



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-593

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

Appearances:

The Law Offices of Neal Rosenberg, attorneys for petitioner, by Karen Newman, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Yeled v'Yalda (Yeled) for the 2023-24 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 facts and procedural history of this case and the IHO's decision will not be recited in detail.

Briefly, in May 2018, a committee on preschool education (CPSE) found the student eligible for special education and related services as a preschool student with a disability and recommended the student for a bilingual program (Yiddish and English) consisting of two hours per day (for five days per week) of special education itinerant teacher (SEIT) services in a group of two and two 30-minute sessions per week each of individual speech-language therapy,

individual occupational therapy (OT), and individual physical therapy (PT) (Parent Ex. B at pp. 1-22).¹

According to a March 2021 psychoeducational evaluation report, the student was then-currently a second-grade student in secular studies at a nonpublic religious school (Dist. Ex. 6 at p. 1). According to the report, the student's most recent IEP (December 2019) recommended integrated co-teaching (ICT) services, counseling, OT, PT, and speech-language therapy (*id.*). A January 2023 progress report indicated that, during the 2022-23 school year, the student attended fourth grade at the same nonpublic school and received ten 60-minute sessions per week of special education services through Yeled (Dist. Ex. 5 at p. 1).

On May 3, 2023, a CSE convened to conduct the student's annual review and develop an IEP for the student for the 2023-24 school year (Dist. Exs. 1 at pp. 1-21; 2 at p. 1). Finding the student eligible for special education and related services as a student with a speech or language impairment, the CSE recommended a bilingual program (English and Yiddish) in a 12:1+1 special class placement with related services consisting of one 30-minute session per week of counseling (Yiddish) in a group and two 30-minute sessions per week each of individual OT (English), PT (English), and speech-language therapy (Yiddish) (*id.* at pp. 1, 14-15, 19-20).²

The May 2023 IEP further stated that if there was no class available in the recommended language of instruction, the student would be placed in an interim monolingual class with an alternate placement paraprofessional, who was bilingual in the recommended language of instruction, until the student was placed in an appropriate bilingual class (Dist. Ex. 1 at p. 20).

In a letter, dated May 10, 2023, the parent provided the district notice of his intent to place the student in a nonpublic school at his own expense and his desire for the continuation of the student's special education services during the "next school year" (Dist. Ex. 4).

On May 31, 2023, the parent executed an enrollment contract with Yeled for delivery of special education and/or related services from September 1, 2023 through June 30, 2024 (Parent Ex. D).

In a July 7, 2023 prior written notice, the district provided a summary of the programs and services recommended by the May 2023 CSE and in an accompanying school location letter

¹ State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; *see* "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; *see* Educ. Law § 4410[1][k]).

² The student's eligibility for special education as a student with a speech-language impairment for the 2023-24 school year is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

identified the specific school site at which the student's program would be provided (Dist. Exs. 2; 3).

In an August 23, 2023 letter to the district, , the parent shared his concern that the recommended 12:1+1 special class was too restrictive, that the student needed the structure of 1:1 services from a trained professional in order to develop basic skills, and that without an appropriate recommendation the parent would seek continuation of the last agreed upon IEP (May 2018) which included 10 hours of SEIT services and related services consisting of two 30-minute sessions per week each of speech-language therapy, OT, and PT (Parent Ex. C at pp. 1-2). The parent did not include in the notice his intention to seek district funding or reimbursement for these services (Parent Ex. C at pp. 1-2).

During the 2023-24 school year the student attended the fifth grade at the same nonpublic school and received services consisting of ten hours per week of "special education" services along with OT through Yeled (Parent Exs. F; G at pp. 1-3; H at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parent alleged that the student was "identified as a special education student" at a CSE meeting on May 3, 2023 (id. at p. 2). The parent alleged that the CSE recommended 12:1+1 special class and related services was "far too restrictive" for the student and that the student required a bilingual Yiddish program (id.). The parent alleged that the student had been making progress with "10 hours of SEIT support," that "he has been able to handle mainstreaming opportunities" with this support, and that he needed to 1:1 instruction in order to develop basic skills (id.). The parent alleged that the IEP did not accurately reflect the student's academic, social, and emotional issues, and that the annual goals included in the IEP were not specific enough to address the student's needs (id.). The parent sought an order continuing the student's CPSE program provided by Yeled which consisted of SEIT services, speech-language therapy, OT, and PT (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 8, 2024 (Tr. pp 1-46). The parties submitted documentary evidence, which was admitted into the hearing record without objection, including testimonial affidavits (Tr. pp. 7-8). The district cross-examined Yeled's special education consultant and Yeled's director of fiscal services (see Tr. p. 15-25, 28-34). In a decision dated November 22, 2024, the IHO found that the district provided the student with a FAPE for the 2023-24 school year and dismissed the parent's due process complaint notice in its entirety (IHO Decision pp. 4, 7).

