The University of the State of New York

The State Education Department
State Review Officer
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No. 24-524

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

**Appearances:**
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition at the YKT Learning Academy School (YKT) for the 2023-24 school year.[1] The district cross-appeals from that portion of the IHO's decision which found that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year and that equitable considerations favor the parent. The appeal must be dismissed. The cross-appeal must be sustained in part.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school

[1] The unilateral placement appears to be, or be associated with, a yeshiva school that is variously described as YKT Voc, YKT Learning Academy, and YKT V (see Parent Exs. A; C-I; see also Req. for Rev.). In this decision, the unilateral placement will simply be referred to as YKT.

psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

**III. Facts and Procedural History**

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

Briefly, the CSE convened on May 9, 2023 to conduct the student's annual review and, finding that the student continued to be eligible for special education programs and services as a student with an other health impairment, developed the student's IEP for the 2023-24 school year (see Dist. Ex. 2). The CSE recommended that the student attend a 12:1+1 special class in math for 10 periods per week and English language arts (ELA) for 15 periods per week in a district nonspecialized school (id. at pp. 19-20). For related services, the CSE recommended one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual speech-language therapy (id. at p. 20). The CSE also recommended special transportation services (id. at p. 24-25). The CSE did not recommend that the student receive 12-month services for summer 2023 (id. at p. 21).

A prior written notice dated August 11, 2023 indicated that the May 2023 CSE reviewed an October 2019 classroom observation, a January 2023 counseling progress report, a January 2023 OT progress report, a January 2023 speech-language progress report, and a January 2023 teacher report and notified the parent of the CSE's recommended programming (Dist. Ex. 3 at pp. 1-2).

A school location letter dated August 11, 2023 identified a proposed public school site, a district high school, at which the services listed in the student's IEP would be implemented (Dist. Ex. 3 at p. 5).

In a letter dated September 1, 2023, the parent notified the district of her intent to unilaterally place the student at YKT for the 2023-24 school year (see Parent Ex. B). The parent asserted that the district did not provide the student with an appropriate classroom recommendation for the 2023-24 school year and denied the student a FAPE (id. at p. 2).

On September 1, 2023, the parent signed a contract for the student to attend YKT for the 2023-24 school year beginning on September 5, 2023 and ending on June 20, 2024, with a tuition of $125,000 (Parent Ex. D at p. 1).

**A. Due Process Complaint Notice**

In a due process complaint notice dated July 24, 2024, the parent alleged that the district denied the student a FAPE for the 2023-24 school year (see Parent Ex. A). The parent argued that the CSE convened on May 9, 2023 did not provide the student with an appropriate classroom recommendation (id. at p. 2). Since the district denied the student a FAPE, the parent contended that she researched schools and placed the student at YKT, which she asserted was appropriate for the student (id.). The parent requested that the district be ordered to fund/reimburse the cost of the student's tuition and related services at YKT for the 2023-24 school year (id.).

**B. Impartial Hearing Officer Decision**

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on August 22, 2024 (see Tr. pp. 1-55). In a decision dated October 6, 2024, the IHO found that district failed to offer the student a FAPE for the 2023-24 school year,

but that the parent failed to meet her burden to demonstrate the unilateral placement was appropriate (IHO Decision at p. 3).[2]

The IHO found that the district failed to meet its burden that it offered the student a FAPE because it did not present any witnesses at the hearing (IHO Decision at p. 6).

Regarding the unilateral placement at YKT, the IHO found that the student's schedule indicated that he was taking "Pre-Algebra" four periods per week; however, based on the testimony from the educational director of YKT, the student lacked basic math skills (IHO Decision at p. 7). On that basis, the IHO determined that pre-algebra did not meet the student's individual needs and that the educational director's testimony was not credible regarding the student's math placement (id.). The IHO found that the educational director struggled to define pre-algebra (id.). The IHO held that she could not find that the placement was "serving the [s]tudent's individual needs" (id.).

The IHO then addressed the student's progress at the unilateral placement (IHO Decision at pp. 7-8). The IHO noted that progress, by itself, is not sufficient to determine that a unilateral placement is appropriate, but that it was a relevant factor in assessing appropriateness (id. at p. 7). The IHO found that the teacher progress reports did not substantiate the testimony of the educational director and that the reports merely restated the student's current levels of function without further explanation (id.). The IHO held that the educational director agreed that the progress reports lacked details and that the educational director's testimony on progress did "not align with the [s]tudent's IEP" (id. at pp. 7-8). The IHO noted that the IEP indicated that the student had already attained the math skills to which the educational director testified showed the student's progress (id. at p. 8). Based on this, the IHO held that the educational director's testimony was not credible regarding the student's progress and that she could not find that the student had made academic progress during the 2023-24 school year (id.).

Next, the IHO addressed the student's schedule as it pertained to vocational classes at YKT (IHO Decision at p. 8). The IHO held that the vocational classes provided the student with "no meaningful educational benefit" and contained "no educational component" (id.). The IHO determined that the educational director provided "vague testimony" as to what some of these classes entailed (id.).

