The University of the State of New York

The State Education Department
State Review Officer
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No. 24-536

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

Appearances:
Mayerson and Associates, attorneys for petitioners, by Gary Mayerson, Esq. and John Hobbs, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Augustus K. Balasubramaniam, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their son's tuition at the Shrub Oak International School (Shrub Oak) for the 2024-25 school year. The district cross-appeals from that portion of the IHO's decision which found that the district failed to offer the student appropriate educational programming for the 2024-25 school year and the IHO's finding that equitable considerations favor the parents. The appeal must be sustained in part. The cross-appeal must be dismissed and the matter remanded for further proceedings.

II. Overview—Administrative Procedures

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student in this matter is nonverbal and exhibits both self-injurious and aggressive behaviors (Parent Exs. L at pp. 21-22; P ¶¶ 7-11). He has received the diagnoses of autism spectrum disorder with accompanying intellectual impairment, attention deficit hyperactivity disorder (ADHD), and pica, among other things (Parent Exs. L at p. 21; P ¶¶ 4-6; Dist. Exs. 2 at p. 2; 7 at p. 2). He previously received special education services beginning at an early age in

another state and moved to the district in November 2021 (Parent Ex. P ¶ 13; Dist. Ex. 7 at p. 2, 4). Beginning in February 2022 through the remainder of the 2021-22 school year and for a portion of the 2022-23 school year, the student attended an interim placement at the Foundry Learning Center (Parent Exs. U at p. 5; V at pp. 1, 10; Dist. Ex. 7 at p. 2).

On December 15, 2022, the CSE convened, determined the student was eligible for special education as a student with autism, and recommended 12-month programming consisting of a State-approved residential nonpublic school placement with four 40-minute sessions per week of individual speech-language therapy, two sessions per week of adapted physical education, and full time 1:1 paraprofessional services for behavioral support (Parent Ex. U at pp. 29-31, 35).[1] Additionally, the December 2022 CSE recommended the student receive assistive technology consisting of a tablet "with the support of speech generation, symbol-based system" (id. at p. 30). Additionally, one 60-minute session monthly of group parent counseling and training was also recommended (id. at p. 30). The December 2022 CSE further recommended the student attend a 6:1+1 special class in a specialized school as an interim placement until a nonpublic residential program was located (id. at p. 29).

In January 2023 the parents filed a due process complaint notice and in a decision dated March 9, 2023, the IHO in that matter found that the district denied the student a FAPE for the 2022-23 school year by failing to implement the residential program recommended in his IEP (Parent Ex. V at pp. 1, 3, 7). Additionally, the IHO found that the parents had met their burden to demonstrate that their proposed unilateral residential placement at Shrub Oak would provide the student with educational instruction specially designed to meet his unique special education needs (see id. at pp. 10-13). Finally, the IHO found that equitable considerations weighed in favor of the parents because the parents had participated in all aspects of the special education process and assisted in securing a residential placement for the student (id. at p. 13). The IHO ordered the district to directly fund the student's unilateral placement at Shrub Oak beginning March 13, 2023 through the end of the 2022-23 school year (id. at p. 14).[2] The student began attending Shrub Oak residentially in March 2023 and continued attending during the 2023-24 school year (Parent Exs. L; P ¶¶ 14-15, 17).

A CSE convened on May 28, 2024 and developed the student's IEP for the 2024-45 school year (see Dist. Ex. 2). The May 2024 CSE recommended 12-month programming consisting of a 6:1+1 special class placement in a specialized school, adapted physical education, four 40-minute sessions per week of individual speech-language therapy, and full time 1:1 paraprofessional services for behavioral support (id. at pp. 20-21, 25). The May 2024 CSE recommended assistive technology consisting of an individual tablet with a speech generation and symbol-based system for daily use as needed at home and school (id. at p. 21). Further, the CSE recommended one 60-minute session per month of parent counseling and training (id. at p. 20).

[1] 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]).