The IHO summarized the procedural history of the case noting that all documentary evidence was admitted into the record and summarized the parties' positions, noting that both parties waived opening statements (id. p. 4). Next, the IHO summarized her findings of fact, noting that the student was 11-years old and was classified as a student with a speech or language impairment (id. at p. 5). The IHO found that the district sent the parent a prior written notice and

school location letter, dated July 7, 2023 (*id.*). The IHO also noted the parent sent a "10-day letter" on August 23, 2023 advising the district of her intention to privately place the student for the 2023-24 school year (*id.*).

The IHO summarized her findings that the district met its burden and provided a FAPE for the 2023-24 school year (IHO Decision at p. 7). As justification for her findings, the IHO found that the May 2023 IEP, the prior written notice, and the school location letter, all "provided insight" into the CSE determination and that the IEP sufficiently explained "which other options the CSE considered and why those options were rejected" (*id.*). The IHO found that annual goals were "tailored to the [s]tudent's needs to allow the [s]tudent to make progress in the least restrictive environment" (*id.*). The IHO held that, while the district did not present any witnesses, the documentary evidence provided "a cogent and responsive explanation" and satisfied the district's burden that it provided the student a FAPE (*id.*).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding the district offered the student a FAPE for the 2023-24 school year. The parent argues that the IHO erred in making her decision based entirely on documentary evidence and that testimony was required to explain and substantiate the district's recommendations. According to the parent, the IHO failed to address how or why the 12:1+1 special class would have met the student's needs and erred in finding that the provision of an alternate placement paraprofessional would have been sufficient until the recommended bilingual special class was found for the student. Moreover, the parent argues that the IHO erred in finding that the district sent the parent the prior written notice because no evidence was presented that the parent actually received the document. Finally, the parent alleges that the IHO erred by not evaluating the appropriateness of the parent's unilaterally obtained services and by not evaluating the equitable considerations in her decision. The parent requests that the IHO findings be reversed and that the parent be awarded direct funding for the unilaterally obtained program for the 2023-24 school year.

In an answer, the district argues that the documentary evidence was sufficient to meet its burden and that the recommended program was reasonably calculated to enable the student to make progress in the least restrictive environment. The district requests that the IHO's decision be affirmed and the parent's appeal be dismissed.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).³

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

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

VI. Discussion

A. May 2023 IEP

First, I will address the parent's argument that the IHO erred in relying on documentary evidence alone in her determination that the district provided the student a FAPE for the 2023-24 school year. Specifically, the parent argues that "[s]imply placing in evidence documents that purport to relate to the school year at issue, without offering any testimony to explain their relevance or probative value, to support their validity, to confirm that they faithfully documented [the student's] present levels of performance and needs," among other issues, fails to provide the "cogent and responsive explanation" that the district is expected to provide in order to show that it offered an educational program and services that were reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

³ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

As noted above, the burden of production and persuasion has been shifted under State law to a district to show that it offered a student a FAPE (Educ. Law § 4404[1][c]).⁴ In Andrew F., the Supreme Court held that the "reviewing court may fairly expect [school] authorities . . . to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"(580 U.S. at 404). However, neither the IDEA, State Law, nor case law provides that a district fails to meet its burden of proof simply because the evidence produced does not consist of witness testimony and instead, each party has the right to "[p]resent evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512 [a][2]). Because there is a right to present documentary evidence, the documentary evidence must be discussed as it relates to the disputed issues because a district could prevail on some or all of the disputed issues related to a FAPE for a student by producing evidence consisting of documentary evidence. An IHO is required to conduct a fact-specific analysis in order to determine whether a district offered the student a FAPE and a district must ensure that the hearing record includes evidence addressing the particular issues raised by the parents in their due process complaint notice. The sufficiency of the evidence presented should be determined after weighing the relative strengths and weakness of the parties' evidence in light of the allegations and the relevant legal standards. To be clear, there is no procedural requirement that a district call witnesses at the impartial hearing in order to address the parent's due process complaint notice, especially if the district submits the extensive documentation that is required under the procedures of the IDEA itself.⁵ Thus, the parent's argument suggesting a bright line rule requiring witness testimony is rejected and, as discussed further below, I will address whether the district's documentary evidence alone in this case is sufficient to establish the appropriateness of the May 2023 IEP.⁶

⁴ Ordinarily, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

⁵ If the parents believed that there were particular facts or events during the CSE process that were relevant that should have come to light and were not captured by or, more importantly, contradicted the documentary evidence offered by the district, the parents, as participants in the impartial hearing process, were free to try to establish a different version of the facts, offer contrary documentation, or "compel the attendance of witnesses and . . . confront and question all witnesses at the hearing" including but not limited to the district personnel that participated in the May 2023 CSE meeting (8 NYCRR 200.5[j][3][xii]). The IHO was authorized to issue subpoenas for this purpose if necessary (8 NYCRR 200.5[j][3][iv]).

⁶ If a district intends to rest its case on documentary evidence alone, it is prudent for the district to offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]).

1. Present Levels of Performance

Although the student's present levels of performance, including his management needs, are not in dispute, a discussion thereof provides context for the issues to be resolved on appeal.

Turning to the student's May 2023 IEP, a review of the IEP's present levels of performance reveals that they mirror the reporting found within the January 2023 progress report from Yeled, the parentally chosen provider and included reporting from the director at the student's school and his parent (Dist. Ex. 1 at pp. 1-5; compare Dist. Ex. 1 at pp. 1-5, with Dist. Ex. 5 at pp. 1-4).

Specifically, the May 2023 IEP stated that the student presented with delays in reading, reading comprehension, math, and writing/handwriting and the student was functioning at a second-grade reading level and a fourth-grade math level while the student was in a fourth grade class at his nonpublic school (Dist. Ex. 1 at p. 1). The IEP specifically noted delays in pre-readiness skills (i.e., colors, shapes, number concepts), readiness/early literacy skills (i.e., math skills, phonemic awareness, grasping concepts, social interaction with peers/adults, task completion/following directions, safety awareness, maintaining eye contact) and demonstrating self-regulation (i.e., ability to control his emotions) (id. at p. 3). The IEP stated that the student continued to struggle with understanding the sequence of events in a story and stating the main idea, had deficient decoding skills and poor reading fluency and accuracy, and had been unsuccessful with participating in class discussions about new information (id. at pp. 1-2). In the area of math, the IEP included reporting that the student had not mastered the times tables and displayed poor multiplication skills, had difficulty reading and understanding word problems and applying the correct operation, and produced "messy and disorganized" work (id. at p. 2). The IEP stated that the student's handwriting and spelling were poor (id. at p. 1). The IEP identified organization and study skills delays such as difficulties in understanding/verbalizing/completing assignments, demonstrating effective time-management skills, and asking for assistance and staying focused (id. at pp. 1-2). The IEP included parent reporting and concerns that the student had a short attention span and could not focus for more than 40 minutes and had to be taken out of the class and given 1:1 support (id. at p. 2). The May 2023 IEP included the recommendation, from the student's January 2023 progress report, of continued 1:1 intensive special education services due to the student's academic delays and difficulties (id. at p. 3; see Dist. Ex. 5 at p. 3).

With respect to social development, the IEP included reporting from the special education service providers that the student had poor social skills and difficulty understanding and reading facial cues and responding appropriately (Dist. Ex. 1 at p. 3). The student's school director reported that there were no concerns socially (id.). The parent reported that the student had received a diagnosis of attention deficit hyperactivity disorder (ADHD), did not recognize the emotional reactions of others, would lose interest in a group and would "shy away" from large groups, required social supports, was sensitive to certain situations, and could become teary eyed or aggressive without adults around in situations where he wanted to take control of the situation (id. at pp. 3-4).

Regarding physical development the IEP stated the student had significant weaknesses in handwriting skills which affected his ability to form letters correctly and use correct spacing and that his writing was often illegible, messy, and difficult to decipher (id. at p. 4).

In addition to the January 2023 progress report from Yeled and reporting from the director at the student's school and his parent, the May 2023 CSE would have had available a March 2021 psychoeducational evaluation report (Dist. Ex. 6). A review of the evaluation report shows that its findings were consistent with the reporting in the May 2023 IEP (compare Dist. Ex. 6 at pp. 1-4, with Dist. Ex. 1 at pp. 1-5).

The March 2021 psychoeducational evaluation report included results from 2018 cognitive assessments which found the student's functioning was in the mildly impaired/deficient range for nonverbal IQ and in the borderline delayed range for verbal IQ (Dist. Ex. 6 at pp. 1-2). Academically, the student's teacher reported the student was performing below grade expectations in sight word recognition, decoding, vocabulary, fluency, text-to-self connections, calculation skills, word-problem solving skills, handwriting, writing fluency/syntax/mechanics, grammar, and narrative and expository writing (id. at pp. 3-4).⁷ In addition, the student's teacher reported the student presented with difficulty understanding and executing instructions without intervention, expressing himself fluently/completely/concisely, asking questions in a logical manner, grasping the continuity of patterns, copying letters or numbers, recalling concepts and lessons taught, starting and completing tasks, maintaining attention and focus, transitioning, understanding body language and overall tone in conversation, maintaining eye contact, and understanding humor and sharing ideas and opinions in a socially appropriate manner (id. at p. 2-3). Annual Goals

Next, I turn to the IHO's findings that the annual goals, developed in the May 2023 IEP, were sufficiently tailored to the student's needs (see IHO Decision at p. 7). The parent objects to the IHO's findings asserting that the district "failed to call witnesses to substantiate the development, appropriateness, or implementation of the[] goals for [the student]"; however, the parent does not point out any specific areas of student need where the annual goals were deficient or any specific goals that were not appropriate for the student (Req. for Rev. at pp. 4-5).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Review of the May 2023 IEP shows that it included annual goals in the areas of speech, OT, PT, counseling, English language arts (ELA), and math (Dist. Ex. 1 at pp. 6-14). The speech annual goals targeted phonemic awareness skills, usage of correct grammar/spelling/punctuation/capitalization, auditory comprehension skills, vocabulary development, and pragmatics and conversational exchange (id. at pp. 6-7). The OT annual goals included in the IEP addressed prewriting and handwriting through copying tasks, fine motor and

⁷ The March 2021 psychoeducational evaluation report noted that due to COVID-19 precautions "face-to-face assessment was unavailable" and that an alternative evaluation procedure (a comprehensive report completed by the student's classroom teacher) was employed (Dist. Ex. 6 at pp. 1-2).

visual motor integration skills, graphomotor skills through copying texts of varying lengths, development of the vestibular system through movement experiences (jumping, climbing, swinging), and development of improved strength in upper extremities (*id.* at pp. 7-8). The annual goals in the area of PT targeted improvement in balance skills through running forward, jumping, and ascending and descending stairs (*id.* at p. 9). The IEP included counseling annual goals targeting engaging in new friendships, interpersonal skills, self-image and self-confidence, self-regulation, and self-advocacy skills (*id.* at pp. 9-10). Annual goals in the area of ELA addressed writing sentences with the support of a word wall, punctuation and capitalization, identifying complete and incomplete sentences, writing narrative step by step instructions, applying phonics and word analysis skills in decoding, paragraph writing, making text-to-self/world connections, and reading fluency (*id.* at pp. 11-12). The math annual goals addressed, among other areas, writing and telling time, word problems involving addition and subtraction, one step word problems involving money, number sense, fractional parts, interpreting products of whole numbers, differentiating between relevant and irrelevant information in word problems, and strategies in solving word problems (e.g., guessing and checking, looking for a pattern, making a drawing or model) (*id.* at pp. 12-14).

I note that the annual goals generally included evaluative criteria (80 percent accuracy), and each annual goal identified evaluation procedures (teacher/provider observations, assessment task, check list) and schedules to measure progress (one time per month) (Dist. Ex. 1 at pp. 6-14).⁸

Based on the above review, the annual goals included in the May 2023 IEP were appropriate and addressed the student's needs as identified in the present levels of performance.

2. Educational Placement

a. 12:1+1 Special Class

As stated above, the IHO found that the evidence in the hearing record provided insight into the options the CSE considered before making their recommendation (IHO Decision at p. 7). As noted by the IHO, the May 2023 IEP and July 2023 prior written notice both stated that the CSE considered a 12:1 special class in a community school and a 12:1+1 special class in a specialized school but rejected those options as they were considered inappropriate in addressing the student's academic needs for the upcoming school year (Dist. Exs. 1 at p. 21; 2 at p. 2).

The parent correctly notes that the IHO Decision does not provide much detail in explaining her analysis and findings and while I may have arrived at my conclusions in a different manner, as detailed below, the evidence in the hearing record provides no cause for disturbing the IHO's ultimate finding that the 12:1+1 special class recommendation offered the student a FAPE.

The parent specifically argues that the IHO erred as there was no testimony or documentary evidence in the hearing record explaining why a 12:1+1 special class would have offered the student "an opportunity greater than mere trivial advancement." (Req. for Rev. at p.3). The parent

⁸ The May 2023 IEP did not identify an evaluative criterion in the "CRITERIA" column for the counseling annual goals, however a closer inspection reveals that most of the counseling annual goals included a criterion within the annual goal description (e.g., 8/10 trials, 4/5 trials) (*see* Dist. Ex. 1 at pp. 9-10).

contends that the IHO erred in finding that the district's reliance on documentary evidence was sufficient to meet its burden and asserts that the district was required to present evidence that was "more convincing than the evidence offered in opposition" (*id.* at p. 2). However, the parent does not offer any specific argument within the request for review as to why a 12:1+1 special class was not an appropriate placement for the student and rather solely asserts that the IHO's finding did not sufficiently explain why the recommended 12:1+1 special class was appropriate.

Looking back at the parent's July 2024 due process complaint notice and August 2023 10-day notice, the parent offered the argument that the recommended 12:1+1 special class was "too restrictive" for the student (Parent Ex. A at p. 2; C at p. 1). However, the parent also argued that the student had been making progress while receiving 10 hours of special education support and that he needed the structure of a 1:1 service from a trained professional in order to develop basic skills (*see* Parent Ex. A at p. 2; C at p. 1). The student's January 2023 progress report from Yeled included a similar contradiction in stating that the student "belong[ed] in a general education placement yet require[d] 1:1 support" and in recommending continued "1:1 intensive special education services," which, at that time, included 10 hours of special education services per week (Tr. Dist. Ex. 5 at pp. 1, 3). Accordingly, the parent's arguments, as raised in the due process complain notice, related to LRE concerns, and whether the student should have been placed in a general education setting rather than the recommended 12:1+1 special class.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; *see T.M.*, 752 F.3d at 161-67; *Newington*, 546 F.3d at 111; *Gagliardo*, 489 F.3d at 105; *Walczak*, 142 F.3d at 132; *Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist.*, 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; *see* 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; *Newington*, 546 F.3d at 112, 120-21; *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1215 [3d Cir. 1993]; *J.S. v. N. Colonie Cent. Sch. Dist.*, 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; *Patskin*, 583 F. Supp. 2d at 430; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; *Mavis v. Sobol*, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; *see* 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).⁹

In this instance, the special education consultant at Yeled (consultant) testified that while they "tried to do a little bit [of] push-in," because the student was "very behind" his peers, they needed to do "a lot of pull-out" in delivering the student's 1:1 special education services (Tr. pp. 18-19). The consultant added that the student received the 10 hours per week of individual SETSS during the student's three core subject areas identified as reading, math, and writing (Tr. p. 19). He further testified that the student was "too much behind" and really needed assistance and that since they saw a lot of progress with the services, that it was necessary for the student to receive the 10 hours of special education services a week to make progress (Tr. p. 24-25). Accordingly, based on this testimony it appears that when the student was receiving services from Yeled, the student was not receiving core instruction in a general education setting, but was receiving core instruction separate from the classroom using the 10 hours per week of individual SETSS.

The May 2023 CSE recommended that the student be placed in a 12:1+1 special class for ELA (10 periods per week), math (10 periods per week), social studies (2 periods per week), and

⁹ The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

sciences (3 periods per week) (Dist. Ex. 1 at p. 15). Accordingly, the CSE recommended that the student be in a special class setting for core academic subjects. While it would have been advisable for the district to identify participation with general education peers within the IEP, a review of the student's special education program and related services leaves one to assume the student would have had opportunities to participate with non-disabled peers during lunch and "specials" such as art, music and/or physical education (see Dist. Ex. 1 at pp. 15, 18-20). The CSE reasonably calculated that the student should be placed in a special class setting with the additional support of the supplementary school personnel, which in some ways was a setting similar special class setting to the "push-in" arrangement of the 1:1 instruction described by the consultant.

It is difficult to understand the premise of the parent's objection to the district program as the parent and the consultant from Yeled were recommending what appears to have been the use of 1:1 instruction as a special class separate from the student's general education nonpublic school. On the one hand the parent asserts that the student belonged in a general education setting, but on the other hand, the parent asserts that the student required "intensive" 1:1 instruction in order to receive any educational benefit. The parent argues that with the 1:1 support, the student had been able to "handle mainstreaming opportunities" (see Parent Ex. A at p. 2; C at p. 1). However, it could just as easily be the case that because the student was placed in a regular education setting and was not receiving instruction in the class at his level, he required the 1:1 instruction outside of the classroom.

State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]; "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 15-16, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

Review of the student's management needs shows that the recommendation for a 12:1+1 special class was consistent with the student's needs; in particular, the student required repetition and review, previewing, preferential seating, praise and encouragement, scaffolding and modeling, instruction and assignments broken down, use of a word wall, multi-sensory lessons, use of graphic organizers, use of checklists, writing prompts, reading strategies, check-ins, assistance with word problems, use of a calculator, and grouping of the student with other students with similar strengths and needs (Dist. Ex. 1 at p. 5). In addition, within the IEP's present levels of performance the CSE identified the student's needs for accommodations and supports including repetition and review, preferential seating, scaffolding and modeling, instructions and assignments broken down into smaller units of learning, graphic organizers, and active reading strategies (*id.* at pp. 4-5).

Based on the above, I find that the hearing record supports the IHO's findings and demonstrates that the district's recommended program, including the 12:1+1 special class placement, was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2023-24 school year.

b. Alternative Interim Placement

The parent next argues on appeal that the IHO erred in relying on the IEP's provision of an interim monolingual class with an alternate placement paraprofessional until the student was placed in an appropriate bilingual class to find that the IEP was appropriate. The parent notes that the student was mandated for bilingual Yiddish instruction for math, social studies, science, counseling services, and speech-language therapy and that neither the documentary evidence nor the IHO's decision provide a cogent response as to how the student would make progress in a program that fails to meet his IEP mandate or provide instruction in his dominant language.

The above being said, the district's recommendation for a bilingual paraprofessional in a monolingual classroom, as an interim placement, must be appropriate to address the student's language needs. A CSE must consider special factors including a student's communications needs and, in the case of a student with limited English proficiency, how the student's language needs relate to the student's IEP (34 CFR 300.24[a][2][ii], [iv]; 8 NYCRR 200.4[d][3][ii], [iv]). Pursuant to State guidance, when developing an IEP for a limited English proficient student with a disability, the CSE must consider the student's language needs as they relate to the student's IEP, "as well as the special education supports and services a student needs to address his or her disability and to support the student's participation and progress in the general education curriculum" ("Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/English Language Learners (ELLs) who are Students with Disabilities," at pp. 1-2, Office of Spec. Educ. [March 2011], available at <https://www.nysed.gov/sites/default/files/programs/bilingual-ed/bilingualservices-311.pdf>; see also "Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/English Language Learners (ELLs) who are Students with Disabilities", Office of Spec. Educ. [Jan. 2024], available at <https://www.nysed.gov/bilingual-ed/field-advisoriememoranda-pertaining-ells>). Such considerations include, but are not limited to: the student's need for "special education programs and services to support the student's participation and progress in English language arts instruction, content area instruction in English and ESL instruction; and whether the student needs bilingual special education and/or related services" (*id.* at p. 2). In this case, the CSE was required to "consider specially designed instructional programs provided by appropriately qualified staff" to address the student's needs with regard to "understanding, speaking, reading, writing and communicating in English" (*id.*).

The May 2023 IEP stated that if there was no class available in the recommended language of instruction, the student would have been placed in an interim monolingual class with an alternate placement paraprofessional until the student was placed in an appropriate bilingual class (Dist. Ex. 1 at p. 20). The IEP continues in explaining that an alternate placement paraprofessional was bilingual in the recommended language of instruction (*id.*). However, the IEP does not identify why the alternate placement would have been appropriate for the student, which is troubling as in recommending a bilingual 12:1+1 special class, the May 2023 CSE was indicating that it was necessary for the student.

The hearing record offers little to no evidence with respect to the student's ability level as an English learner. Reporting from the student's school, included in the March 2021 educational evaluation report, indicated that, at that time, regarding the student's "Pre-Assessment ELA" he

was decoding and comprehending on a first-grade level and was estimated to be functioning on a first-grade level in writing (Dist. Ex. 6 at pp. 3-4).

Here the parent correctly notes that the district did not provide any testimony to support how the alternate program would have worked for the student, including any information regarding the student's skill level in understanding English or how the student, who required a bilingual program, would have benefitted from instruction in English only. Accordingly, on this basis, the district's indication on the May 2023 IEP that the student may have been placed in an inappropriate program until the recommended program was located, resulted in a denial of a FAPE to the student for the 2023-24 school year.

3. School Location Letter

On appeal, the parent argues that the IHO erred in concluding that a placement was provided when the district provided no testimony or evidence establishing mailing of the school location letter. The parent argues that he credibly testified that he did not receive a school location letter (see Parent Ex. K at ¶ 5). This testimony was uncontested by the district and the hearing record does not include testimony as to the usual course of business in mailing IEPs nor school logs confirming the mailing of the school location letter (see Tr. at pp. 1-46).

That said, the May 2023 IEP stated that the parent agreed to look at the recommended type of program, as per a placement letter to be received at a later date, and to bring any questions or concerns that may arise during a visit to the district and staff at the specified school (Dist. Ex. 1 at p. 20). The May 2023 IEP further indicated that the placement was at a non-specialized district school (id. at p. 19). At the very least, the parent was aware of the recommendations of the district and participated in the May 2023 CSE meeting.

In a letter dated May 10, 2023, the parent advised the district of his intent to privately place the student in a nonpublic school (see Parent Ex. J at ¶¶ 9-10; see also Dist. Ex. 4).

The July 7, 2023 school location letter identified the specific school site at which the student's recommended services would be provided (Dist. Exs. 2 at p. 6; 3 at p. 1). Although, the school location letter indicates that it was mailed to the parent at an address different from that indicated in the parent's July 2024 due process complaint notice and the parent's August 2023 letter to the district (compare Dist. Exs. 2 at pp. 7-8; 3 at pp. 2-3, with Parent Exs. A at p. 1; C at p. 1). The parent then notified the district, in a letter dated August 23, 2023, that she would continue the student's last agreed upon IEP consisting of 10 hours per week of SEIT services and related services for the 2023-24 school year, noting that she had not yet received a placement offer (Parent Ex. C).

It has been held that a district's notice which contains an incorrect location of the public school to which the student has been assigned is not a per se procedural violation, and is unavailing as a claim for a deprivation of a FAPE, especially where there has been no prejudice to the student in any material respect (see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *9 [S.D.N.Y. Oct. 28, 2011] citing A.S. v. New York City Dep't of Educ., No. 10-CV-9, slip op. at 18-19 [E.D.N.Y. May 25, 2011] [rejecting the parents' claim based upon a deficient notice and further noting that the mistake on the notice was not discovered until during the hearing]).

A similar scenario has presented itself in the instant matter. While the parent argues that the procedural violation alleged amounts to a denial of FAPE, the parent's argument ignores the fact that the parent notified the district, in a May 10, 2023 letter, of his intention to place the student at a nonpublic school. The parent does not allege that the student was prejudiced by the alleged violation but does indicate that the parent fully intended to privately place the student before the prior written notice was sent to the parent. Under the circumstances of this case, where the parent had previously decided to unilaterally place the student, the evidence does not support that any mistake in delivering the school location letter impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits ((A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; T.Y. v. New York City Dep't of Educ., 584 F.3d at 416, 419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010])[holding that a parent's right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school or classroom]). Therefore, I need not disturb the IHO's findings on this issue.

B. Parentally Obtained Services 2023-24 School Year (5th grade)

During the 2023-24 school year the student attended the fifth grade at the same religious nonpublic school he had previously been attending and received services consisting of 10 hours per week of special education services along with OT delivered by a private agency, Yeled (Parent Exs. F; G at pp. 1-3; H at pp. 1-2).

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 consultant from Yeled testified that he engaged with parents to enhance their understanding and constructive involvement in addressing their student's educational, home, and community-based needs; fostered a collaborative environment; and attended clinical team meetings and offered follow-up parent training as needed or requested (Parent Ex. L at p. 1).

In addition, the consultant testified that he conducted one-on-one supervisory meetings and provided targeted training and guidance to ensure that the education specialists were equipped with the necessary tools and skills to achieve positive outcomes for students (Parent Ex. L at p. 1). The consultant testified that he collaborated with special education providers to develop individual goals for each student (id. at pp. 1-2). The Yeled annual review IEP report, attached to the January 2023 progress report, included annual goals targeting prewriting/handwriting skills, general math concepts/reasoning/computation, word recognition and decoding skills, organization/study/learning skills, comprehension, and the mechanics of writing (Dist. Ex. 5 at pp. 8-12).

The May 2024 Yeled special education progress report identified student needs in the areas of reading, reading comprehension, math, writing/handwriting, maintaining focus, organization, study skills, and social skills (Parent Ex. G at pp. 1-3).

To address the student's needs in comprehension and his distractibility issues which hindered his "complete engagement with the stories read," the provider employed sequencing and questioning techniques (Parent Ex. G at p. 1). The provider implemented self-monitoring checklists and actively taught organizational skills to address the student's deficits in study skills and organization (id. at p. 2). In working to improve the student's math computational skills the

provider employed approaches such as the use of graph paper, repeated practice, breaking problems into smaller components, and incorporating math drills (id.). To address the student's deficits in written expression the provider engaged in practices focused on improving writing and spelling and in assisting the student in organizing his thoughts into coherent sentences (id.). To address the student's challenges in social skills the provider employed role playing exercises to help the student practice appropriate conversation skills and teach him how to assess his audience's interest through reading facial cues and body language (id.).

The May 2024 progress report indicated the student had progressed "slightly" in his reading ability and had learned "some more" sight words, had learned basic math computations skills for addition and subtraction, and in the area of receptive language progress it was noted that the student was "now" able to understand verbal instructions, could answer simple questions about a story, and learned facts and acquired knowledge about the surrounding world (Parent Ex. G at p. 1).

A May 2024 OT progress report identified the student's needs in the areas of prewriting/handwriting, motor planning, and attention span deficits (Parent Ex. H at p. 1). To address the student's identified needs, the progress report stated that "[m]odes of intervention" utilized during therapeutic intervention would include grasping skills, copying, behavior/transition, task completion, bilateral coordination/integration skills, attention, balance/postural and equilibrium reactions, strength/endurance, motor control, visual perception, motor planning, handwriting, sensory processing/modulation-auditory, and sensory processing/modulation-visual (id. at p. 2). Additionally, the progress report stated that to facilitate mastery of skills the provider would also use verbal prompts, tactile prompts, visual demonstration, verbal redirections, tactile redirections, visual redirections, sensory preparatory techniques, increased structure throughout task, positive reinforcement and grade activities (id.).¹⁰

The May 2024 OT progress report stated that the student had demonstrated progress in that he was "now" able to form letters correctly, could copy "more complex" shapes, was proficient with maneuvering through simple obstacle courses, and was "now" able to judge distance to avoid "bumps" into other people, especially in narrow places (Parent Ex. H at p. 1).

However, as noted above, during the 2023-24 school year, the student was placed in a general education nonpublic school and was provided with the support of 10 hours per week of special education services and two sessions per week of OT. Further, as noted above, the student was so far behind his peers that the student was predominantly receiving his core academic outside of the general education setting in the nonpublic school (Tr. pp. 18-19, 24-25).

As noted above, specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the

¹⁰ While the May 2024 special education progress report described the student's progress during the 2023-24 school year and things that worked on during the school year at issue, the May 2024 OT progress report appears to focus more on what will be done for the student in the future (compare Parent Ex. G, with Parent Ex. H). A description of what will be targeted in the future is less effective for describing the appropriateness of the current educational program than a description of what was being worked on with the student during the 2023-24 school year.

general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1 [vv]; see 34 CFR 300.39 [b][3]). The hearing record, while not robust in this regard, contains some evidence of the strategies and materials the student's special education provider used with the student during the 2023-24 school year. However, the student was also described as being behind his peers to the extent that all of his core academic instruction was delivered through individual special education services outside of the classroom and, accordingly, there is some question as to the student's functioning in the general education setting during the 2023-24 school year, which cannot be answered without evidence such as the student's report cards or other evidence explaining how the student was performing with the curriculum being provided to him. Notably absent from the hearing record, is any evidence regarding the curriculum at the nonpublic school, the student's non-SETSS instruction, or how the SETSS were connected to the instruction provided by the nonpublic school. Due to this lack of information, which should have been in the parent's possession as she placed the student at the nonpublic school, it is not possible to ascertain whether the provided special education supports assisted the student's functioning in the classroom so that he could access the general education curriculum.

VII. Conclusion

For the reasons above, the district failed to prove that it offered the student a FAPE for the 2023-24 school year; however, the parent failed to sustain her burden to establish the appropriateness of the unilateral placement for the 2023-24 school year. The necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 11, 2025**

**STEVEN KROLAK
STATE REVIEW OFFICER**