The IHO determined that that the student's unilateral program was not "tailored to his academic needs, the [p]arent's witness provided insufficient evidence of the [s]tudent's progress during the school year at issue, and several of the periods in the [s]tudent's schedule seemed to provide no academic benefit whatsoever" (IHO Decision at p. 8). Based on these findings, the IHO found that the parent did not meet her burden to show that the unilateral placement was appropriate (id.). The IHO held that since the parent failed to meet her burden, she did not have to proceed to equitable considerations (id.). The IHO denied the parent's relief and dismissed the case with prejudice (id. at p. 9).

[2] The IHO's decision is not paginated; for purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see IHO Decision at pp. 1-13).

## IV. Appeal for State-Level Review

The parent appeals. The parent contends that she met her burden to demonstrate the appropriateness of YKT based on documentary evidence and testimony and that the IHO's reasons for denying relief were not factually supported or legally valid. The parent asserts that the educational director of YKT testified about the student's pre-algebra class and the IHO should not have disregarded his testimony. The parent further argues that lack of evidence of progress at the unilateral placement is not a legal basis to deny relief and the IHO erred in finding no evidence of progress at YKT. The parent contends that the entirety of the YKT program must be reviewed and the hearing record demonstrates that it was designed to benefit the student. As to the vocational aspect of the unilateral program, the parent argues that the IHO misconstrued the hearing record and the educational director testified how the vocational classes enable students to "transition to life after school." Moreover, the parent contends that equitable considerations would not bar relief.

The district filed an answer with cross-appeal. In its cross-appeal, the district asserts that the IHO erred in finding it failed to offer the student a FAPE for the 2023-24 school year. The district contends that the May 2023 IEP was procedurally and substantively appropriate. The district argues that the IHO's reasoning that a lack of witness testimony lead to the conclusion that the district denied the student a FAPE was error, the student was offered a FAPE for the reasons described in the district's documentary evidence, and that testimonial evidence from witnesses is not required to make such a finding.

The district further asserts that the IHO properly found that the unilateral placement was not appropriate, and the educational director was not credible. The district also argues that equitable considerations do not favor the parent. The district contends that should the SRO find the unilateral placement is appropriate and reimbursement warranted, the award should be reduced. Specifically, the district asserts that the parent's 10-day notice of unilateral placement was not timely because it was dated September 1, 2023 and that any award should be reduced by the religious component of the school's schedule.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would

in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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

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

## VI. Discussion

### A. Preliminary Matters

#### 1. Compliance with Practice Regulations and Scope of Review

Initially I note that the parent's request for review fails to comply with the practice regulations in Part 279 (see generally Req. for Rev.) State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify 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 what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," 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 a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Further, an IHO's

[3] 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).

decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see 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]).

Here, the request for review fails to enumerate the challenges to the IHO's decision and merely contains an "Argument" section that primarily discusses the district's alleged failings, and the parent appears to make points that disagree with the IHO's findings related to pre-algebra, evidence of progress, and vocational classes, but the parent does not cite to the specific findings of the IHO. The request for review simply argues that the IHO disregarded evidence and the IHO's findings did not have a legal basis. The parent argues that the unilateral placement was appropriate. While I decline to exercise my discretion to reject and dismiss the parent's request for review in this instance, the parent's counsel is warned that failure to comply with the practice requirements of Part 279 of State regulations in future matters is far more likely to result in rejection of submitted documents and/or dismissal (see 8 NYCRR 279.8[a],[b]; Application of a Student with a Disability, Appeal No. 24-201).

With regard to allegations related to the IHO's decision, significantly, the IHO held that the educational director's testimony was not credible when discussing the student's math class and the student's progress, and the IHO largely rejected her testimony (IHO Decision at pp. 7-8).

When reviewing credibility findings of an IHO, an SRO gives due deference to the credibility findings of an IHO with regard to witnesses, 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 IHO was in the best position to assess witness credibility and the parent did not specifically appeal this finding by the IHO and therefore, this conclusion is final and binding on the parties (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]). Accordingly, the credibility determination will not be further reviewed. However, to the extent necessary in order to render an independent decision, I will review the remaining evidence.

**B. 2023-24 School Year**

With regard to the parties' dispute on the merits, the district argues that the IHO erred when determining that the district failed to offer the student a FAPE because the district did not present a witness in support of its documentary evidence. The district is correct that the IHO's findings were based heavily or exclusively on the lack of a district witness, with little to no discussion or analysis of the district's evidence. The case law in this jurisdiction related to IDEA disputes does not provide for a per se rule that a district automatically fails to meet its burden of proof simply because the evidence does not consist of witness testimony. In such cases, the documentary evidence must be discussed as it relates to the disputed issues because a district could prevail on some or all of the disputed issues related to a FAPE for a student by producing evidence consisting of documentary evidence. An IHO is required to conduct a fact specific analysis in order to determine whether a district offered the student a FAPE and a district must ensure that the hearing record includes evidence addressing the particular issues raised by the parents in their due process complaint notice. The sufficiency of the evidence presented should be determined after weighing the relative strengths and weakness of the parties' evidence in light of the allegations and the relevant legal standards. To be clear, there is no procedural requirement that the district call witnesses at the impartial hearing in order to address the parent's due process complaint notice, especially after the district submitted extensive documentation that is required under the procedures of the IDEA itself.[4] Thus, as discussed further below, the district's documentary evidence alone could be sufficient to establish the appropriateness of the May 2023 IEP.[5]

In this case, the district entered into the hearing record the student's May 2023 IEP and all of the evaluative information that the May 2023 CSE relied upon (see Dist. Exs. 2; 5-10). The district also submitted a prior written notice and the school location letter (see Dist. Ex. 3). Therefore, the district submitted sufficient evidence to enable the IHO to render a fact specific inquiry regarding the issue raised by the parent in the due process complaint notice, specifically, whether the special class placement was appropriate for the student (see Dist. Ex. 1). Since the IHO failed to conduct such an analysis, a fact-based determination must be made as to whether the recommendations made by the May 2023 CSE were appropriate to meet the student's educational needs in light of his circumstances.

Although the sufficiency of the student's present levels of performance and individual needs as described in the May 2023 IEP are not in dispute on appeal, a discussion thereof provides

[4] If the parent believed that there were particular facts or events during the CSE process that were relevant that should have come to light and were not captured by or, more importantly, contradicted the documentary evidence offered by the district, the parent, as a participant in the impartial hearing process, was free to try to establish a different version of the facts, offer contrary documentation, or "compel the attendance of witnesses and to confront and question all witnesses at the hearing" such as other witnesses, including but not limited to the district personnel that participated in the May 2023 CSE meeting (8 NYCRR 200.5[j][3][xii]). The IHO was authorized to issue subpoenas for this purpose if necessary (8 NYCRR 200.5[j][3][iv]).

[5] If a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]).

context for the next issue to be resolved, namely, whether the recommended 12:1+1 special class placement was appropriate to meet the student's needs.

At the time of the May 2023 CSE meeting, the student was completing eighth grade at a nonpublic school (Dist. Exs. 2 at p. 3; 10 at p. 1). With regard to the student's reading skills, the May 2023 IEP indicated that the student received reading instruction in a group of three students, was able to decode, and had made improvement reading accurately and fluently (Dist. Ex. 2 at p. 2). He could remember the details of a story, identify the setting and characters, and predict outcomes, and was working on identifying character traits, answering inferential question by locating the answer in the story, and identifying the main idea of a story using supporting details (id.). The student had difficulty reading silently and answering questions that required higher level thinking skills (id.). The student's teacher reported that the student was reading at a Fountas and Pinnell level Z and was working on reading with proper tone and inflection, but was self-conscious when reading aloud (id.). The student's instructional level in reading was sixth grade (id. at p. 25).

The May 2023 IEP stated that with teacher support and guidance, the student wrote two to three paragraph "informative writing pieces" and, with the use of graphic organizers, wrote clear event sequences but struggled to express his ideas (Dist. Ex. 2 at p. 2). He was working on writing detailed and descriptive sentences and grammatically correct writing pieces, and had difficulty using correct grammar and writing legibly (id.). The student exhibited task avoidance when writing in response to literature (id. at p. 3). When focused and with 1:1 support and step-by-step instructions, the student could write a three-paragraph essay (id.).

The May 2023 IEP further reported that the student was working at the third or fourth grade level in math and was instructed in a group of two students (Dist. Ex. 2 at pp. 2, 3, 25).[6] He understood the concept of multiplication and could multiply numbers and cents up to five, and was working on multiplying numbers up to nine (id. at p. 2). The student needed "constant" review and repetition to retain concepts (id.). The May 2023 IEP further reflected that during the May 2023 CSE meeting, the student's teacher reported that math was "extremely difficult" for the student and he tried to "avoid math class by getting in trouble and getting sent out of the room" (id. at p. 3). The student was working on solving word problems and used a calculator in class to help him with computation; however, when asked to complete "longer more challenging questions such as those involving decimals," the student could become frustrated and break the calculator (id.).

Regarding the student's speech-language skills, the May 2023 IEP reported that the student exhibited weaknesses in receptive and expressive language skills (Dist. Ex. 2 at p. 3). He was working on "improving his vocabulary skills with particular emphasis on synonyms, proving items for a category, and utilizing curriculum-based vocabulary appropriately" (id.). The student could verbally answer comprehension questions based on stories written at a fifth grade level but needed cueing to "pause appropriately at linguistic junctures," and when cued, the student's reading fluency improved (id.). He was also working on providing multiple meanings for common words and demonstrated "slight" improvement in his ability to identify parts of speech (id.).

