful in the classroom (Dist. Ex. 9 at p. 9). The student was noted to benefit from having a visual schedule on her desk; a checklist for the steps to start and end her day; check for reassurance when returning from a "pull-out program;" "underlining or highlighting key words in directions and text;" and to have a marker when copying written work to a final drat to keep her place (id.). Further, the student's management needs detailed that the student needed to improve decoding, encoding, "written expression as it relates to encoding variables," multi-step word problem development, and letter reversals (id.).

2. Windward and Specially Designed Instruction and Progress

A program description stated that Windward was a school for children with language-based learning disabilities who possess average to superior intelligence but were not meeting the academic potential in a regular school setting and provided a specialized, language-intensive curriculum and small class settings (Parent Ex. M at p. 1). The program description states that all students have three forty-five-minute periods of language arts daily, which included oral language, reading, spelling, and writing (id.). Windward used the Preventing Academic Failure (PAF) program, a multisensory Orton-Gillingham based program, for reading and spelling (id.). The program description noted that Orton-Gillingham includes teaching the sounds the letters represent and then immediately using them to build meaningful words and sentences, introducing basic

sound/letter associations (id.). Writing at Windward was taught using the Teaching Basic Writing Skills program which provided systematic instruction in fundamental writing and developed expository writing skills; focused on the construction of sentences, paragraphs, and longer compositions; and developed the skills necessary to plan and organize information to formulate outlines and generate coherent paragraphs and compositions (id.). Students had a daily period of math which was designed to develop a strong understanding of the language and vocabulary of math (id. at pp. 1-2). According to the program description, all areas of the curriculum were language-based, sequential, and highly structured (id. at p. 2).

According to the student's sixth grade schedule at Windward, the student received Orton-Gillingham skills one period per day and language arts two periods per day Monday through Friday (Parent Ex. G). A 2023-24 first quarter report card from Windward shows the student was working on skills falling in the general areas of reading fluency, word attack skills, vocabulary, comprehension, spelling, grammar, writing complete and varied sentences, writing unified paragraphs, math computations, and word problem solving (Parent Ex. BB at pp. 1-2). For each subject area and for the first quarter, the student earned grades in accordance with a rubric of "VG – Very Good," "G - Good," or "S – Satisfactory" without further description or report (id. at pp. 1-3). Some of the notations contained either a "+" or "-" (id.). In a Windward second quarter report card, the student continued to work on the same general areas in language arts and math (Parent Ex. NN at pp. 1-2). Again, for the second quarter the report card noted a letter grade of "VG," "G," or "S" without any further detail or explanation (id. at pp. 1-3).

In February 2024, the parents requested some of the student's test grades at Windward which consisted of the following list of grades: in math - December 20th - Algebra test 92 percent; January 26th - decimal test 95 percent; in social studies – October 24th 98 percent, November 16th 89 percent, December 7th 92 percent, and January 29th 92 percent; and in science - September 102 percent, October 86 percent, November 102 percent, December 87 percent, February 96 percent (Parent Ex. NN at pp. 4-5, 7).

Within the October 2023 speech and language screening for phonological awareness, the speech pathologist stated that Windward used the PAF program for reading and spelling, which was a multi-sensory Orton-Gillingham-based program (Parent Ex. K at p. 8). She added that data clearly showed that this approach was working for the student was "necessary" for the student "to get on grade level" (id. at pp. 1-4, 7-8).

In November 2023, the district conducted an observation of the student at Windward in her language arts class of seven students and two teachers (Parent Ex. HH at p. 1). The student was observed participating in lessons involving vocabulary activities, decoding skills, tracking written text with an index card or finger while listening to a reader, oral reading, and comprehension activities (id. at pp. 1-2).

In December 2023 and January 2024 writing samples revealed the student engaged in activities involving composing, developing, and editing sentences and paragraphs (Parent Ex. MM at pp. 1-6). However, there was no testimony about the context of the writing assignments, the expectations of the student, or how the student was assessed for these assignments (see Tr. pp. 1-2477).

The hearing record shows that the retired district teacher/special education advocate was previously employed by the district and provided the student with services as a literacy specialist/reading teacher from January 2021 to June 2022 when she retired (Tr. pp. 1135, 1140-41, 1144, 1157-58, 1201). The retired district teacher/special education advocate testified at the impartial hearing, that beginning in November 2023 she began working with the student for 30 minutes once every two weeks helping her with homework in reading multisyllabic words and "reading chapter book" (Tr. pp. 1168-69, 1234-35). She acknowledged that she was working with the student in preparation for her testimony at the impartial hearing (Tr. p. 1235). Additionally, the retired district teacher/special education advocate testified that in December 2023 she went to Windward for a three-hour tour as an advocate for "somebody that was interested in it" (Tr. p. 1171, 1241; see Tr. pp. 1239-40).[25] She stated that she was able to observe about ten different classes while there and that she was ten minutes in a class - "in and out" (Tr. pp. 1189-90). She testified regarding the Windward program from that visit and "[t]he way they explained it to us" (Tr. pp. 1171-72). The retired district teacher/special education advocate testified that the student was in a class of nine students and two teachers and the first "literacy group" had from four to five students (Tr. pp. 1171-72; 1185-86, 1229). She testified that at Windward the student was receiving literacy three times a day for 45 minutes (Tr. p. 1170). The retired district teacher/special education advocate acknowledged that she did not have an opportunity to see what the student's schedule was at Windward (Tr. p. 1188). Furthermore, the retired district teacher/special education advocate testified that she did not have the opportunity to speak with anyone at Windward about the student's schedule and that no one at Windward had provided her with any information regarding the student (Tr. pp. 1253, 1274-75).

The psychologist, who conducted the December 2023 independent educational evaluation, had also worked at Windward in the lower school as a school psychologist from 2020 through June 2023 (Tr. pp. 1306, 1310-11). The psychologist acknowledged that she had no role in the middle/upper school and that she had never observed a class there (Tr. pp. 1499-00). In addition, she testified that she had not spoken to any of the student's teachers at Windward about how she was functioning and performing in class (Tr. pp. 1508-09). The psychologist testified that she did not have any input on the creation of schedules, because there was no flexibility on schedules at Windward, noting that everyone had three periods of language arts and one period of math (Tr. pp. 1457-58). She testified that she did not know enough about the curriculum in math to say if it was appropriate (Tr. p. 1487). She testified that she never conducted an observation of the student at Windward (Tr. p. 1488).

The speech pathologist, who conducted the October 2023 speech and language screening for phonological awareness, testified that based on the student's test scores she was getting the proper instruction at Windward (Tr. p. 1762; see Parent Ex. K at p. 8). Within her report, the speech pathologist stated that the student needed to continue with a full day of multisensory direct instruction that Windward had been providing to help the student get on grade level over the next school year (Parent Ex. K at p. 8). However, the speech pathologist acknowledged that she was

[25] The advocate acknowledged that the student was in the upper school and that she toured just the lower school, first through fifth grades, and that she did not have any personal knowledge of the upper school (Tr. pp. 1241, 1246).

not familiar with "what exact program" the student was in, and she never observed the student at Windward (Tr. pp. 1762-63).

The parents' literacy specialist and co-founder of Everyone Reads PA (literacy advocate) observed the student at Windward in social studies and in a reading involving comprehension oral language development where they were working on "those higher level reading skills and…the language piece" and provided testimony regarding the classroom lay-out and the classroom instruction generally (Tr. pp. 1794-95, 1840, 1904-15).[26] This observation took place for three hours (Tr. p. 1975). She did not conduct any assessments of the student (Tr. p. 1873). The literacy advocate testified that she reviewed information about the Windward program and spoke with the CSE representative at Windward about how the student was doing at Windward (Tr. pp. 1892-93). She testified about the instruction the teacher provided to the social studies class, her observations of the classroom, and that the student answered questions during the class (Tr. pp. 1906-14). She testified that the student was engaged and attentive and sometimes needed "guided support" to give a complete answer (Tr. pp. 1914-15). Although she spoke with the teacher it was not much because she was rushing in and out of the classes (Tr. p. 1916). The literacy advocate also testified about her observation of the literacy class, and described the classroom, number of students, and that the student read out loud and answered some questions with corrective feedback from the teacher (Tr. pp. 1918-22). In both classes she observed the use of graphic organizers (Tr. p. 1922). Further, she testified that during her observation of the student she noted that the student demonstrated oral language weaknesses which were supported in the classes with routines and scaffolding (Tr. pp. 1926-27, 1999). She saw "explicit" "repetitive application of [Orton Gillingham] language and corrective feedback" and "structured literacy practices" in both classes (Tr. pp. 1939, 1942). The literacy advocate testified that based upon her observations of the student Windward was providing the student with appropriate instruction (Tr. p. 2005).

The student provided testimony regarding her experiences at Windward, which included discussions of friends, her likes and dislikes and her daily schedule, which was certainly heartening, the student understandably was not of an age to provide information regarding the specially designed instruction she may have been receiving at Windward (see Tr. pp. 2036-57).

In assessing the appropriateness of a unilateral placement for tuition reimbursement purposes, parents must demonstrate that the private school provides specialized instruction tailored to the student's unique individual needs; this evidence may, at times, consist of descriptions of the school's programmatic elements without more specific evidence related to the student's experience with the individualized program during the school year at issue. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features

[26] The literacy advocate has a certification in elementary teaching in Pennsylvania and is a CERI certified structured literacy classroom teacher (Parent Ex. FF at p. 1). The literacy advocate taught in a general education classroom but never in a special education classroom (Tr. p. 1853).

such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert denied, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]).

One of the factors to consider in determining if a private school is appropriate is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient" (Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]). Parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]), as a lack of evidence as to how a student's significant area of need is addressed by the unilateral placement can result in a finding that the unilateral placement is not appropriate (see R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [finding a unilateral placement was not appropriate where it was undisputed that speech-language therapy was "critical" to remediate the student's language needs, the private placement chosen by the parents did not provide speech-language therapy and, although the parents claimed the student received private speech-language therapy, they "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided")], aff'd, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [finding that the parent failed to prove that the unilateral placement addressed the student's considerable social/emotional needs absent testimony from the student's counselor, evidence concerning the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]).[27]

Here, the testimony by the parents' witnesses about the appropriateness of Windward were conclusory opinions made without adequate factual bases in the evidence in the hearing record. The IHO found the parents' witnesses reliable and credible and accorded their testimony significant weight despite their lack of direct knowledge about the Windward program for the student for the 2023-24 school year.[28] Although a unilateral placement is not required to create a document similar to an IEP, there must be evidence that describes the specially designed instruction being provided to the student and as the IHO and district have pointed out, there was no testimony from

[27] Regulations define specially designed 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]).

[28] To the extent that I agree or disagree with the IHO's findings of fact, it is based on the weight accorded to the evidence, not the credibility of the witnesses' testimony (see L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 487-88 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at *18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *9-*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. 2013]).

any official representative, teacher, provider or other staff member from Windward at the impartial hearing, and other than letter grades and writing samples, the hearing record does not include any progress reports, assessments, goals, or other documentary evidence reflecting the specially designed instruction provided to the student.

While the hearing record does contain general information about educational programming at Windward and anecdotal information gleaned by witnesses who had similarly general knowledge of Windward not directly related to the student or who had engaged in limited observations of the student at Windward for evaluative purposes,[29] the parent was required to come forward with evidence that described the services actually provided to the student at Windward and the specifics of the delivery of those services to the student. The hearing record does not explain how any services that may have been provided by Windward addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

Furthermore, although there was testimony that the student made progress at Windward, there were no progress reports indicating the same and the testimony came from witnesses who had not worked directly with the student at Windward. It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar.

[29] In assessing the appropriateness of a unilateral placement for tuition reimbursement purposes, parents must demonstrate that the private school provides specialized instruction tailored to the student's unique individual needs; this evidence may, at times, consist of descriptions of the school's programmatic elements without more specific evidence related to the student's experience with the individualized program during the school year at issue. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert denied, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]).

29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). Accordingly, while the student's progress at Windward was a relevant factor to consider, the hearing record lacks sufficient evidence to determine the degree or nature of the student's progress in terms of the acquisition of specific skills.

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).

Based upon the foregoing, and under the totality of circumstances, I find that the parents' evidence was insufficient to demonstrate that the student's unilateral placement at Windward provided the student with special designed instruction to address the student's unique needs. Accordingly, in this instance, there was inadequate evidence in the hearing record to support a finding of appropriateness. Accordingly, as the evidence in the hearing record does not support a finding that the parents' unilateral placement at Windward was appropriate for the student under a Burlington-Carter analysis, the IHO's contrary finding must be reversed.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record demonstrates that the district failed to offer the student a FAPE, however, the parents did not meet their burden to prove that Windward was an appropriate unilateral placement for the 2023-24 school year were appropriate, and the IHO's findings to the contrary must be reversed.

I have considered the parties' remaining contentions and find them unnecessary to address given my determination above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 18, 2024, is modified by reversing those portions that found Windward was an appropriate unilateral placement for the 2023-24 school year and ordered the district to reimburse the parents for the tuition at Windward for the 2023-24 school year.

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

JUSTYN P. BATES
STATE REVIEW OFFICER