



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-173

**Application of the XXXXXXXXXXXXXXXXXXXX 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, attorneys for petitioner, Neha Dewan, Esq., of counsel

Regina Skyer and Associates, LLP, attorneys for respondents, Lara Damashek, 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 which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron 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**

The student's educational history reflects that he initially received special education services through the Committee on Preschool Special Education (CPSE) including special education itinerant teacher (SEIT) services, which were provided in a regular education preschool setting, and related services which were provided outside the school setting (Tr. pp. 503-05). The student underwent a private evaluation prior to entering kindergarten and subsequently attended a district class with integrated co-teaching (ICT) for his kindergarten and

first grade years (Tr. pp. 506-09, 547).<sup>1</sup> The student reportedly struggled with the large class size in the ICT setting and for second grade, the parents placed the student at the Aaron School where he continued to attend during the 2011-12 school year, in fifth grade at the time of the hearing (Tr. pp. 343, 509, 548; see Dist. Exs. 7 at p. 1; 10 at pp. 1-2; Parent Exs. C; F). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (Tr. p. 520; see 8 NYCRR 200.1[d], 200.7).

On January 30, 2011 the parents reached a decision to sign a contract with the Aaron School in order to reserve a seat for the student for the 2011-12 school year (fifth grade) and they paid a nonrefundable deposit of \$8,000 on that date (Tr. p. 534; Parent Exs. D at pp. 1-2; E; G at p. 1).<sup>2</sup>

On April 7, 2011 the CSE convened to conduct an annual review of the student and to develop his fifth grade IEP for the 2011-12 school year (Dist. Ex. 1 at p. 1). At the time of the April 7, 2011 CSE meeting the student was functioning approximately one and a half years below grade level academically and demonstrated deficits in executive functioning in the areas of organizational skills, self regulation, cognitive inflexibility/rigidity, processing speed, and attending skills (Tr. p. 510; Dist. Ex. 1 at pp. 3, 4). The student was described as being easily distracted by both internal and external stimuli, requiring significant redirection, and capable of becoming highly dysregulated (Tr. pp. 26, 510; Dist. Ex. 1 at p. 3). He demonstrated difficulty with social interaction and at times required assistance to process and solve social situations, maintain friendships, and understand social cues and nuances (Tr. pp. 246, 271-72, 345, 386, 510, 512; Dist. Ex. 1 at pp. 4, 11). The student also exhibited deficits in receptive, expressive, and pragmatic language skills, grapho-motor skills, and in his ability to complete activities of daily living skills independently (Tr. pp. 510-11; Dist. Ex. 1 at pp. 4, 10-13). The resultant IEP reflected the student's classification as a student with a speech or language impairment and recommended the student be placed in a 12:1 special class in a community school with related services of occupational therapy (OT) and speech-language therapy (id. at pp. 1, 16).<sup>3</sup>

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<sup>1</sup> Although the term ICT was used in the hearing record (Tr. p. 101), "collaborative team teaching" (CTT) was used more often (Tr. pp. 42-43, 56, 59, 65, 68, 79, 444, 477, 490, 507-09, 514, 517, 519, 531, 547, 560, 564-66). However, for consistency with State regulations, in this decision, I refer to this type of class as an integrated co-teaching or ICT placement. ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

<sup>2</sup> The parents made additional payments totaling \$47, 950 on May 12, 2011, September 2, 2011, and November 30, 2011 (Parent Ex. E).

<sup>3</sup> The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

By final notice of recommendation (FNR) dated July 18, 2011, the district summarized the services reflected in the student's April 7, 2011 IEP and notified the parents of the particular public school site to which the student had been assigned (Dist. Ex. 3). According to the student's mother, she called the school and attempted to schedule a visit; however, she got only a recording (Tr. p. 528).

By letter through their attorney dated August 24, 2011, the parents informed the district that they believed that the April 7, 2011 failed to offer the student a FAPE on procedural and substantive grounds (Parent Ex. A at pp. 1, 2). The letter further indicated that, unless the district cured the procedural and substantive errors in the student's IEP and offered him an appropriate placement, the parents would be placing the student at the Aaron School for the 2011-12 school year and seeking funding for the placement (*id.* at p. 1). The parents also requested transportation services to the Aaron School beginning on the first day of school (*id.* at p. 3). The parents indicated that the letter provided the district with the specific disagreements they had with the IEP, as well as an opportunity for the district to remedy these defects before the commencement of the school year (*id.* at p. 2). The letter also indicated the parents' view that, because they had not received a FNR before school closed for the summer, they would be unable to visit the assigned school until September and reiterated that they had previously requested more information about the assigned class but had not yet received any such information from the district (*id.* at p. 3).<sup>4</sup>

The parents visited the assigned school one week after school resumed in September 2011 and determined that it was not appropriate to meet their son's needs and the student remained at the Aaron School for the 2011-12 school year (*see* Tr. pp. 103-04, 528-33; Parent Ex. F at p. 1).<sup>5</sup>

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

In a due process complaint notice dated November 29, 2011, the parents requested a hearing and alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year on both substantive and procedural grounds (*see* Dist. Ex. 10). Among other things, the parents alleged that: (1) the April 2011 CSE lacked required CSE members; (2) the April 2011 CSE developed the student's IEP without sufficient and appropriate evaluative material and failed to consider the neuropsychological report procured by the parents; (3) the parents were denied meaningful participation by the CSE's failure to give due weight to parental and professional assessments of the student; (4) the IEP did not set forth the student's management needs; (5) the goals and short-term objectives were not measurable and failed to address the student's identified needs; and (6) the April 2011 IEP was not reasonably calculated to provide the student with a FAPE, insofar as the 12:1 special class in a community school could not meet the student's needs (*id.* at pp. 2-4). The parents also alleged that the particular

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<sup>4</sup> A corrected version of this notice and request for transportation dated September 8, 2011 corrected the parents' reference to the assigned school (*compare* Parent Ex. A at p. 3 *with* Parent Ex. B at p. 3 and *with* Dist. Ex. 3).

<sup>5</sup> The parent indicated that she initially attempted to visit the assigned school on the first day of the 2011-12 school year without having made an appointment and that the principal was not cooperative in providing the parent with a tour of the school (Tr. pp. 529-30). However, the parent rescheduled and visited the school along with her husband, the following week (Tr. pp. 104-05, 529-30).

public school site to which the district assigned the student was inappropriate because the student would have been inappropriately grouped within the 12:1 special class and would not have been equipped to cope with a mainstream school environment (id. at p. 5). In addition, the parents maintained that the Aaron School was an appropriate placement for the 2011-12 school year and that equitable considerations favored their request for relief (id. at p. 6). As relief, the parents requested that the IHO award them reimbursement for the costs of the student's tuition at the Aaron School for the 2011-12 school year (id.).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on February 14, 2012 and concluded on June 5, 2012 after four days of testimony (Tr. pp. 1-568). In a decision dated July 25, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year because a 12:1 special class placement in a community school was not appropriate for the student (IHO Decision at pp. 23-24). The IHO noted support for this finding in the educational history of the student; the results of the neuropsychological report; the classroom observation considered by the April 2011 CSE, which noted the student's constant need for redirection in a class with two teachers; and evidence in the record that the student was unable to handle a mainstream environment (id. at pp. 21-24). The IHO found that the district was unable "to offer [the student] a therapeutic environment in a special education setting with students who had similar cognitive and social emotional needs" (id. at p. 23).

The IHO next found that the parents' unilateral placement was appropriate for the student, because, since his attendance at the Aaron School, the student made progress in writing, reading and math; was better able to navigate social situations; and was more motivated and had less anxiety (IHO Decision at p. 24). Addressing the availability of related services, the IHO noted that, although the Aaron School provided fewer pull-out therapy sessions than had been recommended by the district, the students engaged in small group therapy and study sessions and that the language-based classroom provided speech services throughout the day (id.). The IHO further found that the Aaron school could provide additional individual services if warranted (id.).

Lastly, the IHO found that equitable considerations favored the parents because the hearing record indicated that the parents cooperated, attended meetings, provided the CSE with a privately obtained evaluation, visited the assigned school, and gave appropriate notice to the district of their intent to unilaterally place the student (id. at p. 25). Consequently, the IHO ordered the district to reimburse the parents for the student's tuition at the Aaron School for the 2011-12 school year (id.).

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

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year, that the assigned school was an inappropriate placement for the student for the 2011-12 school year, that the Aaron School was an appropriate placement for the student, and that the equities favored the parents. Specifically, with respect to the IEP program recommendations, the district alleges that in combination with

the recommended supports, the 12:1 special class would address the student's academic and sensory needs. The district asserts that the CSE team properly believed that the student's distractibility issues were not severe enough to warrant a different recommendation. The district further contends that the CSE properly believed that the student could make progress and become more autonomous if exposed to typically developing peers in a community school. Relative to the assigned school, the district argues that since the parents rejected the IEP, the district was not required to demonstrate that the assigned school was appropriate. In any event, the district asserts that the teacher in the assigned school provided individualized support to students and believed the functional level of the student to be similar to that of the students in her class.

The district also alleges that the IHO erred in finding the Aaron School to be an appropriate placement, since it lacked opportunities for the student to interact with the general education population; offered limited related services consisting of three pull-out sessions for students in the fifth grade, even if an individual student's IEP mandated more; and provided group goals, rather than specific goals for each student. Turning to the equities, the district alleges that the parents did not seriously intend to enroll the student at the public school, citing the timing of the Aaron School enrollment contract and the parents' payments thereon. The district seeks an order reversing the IHO's decision in its entirety.

In their answer, the parents request that the district's appeal be dismissed and that the IHO's decision be affirmed in its entirety. The parents assert that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year, that the Aaron School was an appropriate placement, and that equitable considerations favored the parents. The parents assert that the hearing record establishes that the CSE ruled out a 12:1+1 special class solely on the ground that the student's peers in such a class would likely have behavioral or emotional issues. The parents note that the classroom observation considered by the CSE showed the student to be highly distractible, requiring continuous teacher support; cite testimony that the district does not have a program that fits the student's needs; and cite evidence that the student could not handle a mainstream environment. Turning to the assigned public school site, the parents argue that a district must also establish that a particular school location is appropriateness and argue that such a showing is not speculative. Furthermore, the parents allege that in this case the assigned public school site was inappropriate, pointing out that there were no teachers present during lunch or recess to assist the student; while the other students in the assigned classroom were classified as learning disabled, the student was classified with a speech or language impairment; the teacher inappropriately relied on a particular student's paraprofessional and student teachers in the classroom; and no other students in the assigned class had significant regulation difficulties or followed a sensory diet.

The parents assert that the IHO correctly found the Aaron School to be an appropriate placement for the student. In response to the allegations of the district, the parents assert that the Aaron school offers a language based classroom, such that the students receive speech support the entire day and not just during pull-out sessions; the students may receive more help from the related service providers as needed; and the teacher does have specific goals for each student. Finally, with respect to equitable considerations, the parents allege that the date on which the parents signed the enrollment contract with the Aaron School is irrelevant and the language in

that contract allowed the parents to be reimbursed in part if the district offered an appropriate class.<sup>6</sup>

## 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 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. Mamaroneck 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., 2010 WL 3242234, at \*2 [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, 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, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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<sup>6</sup> The district addresses issues in its petition for review that were raised in the parents' due process complaint notice but not addressed by the IHO. In their answer, the parents respond to the district's allegations on these points, affirmatively alleging additional support for their original allegations regarding CSE composition; adequacy of the goals included on the April 2011 IEP; and the parents' opportunity for meaningful participation in the development of the April 2011 IEP. I will not address these issues because, as further detailed below, the IHO's Decision is upheld on the grounds set forth therein and there is no need to review possible alternative grounds for affirmance, particularly given the absence of an affirmative cross-appeal in the parents' answer.

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, 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. Dep't 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**

### **A. 12:1 Special Class in a Community School**

Turning first to the district's appeal from the IHO's determination that the district's recommendation of a 12:1 special class in a community school with related services was inappropriate for the student (see IHO Decision at p. 23), I find that the IHO's conclusion is supported by the hearing record. In particular, for the reasons discussed below, I find that the 12:1 special class in a community school would not have addressed the student's significant need for consistent support by an adult in a small classroom in order for the student to focus and complete academic tasks and to perform socially.

State regulations provide that a 12:1 special class is designed for students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting (8 NYCRR 200.6[h][4]). However, in this case, as described below, the student also exhibited management needs that interfered with the instructional process to the extent that an additional adult was needed within the classroom to assist in his instruction.

I note initially that State regulations define management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). Here, the April 2011 IEP indicated that the student's academic and social/emotional management needs included, among other things, teacher proximity; multisensory and interactive learning; reminders, cues, prompting, repetition, and rephrasing of directions and information; the provision of sensory tools, sensory diet, and body breaks as needed; positive reinforcement; frequent teacher check-ins; guided practice and review; teacher modeling, intervention and redirection; and role play (Dist. Ex. 1 at pp. 3, 4). I note that each of these strategies would require some level of direct implementation or assistance by classroom staff. Therefore, based on the number and type of management needs the student required in the particular

circumstances of this case, it was not reasonable for the IHO to conclude that a teacher alone could provide instruction to 11 students while also attending to the various academic and social/emotional management needs of the student in the instant case; on the contrary, this indicates that the student would not have received sufficient support in a class with a 12:1 student-to-teacher ratio.

The district neuropsychologist, who participated in the student's April 2011 CSE meeting, testified that the management needs contained in the April 2011 IEP were specific to the student because they were taken directly from the parent and Aaron School reports, read aloud and then amended as needed, as per the parent and teacher (Tr. p. 95).

The goals contained in the student's April 7, 2011 IEP also indicate that the student required a significant level of teacher assistance to perform academic tasks and that the student was not expected to perform the skills independently in order to meet his academic goals (Dist. Ex. 1 at pp. 6, 7). For example, the student's math goals indicated the conditions under which the student would be expected to perform computational and math concepts, including, among other things, the provision of frequent teacher check-ins, guided review, verbal prompting, and teacher modeling (*id.* at p. 6). The conditions under which the student was expected to perform his reading goals included, among other things, that he would be given frequent teacher check-ins, guided review, teacher modeling, frequent review, and verbal prompting (*id.* at pp. 6, 7).

Aside from the student's April 2011 IEP itself, the hearing record also clearly documents the student's need for extensive management needs, as described in the reports and evaluations considered by the April 2011 CSE, and this information was also consistent with the testimony of the student's Aaron School teacher related to the 2010-11 school year. For example, the classroom observation that was completed in November 2010 by a district social worker, and which was available to the April 7, 2011 CSE, reflected that the student required teacher intervention and redirection throughout the entire period observed, and was rarely on task, focusing largely on a sensory ball (Tr. p. 22; Dist. Ex. 8). Notably, the student's teachers at Aaron School for the 2010-11 and 2011-12 school years testified that the classroom observation was an accurate description of the student during both school years (Tr. pp. 250, 381, 383).<sup>7</sup>

The student's need for a greater level classroom support was also indicated by his Aaron School teachers in the February 2011 mid-year report, which was available to the April 7, 2011 CSE (Tr. pp. 22, 24-25; Dist. Ex. 7). The mid-year report indicated that the student's struggles in school could be attributed to his difficulties with self regulation, his language deficits, and his weaknesses in executive function, and further indicated that his teachers at Aaron School had provided many academic and social strategies that allowed the student to succeed in school (Dist. Ex. 7 at p. 7). For example, with respect to the student's literacy instruction, the report indicated that the student was easily distracted by internal and external stimuli, frequently fidgeted during class, moved about in his chair, or stood during reading and that, in order to help the student regulate his body and to assist him in maintaining his attention, the teacher utilized strategies including providing verbal and visual reminders, repetition and rephrasing of questions, on the

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<sup>7</sup> The hearing record also reflects that the student's head teacher at the Aaron School during the 2010-11 school year was also his math teacher during the 2011-12 school year (Tr. p. 374).

spot questioning, teacher proximity, and frequent sensory body breaks, as well as positive reinforcement (id. at p. 2).

With respect to the student's math group, the report stated that when the student was either externally distracted by peers or internally distracted by his own thoughts, he was reminded to utilize a strategy called "[g]ive me five" which consisted of demonstrating "whole body listening" (i.e. eyes on teacher, quiet voice, ears listening, brain thinking and hands still) and that the student also benefited from individualized water/body breaks and the use of sensory tools (id.).

With regard to writing, the mid-year report reflected that the student's teacher provided teacher check-ins and conferencing throughout the five steps of the writing process (id. at p. 3). According to the report, the writing teacher encouraged the student to add more details in order to write longer fictional pieces; however, due to his language difficulties and cognitive inflexibility he was, at times, extremely resistant to teacher feedback and support, adamant that it was his story and that it would be exactly as he desired, even though, according to the teacher, he was capable of producing higher quality work (id.). The report reflected that to help the student take his writing to the next level, the teachers asked him "WH" questions to encourage him go back and add more descriptions and information about events, places and characters in the story; persuaded him not to rush to complete the story in one sitting; and reiterated the importance of the writing process (id. at pp. 3-4). The report reflected that the student required more support when writing an expository paragraph and that organizing strategies including checklists, semantic webs, paragraph outlines, sentence starters, and transition words to structure his writing were provided to assist the student (id. at p. 4).

In language arts, teacher conferencing and teacher modeling of tasks and assignments were strategies used to provide the student with a structured guideline to follow and the student was prompted by the teacher to look over his work before handing it in (id. at p. 5). The report reflected that, due to the student's fine motor difficulties related to handwriting, he could become extremely frustrated when asked to erase or re-do his work and that he was working on verbalizing his frustration instead of grunting or having a physical reaction (id. at p. 4).

The student was reported to have difficulty participating in class discussions due to his language deficits, which the report reflected required the support of strategies including, among other things, repeating and rephrasing of questions, preferential seating, re-reading material, and repeated exposure to a topic, skill, or concept (id. at p. 8).

With regard to health class, the report indicated that the student's overall goal was to improve his ability to react to and handle problems more independently (id. at p. 6). The student was exposed to problem solving, building upon friendships, anger management techniques, and understanding expected school behavior and he also practiced problem solving, self advocacy, and perspective taking skills in a "Hang Out" group on Fridays (id.).

The student's pragmatic language deficits were also reported to result in difficulty with social interaction (id. at p. 7). Here, the report noted that, although the student enjoyed having conversations with his peers, he had difficulty initiating and engaging in conversations, which

caused him great frustration (id. at p. 7). According to the report the student would respond with a silly face or sound or by getting in the other person's personal space, which was offsetting and annoying to his classmates (id.). The report reflected that teachers supported the student in this area using perspective taking by having the student verbalize how he would feel if a classmate did that to him, and further supported the student's pragmatic language and problem solving skills using strategies such as teacher check-ins, redirection, the weekly "Hang Out" group, and a special lunch plan which allowed the student to schedule who he would sit next to at lunch on certain days (id. at pp. 6, 7; see also Dist. Ex. 1 at p. 4). The student was also reported at times to become overwhelmed when in larger social settings and to feel as if he were competing for a friend's attention, which also led to frustration (Dist. Ex. 7 at p. 8).

With regard to the student's need for behavioral support, the mid-year report reflected that he was not intrinsically motivated to do his best and required the use of a school wide behavior system, which contained specific expectations and a daily goal to ensure he stayed on task and completed his work before he was allowed to take a break to draw or create a comic (id.). The report indicated that, due to the student's executive functioning weakness, he was not always able to fill out his personal success chart after each period independently, and further noted that the student benefited from more immediate positive reinforcement in order to be successful, such as teacher reminders to stay on task and five-minute drawing breaks between periods, which helped to regulate the student's body and keep him motivated for learning new things and producing work (id.).

The mid-year report also indicated that, again, due to his executive functioning deficits, the student required a morning checklist on his desk to help him internalize and follow the routine independently; however, the report also indicated that the student continued to need teacher prompting to complete all tasks, such as handing in homework and marking his goal for the day (id.). The student was also reported to have difficulty packing up independently at the end of the day and required a tapping break in a separate environment to help him regulate his body during this hectic time and then transition back to class where he would use a pack-up agenda to follow the daily routine (id.). The report reflected that the student required teacher support, check-ins and reminders to help keep his "trapper" and desk organized, and, as it took him a long time on his own, his teachers often wrote down his homework assignments for him as long as he opened up to the correct page on his own (id.).

According to the mid-year report, the student's classroom success was greatly impacted by his self regulation difficulties (id.). In order to help himself attend better throughout the day, he hummed or tapped an object while sitting at his desk, some days almost nonstop and other days, not at all (id.). However, according to the report, on most days the student utilized a sensory diet created by the occupational therapist, which included doing wall rolls with the medicine ball before the mid-morning academic subject, taking a tapping break after lunch in the cafeteria, and taking a tapping break after math, as well as utilizing additional strategies including theraputty, chewing gum, multisensory instruction, and on the spot questioning (id.). Additionally, the report indicated that the student frequently used a standing work space in the back of the room to limit his distractions, to reduce his opportunity to laugh at/with other boys in the class, and in order to help him to complete independent work more successfully (id.). The

student also used a pacing lane in the back of the room which allowed him to move around and which helped him to stay engaged during a lesson (id.).

Lastly, the mid-year report indicated that, due to his cognitive inflexibility, the student occasionally became so passionate about completing something he had started after the rest of the class had moved on to something else, that he required 1:1 support to move on and accept that it was a "have to do" activity, that he just had drawing time (a break), and would again at lunch (id. at p. 9). According to the report the student also utilized a frustration scale that was located on his desk to identify and express how he was feeling to his teachers (id.). The report indicated that the intensity of the student's reaction to a problem often did not correlate with the severity of the problem itself (id.). According to the report, the student utilized drinks of water, deep breaths, and tapping breaks to bring his body back to a calm state or a zero on the frustration scale (id.). The report reflected that, although the student had made improvements in this area, it was an ongoing area of need (Dist. Ex. 7 at p. 9).

The student's November 2010/March 2011 private psychoeducational evaluation, which was provided for consideration at the April 7, 2011 CSE meeting, also reflected, among other things, the student's need for a significant level of support (Tr. pp. 22, 47; Dist. Ex. 9). For example, in the evaluation report, the evaluators made behavioral observations, including that, although the student demonstrated strong effort and motivation when he was performing well, when faced with more challenging tasks, he exhibited difficulty with sustained attention and self regulation and became physically restless, engaged in stereotypical, stimulatory behavior (such as hand flapping), and was inattentive and increasingly impulsive (Dist. Ex. 9 at pp. 2, 3, 4, 5). The report indicated, however, that the student responded well to reassurance, praise, and positive feedback; was able ask for and benefit from brief breaks when he felt overwhelmed or fatigued; and was, in general, assisted by the structure inherent to the 1:1 testing environment, as well as various means of as-needed scaffolding, such as having instructions repeated, clarified, and/or broken down to aid in his language processing, and cueing to take his time and check his work, which addressed the student's impulsive tendencies (id. at p. 2). With regard to attention, the report reflected that, when the student was provided with 1:1 support and structuring and felt he would be successful, he was better able to sustain his focus, but without such support, he demonstrated persistent difficulty with inattention and decreased self regulation (id. at p. 6). Similarly, with regard to executive functioning, the report reflected that the student displayed greater difficulty with effectively planning a course of action and self monitoring it for effectiveness when presented with an unfamiliar or difficult problem (id. at p. 6). The report indicated that the student could be negatively affected academically and socially during times of heightened challenge, as he became more anxious and his difficulties were exacerbated at those times, such that he demonstrated trouble maintaining his focus and inhibiting his impulses and was vulnerable to task-interfering and stereotyped behavior such as repetitive tapping (Dist. Ex. 9 at p. 8). However, the report further indicated that these issues were greatly moderated with the provision of encouragement, increased structure and support from adults, and behavior modification (id. at p. 8).

The student's 2010-11 head teacher from the Aaron School, who participated in the April 2011 CSE meeting also offered testimony that the student required breaks from instruction to address his need for extra sensory input (Tr. p. 384). The head teacher explained that someone

needed to be available to go out of the room with the student for a tapping or a body break, and that although the student was able to request a break appropriately, he was not able to monitor his breaks or his sensory schedule on his own, had difficulty ending the breaks and returning to the classroom and required assistance to do so (Tr. pp. 384-85). With regard to academics, the head teacher's testimony indicated that the student required a lot of teacher check-ins to ensure that he was engaged in tasks and a lot of redirection, individualized support, and information and instruction broken-down in order to complete work independently (Tr. pp. 383, 392).

The head teacher testified that the student also required assistance with social interactions throughout the school day (Tr. p. 345). For example, the head teacher testified regarding an incident where the student incorrectly thought his peers were talking about him and "got stuck" on this thought, unable to move on, and became frustrated and cried (Tr. p. 386). The teacher indicated that the student needed her to problem solve with him at that time in order for him to return to class (Tr. p. 387). The parent also testified that the student's sensitivity, tendency to misunderstand social cues and nuances, and his need for "in the moment support" to navigate and problem-solve social situations rather than addressing them at a later time (Tr. pp. 510, 512). The head teacher testified that, at the student's April 7, 2011 CSE meeting, she disagreed with the 12:1 recommendation because, considering the student's social, academic and problem solving needs, she believed that one teacher could not facilitate the student and reengage him if he or she was also teaching the other students in the class (Tr. p. 391).

I also note that testimony of the principal and the teacher of the assigned class was offered which related to the district's intended provision of additional adult support that would have been available to the student in the classroom at the public school site as a result of the presence of at least one teacher's assistant and an individual student's paraprofessional (Tr. pp. 124, 128-29, 149-51, 159, 165, 168, 187, 194, 201-02, 204-07, 214, 216, 223, 226), as well as testimony that the assigned classroom actually contained fewer students as of the first day of school (Tr. p. 147). However, such testimony is not permissible for determining whether the IEP was adequate. The determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis and includes the consideration of only the information known at the time the IEP was developed (R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, \*17-\*18 [S.D.N.Y. March 21, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*6 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at \*16 [S.D.N.Y. Nov. 16, 2012]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*14 n.19 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]. However, the Second Circuit rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 185-89). Thus, applying the prospective analysis articulated in R.E. to this case, I cannot agree with the district that, given the participation of the additional adults in the assigned classroom, the 12:1 special class program set forth in the April 2011 IEP was reasonably calculated to provide the student with educational benefits in the least restrictive setting.

In conclusion, although the CSE recommended significant supports to the student through provision of comprehensive management needs strategies in the student's IEP, the IEP itself did not provide sufficient means by which these strategies could be delivered. Furthermore, although the CSE team believed that the student's distractibility issues were not severe enough to warrant any other recommendation, the evidence in hearing record does not support the district's argument. Based on the descriptions above of the student's management needs and the types and frequency of the strategies required in order to meet those needs, I find that the 12:1 special class would not have provided sufficient support for the student.<sup>8</sup> Moreover, with regard to the LRE, I note that while perhaps the student could have functioned in a community school in terms of accessing typically developing peers, he could not have done so without a significant amount of adult support, which, again, would not be available in a 12:1 special class placement called for in the IEP.

## **B. Appropriateness of the Aaron School**

I will next consider the district's challenge to whether the parents established that the Aaron School was an appropriate placement for the student during the 2011-12 school year. 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 a Student with a Disability, Appeal No. 12-036; 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. 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.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at \*2 [2d Cir. Mar. 29, 2013]; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49 (2005); L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at \*15 (S.D.N.Y. March 19, 2013); see also Educ. Law § 4404[1][c]). "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 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]; see L.K., 2013 WL 1149065, at \*15). 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 M.B., 2013 WL

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<sup>8</sup> While I have concluded that the 12:1 special class placement offered in the IEP was insufficient, I do not reach the issue of whether the student, at a minimum, required the district to provide 1:1 support in order to offer the student a FAPE, as some, but not all of the experts may have alluded.

1277308, at \*2; D. D-S v. Southold Union Free Sch. Dist., 2012 WL 6684585, at \*1 [2d Cir. Dec. 26, 2012]; 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"]; L.K., 2013 WL 1149065, at \*15). 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; M.B., 2013 WL 1277308, at \*2; 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; L.K., 2013 WL 1149065, at \*15; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at \*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 M.B., 2013 WL 1277308, at \*2; Frank G., 459 F.3d at 364-65).

The IHO based her finding that the Aaron School was appropriate for the student for the 2011-12 school year in part upon her determinations that it provided "the student with an opportunity to make meaningful progress academically, socially and emotionally," that the student made progress in various areas during his attendance at the Aaron School, and that the levels of related services provided to the student at the Aaron School were appropriately individualized and consistent with the student's abilities (IHO Decision at pp. 24). After careful review of the evidence contained in the hearing record, I find that, for the reasons discussed below, the hearing record supports the IHO's conclusion that the Aaron School was an appropriate placement for the student for the 2011-12 school year.

By way of additional background, the hearing record reflects that the student's fifth grade Aaron School class for the 2011-12 school year consisted of 11 students, one teacher, and one assistant teacher, who was also a certified teacher (Tr. pp. 248, 323). Similar to the student in the instant case, who was ten years of age during most of the 2011-12 school year and classified as a student with a speech or language impairment, the students in his Aaron school class were all ten and eleven years old and classified as having a speech or language impairment, a learning

disability, or an other health impairment (Tr. pp. 266-67; see Dist. Ex. 1 at p. 1). The student's 2011-12 head teacher at the Aaron School testified that the student was also similar to his classmates with regard to social/emotional and academic functioning and in their need for 1:1 attention to provide, for example, instructions and information broken down, repetition and redirection, and sensory breaks, (Tr. pp. 247-48, 253, 268-69, 283-84).

### **1. Academics**

The hearing record demonstrates that the Aaron School provided appropriate academic instruction and academic support to the student for the 2011-12 school year. The head teacher testified that the student's class at the Aaron School was broken down into smaller, ability-based groups of seven students for literacy instruction, and eight students for math instruction, both of which met daily for 45 minutes (Tr. pp. 268-69, 274-75; see also Tr. p. 393; Parent Ex. C at pp. 1, 2). The head teacher testified that the student's literacy level was between a 3.5 to 4.0 grade level, and that she provided instruction at the level of the student's literacy group, which was also around the 4.0 grade level (Tr. p. 275). The hearing record reflects that the student's literacy teacher used the level three book of the Wilson reading program to instruct the student's literacy group, which focuses on improving phonological awareness, decoding, fluency, and spelling; and that comprehension skills, including summarizing and sequencing, locating the main idea and supporting details, making inferences, drawing conclusions, cause and effect, and perspective taking were taught in isolation and supplemented with resources such as trade books, various educational websites, and teacher created materials (Parent Ex. C at p. 1). The head teacher testified that the student's literacy teacher modified the curriculum specifically for the student by, among other things, making worksheets herself, which included helpful hints; using graphic organizers, thinking maps, and chunking of information; and by providing photocopies of specific pieces of information for the student, and that the student responded well to these modifications (Tr. pp. 275-76). The February 2012 mid-year report from the Aaron School reflected that the student's literacy program also included read alouds, reader's theatre, and creative writing prompts to promote student interest and to help students learn to read and write effectively (Parent Ex. C at p. 1). The head teacher indicated that she spoke to the student's literacy and math teachers daily and further indicated that the student performed better in smaller groups because he was able to get more frequent positive supports and reinforcement, had more opportunities for active participation, such as coming up to the board and doing hands-on activities, and because he had a lot more teacher interaction in the smaller group settings (Tr. pp. 273-74).

The student's math teacher testified that, at the time of the hearing, both the student and his math group were functioning at an early fourth grade level or about a 4.0 to 4.2 grade level (Tr. p. 394). According to the February 2012 Aaron School report, the math teacher was using the Saxon Mathematics level 4 curriculum supplemented with lessons from Houghton Mifflin Math Steps 3, Attack Math, and teacher created materials to provide additional practice and reinforcement of concepts (Parent Ex. C at p. 2). The math teacher testified that she modified the Saxon math curriculum for the student by giving him shorter tasks and extra time to complete certain tasks; providing him with breaks from pencil/paper tasks by implementing multisensory activities, for example, using manipulatives for multiplication and division; and by sending home work to preview (Tr. p. 396). The head teacher also testified that the math teacher emailed the

student's mother each week informing her of the topics she would be covering in the next week, so that the parent could preview the information with the student (Tr. p. 277). Her testimony also indicated that this preview was helpful to the student and that he benefited from the review and repetition of information (Tr. p. 277). The February 2012 mid-year report indicated that a typical math lesson included a short warm-up review of concepts, direct teaching to introduce or reinforce new concepts, and guided practice where the student worked independently or with a peer (Parent Ex. C at p. 2). The math teacher testified that she could provide the student with 1:1 support in the small group setting by pulling him aside at the beginning and at the end of the period when students were doing independent or partner work, correcting their homework, or practicing multiplication on their own (Tr. p. 395). She indicated that during the 1:1 support time, she sometimes directly taught him something that she saw he was missing, went over homework, or gave him a preview of what the class would be doing that day (Tr. p. 395; see Tr. p. 390). The math teacher also testified that the student required 1:1 support to the extent that she had to set expectations that were different from the rest of the students in the math group (Tr. p. 387). For example, she would have the student complete half of a page, take a sensory break, and then rejoin the class (Tr. p. 387).

The 2012 mid-year report reflected that the student also received instruction in other academic areas, as well as in music, physical education, library, computer skills, and art (Parent Ex. C at pp. 1, 3-6, 9, 10). The student's 2011-12 head teacher testified that she saw the student for academic subjects other than literacy and math, including science, social studies, writing, and language arts (Tr. pp. 243, 273). She testified that while she gave instruction, the assistant teacher went around to see who needed extra help, needed something clarified, or needed a little push, and that, after giving the direct instructions, she and the assistant teacher each walked around and spent a little extra time with students who needed extra 1:1 support (Tr. p. 249). Additionally, as discussed in detail above, the student required a significant number and variety of strategies to address his management needs, as well as frequent provision of these strategies in order to support his instruction (Tr. pp. 243, 244-47, 250-53, 256-58, 260, 264-66, 345, 383-87, 392, 510-12). The student's parent testified that the management needs included in the student's April 7, 2011 IEP were being implemented for the student at the Aaron School at the time of the hearing (Tr. pp. 550-51). Furthermore, the February 2012 mid-year report also documented the many strategies that were utilized at Aaron School during the 2011-12 school year to address the student's management needs, which I note were consistent with those reflected as needed in the student's IEP (compare Dist. Ex. 1 at pp. 3, 4 with Parent Ex. C at pp. 2-7).

## **2. Sensory Needs**

The hearing record also reflects that the Aaron school provided appropriate supports for the student's sensory needs. The head of Aaron School testified that every classroom had a variety of sensory and tools available to students in a sensory box and that the occupational therapist was in and out of the room observing students and providing them with interventions to help in their self regulation (Tr. pp. 329-30, 369, 398). She indicated, for example, that the occupational therapist monitored seating position, provided students with seat cushions or weights at the bottom of their chairs as needed, utilized chewing gum as a sensory intervention, and that students who had issues with regulation in the classroom could either take quick 30 to 40-second breaks or leave the classroom for longer sensory breaks to do push-ups or heavy

lifting in order to regulate themselves (Tr. p. 329). As discussed above in detail, the student required sensory breaks outside of the classroom to assist him in self regulation and, notably, was not able to independently take his sensory breaks, but rather required assistance to return to the classroom after a sensory break (Tr. pp. 251-53, 264-66, 384, 538). However, the head teacher testified that there was always a teacher available to take the student to a specific area at the school for a "tapping break" or a "body break" (Tr. pp. 252-53). The parent also testified that if the student needed to go out into the hallway to do push-ups, heavy lifting or whatever he required in order to regulate his body, one of the teachers was able to help him address this need and then come back to the class and get back on task (Tr. p. 538). The February 2012 mid-year report from Aaron School also reflected the student's use of sensory breaks to provide the additional sensory input that he required (Parent Ex. C at p. 7). The mid-year report indicated that the student was encouraged to take his sensory breaks between classes, rather than during academics, and that positive reinforcement for on task behaviors during academic periods helped the student use his breaks appropriately (*id.*). The student was also encouraged to take organizing body breaks, use hand fidgets, and chew gum throughout the day to provide him with the sensory input he craved and to help him remain seated and attentive during class lessons (*id.*).

### **3. Social/Emotional Needs**

The evidence hearing record also demonstrates that the Aaron School appropriately addressed the student's social/emotional needs. As discussed above in detail, the student required assistance throughout the day to navigate through social problems with peers, as he often misunderstood social cues and nuances, and because he perseverated on topics he preferred or that bothered him (Tr. pp. 246-47, 272-73, 345, 386-87, 510, 512; Parent Ex. C at p. 7). The hearing record reveals that the additional staff in the student's Aaron School classroom enabled the student to receive the support he needed at the time of an incident when it was most beneficial to the student (Tr. pp. 386-87, 391, 512). In addition, the 2011-12 head teacher testified that the student may require assistance with social interaction during lunch, such as in problem solving with a peer (Tr. pp. 270-72). She further testified that the student's lunch time was always supervised by two teachers, typically one head teacher and one assistant teacher, and that one of these staff provided strategies such as reminding the student to take a moment away from the situation and think about it, help him see both sides of the situation, perspective take, and really problem solve (Tr. pp. 269, 271-73, 301-02). The hearing record also reflects that the student participated in a weekly social skills "Peer Group" to teach students how to handle themselves in everyday social situations and that the social skills curriculum was weaved into the entire school day (Tr. pp. 352, 367, 538). The parent testified that the student received a lot of 1:1 support from the psychologist at the Aaron School for the "social stuff, for helping him with one-to-one social interactions" (Tr. p. 538). The head of Aaron School testified that, in fifth grade, they have a curriculum wherein a social worker or a psychologist develops goals for the class related to the particular issues students should be working on in order to become more socially adept and aware and in order to better enable students to deal appropriately with their typically developing peers (Tr. pp. 367-68; Parent Ex. C at p. 1).

### **4. Related services**

According to the IHO, the Aaron School was appropriate for the student because, among other things, it offered the student related services that were appropriately individualized for the student to enable him to progress across his multiple areas of need (IHO Decision at pp. 24-25). The district contends that the IHO was incorrect and the Aaron School program was inappropriate to address the student's special education needs because it failed to provide sufficient related services needed by the student.

However, as discussed above, in order to establish the appropriateness of a unilateral placement to address a student's needs, the parents need not show that the placement provides every special service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (Gagliardo, 489 F.3d at 112; L.K., 2013 WL 1149065, at \*15; Frank G., 459 F.3d at 365; M.H. v. Dep't of Educ., 712 F. Supp. 2d 125, 166 [S.D.N.Y. May 10, 2010], aff'd 685 F.3d 217; Stevens, 2010 WL 1005165, at \*9; see R.K. v. Dep't of Educ., 2011 WL 1131522, at \*3-\*4 [E.D.N.Y. Mar. 28, 2011]), aff'd, R.E., 694 F.3d 167.

The hearing record reflects that during the 2011-12 school year at Aaron School, the student received one 30-minute speech-language therapy session per week with a peer and two 30-minute OT sessions per week, also with a peer (Tr. pp. 299-300; Parent Ex. C at p. 1). In addition to the social skills "Peer Group" described above, the student also participated in a weekly push-in "Life Skills" group facilitated by the occupational therapist and the speech pathologist (Tr. p. 300; Parent Ex. C at p. 1). The student's head teacher testified that the speech-language pathologist and the occupational therapist each come in and do a push-in lesson once a week and also make frequent visits to the classroom to see how students are doing (Tr. pp. 278-79). She stated that the occupational therapist had recently been coming in once a week during pack-up time to see how students were doing with their executive functioning skills and to assist them in that area (Tr. p. 279).<sup>9</sup>

While the district argues that because the Aaron School limits the number of pull-out related services sessions a student can receive to three sessions per week, the evidence supports the IHO's finding that the student's needs were also addressed by the push-in services provided to the student at the Aaron School (IHO Decision at p. 24; Tr. pp. 300, 357). The student's head teacher testified that the student benefited from therapists coming into the classroom because they were able to apply what they were working on with the student in the classroom setting (Tr. p. 279). The head of Aaron School testified that the school explained her view that group therapy settings are beneficial for students once they get to fourth or fifth grade because most of the issues that need to be addressed involve communications between students and peer interaction between students (Tr. p. 353). She also indicated that OT was integrated into the classroom "[s]o everybody gets everything everyday" (Tr. p. 354). She stated that the occupational, speech-language and counseling therapists were in and out of the classroom supporting the students and that this was a greater benefit to the class and the student than just individual pull-out related services (Tr. pp. 331, 357-58). The head of the Aaron School also indicated that, if a student needed more support than he could receive in the push-in group

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<sup>9</sup> As the hearing record does not reflect that the student exhibited aggression, the head teacher's reference to "aggressive functioning" appears to be a typographical error and should read "executive functioning" (see Tr. p. 279 and see Tr. pp. 352, 353).

sessions, on an as-needed basis, as was done for the student in the instant case, a therapist might be called in to develop a plan for the student and help implement that plan in the classroom (Tr. pp. 331-32, 398). I also note that, although the student was receiving the maximum number of related services provided by Aaron School, the head of the school testified that the related services the student received at Aaron School were addressing his needs based on the fact that the student was progressing and doing well in the classroom while receiving those services (Tr. p. 359).

## 5. Progress

A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B., 2013 WL 1277308, at \*2; D. D-S, 2012 WL 6684585, at \*1; L.K., 2013 WL 1149065, at \*15; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at \*5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).<sup>10</sup> However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115 [citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 (1st Cir. 2002)]; L.K., 2013 WL 1149065, at \*15. In this case, I agree with the IHO that the evidence in the hearing record demonstrates that the student progressed during the 2011-12 school year at Aaron School (IHO Decision at p. 24).

The February 2012 mid-year report from Aaron School reflected the student's performance and progress from fall to mid-year in all academic areas, given the supports described in the report (Parent Ex. C). The student's head teacher testified that the student progressed academically during the 2011-12 school year and gave examples, such as the student's improvement from writing basic to more complex sentences at the start of the school year to writing a four paragraph essay given teacher support (Tr. p. 281). She also indicated the student had made progress in the social/emotional domain, for example, he attempted to use the tools he had learned to navigate through social situations and utilized tapping breaks more appropriately (Tr. p. 281). The student's math teacher testified that the student made progress in learning his multiplication facts; in doing word problems, including crossing out extra information, circling important information, and underlining numbers needed to do calculations (Tr. pp. 401-02). The February 2012 mid-year Aaron School report also reflected, with regard to

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<sup>10</sup> To be clear, however, I note, however, that the Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit . . . 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

math skills, improvement in the student's ability to use the inverse relationship between multiplication and division to solve computational problems; his increased automaticity of addition, subtraction, multiplication and division facts; and his increased ability to tackle word problems independently (Parent Ex. C at p. 3). The mid-year report also reflected that the student responded very well to many of the strategies used to address his academic and social/emotional management needs, including a "tree map of key words" to assist him in solving word problems; teacher modeling; repeated opportunities to practice concepts and repeated exposure to information in a variety of formats to internalize the new skills and complete tasks involving those skills independently; positive praise and teacher reassurance; frequent teacher check-ins in order to complete his best work; an individualized incentive plan to motivate him to complete his best work consistently; on the spot questioning; use of visuals, manipulatives and step-by-step checklists; and the provision of short sensory breaks during math group to support his self regulation needs (*id.*). The report reflected the student also benefited in other subject areas from similar strategies, as well as by the provision of thinking maps and outlines to help him organize his thoughts; rephrasing; asking him leading questions; modeling specific examples of higher order cognition; prompts to let him know he would be called on to answer soon, in order to provide him with additional time to process and respond to information; and preferential seating where there were minimal distractions to assist him in staying on task and finishing work in a timely manner (*id.* at pp. 4, 5). In addition, the parent's testimony also reflected that the student had a better attitude regarding academics; that his reading and math had definitely improved; that he had made progress socially and was less anxious about social interactions; and that she believed he had more perspective socially than in the past due to the problem solving that the teachers and staff at Aaron School did with the student (Tr. pp. 541-42).

## **6. Group Goals**

The district alleges that the Aaron School did not provide specific individualized goals for each student but rather provided group goals, citing to the testimony of the student's math teacher (Tr. p. 417). However, the student's math teacher further clarified that she was referring to areas of study related to the student's math and literacy groups and that although she does not follow the goals on the student's IEP and does not have a formal goals document written out, she does have specific goals for where she wants the student to be (Tr. p. 422). She testified that she included specific goals for the student in her reports (Tr. p. 422).

A review of the February 2012 mid-year report reveals that the student continued to work toward goals that had been set forth in the previous fall report including solving division problems where a multi-digit number is evenly divided by a one digit number; using the inverse relationship between multiplication and division to compute and check results; problem solving by developing strategies for selecting the appropriate operational method to solve the problem; and extracting important information from problems and verbally explaining the rationale for the choice of strategy (Parent Ex. C at p. 3). The mid-year report also reflects the student's literacy goals, which addressed expanding his abstract comprehension skills, such as inferencing and understanding point of view, analyzing text, and identifying and understanding figurative language (*id.* at p. 2). Finally, the February 2012 mid-year report also included additional new goals for the student going forward for the rest of the 2011-12 school year, including that the student would demonstrate ability to write a multi-paragraph essay with minimal support;

improve his ability to problem solve with peers and use age appropriate language to express himself; and improve his ability to cope with his frustration when asked to participate in a group activity rather than a task of his own choice (id. at pp. 7-8).

The district's argument that the unilateral placement failed to develop individualized goals also fails for two additional reasons—first is that the district has confused the requirements in that it is a public district, not a private school, that is called upon to follow the procedures of the IDEA in developing an IEP that includes goals for each student with a disability, and, second, because where "[i]n this Circuit, courts are 'reluctant to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress'" (J.L. v City Sch. Dist. of City of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013] citing P.K. v. New York City Dep't of Educ., 819 F.Supp.2d 90, 109 [E.D.N.Y.2011]) and thus similarly, even if there was a requirement that the unilateral placement develop goals for the student, I would not hold that the parents' placement was substantively deficient in this instance (Gagliardo, 489 F.3d at 112 [explaining that '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...']), To hold otherwise in this instance would be to suggest the parents should be held to a higher standard than the district is held.

## 7. LRE

I turn next to the district's argument that the Aaron School was an inappropriate placement for the student for the 2011-12 school year because it did not constitute the student's LRE. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at \*19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; Application of a Student with a Disability, Appeal No. 12-027; Application of the Dep't of Educ., Appeal No. 10-049, aff'd M.C. v. Lake George Cent. Sch. Dist., 2012 WL 3886159 [N.D.N.Y. Sept. 6, 2012]; Application of the Dep't of Educ., Appeal No. 10-042; Application of a Child with a Disability, Appeal No. 99-083). The evidence in this case described above supports the conclusion that the student should be placed in a special class setting, a setting that is offered by the Aaron School. The hearing record reflects that, during the 2011-12 school year, the student was not provided with opportunity to be mainstreamed with typically developing peers at Aaron School (Tr. pp. 282, 410). However, the student's head teacher for the 2011-12 school year testified that she did not know how the student would socially navigate with typical peers due to his social/emotional needs (Tr. p. 282).

Based on the foregoing, I find that with regard to LRE considerations, while the Aaron School may not have maximized the student's interaction with nondisabled peers, in this instance, this factor does not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at the Aaron School for the 2011-12 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

### C. Equitable Considerations

Having determined that the Aaron School was an appropriate placement for the student for the 2011-12 school year, I will now consider whether equitable considerations supported the parents' reimbursement claim for tuition costs. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). 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 J.P. v. New York City Dep't of Educ., 2012 WL 359977, at \*13-\*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at \*10; S.W. v. New York City Dep't of Educ., 2009 WL 857549, at \*13-14 [S.D.N.Y. March 30, 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 M.C., 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of a Student with a Disability, Appeal No. 12-036; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

In this case, the IHO found that equitable considerations favored the parents because they cooperated with the CSE, attended the CSE meeting, provided the CSE a copy of the privately obtained evaluation, visited the assigned school, and timely expressed their objections regarding the April 2011 IEP and provided notice of their intent to unilaterally enroll the student at the Aaron School (IHO Decision at p. 25). The district argues that equitable considerations militated against an award of tuition reimbursement to the parents because the parents never intended to accept the recommended placement. In support of its argument, the district points to the fact that the parents signed the enrollment contract and paid the deposit to the Aaron School for the 2011-12 school year before the April 2011 CSE meeting and made a subsequent tuition payment to the Aaron School before visiting the assigned school.

The hearing record indicates that the mother attended and actively participated in the April 2011 CSE meeting and the parents cooperated fully with the CSE during the review process, including by obtaining their own private evaluation (see Tr. pp. 513, 517-18; Dist. Exs. 1 at p. 2; 2; 9). At the CSE meeting the parent and the student's Aaron School special education teacher expressed concern with the April 2011 CSE's program recommendation (Tr. p. 393, 518). The parent unsuccessfully requested that the district assign a school in the spring so that she

would have an opportunity to visit the assigned school prior to the summer break (Tr. pp. 526-27). Once the 2011-12 school year began, the parents visited the assigned school on two occasions and the mother asked the public school principal "poignant questions" and was "concerned" (Tr. pp. 127, 529).<sup>11</sup> The parents described their concerns about the CSE program recommendation in a letter through their attorney to the district dated August 24, 2011 and subsequently by corrected letter dated September 8, 2011 (Parents Exs. A; B).

The parents signed an enrollment contract with the Aaron School for the 2011-12 school year on January 30, 2011 and remitted an \$8,000 non-refundable deposit, months before the CSE meeting, reserving her son's seat at the school for the 2011-12 school year (Tr. p. 534; see Parent Exs. D at p. 1; E; G at p. 1). The parent testified that they did so because they "wanted to secure a place for him" and "didn't know what was going to happen at the CSE meeting" (Tr. p. 534). I also note that the mother testified that they made the second tuition payment to the Aaron School on May 10, 2011, after the CSE meeting but before receiving the FNR, because the CSE informed her that, although not appropriate for the student, a 12:1 class was all the district had to offer (Tr. p. 536; see Parents Ex. E; G at p. 2). The mother testified that she would have considered a public school or a state-approved non-public school if such an institution offered an appropriate program for the student (Tr. pp. 520-21, 536-37). The parents made two more payments to the Aaron School for the student's 2011-12 tuition in August 2011 and November 2011, the total of all payments equaling \$47,950.00, which satisfied the total tuition amount due for that school year (Parents Exs. D at p. 1; E; G at pp. 3-4). I note that the enrollment contract between the parents and the Aaron School did include provisions for withdrawal of the student from the school, in addition to partial refund of tuition paid, in the event the district offered the student an appropriate placement (Parent Ex. D at p. 2). Accordingly, I find that the hearing record does not support a conclusion that reimbursement should be reduced or denied because the parents never intended to enroll the student in a public school. Under the circumstances, I decline to find that equitable considerations do not support the parents' request for relief.

Based upon the evidence contained in the hearing record, I find that the parents acted reasonably under the circumstances of this case and cooperated with the district in good faith to develop an appropriate IEP for the student. The parents did nothing to hinder the district from developing an appropriate IEP. While the parents did not include a specific request to reconvene the CSE in her August and September 2011 letters (Parent Exs. A; B), the parents were not required to do so and it does not weigh against the parents. However, the district adhered to the strict letter of the requirements and, in so doing, did little, equitably speaking, to better its position, such as voluntarily holding an additional CSE meeting (or offering to modify the IEP without a meeting) to increase the chances of satisfactorily addressing the contents of the parents' concerns with the IEP.<sup>12</sup> Had the district done so and the parents then refused appropriate

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<sup>11</sup> While I have deep reservations about the parents' claims of a denial of a FAPE that arising from a parents visit to the assigned public school site which the student never attended, the practice of visiting an assigned school has value for purposes of equitable considerations, especially if it prompts the parents to exercise their right to request another CSE meeting to make specific modifications of the IEP.

<sup>12</sup> To be clear, the CSE was not required under state regulations to reconvene simply because the parents provided 10-day notice identifying concerns, however, when the parents have provided a 10-day notice window -- which was envisioned as providing public schools with an opportunity to cure -- and the district makes no attempt at all, such inaction does nothing to enhance a district's position in the weighing of equitable factors.

corrections to the IEP, the district's argument that the parents did not intend to enroll the student in the public school might have been more credible. Therefore, I concur with the IHO's finding that equitable considerations favor the parents overall and justify an award of tuition reimbursement under the circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at \*8-\*9 [S.D.N.Y. Jan. 3, 2013]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at \*8-\*9 [S.D.N.Y. Dec. 26, 2012]; R.K., 2011 WL 1131522, at \*4.

## **VII. Conclusion**

Based on the foregoing, there is no reason to disturb the IHO's findings set forth in the July 25, 2012 decision that found that the district failed to offer the student a FAPE during the 2011-12 school year, that the parents' unilateral placement at the Aaron School was reasonably calculated to meet the student's educational needs, and that equitable considerations favored an award of reimbursement to the parents of the student's tuition at the Aaron School for the 2011-12 school year.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
August 26, 2013**

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