The University of the State of New York

The State Education Department
State Review Officer
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No. 24-529

Application of the BOARD OF EDUCATION OF THE WEST HEMPSTEAD UNION FREE 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:
Guercio & Guercio, LLP, attorneys for petitioner, by Douglas A. Spencer, Esq.

Thivierge & Rothberg, PC, attorneys for respondents, by Christina D. Thivierge, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the ELIJA School (ELIJA) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the student's educational history will not be recited here in detail. The student is nonverbal and has received diagnoses of autism spectrum disorder and Pica; he received special education services as a young child through the Early Intervention Program (EIP) and thereafter through the Committee on Preschool Special Education (Dist. Ex. 32 at pp. 1-2; see Dist. Exs. 1-4).[1]

[1] Parent exhibits B through J were withdrawn as duplicative with district exhibits (Tr. p. 1299); however, parent exhibits B-J were included with the hearing record on appeal. For purposes of this decision, the withdrawn parent exhibits have not been considered.

On April 29, 2021, a CPSE convened, found the student continued to be eligible for special education as a preschool student with a disability, and recommended extended school year services for July and August 2021, consisting of a 6:1+2 special class, speech-language therapy, occupational therapy (OT), and physical therapy (PT), to be provided at the approved preschool special education program that the student was then attending (Dist. Ex. 1a at pp. 1-2, 9).

On the same day, a CSE convened to review the student's transition from preschool to school-age special education, found the student eligible for special education as a student with autism, and developed an IEP for the 10-month portion of the 2021-22 school year (kindergarten) (see Dist. Ex. 1). The CSE recommended that the student attend a 6:1+2 special class for five hours per day in a State-approved nonpublic school and receive speech-language therapy, OT, and PT (id. at pp. 1, 9, 11). In addition, the CSE recommended the student be provided access to an augmentative communication device—specifically an iPad with ToucheChat—daily throughout the day at home and school (id. at p. 9). The CSE reconvened on August 11, 2021 to update the student's IEP given that the student had been accepted to attend a 6:1+2 special class at a Board of Cooperative Educational Services (BOCES) program (Dist. Ex. 2 at p. 1; see Dist. Ex. 29). Meeting notes appended to the IEP reflect that the BOCES program would employ applied behavioral analysis (ABA) methodologies and provide the student discrete trials five times daily (Dist. Ex. 2 at p. 1). The CSE modified the frequency and duration of the related services, recommending that the student receive five 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and two 30-minute sessions of individual PT per week (compare Dist. Ex. 2 at p. 9, with Dist. Ex. 1 at p. 9). The CSE also added one 60-minute monthly speech-language consultation to help the parent navigate and gain more knowledge about the student's communication device and one 30-minute speech-language consultation per week as a support for school personnel relating to the device (Dist. Ex. 2 at p. 9). On September 24, 2021, the CSE amended the IEP without a meeting to add a 1:1 aide to the student's programming, which was discussed during the August 2021 CSE meeting, and update the student's special transportation accommodations (Dist. Ex. 3 at pp. 1, 11; see Dist. Ex. 2 at p. 1). The CSE reconvened again on November 15, 2021 at the request of the parent (Dist. Ex. 4 at p. 1). The November 2021 CSE added home-based services to the student's IEP consisting of: five 60-minute sessions of individual behavior intervention services per week; one 30-minute session of individual OT per week; and two 60-minute sessions of individual parent counseling and training per week (id. at pp. 2, 18).[2]

For the 2021-22 school year, the student attended the BOCES program and, in February 2022, began receiving the home-based services from a private company, Kidz Choice, with which the district contracted (see Dist. Exs. 41-44; 47-54; see also Tr. p. 1094). In February 2022, the district conducted a reevaluation of the student through the BOCES program (see Dist. Exs. 33-38). In May 2022, the student underwent a private neuropsychological evaluation; however, the report of the evaluation was not completed until July 18, 2022 (Dist. Ex. 32).

[2] The CSE also added one 2-hour session of small group parent counseling and training per month to take place in the school or community (Dist. Ex. 4 at p. 18).

On May 6, 2022, the parents entered into a contract with ELIJA for the student's attendance for the 12-month 2022-23 school year (see Parent Ex. K).[3]

A CSE convened on June 17, 2022 to develop an IEP for the student for the 2022-23 school year (first grade) and found the student continued to be eligible for special education as a student with autism (see Dist. Ex. 5).[4] According to the meeting notes, the parents reported to the CSE that they did not believe the BOCES class was working for the student and that, upon discussion, the CSE agreed to seek out other available State-approved nonpublic schools for the student for the 2022-23 school year (id. at p. 2). The meeting notes reflect that the CSE recommended that the student continue to attend the BOCES program for the extended school year while a new nonpublic school was sought and that the student continued to require a 1:1 aide for the extended school year (id.). Thus, for July and August 2022, the CSE recommended that the student attend a 6:1:+2 special class daily for five and half hours per day at the BOCES program and receive weekly related services to be provided in the respective therapy rooms consisting of two 30-minute sessions of individual speech-language therapy, one 30-minute session of individual OT, and one 30-minute session of individual PT, and weekly home-based services consisting of three 30-minute sessions of individual speech-language therapy, one 30-minute session of individual OT, five 2-hour sessions of individual behavior intervention services, and two 60-minute sessions of individual parent training and counseling (id. at p. 16). Under the section labeled "Recommended Special Education Program and Services," the IEP listed "none" for the special education program and related services (id. at p. 15). For supplementary aids and services/program modifications/accommodations, the IEP included a speech-consultation one time monthly for one hour at home and a 1:1 aide daily for five hours per day (id.). Additionally, access to an augmentative communication device was recommended with a 30-minute weekly speech-language consultation for school personnel on behalf of the student (id.).

In a letter dated June 23, 2022, the parents detailed their concerns about the BOCES program, indicated that "to date" they had not received any word about a different State-approved nonpublic school recommendation, and informed the district that, as a result, they intended to unilaterally enroll the student at the ELIJA School for the 2022-23 extended school year and seek public funding for the costs of the student's tuition (see Parent Ex. BB).

In June and July 2022, the district sent out referral packets to seven potential State-approved nonpublic schools; however, the student was not accepted to any of those schools (Dist. Exs. 55-61).

In a letter dated August 19, 2022, the parents notified the district that they were unable to attend a CSE meeting scheduled for August 22, 2022 (Dist. Ex. 69 at pp. 2-3).[5] The letter proposed

[3] ELIJA countersigned the agreement on May 13, 2022 (Parent Ex. K at p. 6). ELIJA 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).

[4] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[5] The letter was sent via email on August 19, 2023 (Dist. Ex. 69 at p. 2).

a new date for the meeting of September 7, 2022 as that would enable ELIJA staff and the private neuropsychologist to attend (id. at p. 3). The district responded to the parents' letter on August 23 and again on August 29, 2022, indicating it wanted to schedule the meeting as soon as possible and prior to September 1, 2022 and proposed several dates in August 2022 (id. at pp. 1-2). The parent responded on August 30, 2022 that the proposed times in August did not work (id.).