[2] Shrub Oak 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).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 12-month 2024-25 school year (see Parent Ex. A). The due process complaint notice, among other claims, alleged that the CSE failed to adequately assess or describe the student, conduct an FBA or develop a BIP, individualize the IEP, communicate with the parents, develop appropriate IEP goals, offer an appropriate special class size and 1:1 paraprofessional, or offer appropriate related services or ESY services (id. at pp. 4-5; 7-8). The parents requested direct funding for the cost of the student's attendance at a residential setting at Shrub Oak, the cost of an augmentative and alternative communication (AAC) device and software, and transportation costs for the student and his parents (id. at p. 11).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 27, 2024.[3, 4] In a decision dated October 17, 2024, the IHO found that the district failed to offer the student a FAPE for the 2024-25 school year because the district failed to address the parents' concerns regarding the 1:1 behavior paraprofessional's ability to manage the student's self-injurious and maladaptive behaviors (IHO Decision at pp. 5-6). The IHO found that the district did not provide an explanation as to how the support from the 1:1 behavior paraprofessional would address the parents' concerns or support the student so that he would be able to access his educational program (id. at p. 6). The IHO found that the hearing record supported that the student required 1:1 support to access his curriculum; the IHO reasoned that without access to his curriculum, the student would be unable to attain an educational benefit and thus found that the district failed to offer the student a FAPE for the 2024-25 school year (id.).

The IHO then addressed the appropriateness of the parents' unilateral placement (see IHO Decision at pp. 6-7). The IHO stated that the standard in the Second Circuit regarding residential settings requires the State to recommend a residential program when it is necessary for the child to make meaningful educational progress and that "the central inquiry is whether the [s]tudent's conduct outside the school building and outside the normal hours of the school day is such that it impedes their ability to derive an academic benefit from a day program" (id. at p. 6). The IHO found that, based on the evidence in the hearing record, the district was not required to recommend a residential program to the student because the standard set by the Second Circuit requires objective evidence, not conclusory language (id.) While "[t]he parent, the [d]irector of [e]ducation at the [p]rivate [s]chool, and the [p]ediatric [n]europsychiatrist all cited to the [s]tudent's maladaptive behaviors and elopement as reasons why the [s]tudent required a residential

[3] The pendency implementation form is contained in Parent Exhibit A; however, this version of the document is not signed (Parent Ex. A at p. 13). Another version of the pendency implementation form that is signed by a district reviewer is contained in the record as a supplemental document (compare Parent Ex. A at p. 13; with Pendency Implementation Form).

[4] A pendency implementation form, signed by a district reviewer, dated August 28, 2024, agrees to provide direct funding for the student's 12-month residential placement at Shrub Oak beginning on July 1, 2024 (Pendency Implementation Form).

program[,]" the IHO found that there was no objective evidence present in the record to show that the student required a residential placement (id.). The IHO provided a list of some evidence that would have been considered objective, but stated that the evidence the parents presented focused on the "educational benefits the [s]tudent attain[ed] through their educational program, which takes place between 8:55[a.m.] and 2:50[p.m.]/3:55[p.m.]" (id. at pp. 6-7). When ruling on the appropriateness of the parents' unilateral placement, the IHO found that there were "insufficient credible facts alleged to find the [district] was required to recommend a residential placement" (id. at p. 7).

Although she determined that that there was insufficient evidence to support a finding that the district was required to recommend a residential program for the student, the IHO made alternative findings noting that equitable considerations weighed in favor of the parents (id.). The district argued that the parents had "unclean hands," but the IHO found this argument to be without merit and unsupported by the evidence in the hearing record (id.). Finally, the IHO found that the district did not provide any evidence to support the argument that the cost of the tuition was unreasonable (id. at p. 8). The IHO dismissed the parents' claim with prejudice because she found that the district was not required to recommend a residential program for the student (id.).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding that the parents failed to meet their burden to demonstrate that the student's programming at Shrub Oak was appropriate for the student. Specifically, the parents allege that the IHO applied the standard regarding the necessity of residential programs incorrectly. The parents argue that it is not their burden to show that it was necessary for the district to recommend the student be placed in a residential program, but rather their burden was to establish that, in the totality of the circumstances, Shrub Oak's residential program was reasonably calculated to provide the student with meaningful educational benefit. The parents requested that the IHO's decision be reversed and to award direct funding for the student's unilateral placement; alternatively, the parents request that the matter be remanded to an IHO.

The district answers, asserting that the IHO did not err in finding that the program at Shrub Oak was inappropriate for the student. Additionally, the district cross-appeals from the IHO's finding that the district denied the student a FAPE for the 2024-25 school year and from the IHO's finding that equitable considerations favor the parents.

The parents, in their answer to the cross-appeal, argue that the district failed to demonstrate that it offered the student a FAPE for the 2024-25 school year at the due process hearing.[5] The parents also assert that equitable considerations favor the parents. Finally, the parents assert that they have met their burden to prove that Shrub Oak is an appropriate unilateral placement for the student.

[5] The parents' answer to the cross-appeal, titled "Petitioners' Reply Memorandum of Law" exceeds 10 pages in length in violation of section 279.8(b) (8 NYCRR 278.8[b]).

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]).[6]

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).

[6] 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

At the outset, I find that the IHO failed to adequately address the parents' allegations contained in their due process complaint notice (compare Parent Ex. A, with IHO Decision at pp. 5-6). The IHO found that "[t]he record reflects that the [s]tudent requires 1:1 attention in a small group setting with constant repetition, hand over hand instruction, and constant engagement and redirection to attain an educational benefit and make slow incremental progress. At first blush, it appears that this is the program that the [district] offered the [s]tudent" (IHO Decision at p. 6).

However, without addressing any of the remaining issues, the IHO indicated that the district failed to address the 1:1 behavior paraprofessional's ability to adequately address the student's self-injurious and maladaptive behaviors, without addressing the other providers, or the behavioral aspects of the case, such as the parents' allegations that the student required an FBA and a BIP (IHO Decision at p. 6). The IHO concluded without citation to the facts that the evidence in the hearing record supports a finding that the student requires 1:1 support to access his curriculum; without access to his curriculum the student cannot attain an educational benefit; therefore, the district failed to offer the student a FAPE for the 2024-25 school year (id.). However, the parents did not allege that a 1:1 behavior paraprofessional's was inadequate to address the student's self-injurious and maladaptive behaviors (see generally Tr. pp. 1-60; Parent Exs. A; P). Rather, regarding the 1:1 behavior paraprofessional, the parents alleged that the district failed to offer the student a 1:1 instruction program throughout the school day and that a 1:1 behavior paraprofessional would not be supportive enough to deliver the student's instruction (Parent Exs. A at pp. 7-8; P ¶ 20). The IHO did not address or resolve the behavioral allegations that made by the parents in the due process complaint notice and did not address the parents' allegations that the student must be instructed in a 1:1 setting by a teacher.

To be clear, the parents enumerated 86 allegations in their due process complaint notice and the IHO failed to adequately address or firmly resolve any of the allegations. Thus, I find that the matter must be remanded to address the parents' allegations as specifically stated in their due process complaint notice. When determining whether the district offered the student appropriate programming pursuant to the Burlington/Carter standard on remand, the IHO should address among the parent's other claims: whether the failure of the district to send a school location letter, prior written notice, or other placement recommendation for the student to the parent before the start of the 12-month extended school year resulted in a denial of FAPE; whether the CSE was required to conduct its own evaluations of the student prior to the May 2024 CSE meeting or otherwise lacked sufficient information to develop the student's IEP; whether there were private evaluations or recommendations of private providers that the CSE failed to consider; whether the CSE predetermined the student's programming; whether the district was required to provide the parent with CSE meeting minutes; whether the district was required to respond or convene a CSE meeting to address the parents' letters expressing their concerns; whether the district failed to provide the appropriate parent counseling and training on the student's IEP; whether the IEP contained inaccuracies and if so, whether those inaccuracies denied the student a FAPE; whether the district inappropriately failed to conduct a functional behavior assessment or develop a behavior intervention plan; whether the 6:1+1 special class in a special school with a 1:1 paraprofessional was as recommended in the student's IEP was adequate; whether the student requires 1:1 teaching; whether the district denied the student a FAPE by not recommending extended-day services to the student; whether the IEP adequately address the student's need for

assistive technology; whether the IEP adequately addressed the student's sensory needs; whether the annual goals developed in the IEP adequately address the student's needs; and whether the district failed to recommend the student to the central based support team (see Parent Ex. A pp. 1-14).[7, 8] Importantly, the IHO also failed to make findings regarding the parents' allegations that during the CSE meeting the CSE determined that the student should be referred to the district's central based support team (CBST) because the CSE had decided the student should be placed in a residential setting, but that the district instead an IEP calling for a special class in a specialized school within the district.[9] The resolution of the parents' claims may well have resulting implications for the remainder of the parties' disputes in the case.

After addressing these issues, the IHO should determine whether the district denied the student a FAPE based on the allegations contained in the parents' due process complaint notice. Should the IHO find that more information is needed to adequately address these allegations, the parties and the IHO should further develop the hearing record.

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[7] The IHO should pay particular attention to the annual goals listed in the student's May 2024 IEP and whether all of those annual goals could be implemented in the recommended 6:1+1 classroom (see Dist. Ex. 2 at pp. 15; 17).

[8] On remand, the IHO need not address the parents' allegations regarding methodology or the district's alleged failure to recommend the student an extended school year. In addition, generally, an IEP is not required to specify the methodologies used with a student and the precise teaching methodologies to be used by a student's teacher are usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94). Indeed, a CSE should take care to avoid restricting school district teachers and providers to using only the specific methodologies listed in a student's IEP unless the CSE believes such a restriction is necessary in order to provide the student a FAPE. However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). In the due process complaint notice, the parents did not specify the type of methodology that allegedly should have been utilized for the student, thus the issue does not have to be addressed on remand. The parents also alleged that the district failed to recommend an extended school year services in the May 2024 IEP; however a brief review of the IEP reflects that the district did recommend services on a 12-month basis for the student, and the parents claim as set forth in the due process complaint notice is due to a misreading of the IEP (Dist. Ex. 2 at p. 21).

[9] It appears on appeal that the parents believe the student required a residential setting for the 2024-25 school year, which calls into question why they alleged that the district failed to provide what parents at times refer to as "extended day services," that is, services outside of a day school's regular school hours. There is no explicit provision under State or federal law that lays out specific requirements for services outside of the regular school day, only case-by-case adjudicative determinations that address parental requests for services outside of regular school hours. However, the residential placement sought by the parent already involves circumstances that extend well beyond the school day.

Additionally, the IHO utilized the incorrect standard when determining the appropriateness of Shrub Oak. Rather than making a ruling regarding whether the unilateral placement was appropriate for the student, the IHO found that the district was not required to recommend a residential placement (IHO Decision at p. 7). As further described below, an analysis of appropriateness regarding a unilateral placement must assess whether, under the totality of the circumstances, the placement offers specially designed instruction that is reasonably calculated to address the student's individual needs.

Should the IHO find that there has been a denial of FAPE based on one of the allegations made in the parents' due process complain notice, the IHO must also reassess the evidence in the hearing record regarding the appropriateness of the unilateral placement using the correct standard. The IHO should use the following standard for the analysis:

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).

Additionally, while some Circuit Courts of Appeal have adopted separate tests to determine whether a unilateral residential placement is reimbursable under the IDEA, in determining the appropriateness of any unilateral placement, including a residential one, the Second Circuit has employed the analysis considering the "totality of the circumstances" (see D.D-S. v. Southhold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. 2012 [holding tuition reimbursement was not warranted for a residential placement because the parent did not present evidence that the placement was appropriate to address the student's educational needs]; Mrs. B., 103 F.3d at 1120-22; see also Jefferson County Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227, 1238-39 [10th Cir. 2012], cert. denied 133 S. Ct. 2857 [2013] [holding that the essential question is whether the residential placement provides specially designed instruction and related services to meet the student's unique needs]).[10]

As for the parent's decision to unilaterally seek a residential placement, the IHO should be mindful 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

[10] The Circuit Courts for the Third, Fifth, and Seventh circuits have adopted various tests for determining the appropriate of a residential unilateral placement (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 297-300, 298 n.8 [5th Cir. 2009] [holding that a residential placement must be essential for the student to receive meaningful educational benefits and primarily oriented toward enabling the student to receive an education]; Mary T. v. Sch. Dist., 575 F.3d 235, 242-44 [3d Cir. 2009] [holding that a residential placement must be necessary for educational purposes as opposed to being a response to medical or social/emotional problems segregable from the learning process]; Dale M. v. Bd. of Educ., 237 F.3d 813, 817 [7th Cir. 2001] [holding that the services provided by the residential placement must be primarily oriented toward enabling the student to obtain an education, rather than noneducational activities]).

appropriateness of the unilateral placement (Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]). The IHO should assess restrictiveness of the parent's unilateral placement under this standard.

The IHO may, in her sound discretion, decide whether to revisit the issue of equitable considerations upon remand after reassessing the evidence and the parties under the first and second Burlington/Carter criteria.

VII. Conclusion

Based on the determinations above, the IHO's findings pursuant to the first and second Burlington/Carter criteria must be vacated. Upon remand, the IHO must determine whether the district denied the student a FAPE based on the allegations contained in the parents' due process complaint notice. Should the IHO find that the student was denied a FAPE, the IHO must assess the parent's unilateral placement using the correct standards. The IHO, in her sound discretion, may decide whether the issue of equitable considerations needs to be readdressed upon remand after addressing the first and second Burlington/Carter criteria.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that those portions of the IHO's decision dated October 17, 2024 which found that the district failed to offer the student a FAPE and that the parent's unilateral placement of the student was unnecessary because the district was not required to offer the student a residential placement are vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings in accordance with the body of this decision.

Dated: **Albany, New York**
April 2, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER