



# The University of the State of New York

The State Education Department

State Review Officer

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No. 12-134

**Application of the [REDACTED]  
[REDACTED] for review of a determination of a hearing  
officer relating to the provision of educational services to a  
student with a disability**

## **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for petitioner,  
Jessica C. Darpino, Esq., of counsel

The Law Offices of George Zelma, attorneys for respondent, George Zelma, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Rebecca School for the 2011-12 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

With regard to the background of the dispute in this case, in September 2009, the student was given a diagnosis of a pervasive developmental disorder (PDD) (Dist. Exs. 2 at p. 1; 3 at pp. 1, 6; 4 at p. 4; 5 at pp. 1, 3; 6 at p. 1). She has difficulty with respect to attention and eye contact (Dist. Exs. 3 at p. 6; 5 at p. 4). In addition, she exhibits delays in her acquisition of auditory comprehension and expressive language skills (Dist. Ex. 4 at p. 4). The student also exhibits severe sensory modulation dysfunction, and presents with poor arousal level affecting her attention span, body and spatial awareness and relatedness (Dist. Ex. 5 at p. 4). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (Tr. p. 17; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Prior to moving into the district in December 2010, the student attended a special education preschool and received speech-language therapy, applied behavioral analysis (ABA) instruction and occupational therapy (OT) in a different State (Tr. p. 436; Dist. Exs. 2; at p. 1; 3 at p. 6; 6 at p. 1; Parent Ex. C at p. 2). Pursuant to the parent's request for special education services for the student, the district conducted evaluations of the student, and on February 2, 2011, the Committee on Preschool Special Education (CPSE) convened to develop the student's IEP (Parent Ex. C at pp. 2, 9; see Dist. Exs. 2-6). The February 2011 CPSE recommended the provision of 20 hours per week of special education itinerant teacher (SEIT) services, twice weekly 45-minute sessions of individual speech-language therapy in addition to twice weekly 45-minute sessions of individual OT (Parent Ex. C at p. 2). Although the parent disagreed with the February 2011 CPSE's program recommendation, the parent testified that she consented to the provision of services, and the student began to receive special education services subsequent to the February 2011 CPSE meeting (Tr. pp. 439-40; Parent Ex. C at p. 2). By letter to the district dated March 7, 2011, the parent advised that she objected to the February 2011 IEP, and that she planned to enroll the student in the Rebecca School (Parent Ex. C at pp. 2, 9).<sup>1</sup> In May 2011, the student enrolled in the Rebecca School (Tr. pp. 323, 443; Parent Ex. H; see Parent Ex. C at p. 3).<sup>2</sup> On August 24, 2011, the CSE met to develop a school-aged IEP for the 2011-12 school year (Dist. Ex. 1). For the 2011-12 school year, the August 2011 IEP noted that the student required a 12-month placement and offered a 6:1+1 special class in a specialized school, together with related services comprised of twice weekly 30-minute sessions of individual speech-language therapy and twice weekly 30-minute sessions of individual OT (Tr. pp. 100, 103; Dist. Ex. 1 at pp. 7-8, 12). Annual goals were developed with respect to academics, OT, and speech and language (Dist. Ex. 1 at pp. 3-7). In the August 2011 IEP, the CSE also found the student eligible for alternate assessment (id. at pp. 10, 12).

By final notice of recommendation (FNR) to the parent dated August 29, 2011, the district summarized the August 2011 placement recommendation in the student's IEP and informed the parent of the particular public school site to which the student was assigned (Parent Ex. F at p. 1). In a letter dated September 8, 2011 to the district, the parent described the

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<sup>1</sup> The parent's March 7, 2011 letter to the district was not incorporated into the hearing record.

<sup>2</sup> The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

assigned public school site as "passable" for the student; however, the parent rejected the proposed program and outlined her reasons for rejection, which included her concerns for the student's safety (Parent Exs. F at p. 2; L at pp. 1-2). The parent further advised that the student would continue to attend the Rebecca School for the upcoming school year, and that the parent planned to request tuition reimbursement (Parent Exs. F at p. 1; L at p. 1).

In an administrative decision in different due process proceeding dated October 20, 2011, an IHO found that the student's CPSE IEP was inappropriate and directed the district to reimburse the parent for the student's tuition at the Rebecca School for the period of May 2011 through August 2011, in addition to payment of the student's tuition at public expense (Parent Ex. C at pp. 13-14).

### **A. Due Process Complaint Notice**

The day after the prior proceeding concluded, by due process complaint notice dated October 21, 2011, the parent requested a second impartial hearing over the student's school-age August 2011 IEP for the 2011-12 school year that is the subject of this State-level review (Parent Ex. A). The parent asserted that the district denied the student a free appropriate public education (FAPE) because, in part, the district did not offer the student an appropriate program (id.). The parent further alleged that the district did not provide her with a written copy of the August 2011 IEP (id. at p. 5). In addition, the parent claimed that the assigned public school site was not appropriate for the student's needs, and further asserted that, despite her efforts to visit the proposed classroom, the district denied her access (id. at pp. 5-6). The parent maintained that the Rebecca School constituted an appropriate educational setting for the student, where the student reaped educational, emotional, behavioral and social benefits in the least restrictive environment (LRE) (id.). Lastly, the parent contended that equitable considerations supported her request for relief (id. at p. 7).

As a remedy, the parent requested, among other things, payment of the student's tuition for the Rebecca School for the 2011-12 school year to be provided at public expense (Parent Ex. A at p. 7). Additionally, the parent invoked the student's right to pendency (stay put) (id.).

On November 1, 2011, the district submitted a response to the due process complaint (Parent Ex. B). The district alleged, among other things, that the assigned public school site was reasonably calculated to enable the student to obtain educational benefits (id. at p. 3). The district further noted that unless the parties agreed otherwise, the student would remain in her last agreed-upon placement until completion of the proceedings (id.).

### **B. Impartial Hearing Officer Decisions**

On November 15, 2011, an impartial hearing convened and after four days of testimony, concluded on May 21, 2012 (Tr. pp. 1-490). During the course of the proceeding, in an interim decision dated January 6, 2012, the IHO directed that the district continue to pay for the cost of

the student's tuition for the Rebecca School pursuant to pendency (stay put), effective October 21, 2011 (Interim IHO Decision at p. 2).<sup>3</sup>

On May 25, 2012, the IHO rendered his decision on the merits, in which he directed the district to reimburse the parent for the student's tuition at Rebecca School for the period of October 21, 2011 through the end of the 2011-12 school year, having concluded that the district did not offer the student a FAPE, the Rebecca School was appropriate and equitable considerations favored the parent's request for relief (IHO Decision at pp. 24-25, 28). Regarding the provision of a FAPE to the student, the IHO found that the August 2011 IEP was deficient, in part, because, the goals listed in the IEP lacked baseline data, and did not address the student's documented needs, particularly with respect to her sensory or learning deficits (*id.* at p. 21). As a result, the IHO concluded that the goals included in the August 2011 IEP were not appropriate for the student (*id.*). The IHO also found that due to the absence of the student's Rebecca School providers at the August 2011 meeting, coupled with the goals' failure to address the student's identified needs, a "true picture" of [the student] could not possibly be obtained" (*id.*). The IHO further noted that the district did not memorialize the parent's request to place the student at the Rebecca School on the IEP; however, he did not determine whether the district's failure to do so rose to the level of a denial of a FAPE (*id.*). Next, despite the parent's claim that she did not receive the IEP in a timely fashion, the IHO did not find that any delay in the parent's receipt of the IEP resulted in a procedural irregularity, because the parent received the FNR, and she scheduled a visit at the assigned public school site (*id.* at p. 22). Furthermore, the IHO was

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<sup>3</sup> The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \* 20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "the then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] *aff'd*, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelle, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] *aff'd*, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at \*23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

troubled by the parent' s testimony that the district would not make a final decision on the student's IEP without input from the student' s Rebecca School providers, and noted that the district did not contact anyone from the Rebecca School (id. at pp. 22-23). Similarly, the IHO found that the August 2011 IEP was not based on input from the student' s "previous teachers," which also contributed to a denial of a FAPE to the student (id. at p. 23). Additionally, he discredited the testimony of the district special education teacher who took part in the August 2011 CSE meeting, because despite the special education teacher' s testimony that she was familiar with the student' s needs, there was no classroom observation report before the August 2011 CSE and there was no input from the Rebecca School (id.).

The IHO also concluded that the assigned public school site would not adequately implement the student' s IEP (id. at p. 22). For example, he noted that the special education teacher of the proposed class was unaware of the extent of the student' s special education needs and deficits, and despite the student' s need for constant stimulation, the IHO was troubled by the lack of a trampoline in the proposed classroom (id.). Having found that the district denied the student a FAPE during the 2011-12 school year, the IHO went on to find that the Rebecca School was appropriate for the student, in part, because the program was individualized and customized for her (id.). The IHO found that the hearing record demonstrated that the student required a small self-contained special education class in an appropriate setting, combined with a multisensory approach and appropriate related services in order to benefit from instruction and receive a FAPE (id. at p. 24). He further concluded that the sensory program implemented for the student made it possible for the student to remain regulated and to attend (id.). Under the circumstances, the IHO concluded that the hearing record demonstrated that the student received an educational benefit while at the Rebecca School (id. at p. 24). Lastly, the IHO concluded that equitable considerations favored the parent' s claim for relief, because the hearing record contained "overwhelming" evidence that reflected "parental involvement and cooperation" (id.). He also noted that the parent afforded the district timely notice of her rejection of the IEP, and her intention to seek payment of the student' s tuition to be provided at public expense (id. at p. 22). Additionally, the IHO noted that the district did not challenge the reasonableness of the cost of the student' s tuition at the Rebecca School (id.).

#### **IV. Appeal for State-Level Review**

The district appeals, and argues, in pertinent part, that it offered the student a FAPE during the 2011-12 school year, that the Rebecca School did not constitute an appropriate unilateral placement for the student, and that equitable considerations should preclude the parent' s request for relief.

Preliminarily, the district argues that the IHO erred to the extent that he decided matters not included in the due process complaint notice. Next, the district maintains that it offered the student a FAPE during the 2011-12 school year, for the following reasons, which included, among other things: (1) although no representatives from the Rebecca School took part in the August 2011 CSE meeting, the parent was accompanied by her attorney, and therefore, there is no showing in the hearing record that an improperly constituted CSE developed the student' s IEP; (2) the August 2011 CSE based its program recommendation for the student on recent and appropriate evaluative data; and (3) the goals contained in the August 2011 IEP were appropriate

for the student and they adequately addressed the student's sensory and academic needs. In addition, the district argues that the IHO erred to the extent that he determined that the August 2011 CSE's failure to memorialize the parent's desire to place the student at the Rebecca School resulted in a denial of a FAPE. On the contrary, the district maintains that it considered other program options for the student, and while this discussion was not detailed in the August 2011 IEP, the August 2011 CSE's failure to note the discussion of program options for the student did not result in a denial of a FAPE to the student. Furthermore, the district alleges that the assigned public school site could address the student's sensory and academic needs. With respect to the appropriateness of the Rebecca School, the district contends, in pertinent part, that it did not constitute an appropriate placement for the student, because she was the only verbal student in her class. In addition, the district claims that given that the student is constantly overstimulated and unregulated, the lack of structure and academic instruction at the Rebecca School render it an inappropriate educational setting for the student. The district also alleges that the Rebecca School did not appropriately group the student by age. Finally, the district argues that equitable considerations weigh against the parent's claim. Specifically, the district alleges that the parent never seriously considered enrolling the student in a district school, nor did she provide the district with timely and proper notice of her intent to place the student in the Rebecca School for the upcoming school year. Further, the district asserts that the parent did not establish that she was unable to afford the cost of the Rebecca School tuition, and therefore, there was insufficient evidence in the hearing record to show that payment of the student's tuition should be provided to her at public expense.

In an answer, the parent requests that the petition be dismissed and that the petition fails to comport with the pleading requirements set forth by State regulation. As an initial matter, the parent argues that the instant appeal has been rendered moot, by virtue of receiving the relief they requested under pendency. In the alternative, assuming a live claim exists, the parent maintains that the district denied the student a FAPE during the school year in question, the Rebecca School constituted an appropriate unilateral placement for the student, and no equitable considerations exist that would bar or diminish her request for relief. In pertinent part, the parent argues that the district denied the student a FAPE during the 2011-12 school year, because the hearing record does not contain evidence that the recommended program and assigned public school site were reasonably calculated to provide the student with meaningful educational benefits. More specifically, the parent argues that the district submitted sparse evidence with regard to the student's needs. Furthermore, the parent asserts that the Rebecca School was an appropriate placement, because it was designed to meet the student's unique and individualized educational needs and the student was appropriately grouped based on her functional needs. Lastly, the parent contends that the equities favor her request for relief, in part, because she cooperated with the district and provided it with timely and proper notice that she rejected the IEP and assigned public school site.

The district submitted a reply to the parent's answer. The district maintains that the instant matter should not be dismissed on mootness grounds, because pendency had not attached during the period of August 31, 2011 through October 20, 2012. As a result, the district contends that a live claim exists, and urges review of the instant case on the merits.

## 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. 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; 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. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaronck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

Initially, with regard to the parent's claim that the case was rendered moot due to receiving all of the relief they requested under pendency, the parent clearly was entitled to reimbursement for the costs of the unilateral placement effective with the filing of the due process complaint on October 21, 2011, however, there was some dispute at the impartial hearing regarding the period not covered by the prior IHO's unappealed order, that is, between the final date through which he ordered relief, August 30, 2011, and the initiation of the proceeding in this case on October 21, 2011 (see Tr. pp. 3-16). The IHO did not amend his pendency order, indicating that the parent was eligible for reimbursement under pendency effective October 21, 2011. It appears that some of the parties' discussion with the IHO regarding pendency occurred de hors the record (Tr. p. 3), and that the IHO asked for further briefing of this issue, which did not occur (Tr. pp. 7, 14). I have found little authority that clearly supported one party's position over the other. Out of an abundance of caution, I decline to find the case moot due to this open question, although it is very clear that the parents have received most, if not all, of the relief they sought.<sup>4</sup> Accordingly I will proceed to discussion of the merits.

### **A. Receipt of the August 2011 IEP**

The IHO found that the parent never received a copy of the August 2011 IEP until the commencement of the impartial hearing (IHO Decision at pp. 21-22). The district maintains that the evidence in the hearing record establishes that it mailed a copy of the August 2011 IEP to the parent, whereas the parent claims that she rebutted any presumption of mailing of the IEP. As indicated below, the hearing record fails to substantiate the parent's assertion.

New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (Nassau Ins. Co., 46 N.Y.2d at 829-30; In re \_\_\_\_\_

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<sup>4</sup> The IHO's request for briefing on this particular point was within his sound discretion, as it is a nuanced legal issue, and it is disappointing that counsel for the parties appears to have failed to respond to the IHO in a meaningful way. In some circumstances, although I decline to do so at this late juncture in the case, I would require counsel for the both parties to articulate with clarity the relevant legal authorities upon which they have based their position. It is their function not only to zealously represent their clients, but also to assist the IHO with carefully conducted research on their positions on difficult legal issues. It is not the IHO's responsibility to make their cases for them.

Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep' t 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires... in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep' t 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]. In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (Nassau Ins. Co., 46 N.Y.2d at 829-30).

Here, the hearing record contains a photocopy of the August 2011 IEP (Dist. Ex. 1). Further review of the hearing record reveals that the district presented testimony from the clerical associate who was responsible for mailing the August 2011 IEP to the parent as well as the August 16, 2011 notice of the IEP meeting (Tr. pp. 193-204; Dist. Ex. 8). The clerical associate explained that her duties for summer 2011 included data entry "packaging," and when conferences had been completed, she further testified that it was her responsibility to ensure that everything was mailed out (Tr. pp. 195-96). According to the clerical associate, on September 2, 2011, she mailed a copy of the August 2011 IEP to the parent (Tr. pp. 196-97). The clerical associate confirmed the date of the mailing, because at the time that she mailed the IEP to the parent, she simultaneously provided the district's CPSE administrator with a copy of the student's IEP, along with copies of updated reports from the Rebecca School and the student's providers (Tr. pp. 197-98).<sup>5</sup> Additionally, the clerical associate stated that she left a note with the CPSE administrator to advise her that the clerical associate delivered a copy of the IEP to the parent (id.). She further testified that she "double-check[ed]" the parent's address, which she retrieved from the district database (Tr. p. 198). The hearing record does not suggest that the August 2011 IEP was undeliverable. Rather, a review of the hearing record reveals that the address to which the clerical associate mailed the August 2011 IEP matched the address that the August 29, 2011 FNR bore (compare Tr. p. 198, with Parent Ex. F at p. 1). The parent confirmed that she received a copy of the August 29, 2011 FNR by mail, which also summarized the some of the contents of the August 2011 IEP (Tr. pp. 457, 475; Parent Ex. F at p. 1). Moreover, the evidence shows that on September 8, 2011, the parent visited the assigned public school site listed on the August 29, 2011 FNR (Tr. pp. 221, 457-58, 474-76; Parent Exs. D; F at pp. 1-2; L).

Under the circumstances, upon review of the hearing record, I find that the copy of the August 2011 IEP, coupled with the clerical associate's testimony, establishes that the August 2011 IEP was prepared and mailed to the parent at the proper address, and that the district retained copies of the August 2011 IEP (Tr. pp. 196-98; Parent Ex. F at p. 1). I find that this evidence gives rise to a presumption of mailing and receipt (see Nassau Ins. Co., 46 N.Y.2d at 829). I also find that there was no testimony or evidence rebutting the presumption that standard office practice was followed, nor was there evidence showing that the procedure followed was

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<sup>5</sup> According to the district special education teacher who participated in the August 2011 CSE, the clerical associate had advised the special education teacher that she sent the parent a copy of the student's IEP (Tr. pp. 134-35).

done with such carelessness that it would be reasonable to assume that the August 2011 IEP was not mailed (Nassau Ins. Co., 46 N. Y.2d at 829-30). Accordingly, the parent's claim that she did not receive the IEP is insufficient to rebut the presumption of mailing.

## **B. Adequacy of the August 2011 IEP**

Notwithstanding my determination that the parent failed to overcome the presumption of mailing in this instance, as set forth in greater detail below, although I base my decision on slightly different grounds, I agree with the IHO's ultimate conclusion that the district did not provide the student with a FAPE (IHO Decision at p. 23).

### **1. CSE Process – Private School Personnel at CSE Meeting**

The IHO found that the lack of personnel from the Rebecca School at the August 2011 CSE meeting contributed to a denial of a FAPE to the student (IHO Decision at pp. 22-23). The IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]- [3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). State regulations further provide that a CSE shall include "persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual" (8 NYCRR 200.3[a][1][ix]).

Attendees at the August 2011 CSE included the following individuals included a district special education teacher, a district regular education teacher, a district representative, a district social worker, a district school psychologist, and the parent (Tr. pp. 85-88; Dist. Ex. 1 at pp. 13-14). The parent's attorney participated in the August 2011 CSE via telephone (Tr. pp. 86-87, 153, 445; Dist. Ex. 1 at p. 14).

The district claims that the lack of participation from the student's teacher and providers from the Rebecca School did not result in a denial of a FAPE to the student, in part, because the parent attended the August 2011 CSE meeting accompanied by her attorney (Pet. ¶ 41). While it is unusual for a student to be denied a FAPE where the parent and counsel are in attendance at the relevant CSE meeting, in this instance, I am not persuaded in this instance that the absence of the student's Rebecca School providers did not constitute a procedural error which impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.<sup>6</sup> In the instant case, the hearing record reflects that on August 16, 2011, the

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<sup>6</sup> But see, Application of the Bd. of Educ., Appeal No. 11-096; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-051. In these cases, no procedural errors resulting in a denial of a FAPE to the student developed as a result of the CSE process where the parent was accompanied by counsel during the CSE meeting in dispute.

district advised the parent of the date of the CSE meeting and further informed her that she "may bring other individuals who [had] knowledge or special expertise regarding [the student]" (Tr. pp. 93-94, 122; Dist. Ex. 8 at p. 1). The district special education teacher admitted that it would have been helpful to draft the IEP with the input of the student's providers from the Rebecca School (Tr. pp. 132-33).<sup>7</sup> However, in this case, the parent did not contact any Rebecca School personnel, nor did she bring any documentation from the Rebecca School to the August 2011 CSE meeting regarding her daughter (Tr. pp. 121, 469). Regardless of whether the parent was able to invite the student's Rebecca School teacher and providers, the hearing record indicates that in the hour prior to the CSE meeting, the district school psychologist attempted to contact the Rebecca School to secure the participation of the student's providers; however, CSE meeting minutes or other records reflecting the CSE's efforts to contact those individuals were not incorporated into the hearing record (Tr. pp. 91-92, 121).<sup>8</sup> There is no information in the hearing record regarding previous attempts to contact Rebecca School personnel in an effort to include them in the CSE meeting (Tr. p. 132). Although it is undisputed that neither the parent nor her attorney requested that the August 2011 CSE meeting be adjourned to allow for the participation of Rebecca School personnel in the development of the student's IEP, the hearing record further suggests that the CSE meeting could not be adjourned at that point, because the beginning of the school year was approaching, and the district was required to have an IEP in place on the first day of school (Tr. pp. 120, 139; see also, 20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194). Notwithstanding the district's claim that the parent had previously cancelled the CSE meeting several times, which in turn, resulted in a late summer scheduling of the CSE meeting, there is no documentation in the hearing record which reflects the district's efforts to schedule the CSE meeting earlier in the summer or any record of the parent's cancellations of the meeting (Tr. p. 140). I further note that the CSE could have reconvened with participation from Rebecca School personnel; however, the hearing record fails to demonstrate that the district made any efforts to reconvene the CSE after the commencement of the school year. Under the circumstances, the hearing record suggests that the CSE hastily developed the student's IEP, without first having obtained the input of Rebecca School personnel who were actually working with the student, which in turn, as discussed below, hampered the CSE's ability to develop an accurate depiction of the student's deficits and how to appropriately address her special education needs, and ultimately denied the student a FAPE.<sup>9</sup>

## **2. Failure to Memorialize Discussion Regarding August 2011 CSE's Consideration of Other Programs in August 2011 IEP**

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<sup>7</sup> It is also undisputed in the hearing record that the district special education teacher who took part in the August 2011 CSE meeting was not a special education teacher of the student, nor would she have been responsible for implementing the student's IEP, as she testified that she was a middle school teacher (Tr. pp. 85-86; 123-25).

<sup>8</sup> The district special education teacher testified that the district regular education teacher who participated in the August 2011 CSE meeting recorded the CSE meeting minutes; however, the district regular education teacher did not testify at the impartial hearing and the hearing record does not include a copy of the August 2011 CSE meeting minutes (Tr. p. 120).

<sup>9</sup> The hearing record is equivocal with regard to the IHO's conclusion that the district advised the parent that the district would not make any final conclusions with respect to the student's IEP until the CSE spoke with Rebecca School personnel (compare Tr. p. 173, with Tr. pp. 444-45, and Tr. pp. 472-73).

Notwithstanding my determination, I have considered the district's remaining claims surrounding the August 2011 CSE process. The IHO found that the August 2011 CSE considered a nonpublic school; however, this was not memorialized (IHO Decision at p. 23). State regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services (8 NYCRR 200.6; see 34 CFR 300.115[a]).

The district special education teacher testified that the August 2011 CSE considered placing the student in a 6:1 classroom or a special class in a community school (Tr. p. 111). According to the August 2011 IEP, the CSE opted against placing the student in a general education setting, because it determined that the student's need warranted a special class in a specialized school to address her significant needs (Dist. Ex. 1 at p. 3). The district special education teacher explained that the August 2011 CSE was most concerned about the student's speech and ability to communicate her needs, and therefore, the CSE determined that the student required more support (Tr. p. 111). Although the hearing record indicates that during the meeting, the parent requested placement at Rebecca, the August 2011 CSE did not document her request in the IEP; however, neither the IDEA or State regulation impose any such requirement on districts (Tr. pp. 111-12). Accordingly, I cannot conclude that the district's failure to document in the IEP the parent's request to place the student at the Rebecca School for the 2011-12 school year contributed to a denial of a FAPE to the student in this instance.

### **3. Evaluative Data and Present Levels of Performance**

Turning next to the district's contention that the August 2011 CSE had access to and considered recent and sufficient evaluative data, as indicated below, a careful and independent review of the hearing record supports a finding that although the August 2011 CSE had access to comprehensive evaluative data, the CSE failed to reflect the information included in the evaluations before it in the August 2011 IEP, and therefore, the CSE failed to accurately depict and address the student's identified needs, which ultimately resulted in a denial of a FAPE to the student.

Under the IDEA and State regulations, the CSE must review each student's IEP at least once each year to determine its adequacy and recommend an educational program for the next school year (34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see 20 U.S.C. § 1414[d][4][A][i]; Educ. Law § 4402[1][b][2]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation,<sup>10</sup> the student's strengths; the concerns

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<sup>10</sup> Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be

of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In December 2010, pursuant to the parent's request to evaluate the student, the district arranged for a community-based organization to conduct a number of evaluations in the student's home, which included a social history, a bilingual psychological evaluation, a speech-language evaluation, an OT evaluation, and an educational evaluation (Tr. pp. 436-38; Dist. Exs. 2-6).<sup>11</sup> According to the district special education teacher, the August 2011 CSE met that day for the student's "Turning Five" review which developed the 2011-12 IEP effective September 2011 (Tr. pp. 104-05).<sup>12</sup> The special education teacher indicated she was familiar with the student through her participation in the August 2011 CSE meeting and through review of the student's history and data available to that CSE (Tr. pp. 84-86; Dist. Ex. 1 at p. 14). The special education teacher further testified that the August 2011 CSE discussed "every piece of information" available which included a December 10, 2010 social history, a December 10, 2010 bilingual psychological evaluation, a December 15, 2010 speech (and language) evaluation, a December 22, 2010 educational evaluation, and a December 31, 2010 OT evaluation (Tr. pp. 88-91, 114; Dist. Exs. 2 at pp. 1-3; 3 at pp. 1-7; 4 at pp. 1-4; 5 at pp. 1-4; 6 at pp. 1-4).<sup>13</sup> The district special education teacher indicated that the August 2011 CSE reviewed the available documents prior to the parent's arrival (Tr. p. 98). When parent arrived at the August 2011 CSE meeting, the CSE attempted to obtain information about the student from the parent (Tr. p. 94). The teacher indicated the August 2011 CSE "went through what (it) considered...[needs that were] age typical for a student with autism and going into kindergarten, just trying to figure out where she would fit" (Tr. pp. 94-95).

As indicated above, in developing the student's IEP, the August 2011 CSE reviewed a December 2010 social history (Dist. Ex. 2). The parent reported to the school psychologist who conducted the social history that the student was happy and affectionate, but the parent also

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sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). [12-096]

<sup>11</sup> The hearing record reflects the student moved to New York from another state on December 1, 2010 (Tr. p. 436). The December 22, 2010 educational evaluation report indicated the evaluation was an initial educational evaluation to determine the student's eligibility for district special education preschool services (Dist. Ex. 3 at p. 1). The student's preschool IEP pertinent to the remainder of the 2010-11 school year is not included in the hearing record.

<sup>12</sup> The district special education teacher testified that she was employed as a district middle school special education teacher for grades five to nine (Tr. p. 84). The teacher noted she was certified as a special education teacher and a general education teacher for students in grades five to nine (Tr. p. 85). The special education teacher's testimony indicated she was not a certified kindergarten teacher, and accordingly, she would not have been the student's kindergarten teacher (Tr. pp. 123-24).

<sup>13</sup> I note that all evaluative documentation available to the August 2011 CSE was timely (Tr. p. 130; Dist. Exs. 2-6).

described the student as "very strong willed" and required "constant stimulation" (id. at pp. 1-2). The evaluator further reported that the student communicated in one and two-word utterances, some memorized phrases, and jargon, and that others found it difficult to understand her (id. at p. 2). In addition, the December 2010 social history revealed that the student demonstrated echolalia (id.). According to the report, the student could, upon request, point to at least three major body parts, and to common pictures in a book or magazine when named (id.). The evaluator also noted that the student sometimes listened to a story for five minutes, and the student sometimes followed one to two-step directions (id.). In addition, the evaluator stated that at the time, the student named at least ten objects and used some noun-verb phrases (id.). The December 2010 social history report further revealed that the student verbally expressed 50 recognizable words and used some simple words as descriptors (id.). Additionally, the student asked "what" wh-questions, and used some negatives in phrases (id.).

Regarding the student's social/emotional functioning, the social history report also reflected that per parent report, the student responded well to routine and structure, particularly at school (Dist. Ex. 2 at p. 2). However, the parent also reported that when the student was not in school, the student displayed severe behaviors including prolonged tantrums, head banging, scratching, and aggression towards herself or others (id.). The student presented with significant sensory concerns and exhibited a high tolerance for pain (id.). The evaluator also reported that the student became frustrated easily and displayed poor safety awareness (id.). According to the report, the student also presented with a high activity level, and focused on sensory activities (id. at p. 2-3). With respect to the student's adaptive functioning, at the time that the social history was obtained, the student required assistance with her overall adaptive skills specific to dressing, toilet training, personal hygiene, and awareness and safety when around hot objects (id. at p. 3). The social history report also indicated that the student demonstrated understanding of the function of the telephone and was able to count up to ten objects (id.). However, the report further noted that the student could not use the television without help, nor did she demonstrate appropriate behavior when riding in a car, or an understanding of the function of money (id.).

The August 2011 CSE also reviewed a December 2010 bilingual psychological evaluation, which was conducted by the same school psychologist who obtained the social history (Dist. Ex. 6 at pp. 1-4; see Dist. Ex. 2 at p. 1 at p. 1). The bilingual psychological evaluation report indicated that behaviorally, the student did not respond to the evaluator's greeting, make eye contact, or respond to her name (Dist. Ex. 6 at p. 1).<sup>14</sup> According to the evaluator, the student expressed herself in one to two-word utterances combined with jargon, and the student also made screeching and high-pitched sounds (id.). The evaluator found that the student did not follow single-step commands, even when she provided the student with visual cues or physical prompting (id.). The evaluator described the student as self-directed and further noted that the student was unable to engage in structured tasks (id.). Sensory seeking behaviors observed during the parent interview portion of the evaluation included the student dragging and throwing herself on the floor, climbing onto furniture, and spinning around while sitting on the floor (id.). When the evaluator presented the student with manipulatives, the student grabbed them and threw them on the floor (id.). The evaluator further found that the student did not imitate

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<sup>14</sup> The hearing record indicates the student's family speaks English in the home (Dist. Exs. 2 at p. 2; 3 at p. 1; 4 at pp. 1, 4). The hearing record does not reflect the student speaks any language other than English.

simple actions such as clapping hands, waving good-bye or scribbling (id.). In addition, the evaluator noted that the student became increasingly uncooperative and inattentive as the evaluation session progressed, at which point formal cognitive testing was discontinued (id. at pp. 1-2). However, the evaluator found that the student was attentive and engaged in a read/sing along with the parent (id. at p. 1). In regard to adaptive behavior functioning, the evaluator's completion of the Vineland-II Adaptive Behavior Scales Survey Interview Form with the parent as informant yielded an adaptive behavior composite score within the low range across the domains of communication, daily living skill, socialization, and motor skills (id. at p. 2).

The psychological evaluation report included multiple recommendations from which the student would benefit, which included placement in a smaller educational setting that provided individualized attention, curriculum adaptations, strategies to facilitate the student's learning, language development, socialization, and self-help skills, as well as a behavior modification regimen to shape or modify appropriate behavior for specific concerns (Dist. Ex. 6 at p. 3). In addition, the evaluator recommended the development of strategies to help the student improve her language comprehension through the use of visual aids for instructions, repetition of directions, as well through the provision of simplified, explicit, and structured verbal directions (id.). The evaluator also suggested that strategies to improve the student's expressive language skills incorporate the use of words and pictures and/or objects/actions (id.). In addition, the evaluator suggested that the student would benefit from opportunities for supervised social and verbal interaction with peers to encourage the development of adequate social and communication skills (id.). The evaluator also indicated that the student would benefit from pre-academic readiness/cognitive games (id.). Additional recommendations included the provision of a multi-modal, multi-sensory approach to instruction and exposure to high-interest materials at school and at home (id.). The evaluator further suggested that teachers employ a positive approach with the student, maintain realistic expectations and praise any improvement (id.). She also suggested follow-up to be provided at home to help the student improve her on task behavior and appropriate peer interactions (id.). Additionally, the evaluator recommended the provision of short, interesting, and varied activities (id.). According to the evaluator, such activities should be presented to the student in quick succession and alternated between tasks that involved quiet seat work with those that allowed for greater freedom of movement and/or greater interaction among students (id.). Lastly, the report indicated that the student should be provided with frequent praise and positive reinforcement (e.g., verbal comments, smiles) for appropriate behaviors such when attending completely, and that inappropriate behaviors should be ignored as much as possible (id.).

The December 15, 2010 speech-language evaluation report that was also before the August 2011 CSE revealed that behaviorally, the student demonstrated poor attention span and focus, and the student exhibited difficulty sitting through the evaluation (Dist. Ex. 4 at p. 1). Pragmatically, the student used gestures and single words to communicate her wants and needs, and sometimes spontaneously verbalized single words and rote phrases (id. at p. 4). Although the student's history included 12 ear infections, previous audiometric testing revealed that her hearing was within normal limits (id. at pp. 1-2). The December 2010 speech-language evaluation report reflected that per parent report, the student tended to become frustrated and violent (id. at pp. 2, 4). The parent further reported that the student tended to put non-food objects in her mouth (id. at p. 2). Administration of various formal evaluative tools yielded

results indicating that the student exhibited below age level play skills at the two-year level and delayed acquisition of auditory comprehension skills and expressive language skills, both at the 21-month level (id. at pp. 1-2, 4). The speech-language evaluation report also contained details regarding receptive and expressive skills the student displayed at the time of the evaluation, as well as extensive information about developmentally expected receptive and expressive language and pre-readiness skills the student did not yet display (id. at p. 3).

The December 2010 educational evaluation report reviewed by the August 2011 CSE included a parent report that the student had high sensory needs and required a highly structured setting throughout the day, and a highly supervised classroom when enrolled in school (Dist. Ex. 3 at p. 1). Behaviorally, the evaluator found that the student's attention span was poor, as the student required "constant redirection" to task during the evaluation (id. at p. 6). The evaluator noted that the student did not maintain eye contact or respond to her name (id.). Contrary to previously noted information included in the social history report, bilingual psychological evaluation report and the speech-language evaluation report, during the educational evaluation, the student used three to five -word utterances in conjunction with pointing and gestures to communicate (id.). The evaluator indicated that the student "mostly echoe[d] what [the student heard] being communicated to her" (id. at pp. 6-7). In addition, the evaluator reported that the student did not display reciprocal communication (id. at p. 7). The evaluator also described the student's articulation skills as "adequate," as the teacher "easily understood" her (id.). However, the evaluator noted that the student had not yet mastered pre-academic skills (id.). Administration of the Developmental Assessment of Young Children (DAYC) revealed that the student, who was 4.8 years at the time of the evaluation, performed at the 23-month age equivalent level (59 percent delay) in the communication developmental area, at the 29-month age equivalent level (48 percent delay) in the cognitive developmental area, at the 32-month age equivalent level (43 percent delay) in the adaptive developmental area, at the 38-month age equivalent level (32 percent delay) in the physical development developmental area, and at the 39-months age equivalent level (30 percent delay) in the social-emotional developmental area (id. at p. 2).<sup>15</sup> Similar to the speech-language evaluation report, the educational evaluation report contained specific information about skills the student was able and unable to do for each developmental area assessed on the DAYC (id. at pp. 2-7).

A December 2010 OT evaluation report reviewed by August 2011 CSE contained background and behavioral information consistent with all of the aforementioned evaluations, including the student's display of echolalia, lack of engagement with the evaluator, and constant moving and walking around the room (Dist. Ex. 5 at p. 1). In addition, the student was observed and reported to put objects and toys in her mouth, as she was unable to differentiate between food and dangerous objects (id.). The occupational therapist administered standardized and non-standardized assessments (id.). Administration of the Peabody Developmental Motor Scales-II (PDMS-II) yielded results that indicated the student's visual motor and fine motor skills were poor compared to other children who were the same age, with a standard deviation of -2.8 (id. at pp. 2, 4). According to the evaluator, the student used immature grasp patterns when holding classroom tools (id.). The student was unable to complete age-expected visual motor skills

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<sup>15</sup> The hearing record describes the DAYC as a standardized norm-referenced battery of subtests that measures the development of cognitive, communication, physical, social/emotional and adaptive skills (Dist. Ex. 3 at p. 2). The DAYC scores are based on a chronological age of 4.08 years (56 months) (id.).

including imitating vertical and horizontal lines, snipping paper, and stacking blocks (id. at p. 4). The evaluator further noted that the student presented with severe sensory modulation dysfunction, characterized by poor arousal level affecting her attention span, body awareness, spatial awareness, and relatedness (id. at pp. 3-4). The evaluator also found that the student displayed poor eye contact (id. at pp. 1, 4). In addition, the evaluator reported that the student inconsistently responded to her name and was also inconsistent in following simple one step verbal-visual directions (id. at p. 4). The report also reflected that the student exhibited self-stimulating behaviors such as hand flapping, seeking shiny objects, jumping around excessively, and rocking front to back (id. at pp. 3-4). According to the evaluator, such behaviors would greatly affect the student's ability to function appropriately in a classroom setting (id. at p. 4). Given the student's "significant" fine motor and visual motor delays, as well as the student's sensory regulation dysfunction which affected the student's ability to appropriately function in a class setting, the evaluator recommended the provision of OT; however, she did not specify the frequency of services (id.). Recommended goals set forth in the December 2010 report included the improvement of fine motor, visual motor and self-care skills, as well as the improvement of sensory processing skills (id.).

While I am persuaded by the district's contention that the August 2011 CSE had before it sufficient evaluative data to create the student's IEP, among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, in this case, despite the highly detailed information available to the August 2011 CSE, the description of the student's academic present levels of performance and learning characteristics noted on the August 2011 IEP was sparse (Dist. Ex. 1 at p. 1). As noted above, none of the student's teachers or providers from the Rebecca School participated in the August 2011 CSE, and consequently, in this particular case, an accurate picture of the student's needs could not be obtained (IHO Decision at p. 21). Specifically, absent from the August 2011 IEP was information regarding the student's delayed developmental levels noted on the DAYC included in the educational evaluation and on formal and informal testing noted in the speech-language evaluation reports (Dist. Ex. 3 at pp. 1-7; 4 at pp. 1-4). Instead, the August 2011 IEP indicated, "[a]ccording to [the student's] Mother, [the student] has made improvements academically. [The student] can identify her letters and numbers. (S)he can receptively identify most colors and similar shapes, number(s) 1-10 and common animals" (Dist. Ex. 1 at p. 1).

Moreover, although the August 2011 IEP indicated the student required significant prompting in order to participate in activities and engage in social interactions, a review of the IEP shows that it contained little information with respect to the extent and quality of the student's relationships with peers and adults, and feelings about self (Dist. Ex. 1 at p. 1). In regard to the student's physical development, aside from a notation about the parent's concern

regarding the student's "significant sensory issues," speech-language and communication difficulties characterized by her use of jargon, echolalia, limited use of spoken language, and difficulty being understood by others, the August 2011 IEP offered little information with respect to the specifics of the student's significant sensory regulation difficulties and how such difficulties affected her ability to attend, focus, communicate, and interact with people and the environment (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p.2, and Dist. Ex. 3 at pp. 6-7, and Dist. Ex. 5 at p. 4). Additionally, according to the district special education teacher, the parent reported to the August 2011 CSE that the student placed inedible objects in her mouth (Tr. p. 106). Although the August 2011 CSE recommended the provision of OT the resultant IEP lacked any information with respect to the student's present levels of performance and individual needs specific to sensory based oral behaviors (see Dist. Exs. 1 at pp. 1-14; 3 at p. 2). Furthermore, the district special education teacher indicated she did not know the extent to which the student put objects in her mouth, nor did the teacher further inquire about the student's mouthing behavior (Tr. pp. 147-48). Moreover, the hearing record also reflects that the August 2011 CSE failed to obtain additional information regarding the extent of the student's tendency to become upset if the student's agenda was not followed, although the December 2010 educational evaluation indicated as such (Tr. pp. 134, 147-48, 155-58; Dist. Ex. 3 at pp. 1-7).

In regard to the student's academic strengths, the August 2011 IEP characterized the student as "a happy and playful girl who loved to sing and watch movies" (Dist. Ex. 1 at p. 1). The August 2011 IEP further noted that the student enjoyed sensory activities such as "(P)lay-(D)oh, shaving cream, finger painting, and playing with putty" (id.). However, I again note that despite information unique to the student available to the CSE in the educational evaluation report, the IEP lacked specificity (compare Dist. Ex. 1, with Dist. Ex. 2 at p. 1, and Dist. Ex. 3 at pp. 2-7). In regard to the student's social strength, while the August 2011 IEP described the student as "resourceful and independent," the August 2011 CSE did not explain what that meant for the student and leaving it vague as it relates to how she learns or struggles (Dist. Ex. 1 at p. 1). With regard to the student's physical development, the August 2011 IEP noted that the student "enjoys being active," but did not indicate that the student could focus on activities, as long as the student was "sensory involved," (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 3). Additionally, the August 2011 IEP did not contain information regarding the student's balance, muscle tone or muscle strength (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 3 at p. 4). Nor did the August 2011 IEP describe the student's fine motor or visual motor deficits consistent with the December 2010 OT evaluation (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 5 at p. 4).

Finally, in regard to the student's unique needs, the August 2011 IEP offers a sparse and vague depiction of the student's deficits and tools and strategies to address them.<sup>16</sup> Academically, as previously noted, despite a wealth of information about the student's pre-

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<sup>16</sup> According to the district special education teacher, upon reviewing the (evaluative) documents from December 2010, the CSE determined that the student was able to "do a lot of things," and "for a child with autism ... she was doing fairly well...at that age range, and especially with autism, there's a lot of progress can be made in a month or three months or four months or five months" (Tr. p. 98). I find the reasoning reflected in this testimony vague. In addition, the district special education teacher testified that based on documentation available there was not a "huge concern" academically because the student was growing in her skills (Tr. p. 108). Based on previously discussed results of the December 2010 DAYC and without more current evaluative information to support the special education teacher's testimony, and without input from Rebecca School personnel, I disagree.

academic and language delays included in the December 2010 educational and speech-language evaluations, the August 2011 IEP only indicated that "[a]t the moment, [the student] [wa]s not able to identify objects and body parts based on their function" (Dist. Ex. 1 at p. 1; 3 at pp. 1-7; 4 at pp. 1-4). Social needs included in the August 2011 IEP reflected the student's need for "significant prompting" to participate in activities and engage in social interactions; however, the August 2011 did not elaborate on this statement regarding the level or extent of prompting (Dist. Ex. 1 at p. 1). I further note that the district special education teacher admitted that "most students" required "significant prompting," (Tr. pp. 184-85). Physically, the August 2011 IEP noted that the student needed help with activities of daily living (ADL) skills, but again, the August 2011 CSE failed to offer any details regarding the student's specific deficits in this area of need (Dist. Ex. 1 at p. 2). Management needs incorporated in the August 2011 IEP included the provision of highly motivating objects and activities, positive reinforcement, visuals and non-verbal and verbal prompting to complete most tasks (id.).

In view of the foregoing, while I find that the August 2011 CSE had sufficient information before it to create an IEP individually tailored to meet the student's special education needs, I am constrained to find that the resultant IEP was not aligned with the information before the CSE, and, accordingly not designed to address the student's unique needs and enable her to make meaningful progress in her primary areas of need. Under the circumstances presented above, the district failed to provide the student with a FAPE during the 2011-12 school year.

#### **4. Annual Goals and Short-Term Objectives**

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]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

The district special education teacher indicated that she and the school psychologist who participated in the August 2011 CSE wrote the annual academic and related services goals (Tr. pp. 109-10). The August 2011 IEP contained eleven annual goals for the student with respect to reading, writing, mathematics, speech-language, OT (Dist. Ex. 1 at pp. 3-7). Although I find that the present levels of performance and identification of needs included in the August 2011 IEP were insufficient, some of the annual goals included in the August 2011 IEP were reflective of the evaluation reports available to the CSE (Tr. p. 110; Dist. Ex. 1 at pp. 3-7). Seven out of the eleven annual goals were detailed and measurable (Dist. Ex. 1 at pp. 3-6). However, the remaining four annual goals were not specific in regard to the student's sensory processing, visual motor, auditory comprehension and vocabulary skills, and devoid of what the student would be expected to acquire and therefore, did not target the student's identified areas of need,

nor did they provide information sufficient to guide a teacher in instructing the student and measuring his progress (Dist Ex. 1 at pp. 6-7; see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*8 [S.D.N.Y. Dec. 8, 2011]; Tarlowe, 2008 WL 2736027, at \*9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; W.S., 454 F. Supp. 2d at 146, 147; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).<sup>17</sup> In addition, although the student was participating in alternate assessment, the August 2011 IEP lacked short-term objectives or benchmarks, offering no indication of the intermediate steps between the student's present level of performance and the measurable annual goals (see Dist. Ex. 1 at pp. 3-7). Instead, the August 2011 IEP provided that for each of the eleven annual goals the short-term objectives and/or benchmarks would be "As determined by teachers/providers" (*id.*). While a district's failure to include short-term objective does not necessarily rise to the level of a denial of a FAPE, in this instance, there is no evidence that demonstrates that the August 2011 CSE had recent progress reports or the student's previous IEP giving rise to a conclusion that the district would implement the August 2011 IEP and assess benchmarks of the student's progress in a manner similar to its assessment of the student's progress towards her annual goals during the previous school year (see E.C. v. Bd. of Educ. of the City School Dist. of New Rochelle, 2013 WL 1091321 at \*19-20 [S.D.N.Y. Mar. 15, 2013]). Under the circumstances, an overall reading of the annual goals enumerated in the August 2011 IEP reveals that they were deficient, and the August 2011 CSE placement recommendation for a 6:1+1 class was premature.

For the foregoing reasons, I find that the August 2011 IEP inadequately described the student's academic and sensory deficits which significantly affected her academic and social performance. I further find that the August CSE inadequately developed goals and short-term objectives for her. These deficiencies in the description of the student and the goals cumulatively lead to an IEP that was not reasonably calculated to enable the student to receive educational benefits as "[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). Therefore, I agree with the IHO that the district did not offer the student a FAPE during the 2011-12 school year.

### **C. Unilateral Placement**

Next, regarding the appropriateness of the parents' unilateral placement of the student at the Rebecca School for the 2011-12 school year, although the district argues that the Rebecca School did not constitute an appropriate placement for the student, in part because it did not address the student's unique special education needs, the evidence contained in the hearing record favors a conclusion to the contrary. As discussed in greater detail below, I find that the district's assertion is unpersuasive, and uphold the IHO's determination that the Rebecca School served as an appropriate placement for the student for the 2011-12 school year.

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<sup>17</sup> Although the hearing record reflects that the August 2011 CSE reviewed the proposed goals with the parent, it is unclear based on the testimonial evidence whether the parent requested additional goals in the IEP, particularly goals related to the student's sensory needs (Tr. pp. 110, 448).

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; Matrejek, 471 F. Supp. 2d at 419). 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 (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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., 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "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 private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

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; see Frank G., 459 F.3d at 364-65).

According to the Rebecca School program director (program director), the Rebecca School provides instruction to students, ages 4-21, who exhibit neurodevelopmental delays in relating and communicating, with a number of students having received diagnoses of autism spectrum disorder (Tr. p. 319). The hearing record reflects that the Rebecca School primarily utilizes a developmental individual difference relationship (DIR)-based model for instruction (Tr. p. 319). On May 18, 2011, the student began attending the Rebecca School (Tr. pp. 323). A December 2011 Rebecca School interdisciplinary report of progress (Rebecca School report) indicated the student was enrolled in an 8:1+2 classroom with children ranging in age from five to nine years old (Parent Ex. K at p. 1). The hearing record indicates that at the time of the impartial hearing, the student's classroom was comprised of eight students, one head teacher, two teaching assistants, two paraprofessionals "not assigned" to the student, and one nurse, also "not assigned" to the student (Tr. p. 324; Parent Ex. K at p. 1). During the 2011-12 school year, the student received two weekly 1:1 and one group 30-minute sessions of OT, two weekly 1:1 sessions of speech-language therapy, and one weekly speech-language therapy session in a cooking group, in addition to music therapy, art, and adaptive physical education, and "Floortime" sessions (Tr. pp. 231, 384-87, 417; Parent Exs. K at pp. 1, 5, 7).<sup>18, 19</sup>

### **1. Grouping with Non-Verbal Peers**

The district asserts that the Rebecca School did not constitute an appropriate placement for the student because the student was the only verbal student in her class, and the hearing record offers no indication regarding the student's academic functioning or how the educational program was specially designed to meet the student's unique needs. Here, the December 2011 Rebecca School report indicated that the student was primarily verbal, and that she typically communicated in one or two-word utterances, as well as by pointing or taking a staff member's hand and leading them to what she wants (Parent Ex. K at pp. 1-2, 7). According to the Rebecca School report, the student enjoyed engaging with familiar adults, was beginning to interact with her peers, and related best when her sensory needs were met (id. at pp. 1-2). The Rebecca School report described in detail, the student's interactional strengths and weaknesses specific to shared attention and regulation, engagement and relating, two-way purposeful emotional interaction, in addition to shared social problem solving (id.). The Rebecca School report also indicated that the student used single-word verbal commands (i.e., "stop," "squeeze," "play") and interacted with a familiar adult for as much as up to 15 circles of communication during a highly

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<sup>18</sup> The hearing record reflects that speech-language therapy occurred in the clinician's office, the classroom, or in community settings such as the grocery store (Parent Ex. K at p. 7).

<sup>19</sup> The Rebecca School special education teacher defined Floortime as a method that follows a student's lead, interests, and desires (Tr. p. 231). According to the special education teacher, Rebecca School personnel reach students at their current developmental level and move forward from there (Tr. p. 231).

motivating activity and up to three circles of communication with preferred peers in the classroom (id. at p. 2). Pragmatically, the student consistently used language for purposes of making requests, negation/protesting, labeling, and to draw an adult's attention to an object of interest (id. at p. 7). Receptively, the student's ability to process and respond to verbal language was described as largely dependent on her level of regulation and attention during a given interaction (id. at p. 8). She benefited from extended processing time and use of a visual aid (i.e., picture, object, gesture) to support her comprehension of verbal language (id.). Expressively, in addition to indicating that the student was verbal and typically communicated using gestures (i.e., pointing, reaching for an object), one-word phrases and longer memory-based phrases such as "are you okay?" the Rebecca School report noted the majority of the student's spontaneous single-word vocabulary consisted of nouns, verbs, and adjectives (i.e., color) which the student used to label and request (id.). Based on the above, there is sufficient information in the hearing record regarding the student's academic functioning at the Rebecca School, and how Rebecca School personnel addressed the student's unique language and sensory needs.

Moreover, although not dispositive of a determination of appropriateness, the hearing record supports the IHO's determination that the student progressed in areas of need during the 2011-12 school year at Rebecca School (IHO Dec. at p. 24; see Frank G., 459 F.3d at 364). According to the student's special education classroom teacher from the Rebecca School, since September 2011, the student made progress in her willingness to engage in longer interactions and interact around different types of activities (Tr. p. 241). The student also made "huge gains" in her ability to initiate more with peers throughout the day, whereby she progressed from limited awareness of peers to greeting peers hello by name and by playing "chase games" with a preferred friend (Tr. pp. 241-44). The special education teacher further noted that the student could sit and attend to an activity for 30 minutes at a time and that the student required fewer sensory breaks (Tr. pp. 254-55). In regard to the student's goals and objectives included in the December 2011 Rebecca School report, her special education teacher testified the student achieved a short-term objective regarding initiating one circle of communication with familiar adults, related to the student's goal regarding her ability to initiate and maintain a continuous flow with a familiar adult (Tr. pp. 261-63; Parent Ex. K at p. 11). The student also met two goals that targeted her interest in reading and word recognition, identifying peers by name, and hand washing after toileting (Tr. pp. 265, 267; Parent Ex. K at p. 11). The hearing record further reflects that the student made progress on goals that addressed 1:1 number correspondence, number identification, and comprehension (Tr. p. 266; Parent Ex. K at p. 11). Furthermore, testimony by the student's speech-language pathologist and occupational therapist at the Rebecca School indicated the student made progress in both related services since the time of the December 2011 Rebecca School report (Tr. pp. 392-98, 400, 402-03, 405, 425). For example, the student's speech-language pathologist explained that had become "more open to engagement," and the speech-language pathologist further described the student as "consistently more regulated" (Tr. p. 403). The Rebecca School speech-language pathologist also noted improvement in the student's coping skills, and further testified that transitions had become easier for the student as well (Tr. pp. 403-04). Similarly, the student's occupational therapist noted improvement with respect to the student's engagement with peers and adults as well as the student's ability to stay regulated (Tr. p. 425). Testimony by the parent also reflected the

student's progress since attending Rebecca School, particularly with respect to the student's ability to engage in interactive play (Tr. pp. 452-57).

Therefore, despite the district's claim that the Rebecca School inappropriately grouped the student with non-verbal peers, there is nothing in the hearing record to suggest that the student's exposure to non-verbal classmates hindered or prevented the student's development and use of verbal communication skills.

## **2. Lack of Structure at Rebecca School**

Notwithstanding the district's claim that given that the student is constantly overstimulated and unregulated and therefore, the lack of structure and academic instruction at the Rebecca School renders it inappropriate, the hearing record reflects otherwise. The hearing record consistently characterizes the student as a sensory seeking child, who craves movement and tactile input, who engages best with others and the environment when her sensory needs are met, and as someone who is able to regulate and slow down her body with the help of sensory supports (Tr. pp. 232, 236-37, 324, 326-28, 239, 416-17, 419; Parent Ex. K at pp. 1, 5). As discussed below, the hearing record shows that the student's sensory needs were addressed at Rebecca School. Testimony by various Rebecca School personnel indicate consistent with the Rebecca School report that the student received sensory input throughout the school day through the implementation of an individualized "sensory diet," set up by the occupational therapist, whereby classroom staff have been trained to provide the student with sensory input (Tr. pp. 233, 236, 328, 417-18, 420-21, 423-24; Parent Ex. K at p. 6). Specifically, the hearing record reveals that the student received and was responsive to a brushing program followed by joint compression every two hours to increase body awareness, uses a "bear hug" vest (30 minutes on/30 minutes off) to address body awareness, and she also participated in a "therapeutic listening" program two times per day for 20 minutes at three hour intervals to address sensory regulation, visual-spatial, motor planning, body awareness, rhythm and timing, and overall motor coordination (Tr. pp. 240-01, 328-29; Parent Ex. K at p. 6). In addition, motor activities occurred for ten minutes out of every hour to give the student the input she craved (Tr. pp. 234, 243; Parent Ex. K at p. 6). The hearing record also indicates the student participates in an oral motor protocol to give the student (sensory) input in her mouth to address her tendency to mouth inedible objects (Tr. pp. 237-38, 346-47; Parent Ex. K at pp. 5, 7, 9). Furthermore, the hearing record reflects the student's team met weekly and at other times to coordinate its efforts on behalf of the student and to adjust the student's program as needed (Tr. pp. 331, 404). Under the circumstances, the hearing record reveals that the Rebecca School utilized sensory input in order to help the student stay regulated and become more available to learning.

## **3. Grouping by Age**

Regarding the district's claim that the Rebecca School did not appropriately group the student by age, testimony by the program director of Rebecca School indicated the age range of the class was between five and ten years old (Tr. p. 332). Although the age range of the children in the student's class is greater than three years, parents are not held as strictly to State education standards that are applicable to public school districts (see Carter, 510 U.S. at 14).<sup>20</sup> In addition,

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<sup>20</sup> The district's authorities cited to support its position that a unilateral placement must meet grouping

the program director testified that similar to the student, all of the students in the student's class presented with neurodevelopmental delays and their own array of sensory processing needs (Tr. pp. 332-33). In addition, the program director opined the student's class grouping was appropriate for her because the student could work on peer relationships and the classroom make-up of eight students, with six teaching professionals supported the student's needs (Tr. p. 333; see Tr. p. 324). The program director further indicated the student's classroom ratio provided the student with many opportunities for repetition and individualized instruction so that she might hold onto and generalize information (Tr. p. 333). Also, when calm and regulated, whereby the student could attend and focus, the program director noted that the student had the opportunity to work on skills in dyads (sic) (Tr. p. 334). Therefore, in view of the foregoing evidence I decline to find that the Rebecca School was inappropriate in this instance.

Based upon the foregoing, I find no reason to disturb the IHO's determination that the Rebecca School constituted an appropriate unilateral placement for the student for the 2011-12 school year.

#### **D. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that

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requirements (i.e. with other verbal children and within regulatory age ranges) are not on point. The district does not point to any legal authority holds that unilateral placements are required to group students in the same manner as public school districts in order for a unilateral placement to confer educational benefits.

they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

## **1. Parental Intent of Placement of Student in a District Public School**

The district first argues that equitable considerations should preclude relief in this matter, because the parent had no intention of enrolling the student in a district placement. In this instance, on May 13, 2011, four months prior to the CSE meeting, the parent effectuated an enrollment contract with the Rebecca School for the period of July 5, 2011 through June 22, 2012 (Tr. p. 477; Parent Ex. H at pp. 1, 4). In addition, although the hearing record indicates that the parent requested that the district continue the student's placement at the Rebecca School, the hearing record also reveals that the parent was forthcoming regarding her concerns surrounding the August 2011 IEP and the assigned public school site (which had yet to be determined), and that she utilized the CSE process (Tr. pp. 111-12). Furthermore, notwithstanding the district's assertion that the parent indicated during the August 2011 CSE meeting that she was not interested in any district schools, the parent testified that she was open-minded about the student's placement, and the parent added that she would consider a district school provided that the student's safety and IEP needs were met (Tr. pp. 112, 448-49, 476).<sup>21</sup> According to the parent, she was willing to visit any potential assigned public school sites (Tr. p. 449). Likewise, subsequent to her receipt of the August 29, 2011 FNR, on September 8, 2011, the parent visited the assigned public school site (Tr. p. 457; Parent Ex. D). I further note that the parent testified that she also has a son enrolled in a district public school (Tr. p. 479). Under the circumstances, I am persuaded that the parent cooperated with the district and was willing to consider placement of the student in a district school. Even if the parent did not seriously intend to place the student in the district it is of little moment in this case as the Second Circuit has recently explained that, so long as parents cooperate with the CSE, "the pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]).

## **2. Parental Notice of Unilateral Placement**

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<sup>21</sup> As indicated above, the hearing record does not contain any August 2011 CSE meeting minutes to support the district special education teacher's testimony that the parent was not willing to enroll the student in a district public school (Tr. pp. 119-20, 125-27).

The IHO did not address the issue of timely notice of unilateral placement. The hearing record reflects that the parent advised the August 2011 CSE of her concerns regarding the student's IEP and her desire to continue the student's placement at the Rebecca School (Tr. pp. 111-12, 125-26, 448-49).<sup>22</sup> The parent hand delivered her letter to the district advising it that she rejected the August 2011 IEP and assigned public school site, and that she planned to seek tuition reimbursement at public expense (Parent Exs. F at p. 3; L).<sup>23</sup> The parent outlined her reasons for rejecting the assigned public school (Parent Ex. L at p. 2). Even assuming notice was late, in this instance I decline to exercise my discretion to reduce or deny reimbursement due on this basis.

## E. Relief

At the time of the impartial hearing, the parent testified that she was seeking direct payment of the student's tuition to be provided at public expense (Tr. p. 464). The district submits that the parent failed to demonstrate during the impartial hearing that she is entitled to such relief. In a case of first impression, one court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A v. New York City Dep't of Educ., 2011 WL 321137 at \*22 [S.D.N.Y. Feb 1, 2011]).

In this case, as of July 29, 2011, no money had been paid toward the student's tuition (Tr. pp. 372, 477; Parent Ex. I). However, the parent has maintained on appeal that she has received all of the requested relief in this matter, thereby rendering this point moot (Pet. ¶¶ 5, 6). At the time of the impartial hearing, the parent indicated that she had borrowed some money in order to pay the student's tuition; however, she did not disclose the amount, nor did she indicate from whom she had borrowed the money (Tr. p. 477). Similarly, the program director testified that a portion of the student's tuition had been paid at the time of the impartial hearing, but she did not know how much had been paid (Tr. p. 372). Regarding the parent's financial status, the parent indicated that the student's disability insurance constituted her sole source of income, which was approximately \$750.00 per month (Tr. p. 450). She further testified that she had no assets and that she did not receive child support payments (Tr. p. 450). Additionally, in 2010 and in 2011, the parent did not file tax return statements, because she did not meet the minimum income threshold requirement to file a tax return (Tr. pp. 450-51; 479-80). With respect to the status of the student's father the parent testified that though separated, she was still married at the time of the impartial hearing, but she was unaware of the student's father's whereabouts and his occupation (Tr. pp. 477-78).<sup>24</sup> In short, assuming for the sake of argument that the case was not

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<sup>22</sup> The hearing record further indicates that the first day of school was September 6, 2011 (Tr. p. 104).

<sup>23</sup> I note that the program director testified that the parent could be released from the enrollment contract (Tr. pp. 354-55).

<sup>24</sup> According to the December 2010 social history, the student's father had been employed at a warehouse at that time, while the student's mother took care of the family (Dist. Ex. 2 at pp. 1-2).

moot, I would find in the alternative that the parent has satisfied her burden of establishing that she did not have financial resources to front the costs of the student's tuition.

## **VII. Conclusion**

In summary, I find that the district failed to provide the student with a FAPE during the 2011-12 school year, that the Rebecca School was an appropriate unilateral placement for the student and that equitable considerations supported the parent's claims.

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
November 28, 2014**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**