The CSE reconvened on September 7, 2022 to recommend the student's 10-month program for the 2022-23 school year (see Dist. Ex. 6). According to the meeting notes, the student had not been offered acceptance to any State-approved nonpublic school (id. at p. 2). In addition, the notes reflected that the student had not attended the BOCES program during the summer 2022 and that, instead, the parents had unilaterally placed the student at ELIJA (id.). The meeting notes reflect that the district members of the committee shared that the district had available an in-district 8:1+2 special class that utilized ABA principles that was, at that time, under enrolled with only four students (id.). The CSE recommended an 8:1+2 special class for four and half hours per day in a district specialized school with support from a 1:1 aide and in-school related services of five 30-minute sessions of individual speech-language therapy in a six-day cycle, two 30-minutes sessions of individual OT in a six-day cycle, and two 30-minute sessions of PT in a six-day cycle (id. at p. 15). The CSE also recommended services to be delivered to the student at home which consisted of five 2-hour sessions of individual behavior intervention services per week with one 60-minute session of individual parent counseling and training per week (id.). Additionally, the CSE recommended access to an augmentative communication device of an iPad with ToucheChat at school and home, one 60-minute session of speech-language consultation per month at home to help the parents navigate the communication device, and one 30-minute session of a speech-language consultation per week as a support for school personnel on behalf of the student related to the communication device (id.).

A. Due Process Complaint Notice

By due process complaint dated January 12, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A).

Specific to the June 2022 IEP, the parents asserted that the district failed to treat them and their experts as full members of the CSE, failed to consider the full continuum of services, failed to meaningfully consider the recommendations of their expert, failed to draft annual goals at the CSE meeting, predetermined the recommendations, and failed to provide them with a copy of the IEP until August 15, 2022, all of which denied them meaningful participation in the decision-making process (Parent Ex. A at pp. 5-7). The parents also alleged that they informed the CSE that the BOCES program provided incomplete and inaccurate reporting of the student's progress during the 2021-22 school year (id. at pp. 3-4). As for the substance of the IEP, the parents contended that the June 2022 IEP wholly failed to include recommendations for the 10-month portion of the 2022-23 school year (id. at p. 5). The parents asserted that the district failed to conduct a new functional behavior assessment (FBA) or develop an appropriate behavioral intervention plan (BIP) for the student (id. at p. 6). Regarding the BIP, the parents asserted that the IEP recommended a BIP to address only some of the student's maladaptive behaviors (id.). The parents argued that the IEP failed to include appropriate or sufficient behavioral interventions, strategies, or goals to address the student's serious behaviors and failed to recommend appropriate

management needs (id.). As for the recommendations for summer 2022, the parents argued that, although the IEP reflected the student did not made progress when attending the BOCES program during the 2021-22 school year and demonstrated an increase in behaviors, the district recommended the same 6:1+2 special class in the BOCES program (id. at p. 5). In addition, the parents asserted that the CSE failed to recommend an ABA program or a 1:1 aide (id. at pp. 5-6).[6] The parents contended that the CSE did not recommend appropriate related services as the student required related services through a "consult model rather than directly due to the severity of his behaviors" (id. at p. 6).

As for the September 2022 CSE, the parents additionally alleged that the recommendation for the 10-month portion of the 2022-23 school year was not timely and that the district predetermined the student's program, failed to consider the recommendations of the parents' experts, and inappropriately developed annual goals outside of the meeting (Parent Ex. A at pp. 8-9). The parents contended that the BOCES staff provided inaccurate information to the CSE regarding the student's progress and that the IEP mischaracterized the student's program at ELIJA and failed to reflect the student's present levels of performance fully and accurately (id. at pp. 7-9). The parents alleged that the annual goals included in the IEP were not appropriate, specific, or measurable (id. at p. 9). As for the student's behaviors, the parents contended that the CSE inappropriately failed to recommend behavior intervention services for in school (id.). The parents argued that the 8:1+2 in-district recommendation was wholly inappropriate for the student, particularly given the student's lack of progress in the more supportive 6:1+2 special class, and that the district failed to recommend an intensive ABA program (id. at p. 8).

The parents contended that the unilateral placement of the student at the ELIJA school was appropriate and that the student had been making meaningful progress (Parent Ex. A at pp. 9-10). The parents also contended that equitable considerations weighed in favor of their requested relief (id. at p. 10). The parents requested an order for the district to directly fund the tuition, costs and expenses related to the student's attendance at ELIJA for the 2022-23 school year as well as the costs of the student's home-based program of ABA, supervision, and parent counseling and training (id.).

B. Impartial Hearing Officer Decision

The parties proceed to impartial hearing which convened on April 18, 2023 and concluded on August 16, 2024 after 13 days of proceedings (see Tr. pp. 1-1942).[7] In a decision dated October 7, 2024, the IHO found that the district failed to offer the student a FAPE for the 2022-23 school year, that ELIJA was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief (IHO Decision at pp. 53, 58, 64). The IHO also found that the student was entitled to transportation to and from ELIJA (id. at p. 65). The IHO

[6] The parents alleged that the 1:1 aide recommended on the IEP was for the 10-month portion of the school year but that, in any event, a 1:1 aide would not have been an adequate substitute for trained ABA professionals (Parent Ex. A at p. 6).

[7] A prehearing conference was held on March 31, 2023 (see Mar. 31, 2023 Tr. pp. 1-10).

ordered the district to reimburse the parents for the student's tuition at ELIJA for the 2022-23 school year, upon proof of attendance and for the cost of transportation (id.).

Initially, the IHO detailed the parties' positions and summarized the documentary and testimonial evidence (IHO Decision at pp. 6-41). The IHO also detailed the legal standards to apply (id. at pp. 42-43, 59).

Turning to the June 2022 CSE, the IHO determined that the district members of the committee failed to treat the parents and the parents' expert as full members of the CSE and failed to consider the input of either at the CSE meeting, which significantly impeded the parents' opportunity to participate in the decision-making progress and was a denial of FAPE (IHO Decision at p. 52). Moreover, the IHO found that the CSE failed to consider the full continuum of programming as it failed to consider a full-time ABA program (id. at pp. 52-53). The IHO concluded that the CSE's recommendation in June 2022 was predetermined as it did not consider the recommendations of the parent's expert, noting that the district presented no witness who attended the meeting to contest the parents' allegation that the recommendations were predetermined (id. at p. 53). Regarding the delivery of the June 2022 IEP, the IHO found that the district did not rebut the parents' assertion that they did not receive the June 2022 IEP until August 2022 (id. at pp. 44-45).

As for the information about the student's time attending the BOCES program with home-based services during the 2021-22 school year, the IHO held that the BOCES program did not consistently use ABA and that neither the BOCES program nor Kidz Choice, the provider of the home-based services, consistently collected data (IHO Decision at pp. 47-48, 49-50). The IHO also noted that the student did not made progress towards annual goals (id. at pp. 49-50). In addition, the IHO held that the evidence demonstrated that the student failed to make progress during the 2021-22 school in the BOCES program (id. at pp. 45-47). Specifically, the IHO found that the district did not present objective evidence of progress and that, instead, the evidence in the hearing record showed that the student demonstrated a varied degree of progress related to aggression and interfering behaviors (id. at pp. 46-47). Further, the IHO found that the student's scores on standardized measures of intelligence and adaptive behavior decreased over the 2021-22 school year (id. at pp. 45-47). The IHO also pointed to the testimony regarding the student's difficulty using his assistive technology device, finding that the device was too advanced and that the student had a history of not using his device correctly and did not make progress in his ability to use the device to communicate during the 2021-22 school year (id.). The IHO concluded that "the District failed to establish that [the] student . . . was appropriately placed during the 2021-22 [school year] in light of his regression in [self-injurious behavior], aggression, interfering behavior and inability to use his AAC device to functionally communicate and to improve his toileting skills" (id. at p. 47).

Turning to the June 2022 IEP, the IHO determined that the district failed to conduct an appropriate FBA, develop an appropriate BIP, or include appropriate behavioral strategies in the IEP notwithstanding the student's increasing maladaptive behaviors (IHO Decision at pp. 50-52). The IHO noted testimony that the FBA and BIP then in place and used at the BOCES program during the 2021-22 school year addressed only the student's aggression towards staff but not peers and did not address self-injurious behaviors or behaviors related to Pica (id. at p. 51). Moreover,

the IHO found the IEP lacked sufficient behavioral strategies to address the student's self-injurious behaviors, aggression, fecal smearing, or behaviors related to Pica (id. at p. 52).

Given the determination regarding the student's lack of progress during the 2021-22 school year, the IHO agreed with the parents' contention that the evidence did not support that the student "could progress in a 6:1[+]2 or 8:1[+]2 special class" (IHO Decision at pp. 46, 48). Regarding the June 2022 IEP in particular, the IHO found that the IEP did not include a program or services for the 10-month portion of the 2022-23 school year as, at that time, the CSE was waiting for the student to receive acceptance to a State-approved nonpublic school (id. at p. 48). As for the 6:1+2 BOCES program for summer 2022, the IHO found the recommendation inappropriate in light of the CSE's determination that the student needed a more appropriate program, which was why the CSE sent referrals to locate a nonpublic school (id. at pp. 48, 49).[8] Additionally, the IHO found that the failure to recommend a 1:1 aide for the student to support him in the BOCES program during summer 2022 was not appropriate as the student required an individual aide due to his significant behavioral challenges (id. at p. 50).

The IHO found that the district failed to recommend appropriate ABA methodology, noting that the parent's expert recommended a full-time 1:1 intensive ABA program, whereas the recommended BOCES program provided an "eclectic model" of instruction using ABA principles along with a variety of other methodologies, which was not as effective to address the student's behaviors (IHO Decision at p. 49).

Based on all of the above, the IHO found that the June 2022 CSE was "substantively and procedurally flawed" and denied the student's FAPE for the 2022-23 school year (IHO Decision at p. 53).

Turning to the September 2022 CSE, the IHO concluded that the IEP was not timely as the 10-month school year started on September 1, 2022 and the CSE did not convened until September 7, 2022 (IHO Decision at p. 54). In addition, the IHO found that the CSE again failed to treat the parent and the parents' expert as full members of the CSE, which denied the parents the opportunity to meaningfully participate in the decision-making process (id. at pp. 56-57). The IHO held that the district predetermined the student's programming and failed to consider the recommendations of the parents' experts or make recommendations consistent therewith (id. at p. 58). In addition, the IHO found that the district developed the student's annual goals outside of the CSE process (id. at pp. 57-58).

Regarding the September 2022 IEP, the IHO found that the district failed to establish that the annual goals included in the September 2022 IEP were appropriate (IHO Decision at p. 58). In addition, the IHO concluded that the hearing record did not establish how long the CSE would wait to develop an updated FBA and BIP for the student if he was placed in the district (id. at p. 56).

[8] The IHO indicated that the CSE's recommendation for the 6:1+2 BOCES for program was made notwithstanding the view of BOCES staff that a reduction of services for the summer was warranted (IHO Decision at p. 48). The IHO found that the recommendation for reduced services made by the BOCES staff was inappropriate (id.).

The IHO found that, given evidence that the student did not make progress in the 6:1+2 BOCES program, the district failed to support the recommendation that the student attend a less supportive 8:1+2 special class in a district public school (IHO Decision at p. 54). Further, the IHO noted that the district had previously determined that the student's "needs were too great to be addressed in an 8:1:1 special class in District" (id.).[9] Again, the IHO held that the district failed to recommend an intensive 1:1 ABA program, which the evidence in the hearing record established that the student required to make progress, noting that the recommended special class was instead described as one that used ABA principles along with other methodologies (id. at p. 55). The IHO determined that there was a clear consensus regarding the student's need for a 1:1 ABA program (id. at pp. 55-56, 58). The IHO also found that evidence that the student would receive 1:1 discrete trials or be placed in a class with only four students constituted retrospective testimony offered to rehabilitate or revise the IEP (id. at p. 56).

Based on the foregoing, the IHO found that the September 2022 IEP was also not reasonably calculated to enable the student to receive educational benefit and, therefore, the district did not offer the student a FAPE for the 2022-23 school year (IHO Decision at p. 58).

The IHO then found that ELIJA was an appropriate unilateral placement for the student (IHO Decision at pp. 59-64). The IHO determined that the related services model of consultation rather than direct services was appropriate for the student (id. at p. 60). Also, the IHO found that the student had made progress at ELIJA during the 2022-23 school year (id. at p. 62). The IHO also credited the testimony of the ELIJA staff regarding the student's reduction in targeted behaviors and his increased ability to use his assistive technology device (id. at p. 63). Overall, the IHO determined that the student's special education needs were met at ELIJA and that ELIJA utilized the principles of 1:1 ABA by highly trained and experienced ABA instructors who were Board Certified Behavior Analysts (BCBAs) or supervised by a BCBA (id.). Based on the foregoing, the IHO found that the parents met their burden of proof to establish that ELIJA was an appropriate unilateral placement (id. at p. 64).

Next, the IHO found that the hearing record established that equitable considerations weighed in favor of the parents' requested relief (IHO Decision at p. 64). The IHO noted that the parents provided the district with notice when the district failed to provide the student with an appropriate program and that the parents fully cooperated with the district (id. at pp. 44, 64).

As relief, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at ELIJA for the 2022-23 school year, upon proof of attendance, and for the costs of transportation (IHO Decision at p. 65).

IV. Appeal for State-Level Review

The district appeals, seeking to reverse the IHO's findings that the district failed to offer the student a FAPE for the 2022-23 school year, that ELIJAH was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief.

[9] Regarding the 8:1+2 special class in the district public school, the IHO also noted a lack of evidence to establish the student would be placed with students with similar needs (IHO Decision at p. 55).

Regarding the district's offer of a FAPE, the district contends that the IHO "misrepresent[ed] and/or ignore[d] the testimony and evidence presented by the District, misrepresent[ed] and/or misappropriate[d] the law, and fail[ed] to provide a legally sufficient rationale and meaningful support from the record for her determination." The district argues there was no evidence to suggest the student did not make appropriate progress while attending the 6:1+2 BOCES program during the 2021-22 school year. The district contends that, contrary to the IHO's finding, it convened a timely CSE for the 2022-23 school year and created an IEP that was appropriate with a properly supported extended school year program. The district asserts that any delay in the CSE was due to the parents' scheduling issues and that the CSE fully considered the input of the parents and their experts. The district argues that, contrary to the IHO's findings, the district's program for the 2022-23 school year "was at all times appropriate and tailored towards meeting [the student's] unique special education needs." Moreover, the district argues that, to the extent that there "were any errors or omissions, such errors and/or omissions did not deprive the student any educational benefit or otherwise deny the student a FAPE."

As for the unilateral placement, the district asserts that the program at ELIJA included no academic demands, goals, or instruction. The district argues that the student did not have any opportunity to interact with non-disabled peers and received no direct instruction or remediation from either a physical therapist, an occupational therapist, or a speech-language pathologist. The district asserts that the parents "wholly failed to provide sufficient information necessary to meet their burden" that ELIJA was an appropriate placement for the student.