[6] The May 2023 IEP also indicated that in math the student worked "in a group size of one-to-one" (Dist. Ex. 2 at p. 2).

In terms of the student's social/emotional development, the May 2023 IEP reflected that the student enjoyed learning and sharing his thoughts and ideas with his class (Dist. Ex. 2 at p. 4). He had "leadership qualities and ha[d] a lot of potential . . . [h]owever, when faced with a task he [was] not confident that he c[ould] accomplish, he [would] just walk away from the task and disturb others" (id.). According to the IEP the student was easily distracted, required constant redirection, had poor organizational skills, and often teased peers and displayed anxious behaviors (id.). The student had friends but would often put other students down "in order to feel better about himself" and had challenges with respecting peers (id.). The IEP reported that according to the January 2023 counseling report, behavior modification systems were implemented in the classroom and supervised by the school psychologist, and that the student "sometimes require[d] a strict behavior modification system to enable him to learn" (id.). The student sometimes disrupted classroom learning, and his impulsivity made learning a challenge (id.). He had learned to identify areas of personal growth and continued to work on improving his self-esteem (id.). The IEP additionally reported that according to the parent, the student was not comfortable with peers outside of school, did not have any friends outside of school and refused to go to any activities outside of school, was a "loner" who played video games, and although he wanted to be with others he "self-sabotage[d]" (id. at p. 5).

Finally, the May 2023 IEP reported that the student had "notable" delays in the areas of fine/visual motor skills and sensory processing skills which had negatively impacted his academic performance in reading and writing (Dist. Ex. 2 at p. 5). He had normal to low muscle tone, did not position a pencil appropriately while writing, and did not grade his upper extremity movements appropriately, placing too much pressure on the page when writing (id.). He required cueing at times to consistently maintain appropriate line orientation and use proper spacing between words when writing, sometimes confused upper- and lower-case letters when writing in manuscript, and he did not consistently use appropriate letter formation directionality (id.). The student's handwriting rate on the Wold Sentence Copying Test was slightly below the third-grade level, and his visual motor skills were at a 5.6 year old level (id.). He was easily distracted and repetitively sought proprioceptive sensory input throughout the day to regulate himself (id.). The student liked to play hockey and other sports but would become very anxious and self-conscious and did not put in the effort to try and play with others (id. at p. 6).

Turning to the adequacy of the district's recommendations, the August 2023 prior written notice indicated that in determining the recommended special education program and services, the May 2023 CSE considered the student's October 2019 classroom observation report, a January 2023 counseling progress report, a January 2023 OT progress report, a January 2023 speech-language progress report, and a January 2023 teacher report (Dist. Exs. 3 at pp. 1-2; see Dist. Exs. 5-9).[7] The May 2023 IEP accurately reflected the student's needs, including his ELA/reading, math, and writing needs, as described in these progress reports (compare Dist. Ex. 2 at pp. 2-3, with Dist. Exs. 7-9). The student's need for small group instruction was also clearly set forth in the May 2023 IEP, both in the description of the student's group size for ELA/reading (3:1) and

[7] Although not identified in the August 2023 prior written notice, the May 2023 IEP also reflects that the May 2023 considered the student's report card grades for the fall semester of the 2022-23 school year (Dist. Ex. 2 at pp. 1-2; see Dist. Ex. 10).

math (2:1 or 1:1) instruction at the nonpublic school, and as a support the CSE identified to address the student's management needs (Dist. Ex. 2 at pp. 2-3, 6).

To address the student's special education needs, the May 2023 CSE recommended that the student attend a 12:1+1 special class for 10 periods per week in math and 15 periods per week in ELA (Dist. Ex. 2 at pp. 19-20). State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]).

In conjunction with the special class placement, the May 2023 CSE recommended that the student receive one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 2 at p. 20). With respect to supports to address the student's management needs, the May 2023 IEP indicated that the student required small group instruction, use of manipulatives, concrete models, graphic organizers, repetition of directions and instructions, anchor/process charts, comprehensions checks and feedback, verbal praise, opportunities for practice and reinforcement of learned skills and concepts, visual and verbal cues, peer partnerships, peer and teacher modeling, breaks, positive reinforcement, and behavior models (id. at p. 6).

Both the May 2023 IEP and August 2023 prior written notice reported that the May 2023 CSE considered other special education program options for the student, including general education, related services only, special education teacher support services, and integrated co-teaching services, and the prior written notice stated that the "IEP team determined that the student require[d] the support of a small class with individualized attention along with related services of [OT], counseling, and speech-[language therapy] in order to address his academic and social/emotional needs" (Dist. Exs. 2 at p. 27; 3 at p. 2). Additionally, the IEP described concerns with the student's social/emotional learning, and indicated that his behavior impeded his involvement in the general education curriculum such that he "require[d] the support of a small class with counseling, [OT], and speech-[language therapy] in order to participate and make progress in the general education curriculum" (Dist. Ex. 2 at pp. 4, 7, 27).

The May 2023 CSE's determination that the student required what it described as a "small class" and recommendation for ELA and math 12:1+1 special class instruction was in part inconsistent with its determination regarding the extent to which the student would participate in regular classes for students without disabilities (Dist. Ex. 2 at pp. 19-20, 24, 27). Specifically, the CSE determined that the student would have "full participation" in general education "except when pulled out for services" (id. at pp. 19-20, 24). However, the review of the May 2023 IEP does not indicate what, if any, special education instruction the student would have received in his "regular" classes, such as science and social studies, during the 2023-24 school year (ninth grade), or how his need for small group instruction would be met outside of the 12:1+1 special class for ELA and math (see id. at pp. 1-27).

I need not reach the issue of whether the 12:1+1 special class for ELA and math was sufficient to meet the student's needs in those particular areas because a more significant problem

was presented by the May 2023 IEP. The May 2023 CSE's decision to limit the student's special class instruction to ELA and math only, while assigning the student to ninth grade general education classes for science and social studies, does not provide sufficient explanation of how the student's special education needs would be met in these latter subjects. I am not convinced that, when viewed in light of the amount of skill delays the student has experienced as described above, the student would receive adequate support in general education science and social studies at the high school level. Accordingly, I find that the district did not meet its burden of proving that a 12:1+1 special class in ELA and math only, in conjunction with the recommended related services, resulted in an IEP with sufficiently supportive programming to address the student's needs.

As discussed above, the IHO erred by failing to conduct an appropriate analysis of whether the district offered the student an appropriate educational program. However, after conducting a full review, I find that the evidence supports the IHO's conclusion, albeit on different grounds, that the district failed to offer the student a FAPE for the 2023-24 school year.

**C. Unilateral Placement**

Turning to the student's unilateral placement, the IHO determined the student's program at YKT was not tailored to his educational needs (IHO Decision at p. 8). The parent argues on appeal that the documentary evidence, supported by the YKT educational director's testimony, provided evidence of the student's needs and the program developed by YKT to meet those needs; however, as noted above, the parent did not appeal the IHO's credibility finding regarding the YKT educational supervisor's testimony and therefore, my analysis of the student's program at YKT relies solely on the documentary evidence in the hearing record.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; 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).

Regarding the student's programming at YKT, according to a program description of YKT, the program was founded for students with a "variety of learning disabilities that impact[ed] their performance in a general education setting and require[d] different learning modalities in a smaller more individualized setting" (Parent Ex. J at p. 1). Students learned in a "small classroom setting and even on a 1:1 ratio (if needed) for individualized subjects," and were "never in a class of more than [six] students," which "allow[ed] teachers to pay attention to every student individually" (id.). According to the program overview, students were "assessed throughout the year to make changes to curriculum, class tracks, and placement" (id.). At YKT, the related services recommended in a student's IEP were "embedded" into a student's individualized daily program, and YKT additionally "incorporate[d] a variety of classes that reinforced these areas of concern as well as social and emotional needs" (id.).

The YKT program overview related that community outreach was "a vital part" of the YKT program and students took weekly "trips" to neighboring communities and engaged in volunteer and charity work (Parent Ex. J at p. 2). According to the program overview, post-secondary goals and transition were a "key emphasis" of the program and YKT was "determined to provide students with a clear transitional plan from graduation of high school into the next phase of their life" (id.). All students in the YKT program were given the opportunity to "initially be programmed into" a State accredited Regents-track program (id.). YKT also offered the Test Assessing Secondary Completion, a high school equivalency exam which was offered to upper classmen who were "under-credited" and had been "unsuccessful at obtaining passing" NY State Regents examinations (id.). The YKT "vocational experience" worked in conjunction with these two tracks, and students

were "given courses and fieldwork" in "various vocations that may become the way a student will earn income" (id. at p. 2). The YKT program description noted that during the 2023-24 school year many students would be graduating with a New York State Regents diploma and a New York State "[r]eal [e]state [l]icense" (id. at p. 3).

Regarding the evidence as it related to this particular student's programming, the December 1, 2023 progress report completed by the student's YKT teacher reflected results of a November 2023 grade level examination, which showed the student was decoding at a fourth-grade level, and his reading comprehension was at the third-grade level (Parent Ex. F at pp. 1, 2). The teacher progress report summarized the student's academic performance and needs in reading, including that the student was reading at a fourth-grade level, read with "nice fluency and intonation when the words [were] familiar to him," had below grade level decoding skills and struggled with unknown words, and lacked comprehension, struggled to answer "wh" questions, and could not "provide a satisfactory gist statement" of a passage read (id. at p. 3). According to the teacher progress report, the student was writing at an "ending [third]-grade level," with spelling and organization at a second-grade level (id. at pp. 2, 3). While he had "recently demonstrated his ability to write a cohesive response to a test prompt" that was two full paragraphs, he typically struggled to write more than two sentences (id. at p. 3). His writing often lacked structure despite graphic organizers, and rubrics to guide his writing (id.).

The YKT teacher progress report described that in math, the student was at the second-grade level for calculation and problem solving (Parent Ex. F at p. 2). When completing math problems, the student had "difficulty focusing and when multi[ple] steps were involved, they [] need[ed] to be repeated once or twice" (id. at p. 4). According to the report, the student performed better with pure computation than when there was a verbal component (id.). When a problem included a verbal component, the student had to be prompted to break down the problem and eliminate excess information (id.). Regarding word problems, the "areas that need[ed] to be addressed included breaking the problem down to several states while making sure not to lose [the student] in the process" (id.). According to the teacher progress report, the student needed guidance and one-on-one support to help address his deficiencies, and needed to learn number relationships, prime and composite numbers, multiples, and common factorization before moving on to "other math complex content" (id.).

The teacher progress report also related that the "amount of time [the student] remain[ed] engaged [wa]s fleeting," and he needed "lots of repetition to compensate for his limited attention span" (Parent Ex. F at p. 6). When given an assignment he "perceived to be within his capabilities," with the support of his provider the student "heavily engage[d] and t[ook] pride in his work (id.). However, when given assignments that "require[d] significant effort or if [the student] perceive[d] the task to be beyond his capabilities, he [could] become avoidant and give up" (id.). Additionally, the student required "significant prompting, redirection and support to maintain productivity in school" (id.). The teacher progress report indicated that the student often daydreamed in class, got out of his seat at inappropriate times to avoid work, needed to work on showing respect toward authority figures and help them understand his social needs, and was often easily angered and needed to control his temper (id. at p. 7). He also had difficulty remembering to bring assignments in on time, especially after being absent, "struggle[d] with transitions and often need[ed] assistance from his teacher to stay on task and switch to the next subject" (id. at p. 8). The teacher progress report further identified that the student learned in a small group setting, he received in-class

assistance on assignments, and supports for his management needs included verbal prompts, flash cards, behavior plan, group work, graphic organizers, rewards, and preferential seating (id. at p. 9).

Regarding the student's speech-language needs, the April 2024 speech-language progress report noted that the student presented with difficulties in the areas of receptive and expressive language skills, pragmatic skills, and executive functioning (Parent Ex. G at p. 1). According to the report, the student required "prompting to use critical thinking skills" to answer complex questions, and that "using context clues and visualization" would help the student's language growth (id.). The speech-language progress report noted that the clinician used "books, games, cards, and worksheets," and "adaptations of Visualization and Verbalization by Nancy Bell, classic short stories, and reading comprehension passages" with the student (id.). The April 2024 OT progress report reflected that the student exhibited delays in problem solving, attention span, and emotional regulation skills, and indicated that "supervision, verbal prompts, and verbal redirection [would] also be used to facilitate mastery of skills" (Parent Ex. I at pp. 1, 2).

Turning to the issues on appeal, the IHO determined that the student's YKT program was not tailored to the student's educational needs, in part because the student was taking a course entitled "Pre-Algebra" when he was "several grade levels below Algebra in math" according to the evidence in the hearing record (IHO Decision at p. 7).[8] Although the specific label on a course as listed on a student's schedule is not necessarily dispositive either in favor or against a finding of appropriateness, more importantly, the specially designed instruction should be adequately explained. Here the evidence shows that the student would not be appropriately placed in a high school level math class at YKT (see Parent Exs. E; F at p. 4). For example, the teacher progress report related that the student's math skills were at a second grade level, his background knowledge in math was poor, he was missing basic math concepts from elementary school that made high school math frustrating, and he needed to be taught skills usually taught in elementary school, which "inhibit[ed] his ability to work on high school level math for the duration of the entire period" (Parent Ex. F at pp. 2, 4). Additionally, and consistent with the IHO's decision, the teacher progress report indicated that the student needed to master basic multiplication tables and division before working on pre-algebra skills (id. at p. 4). Thus, the evidence is mixed insofar as it appears that there was an effort to work on high school level material, which the student was clearly not able to perform, and that work on elementary level skills was required. Review of the evidence regarding the student's math instruction shows that the teacher used repetition, prompting to break down problems, guidance and one on one support, and while these may be components of specially designed instruction, overall I am not convinced that the evidence in the hearing record provides an adequate basis to overturn the IHO's finding that the math instruction the student received at YKT did not meet his individualized needs (Parent Ex. F at p. 4; IHO Decision at p. 7).

[8] Pre-algebra, if it falls in a student's eighth-grade year prior to an algebra course, would typically include instruction in topics such as understanding the properties of rational and irrational numbers, exponents, linear equations, functions and graphing, patterns with two-variable data, geometric congruence and similarities, work with the Pythagorean theorem, angles and triangles, and the volume of cylinders, cones, and spheres. If YTK was providing students with instruction on these or similar topics, it was not clear how the instruction was being modified for this student.

Turning next to the IHO's concern regarding a lack of evidence of progress, 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, 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]).

Here, review of the hearing record supports the IHO's finding that the teacher progress report did not contain evidence of the student's progress (IHO Decision at p. 7). As noted by the IHO, the YKT teacher progress report identified the student's current level of functioning but did not provide information by which to measure the student's progress (id.; see Parent Ex. F). The only reference to progress in the teacher progress report was that "it would be nice to see the student's progress become consistent" so he could achieve his writing goals but made no other references to the student's progress (see Parent Ex. F).[9]

Similarly, the YKT related services progress reports, including the speech-language progress report, counseling progress report, and OT progress report offered little evidence of the student's progress (see Parent Exs. G; H; I). In this case, only the OT progress report made any specific mention of the student's progress, saying the student had "progressed in improving his emotional regulation issues by identifying calming and proprioceptive sensory activities" (see Parent Exs. F; G; H; I). Although each progress report contains a chart with goals and progress dates, there is no objective measurement of progress and instead, each report simply notes a "C," which is identified by a key in each report as meaning "continue," in the column dated March 2024 (see Parent Exs. G; H; I). Thus, I find the evidence offered by the parent to show progress does not further support the conclusion that YTK is appropriate.

Finally, the IHO found that the classes identified on the student's schedule as "vocational," "community outreach," "success track," and "guest speaker" did not provide meaningful educational benefit to the student (IHO Decision at p. 8). Based on the documentary evidence in the hearing record, the vocational and community outreach programs at YKT afforded opportunities for students to learn about their communities, engage in volunteer work, and learn about the vocational and post-secondary options available to them (Parent Ex. J at pp. 2-3). The YKT program description indicated that YKT took "the transitional piece in [a student's IEP] and ensure[d] that students [were] trained in a vocation that align[ed] with their goals in this domain," and that YKT "underst[ood] that not everyone will attend college upon graduation and therefore it

[9] The teacher progress report indicated that as of December 2023, the student "continue[d] to write on an ending [third] grade level" suggesting that he had not made progress in writing by that point in the school year (Parent Ex. F at pp. 1, 3).

[was] important that [YKT] set them up with a way to be gainfully employed regardless of what track the graduate[d] from" (id. at p. 3).[10] While it appears that these classes could potentially be beneficial to the student, there is insufficient evidence in the hearing record to explain how these classes provided specially designed instruction to meet the student's unique educational needs, as opposed to providing the same general transitional information and opportunities to all students attending YKT.

As noted above, the parent did not challenge the IHO's determination that the testimony in support of YTK was not credible. Based on a review of the non-testimonial evidence, viewed in the totality of the circumstances, the evidence in the hearing record leans in favor of the IHO's ultimate conclusion that the parent did not meet her burden to show that YKT delivered specially designed instruction to address the student's unique needs. Notwithstanding this determination, I will turn to alternative findings of whether equitable considerations warrant relief.

**D. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to

[10] The student's schedule shows a total of seven 45-minute periods per week devoted to these classes (see Parent Ex. E).

assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The district, in its cross-appeal, argues that equitable considerations do not warrant reimbursement. The district contends that the parent should not be awarded reimbursement for the religious component of YKT and that the parent failed to provide the district with timely notice of her intent to unilaterally place the student at YKT.

First, I will address the district's argument that tuition reimbursement should be reduced by the religious component of YKT. As an initial matter, some consideration is warranted of the constitutional issues impliedly raised by the district's request that any tuition reimbursement should be reduced by a percentage representing the religious instruction provided to the student at YKT.[11] As a general matter, the current trend in case law on the issue of public funding for religious instruction permits district funding of nonpublic school tuition without reduction for aspects of religious instruction (see Application of a Student with a Disability, Appeal No. 23-133 [laying out the relevant caselaw through the Supreme Court's decision in Carson v Makin, 596 U.S. 767 (2022)]).

In Carson, the Supreme Court annulled a Maine law that gave parents tuition assistance to enroll their children at a public or private nonreligious school of their choosing because their town did not operate its own public high school (596 U.S. at 789). The program in Maine allowed parents who live in school districts that did not have their own high school or did not have a contract with a school in another district, to send their student to a public or private high school of their selection (id. at 773). The student's home district then forwards tuition to the chosen public or private school (id.). However, the Maine law creating the program barred funds from going to any private religious school (id.). The parents in the Carson case lived in school districts that did not operate public high schools, and challenged the tuition assistance program requirements which they felt would not award them assistance to send their children to religious private schools (id.). The parents sued the Maine education commissioner in federal district court, alleging that the "nonsectarian" requirement violated the Free Exercise Clause and the Establishment Clause of the First Amendment (id.). Ultimately, the Supreme Court found the law to be unconstitutional on the grounds that it violated the Free Exercise Clause of the First Amendment by excluding religious private schools from receiving funding (id. at 789).

Although, the Supreme Court has not directly addressed the issue of tuition reimbursement for time spent in religious instruction at a unilateral placement, there are some principles that can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral

[11] I do note that the district did not make as argument as to what amount of the program was religious, just that the reimbursement should be reduced by the religious component (Answer & Cr.-Appeal at ¶ 18).

program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest v. Calatina Foothills Sch. Dist., 509 U.S. 1, 10 [1993]). In the specific context of tuition reimbursement, some district courts in other states have found that full tuition reimbursement is appropriate under the Establishment Clause (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 [D. Mass. 1998]; Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996), see Edison Twp. Bd. of Educ. v. F.S., 2017 WL 6627415, at *7 [D.N.J. Oct. 27, 2017] [noting that reimbursement of the funds was to the parents, not a religious school, and that "the sectarian nature of an appropriate school does not preclude reimbursement"], adopted at, 2017 WL 6626316 [D.N.J. Dec. 27, 2017]; R.S. v. Somerville Bd. of Educ., 2011 WL 32521, at *10 [D.N.J. Jan. 5, 2011] [finding that, if an appropriate unilateral placement is sectarian, "neither the IDEA nor the Establishment Clause is violated when the court orders reimbursement to the parents" but noting that a district placement might violate the Establishment Clause]; L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 303 [D.N.J. 2003] [noting that application of the endorsement test would not bar reimbursement of tuition for a unilateral placement in a sectarian school under the Establishment Clause];[12] see also Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v. Jeff S., 184 F. Supp. 2d 790, 804 [C.D. Ill. 2002]; Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 812-13 [1996]).

Among those district courts that have examined the issue with more analysis, it has been held that the tuition reimbursement for the full cost of a school year, "[did] not violate the second prong of Lemon" as it "[did] not in any way advance religion" and that "[t]he only matter advanced is the determination by Congress that a disabled child shall receive a free appropriate public education" which the district was obligated to provide yet "did not do so" (Christen G., 919 F. Supp. At 818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[13] Focusing on the indirect aid and individual choice factors discussed in the Supreme Court cases predating Carson, another district court granted full tuition reimbursement to parents for four school years under the IDEA, determining that the Establishment Clause would not be violated by full reimbursement because the placement was "necessary as a last resort" due to the district's denial of a FAPE, "the aid would go to pay for the student's education in a placement the court f[ound] was otherwise appropriate under the IDEA," and the "funds would be paid without regard to [the school's] sectarian orientation" and directly to the parents individually (Matthew J., 989 F. Supp. at 392-93, citing Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 488 [1986]).

In this matter, it is uncontroverted that the district failed to offer the student a FAPE for the 2023-24 school year. Based on this, the parent had no choice but to seek remedial relief, and the parent, under the IDEA, had the right to place the student at a school of her choosing and seek funding for it, provided that it was appropriate to meet the student's needs. Thus, direct funding

[12] In L.M. v. Evesham Tp. Bd. Of Educ., the district court did not decide whether the parent was eligible for tuition reimbursement because the court remanded the case to determine whether the student was offered a FAPE and if the unilateral placement was appropriate (256 F. Supp. 2d at 305).

[13] The second prong of the test set forth in Lemon v. Kurtzman, which has since been abandoned, was that the government action could not have a primary effect of advancing or inhibiting religion (403 U.S. 602, 612-13; see (Kennedy v Bremerton School Dist., 597 U.S. _, 142 S. Ct. 2407, 2411 [2022] [holding that the Supreme Court "long ago abandoned Lemon and its endorsement test offshoot"]).

for the cost of the student's attendance at YKT is not precluded by the Establishment Clause of the First Amendment. The IDEA has the secular purpose of ensuring that all children with disabilities are offered a FAPE. In its Burlington and Carter decisions, the Supreme Court provided the remedy of tuition reimbursement to the parents of children who were entitled to receive a FAPE but did not receive it. The remedy is available to all parents who otherwise meet the criteria set forth in those decisions, regardless of whether the expenses which they incur arise from placement of their children in other public schools or in private schools. Accordingly, I would reject the district's argument that reimbursement or direct funding for the cost of the student's tuition must be reduced due to religious instruction.

However, regarding the 10-day notice of unilateral placement at YTK and her intention to seek public funding for the same, the district is correct that the parent did not provide timely notice as the letter was dated on September 1, 2023 and the student began attending YKT on September 5, 2023 (Parent Exs. B; D). As the 10-day notice was not timely, I would reduce the amount of funding requested by ten percent under the circumstances of this case, or $12,500.00.

**VII. Conclusion**

The IHO erred in her rationale and analysis with regard to whether the district offered the student a FAPE, but the undersigned has nevertheless reached the same result that the student was not offered a FAPE for the 2023-24 school year. Certain adverse findings of the IHO's determination regarding the appropriateness of YTK were not appealed, and I have not found an adequate reason otherwise to reverse the IHO's determination. If I were to reach the issue of equitable considerations, the parent would not be entitled to full funding under equitable considerations as the parent failed to timely notify the district of her intention to unilaterally place the student at YKT.

I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**Dated:** **Albany, New York**
**February 6, 2025**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**