Regarding equitable considerations, the district argues that the parents failed to provide the district with adequate and timely notice of their intent to place the student at ELIJA and seek public funding. The district asserts that the CSE was held in June 2022, which was the first time the parent raised concerns with the district's program. The district argues that, at that point, the parents had already taken affirmative steps to unilaterally place the student at ELIJA. The district argues that the parents acted in bad faith and predetermined that they were not going to accept the district's recommendations.

Lastly, the district asserts that that the IHO erred in awarding reimbursement for transportation services for the 2022-23 school year. The district argues that the parents acknowledged that they did not ask the district for transportation and that this failure "effectively deprived the District of any notice of their request to transport" the student, denied the district an opportunity to review and consider the request, and "failed to provide the District with the opportunity to encumber the funds attendant to such transportation or allow the District to investigate other and potentially less costly options." Additionally, the district argues that the doctrine of laches applies regarding transportation and bars any recovery for transportation due to the delay in the parents' request. The district also argues that the evidence submitted by the parent is not sufficient proof to support an award of reimbursement.

In an answer, the parents generally deny the district's material allegations and assert that the IHO's decision should be upheld in its entirety. The parents assert that the district failed to demonstrate that the IHO's findings should be reversed. In addition, the parents note that the district did not appeal many of the IHO's findings.

In a reply, the district generally denies the parents' allegations.

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]).[10]

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).

[10] 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).

VI. Discussion

A. Preliminary Matters—Scope of Review

Before turning to the merits, I will address the parents' argument that the district did not challenge certain of the IHO's findings in its appeal.[11] 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, a request for review must provide 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 identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2] [emphasis added]). The regulation further states 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][4]).

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 L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024] [finding an SRO properly deemed several specific issues abandoned where the petitioners did not specifically identify them as rulings presented for review and rejecting the argument that the issues "were somehow 'inherently' raised"]; 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, although the district uses bolded and underlined headings in its request for review identifying its "first" through "fifth" claims, State regulations call for the petitioner to use a numbering system to clearly "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" in the request for review (compare Req. for Rev., with 8 NYCRR 279.8[c][2]). The district did not separately list the issues challenged; rather, the "claims" identified under each heading correspond broadly to the three prongs of the Burlington/Carter analysis and the two forms of relief ordered by the IHO (i.e., tuition and transportation), respectively. Thus, on the issue of the district's offer of a FAPE, the entirety of the district's appeal falls under the first heading in three paragraphs, whereas the IHO made several specific findings on claims raised by the parents pertaining to two separate CSE meetings (Req.

[11] Although the parents raised the district's failure to appeal several issues, in its reply, the district does not present any argument to contradict the parents' position that several issues should be deemed abandoned.

for Rev ¶¶ 5-7).[12] Those three paragraphs include broad allegations and fail to appeal several key IHO findings with any clear specificity.

The first paragraph states that the IHO erred in finding that the district denied the student a FAPE for the 2022-23 school year and that the IHO misrepresented or misappropriated the law and failed to provide a legally sufficient rational or meaningful support from the record for her determination (Req. for Rev. ¶ 5). This statement on its own is too broad to meaningfully challenge any specific findings of the IHO (see Bd. of Educ. of Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *13 [S.D.N.Y. Sept. 20, 2024] [finding that "[m]erely asserting that the IHO" erred in finding that the district did not offer the student a FAPE "does not raise the precise rulings presented for review"]; W.R. v. Katonah Lewisboro Union Free Sch. Dist., 2022 WL 17539699, at *9 [S.D.N.Y. Dec. 7, 2022] [same]). The district goes on to argue that "contrary to the IHO's findings," it acted appropriately and/or made recommendations that were appropriate (id. ¶¶ 5-6); however, the district still does not grapple with the IHO's reasoning or with the evidence relied upon by the IHO. At most, the district's allegations may be generously read to challenge findings of the IHO that the district did not timely develop the student's IEP, that the student did not make progress in the BOCES program during the 2021-22 school year, and that the district did not consider the input of the parents and the parents' experts (see id. ¶ 5). The district also generally contends that, contrary to the IHO's findings, the CSE developed "an appropriate and properly supported [extended school year] program" and that the district's program was "at all times appropriate and tailored toward meeting [the student's] unique special education needs" and summarizes the CSEs' recommendations (id. ¶¶ 5-6).[13] Although the district elaborates to some degree in its memorandum of law on certain points, as a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis v. New York City Dep't of Educ., 2021 WL 964820, at *11 [S.D.N.Y. Mar. 15, 2021]; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131).[14]

[12] In determining whether a request for review violates the practice regulations, it may be necessary, at times, to review evidence in the hearing record and the IHO's final decision, itself, for irregularities that may have led to the appealing party's inability to comply with the practice regulations (see generally Application of a Student with a Disability, Appeal No. 19-009 [remanding matter to the IHO due to poorly drafted IHO decision precluding petitioner's ability to formulate a request for review that complied with practice regulations]). To this end, the IHO's decision has been summarized in detail above. Unlike the facts and circumstances in Application of a Student with a Disability, Appeal No. 19-009, the IHO's decision in this proceeding resolved a number of issues in the parents' favor with support for those findings drawn from the evidence in the hearing record (see generally IHO Decision).

[13] While the district does not explicitly state which CSE meeting or IEP it references when summarizing recommendations, it cites both the June and September 2022 IEPs and identify pages of the IHO's decision on which she discusses both educational plans.

[14] Moreover, the memorandum of law suffers from the same deficiency as the request for review in that it states the district's disagreement in the broadest of terms. For example, the district indicates that "[t]he IHO makes a series of assertions, lacking in merit, in support of her erroneous conclusion that the District denied the student a FAPE through its program offering for 2022-2023" (Dist. Mem. of Law at p. 13), but does not identify the assertions that were purportedly erroneous. The district then goes on to summarize the CSEs' recommendations for the student, along with testimony describing the 8:1+2 special class recommended for the 10-month portion

The third paragraph appears to be a catch all, asserting that the 2022-23 program was sufficient as matter of law and that, if there were any errors or omissions, those did not deprive the student of a FAPE or educational benefit (Req. for Rev. ¶ 7). The use of such broad and conclusory statements or allegations within a request for review does not act to bring into the scope of review any and all findings made by the IHO (see, e.g., M.C., 2018 WL 4997516, at *23 [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]).

The district's appeal does reflect that it believes the IHO erred in finding a denial of FAPE for the 2022-23 school year; however, this is not sufficient to bring into the scope of review all of the IHO's discrete findings underlying her determination that the district failed to offer the student a FAPE, and it is not this SRO's role to research and construct the appealing party's arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]).

Based on the foregoing, the district did not appeal several of the IHO's specific findings regarding the June 2022 CSE and IEP including that the district did not provide the parent a copy of the June 2022 IEP until August 2022 IEP, that the district failed to conduct an updated FBA or develop an undated BIP despite the student's increasing behaviors and did not include sufficient behavioral strategies in the June 2022 IEP, and that the June 2022 CSE failed to recommend a 1:1 aide or appropriate ABA methodology (IHO Decision at pp. 44-45, 50-52). Regarding the September 2022 IEP, the district has not challenged the IHO's finding that the annual goals included in the September 2022 were inappropriate, that the hearing record did not establish when an updated FBA and BIP would be developed, or that the CSE failed to recommend an intensive 1:1 ABA program, which the student required to make progress (see IHO Decision at pp. 55-56, 58). Accordingly, these findings have 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]). Thus, the scope of the appeal is limited to those issued explicitly raised within the request for review.[15]

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of the 2022-23 school year, without grappling with the IHO's finding that much of this testimony was retrospective and could not be relied upon to rehabilitate the IEP (id. at pp. 13-16; see IHO Decision at p. 56).

[15] It is also arguable whether the district has sufficiently appealed the IHO's findings about the class ratios and placements recommended in the June 2022 and September 2022 IEPs; however, I find it unnecessary to determine if the district's appeal is sufficient in this respect because, taking into account the determinations that are final and binding, the hearing record otherwise supports the IHO's determination that the district failed to offer the student a FAPE.

B. June 2022 and September 2022 IEPs

1. June 2022 IEP

One of the IHO's findings challenged by the district is the timeliness of the IEP developed for the student for the 2022-23 school year. The IHO found that the CSE failed to recommend programming for the 10-month portion of the 2022-23 school year during the June 2022 CSE meeting and that the September 2022 CSE was not timely convened (IHO Decision at pp. 48, 54).[16]

The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). In addition, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that a district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

On appeal, the district argues that the parents caused the delay by requesting to reschedule a meeting originally scheduled in August 2022. However, the district does not grapple with the IHO's finding that the June 2022 IEP failed to include programming recommendations for a full 12-month school year. The June 2022 IEP recommended that the student attend the 6:1+2 BOCES program with related and home-based services for the period of July 4, 2022 through August 12, 2022 (Dist. Ex. 5 at p. 16). The evidence in the hearing record reflects that the district was attempting to find a State-approved nonpublic school for the student for the 10-month portion of

[16] Separately, as noted above, the IHO determined that the district did not provide the parents a copy of the June 2022 IEP until August 2022, and the district has not appealed this finding (see IHO Decision at pp. 44-45). A district is responsible for "ensuring that a copy of the IEP is provided to the student's parents" (8 NYCRR 200.4[e][3][iv]; see 34 CFR 300.322[f]). However, a district's failure to provide a parent with a copy of an IEP does not always rise to the level of a denial of FAPE (see Cerra, 427 F.3d at 192-94; Application of the Dep't of Educ., Appeal No. 13-032 [failure to deliver IEP prior to start of school year did not rise to the level of a denial of a FAPE because parents had actual notice of the contents of the IEP and rejected it prior to the time that the district would have been required to implement it]). The parents did, however, have notice that the CSE recommended the student continue at the 6:1+2 BOCES program at least until an appropriate nonpublic school was located, as they stated their disagreement with such recommendation in their June 23, 2022 letter to the district, which also stated their intent to unilaterally place the student at ELIJA for the 2022-23 school year (Parent Ex. BB). Accordingly, in this instance, the timing of the provision of the June 2022 IEP to the parents did not, on its own, rise to the level of a denial of a FAPE.

the school year; however the CSE did not memorialize this recommendation in the IEP (Dist. Ex. 5 at pp. 2, 15).[17] Having only a summer program recommendation in place, the parents made the decision to unilaterally place the student, and the student began attending ELIJA for the 12-month school year (see Parent Ex. BB).

Accordingly, there is no dispute that the June 2022 IEP was "not in [a] complete and finalized form by the beginning of the [2022-23] school year" (see Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N., 2017 WL 4641219, at *12 [S.D.N.Y. Oct. 13, 2017]). Further, it is undisputed that the CSE did not attempt to reconvene prior to July 1, the first day of the 12-month school year, to finalize the programming recommendations. Under the facts of this case, the district's failure to provide the student with a final IEP prior to the beginning of the school year constituted a procedural error. Taking into account the district's failure to complete a finalized IEP prior to the beginning of the school year cumulatively with the additional final and binding determinations of the IHO relating to the June 2022 IEP (including the degree to which it addressed the student's behavioral needs, need for a 1:1 aide, and need or ABA methodology), I find that the district has not raised sufficient ground to disturb the IHO's determinations.[18]

2. September 2022 IEP

Even assuming that the September 2022 IEP could be considered as operative for purposes of assessing the district offer of a FAPE notwithstanding that it was developed after the parents' decision to unilaterally place the student for the 12-month 2022-23 school year, I find insufficient grounds alleged by the district to disturb the IHO's decision; further, the evidence in the hearing record supports the IHO's determination that the district did not meet its burden to demonstrate that the 8:1+2 special class was appropriate to meet the student's needs.

Before discussing the September 2022 IEP, a brief discussion of the student's needs as known to the CSE at that time is warranted.

The June 2022 IEP's present levels of performance indicate the student demonstrated significant deficits in cognitive functioning, was rated within the low range across areas of adaptive behaviors (socialization, daily living, communication), was non-verbal and primarily used an iPad with TouchChat software to communicate, had a BIP for self-injurious behaviors and aggression, could navigate the classroom safely with prompts, presented with low muscle tone throughout his trunk and extremities, and presented with hand weakness and decreased manipulation skills which hindered his skilled tool use and fine motor activities (Dist. Ex. 5 at pp. 6-10).

[17] Had the CSE made the recommendation for a State-approved nonpublic school, it would have been required to "arrange for such programs and services within 30 school days of the board [of education's] receipt of the recommendation of the committee" (8 NYCRR 200.4[e][1]; 200.6[j][4]).

[18] Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2d Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

In a June 1, 2022 letter, addressed "To Whom It May Concern," the student's developmental- pediatrician, stated that the student was most recently seen on April 5, 2022 and noted that the student's overall developmental progress "this year" had been limited (Dist. Ex. 45 at p. 1). The developmental pediatrician also noted the student's significant behavioral challenges including hyperactivity, aggressive behavior toward others and self, and pica (placing non-edible items in his mouth) and stated that the student needed constant supervision and behavioral intervention (id.). The developmental pediatrician opined that the student required a highly individualized educational program and 1:1 instruction and recommended that he be placed in a setting that employed ABA methodology and data monitoring and provided home-based ABA and parent training (id.).

Within the July 2022 neuropsychological evaluation report, the private psychologist who evaluated the student indicated that he demonstrated significant deficits across domains and that his poor attention/concentration, poor receptive and expressive language, behavioral dysregulation, sensory-seeking behavior, and low frustration tolerance significantly impaired his ability to fully demonstrate what he knew cognitively and in turn impacted his ability to function appropriately in the classroom (Dist. Ex. 32 at p. 7). The private psychologist stated that the results of formal autism spectrum disorder (ASD) diagnostic assessments were consistent across measures, that the student exceeded the cut-off criteria for ASD on the assessments, and that the student's symptoms/behaviors fell within the "Severe/High Level" range (id. at pp. 4-5, 7, 10-11). In addition, the private psychologist found the student's overall level of adaptive functioning, as well as his functioning within the four subdomains of communication, daily living, socialization, and motor skills, were significantly delayed (id. at pp. 5-6, 11). She also reported the student engaged in behaviors that were of considerable safety concern including self-injurious behaviors, aggression toward others and objects, smearing of fecal matter, and pica (id. at p. 8). The private psychologist determined the student met the criteria for diagnoses of autism spectrum disorder (level 3 requiring very substantial supports) with accompanying intellectual and language impairments, attention deficit hyperactivity disorder (ADHD) - combined presentation, and pica (id.). In her July 2022 evaluation report the private psychologist recommended that the student attend a full-time special education school that provided a highly-structured and intensive fulltime 1:1 ABA teaching environment (discrete trials); instruction provided by professionals well trained in ABA and skilled in working with ASD students; supervision by a BCBA who would the student's program, monitor his progress and make needed changes; fulltime 1:1 support; a 12-month program; 20 additional hours of home-based 1:1 ABA; at least two hours per week of parent training; and related services of speech-language therapy, OT, and PT (id. at pp. 8-9).

The district's director of pupil personnel services (PPS director) testified that, at the June 2022 CSE meeting, the private psychologist recommended the student would benefit from 1:1 instruction in a 12-month program where ABA would be provided both in school and with behavior intervention services in the home (Tr. p. 259). According to the June 2022 CSE meeting minutes the private psychologist reported at the meeting her impressions that the student required a small setting, ideally one-to-one, with intensive ABA where his complicated behaviors could be addressed throughout the day (Dist. Ex. 5 at p. 2). According to the September 2022 CSE meeting notes, following ELIJA staff voicing disagreement with the district's recommended program based on safely concerns, the private psychologist noted the student's need to develop requisite skills in an intensive 1:1 or 2:1 ratio (Dist. Ex. 6 at p. 2).

The September 2022 CSE meeting notes further indicated that the student attended ELIJA during summer 2022 and that ELIJA staff reported that the student's needs would be best addressed in a 2:1 ratio and that he was placed in an individualized classroom with matted walls and floors where he received 1:1 instruction, was under the supervision of a BCBA, and where all staff were registered behavior technicians (RBTs) (Dist. Ex. 6 at p. 2).[19]

The hearing record further demonstrates that BOCES staff and the district also understood the student needed ABA support. The June 2022 CSE meeting notes reflect that, during the 2021-22 school year, the student received instruction through ABA methodology which included discrete trial instruction (Dist. Ex. 5 at p. 1). The BOCES staff reported at the CSE meeting that the student was in a classroom that utilized an ABA approach and that the ABA work sessions occurred in a one-to-one setting (id. at p. 2). The 2021-22 BOCES end of the year summary report stated that the student required a small, structured learning environment utilizing the principles of ABA where his expectations, reinforcements, and consequences were clearly defined (Dist. Ex. 41 at p. 3).

With regard to a special class recommendation, State regulation provides that a classroom with no more than eight students, one teacher, and one or more supplementary school personnel is intended to address the needs of students "whose management needs are determined to be intensive and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b] [emphasis added]). By way of comparison, State regulation provides that the "[t]he maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a] [emphasis added]).

The April 2021 CSE, in developing the student's initial school-aged IEP, determined that the 8:1+2 special class in the district public school was insufficiently supportive given the student's "significant level of need, rate of progress, and continued self-injurious and aggressive behaviors" (Dist. Ex. 1 at p. 1). In response to how the September 2022 CSE had "come full circle" from that determination a year earlier, the district's director of pupil personnel services (PPS director) testified that, in transitioning from preschool, it seemed as though the student required "a lot more support" (Tr. p. 283). She continued and stated that, based on the information before the CSE—i.e., that the student was able to make progress in the 6:1+2 setting with a strong behavior intervention plan and a variety of supports—the district felt that it could provide the student with an appropriate program and provide an increased level of support that would allow the student's behaviors to be well managed in district (Tr. pp. 283-84).

While some progress was indicated by the BOCES staff with respect to the student's behavior and management needs during the 2021-22 school year, the year-end reports consistently described the student's behaviors as highly intensive and requiring a high degree of intervention consistent with the definition in State regulation for a special class with no more than six students

[19] The October 2022 ELIJA progress report indicated that upon the student's enrollment in ELIJA he was placed in a 2:1 staff-to-student teaching ratio due to safety concerns with pica and self-injurious behaviors (Parent Ex. O at p. 1).

(8 NYCRR 200.6[h][4][ii][a]). For example, the June 2022 year-end summary report stated that the student required adult assistance and supervision at all times during meals, required high rates of reinforcement to remain seated and engaged, and that "unsafe" and "challenging" behaviors such as aggression toward staff (scratching, biting, kicking) and self-injurious behaviors (head banging and hand biting) still occurred (Dist. Ex. 41 at pp. 1-3).

Further, although the PPS director testified that the 8:1+2 special class was under-enrolled at the time of the September 2022 CSE meeting as it had "only four students in the classroom" (Tr. p. 284), the IHO correctly found that this testimony that the student would have been in a more-supportive setting then the recommended 8:1+2 special class was retrospective and could not be relied upon to rehabilitate the deficient IEP (IHO Decision at p. 56; see R.E., 694 F.3d at 186-88).[20] In grappling with the permissibility of retrospective evidence in R.E., the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). Here, even if the class proposed by the district was under-enrolled at the time of the CSE meeting, given the recommendation for a special class with a maximum of eight students, the district could not guarantee a smaller ratio.

With respect to methodology, if the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194). Here, the district does not challenge the IHO's determination that there was a clear consensus that the student required ABA but, at most, puts forth an allegation that its recommended program did offer the ABA the student required.

The September 2022 CSE meeting comments reflect that there was some discussion at the CSE meeting regarding ABA principles utilized in the recommended 8:1+2 special class where functional and adaptive skills were reinforced through 1:1 discrete trials and 2:1 small group settings when appropriate (Dist. Ex. 6 at p. 2). The PPS director testified that at the September 2022 CSE meeting the CSE discussed how the student's needs aligned with the students in the 8:1+2 program including the need for specific instruction using discrete trial training as well as ABA methodologies in relation to behavioral concerns and noted that one-to-one discrete trial existed for all direct instruction (Tr. pp. 285, 288-89). The special education teacher, who was the 8:1+2 special class teacher, testified that she considered her whole classroom an "ABA classroom" where she used different facets of ABA, including discrete trial training, which she described as a procedure used within ABA of taking larger skills and breaking them down into smaller

[20] In its appeal, the district has not alleged that the IHO erred in this respect; however, even if it did raise the issue for consideration, there would be no grounds for disturbing the IHO's finding.

components while reinforcing appropriate responses and correcting incorrect responses (Tr. p. 825). However, the IHO weighed this evidence and found that the district provided ABA as part of an eclectic program that included a variety of interventions and methodologies, that ELIJA exclusively provided 1:1 ABA by trained RBTs who were able to implement programming and BIPs, and that based on the student's history, the eclectic model was not as effective as full-time 1:1 ABA in addressing the student's behavior (IHO Decision at p. 49). The IHO determined that the parents established that the student "required only the methodology of 1:1 ABA to progress" and that the district failed to recommend appropriate ABA in school (id. at p. 49).

Even if the district's conclusory statement on appeal that it offered the student an "ABA-based special class program" could be deemed sufficient to raise the IHO's finding that the student required intensive 1:1 ABA that the district's recommended program did not offer (see IHO Decision at p. 49), the evidence in the hearing record supports the IHO's ultimate determination that the September 2022 CSE's recommendation for the 8:1+2 special class in the district public school, even with its ABA principals, was not appropriate. Based on the foregoing, cumulatively with the final and binding determinations of the IHO relating to the September 2022 IEP (including the degree to which the annual goals were appropriate and the degree to which the student's behavioral needs would have been met), there is insufficient basis to disturb the IHO's finding that the recommendation of the September 2022 CSE, even if timely made, was not sufficient to address the student's needs.

C. Unilateral Placement

Having found insufficient basis to disturb the IHO's determination that the district denied the student a FAPE for the 2022-23 school year, the next issue to be addressed is the appropriateness of the unilateral placement of the student at ELIJA.

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).

The hearing record reveals that during the 2022-2023 12-month school year the student attended ELIJA, a comprehensive program with an intensive "Applied Behavior Analytic" teaching approach (Parent Exs. O at p. 1; AA; see Parent Exs. U; CC; DD).

The executive director for ELIJA testified that ELIJA was an ABA school that "employ[ed] the full science of behavior analysis" (Tr. p. 1322). She explained that students at the school had individualized goals that were "informed' by an assessment of their skill sets and the school developed behavior intervention probes and plans based on student needs (Tr. p. 1323). Students' needs were determined by conducting a functional behavior assessment or functional analysis to understand why a student was acting a certain way, and the assessment process was used to identify alternative behaviors that would allow a student to get their needs met or additional skills that could be used in place of problem behaviors (Tr. p. 1323). The executive director explained that the school treated functional assessment and analysis as a process and staff were constantly looking to gather information to inform themselves (Tr. pp. 1452-53). With regard to the student, the executive director testified that as part of his initial assessment she participated in the direct observations and functional behavior assessment conducted to determine the function of his behavior (Tr. pp. 1452-53; see Parent Ex. L).

An August 2022 behavior intervention probe, conducted by ELIJA, identified the student's target behaviors as hitting his head, biting himself and others, engaging in tantrums, and pica

(Parent Ex. L at pp. 1-7). The behavior probe outlined materials, staff roles, and treatment procedures and suggested that the student's target behaviors were controlled by socially mediated negative reinforcement in the form of escape or avoidance from demands and socially mediated positive reinforcement in the form of access to tangibles (id.). A second behavior intervention probe conducted in August 2022 focused on developing the student's toileting skills and reducing his toileting accidents (Parent Ex. N). The behavior intervention probe for toileting was modified in September 2022 and January 2023 (Parent Ex. R). Also in January 2023, ELIJA staff developed a behavior intervention probe that targeted the student's pica (Parent Exs. Q; S). The interventions were updated during the year and included planning for transitioning the student from the parent's car into the school (see Parent Ex. X at pp. 1-5).

The evidence in the hearing record reflects that ELIJA used a structured approach to assess and facilitate the acquisition of meaningful and functional skills, that the skills the student acquired were then immediately programmed to be generalized into the natural school context and home setting, and that data was collected on all previously mastered responses weekly to ensure retention of skills over time (Parent Exs. O at p. 1; AA).

The hearing record indicates that staff members were well-trained and experienced in ABA teaching strategies, behavior reduction procedures, incidental teaching, and functional communication training (Parent Exs. O at p. 1; AA). The executive director of ELIJA testified that the supervisor at ELIJA, who was the BCBA, would design the student's program and the instructors implemented it (Tr. p. 1339, 1342).[21] The executive director testified that the supervisors were responsible for specific teams and their classrooms and that they were the ones who oversaw the instructors who worked directly with the students (Tr. p. 1344). In hiring instructors, the executive director testified that all new hires have some degree of experience working with the "autism population" and must have a minimum of a bachelor's degree and that in most cases a degree in either applied behavior analysis, speech and language development or special education (Tr. p. 1345). All staff regardless of their education must become RBTs within the first few months of their employment, and ELIJA provides "inhouse" RBT training (Tr. p. 1346).

According to the student's initial ELIJA progress report, due to safety concerns with pica and self-injurious behaviors, upon enrollment, the student received 2:1 staff-to-student intensive instruction with the use of discrete trial instruction (Parent Exs. O at pp. 1-2; AA). However, due to the student's favorable response to treatment, beginning in October 2022, the ratio shifted to 1:1 staff-to-student instruction and continued at that level through the 2022-23 school year (Parent Exs. O at pp. 1-2; T at p. 1; AA; CC at p. 1).

The October 2022 ELIJA progress report indicated that the student worked on skills in the areas of attending to teaching stimuli, tolerating demands, tolerating termination of a preferred activity, completing fine motor activities, imitating actions with objects, imitating gross motor movements, following one-step instructions, locating icons on an iPad, requesting preferred items, completing tasks, engaging with toys appropriately, matching identical objects and pictures, completing a morning routine, eating neatly and appropriately, pulling pants up and down, and

[21] The executive director explained that most of the supervisors were BCBAs and that in the cases where a supervisor was not, then she, the executive director, would be the BCBA on the case (Tr. p. 1344).

tolerating prompting to wash hands (Parent Ex. O at pp. 1-9). With respect to speech-language skills the progress report stated that the student utilized eye contact, gestures, and guiding as his primary mode of communication and that he was working on requesting "Pop tube" using TouchChat and "Go" using a picture exchange card (id. at pp. 9-10). The progress report stated that, while remaining in his 1:1 ratio, the student had daily opportunities to participate in a group lunch session with peers and instructors, during which there were opportunities for prompted social interaction (id. at p. 10).

The February 2023 ELIJA progress report indicated that the student had completed programs in tolerating termination of a preferred activity and tolerating prompting to wash hands and going forward his program would target tolerating delayed denied access, tolerating wearing an AAC device, completing intraverbals (completing a sentence or open-ended phrase), identifying and labeling objects and pictures, and imitating a vocal model and maintaining articulation (Parent Ex. T at pp. 1-12; see Parent Ex. W). With respect to speech-language skills the February progress report stated that the student was then-currently working on requesting preferred items and food using TouchChat and his AAC device (Parent Ex. T at p. 12).

The June 2023 ELIJA progress report shows that later in the school year ELIJA added additional "targets" for the student work on such as responding to the instructions "Come here" and "Sit nicely" and reciprocating and initiating greetings (compare Parent Ex. T at pp. 1-12, with Parent Ex. CC at pp. 1-13).

The hearing record reveals that ELIJA staff worked with the student on the following targeted behaviors: self-injurious behaviors, bites to self and others, pica, tantrums, negative vocalizations, and toileting (Parent Exs. L at pp. 1-8; O at pp. 11-18; P at pp. 1-2; T at pp. 14-25; CC at pp. 15-27). The monthly behavior evaluation reports indicate that early in the school year it was determined that "head hits to surface" would be the first behavior to receive intervention due to the risk to the student's safety and that once the student's head hits and tantrums reached "near-zero levels," bites to others would be targeted for intervention (Parent Exs. O at p. 14; T at p. 19; CC at p. 21). The reports also stated that proactively the student's classroom was cleared of any potential items with which the student could engage in pica and that staff delivered noncontingent edibles upon entering "high likelihood pica environments" (Parent Exs. O at p. 13; T at p. 17; CC at p. 19).

The August 2022 behavior intervention probe, which identified target behaviors as the student hitting his head, biting self and others, tantruming, and pica, provided staff with a treatment procedure which included antecedent manipulations (teaching functional alternatives, interaction guidelines, reinforcement of alternative behaviors, noncontingent reinforcement) and consequence manipulations for tantrums and head hitting (Parent Ex. L at pp. 1-7). The behavior intervention probe included a functional assessment and analysis section which found that the student's target behaviors were multiply controlled by socially mediated negative reinforcement in the form of escape or avoidance from demands and socially mediated positive reinforcement in the form of access to tangibles and included a rationale for the current procedure, a plan to fade, and a review of potential risks of implementing, and not implementing, treatment (id. at pp. 7-8).

In March 2023 the behavior intervention probes were updated and turned into two behavior intervention plan documents, one for the target behavior of pica and one for the target behaviors of head hitting, tantrums, and negative vocalizations (Parent Exs. Y at pp. 1-10; HH at pp. 1-5).

In addition to providing services to the student ELIJA provided support to the student's parents. ELIJA staff conducted a home visit in August 2022 and based on the observations and parent reporting provided the parent antecedent based strategies for tantrums such as the use of moderately preferred activities (indoor sensory toys) as a bridge when transitioning from a highly preferred activity (being outside) to a low preferred activity (bathroom) and reinforced consequence based strategies such as following through with the current task (Parent Ex. M at pp. 1-2). Further, the record shows ELIJA conducted monthly clinics with parents as well as monthly home visits for parent training and program consistency and the program description noted that additional supports and training were provided where appropriate (Parent Exs. O at p. 1; AA; see Tr. pp. 1601-02, 1609-15; 1681-82).

The district argues that the student did not receive any direct instruction or remediation from a licensed physical therapist, occupational therapist, or speech-language therapist to address any of his identified deficits in these areas. The district is correct in its assertion that ELIJA did not have "licensed" related service providers working directly with the student, however, the evidence in the hearing record reflects that ELIJA employed a consultative model for OT and PT and that their providers were professionals that work for ELIJA part-time, were on site weekly, and conducted consultations as needed to inform the program design (Tr. pp. 1324-25). The executive director testified that ELIJA's direct service providers, the instructors, were the ones who worked directly with the student in one-to-one ratios and in some cases a two-to-one ratio (Tr. p. 1325). She added that a consult model meant that the professional did not work directly with the student, but consultation was provided to the staff (id.). According to the executive director, the consultations were individualized in that the OT was with the student teaching the staff what they should be doing or making programming recommendations (Tr. p. 1325). She testified that the related services were not provided in the traditional format of "X amount of minutes per week" but instead the professionals' feedback was threaded through the programming that was implemented through their instructor model (Tr. p. 1326). The ELIJA program description stated that the school had a highly trained and licensed speech-language pathologist who collaborated with the staff to embed language supports into the ABA curriculum, trained the instructors with assistive technology devices, and assessed the learners' language needs (Parent Exs. O at p. 1; AA). Thus, the program provided for the student's related service needs but in an indirect model. This approach to addressing the student's related services, while a pedagogical difference, does not, without more, support a finding that ELIJA was inappropriate.

The district also argues that the program at ELIJA did not include academic demands, goals, or instruction and lacked any goals targeting social skills. However, as summarized above and consistent with the student's levels of need, the program at ELIJA targeted several areas including pre-academic and communication skills.

In addition, the district's contention that ELIJA was inappropriate because it did not enable the student to access nondisabled peers is without merit. It is well settled that although the restrictiveness of a parent's unilateral placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S. v. Bd. of Educ. of the City

Sch. Dist. of Yonkers, 231 F.3d 96, 105 [2d Cir. 2000]; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014] [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]).

Lastly, the hearing record shows the student made progress at ELIJA during the 2022-23 school year.

The June 2023 ELIJA progress report indicated that the student mastered ten of his "Targets" in the area of attending including attending to three preferred stimuli directly in front and in various locations on the desk with verbal instruction and attending to three teaching stimuli directly in front on the desk with verbal instruction (Parent Ex. CC at p. 2). The student mastered behavioral targets such as sitting "5s at the desk," tolerating denied access to outside, tolerating delayed access to moderately preferred activity/toys for "20s," tolerating a series of five demands while refraining from hitting head or biting self or others, and holding AAC device for "5s" (id. at pp. 3-4). The student mastered motor and imitation targets such as zipping zippers, placing pegs in pegboard, stringing one large bead, opening a book, putting spoon in bowl, and clapping hands and stomping feet (id. at pp. 5-6).

The June 2023 ELIJA progress report further indicated that the student mastered language targets such as completing sentences with the appropriate word in songs, following one-step instruction, identifying and labeling objects and pictures, locating icons on the iPad, requesting preferred items using AAC (Parent Ex. CC at p. 6-9). In addition, the student mastered leisure targets such as putting two pieces in a five-piece inset puzzle and engaging with toys appropriately (pop-up toys and ball on ramp), a preacademic target of matching identical objects and pictures (paper, ball, water bottle), a socialization target of reciprocating a greeting, and self-care targets such as removing contents of a backpack, scooping food with a spoon, tolerating tooth brush in mouth, and turning on water and placing hands under water (id. at p. 9-13).

A review of graphing data of the frequency of occurrences of the student's targeted behaviors during the 2022-23 school year demonstrates a general trend toward a reduction in the frequency of head hits to surface, hand hits to head, bites to others, and aggression (Parent Ex. GG at pp. 1-4, 7-8, 12-13). The graphing reports show an overall trend toward a reduction in occurrence for bites to self and pica over the course of the school year, with some reversal and some higher frequencies reported during the later part of the year (id. at pp. 5-6, 9-10).

Based on the totality of the circumstances, the evidence in the hearing record supports the IHO's determination that the parents met their burden to prove that ELIJA provided the student with instruction specially designed to meet his unique needs.

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 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).

Here, the district does not dispute that the parents notified them of their disagreement with the district program and intent to unilaterally place the student both at the June 17, 2022 CSE meeting and subsequently in a letter dated June 23, 2022 (see Parent Ex. BB; Dist. Ex. 5). However, the district argues that the parents did not raise concerns about the student's program prior to the June 2022 CSE meeting, notwithstanding that they had investigated and ultimately contracted with ELIJA in May 2022, and that they predetermined that they were not going to accept the programming recommended by the CSE. However, the district's focus on the timing of the parents' contract with ELIJA is misplaced. The Second Circuit Court of Appeals has explained that, so long as the parents cooperate with the district and do not impede the district's efforts to

offer a FAPE, even if the parents had no intention of placing the student in the district's recommended program, their plan to unilaterally place a student, by itself, is not a basis to deny their request for tuition reimbursement (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

Moreover, the district's contention that the parents did not provide first request that the district provide the student with transportation to and from ELIJA is without merit. The parents' letter sent on June 23, 2022 states that the parents were "requesting special transportation" for the student while reserving the right to seek reimbursement for transportation costs or expenses (see Parent Ex. BB at p. 2). The district points to no evidence that it offered district transportation to the student. In addition, during the impartial hearing, the district presented no evidence that the cost of the transportation obtained by the parents was excessive.

In sum, the district has not presented any evidence that the parents acted unreasonably or were attempting to thwart or obstruct the district from making appropriate recommendations. The hearing record supports a finding that equitable considerations favor the parents' requested relief.

VII. Conclusion

The IHO properly found that the district failed to offer the student a FAPE for the 2022-23 school year, that ELIJA was an appropriate unilateral placement for the student, and that equitable considerations favored the parents' request for reimbursement. Accordingly, the IHO properly ordered the district to reimburse the parents for the student's tuition at ELIJA and transportation costs.

Based upon the above determinations, it is not necessary to address the district's remaining contentions.

THE APPEAL IS DISMISSED.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER