



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-008

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]**

### **Appearances:**

Thomas, Drohan, Waxman, Petigrow & Mayle LLP, attorneys for respondent, David H. Strong, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Woodstock Day School (WDS) for the 2011-12 and 2012-13 school years. 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]-[B], [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 279.4[b], 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

With regard to the student's educational history in this case, the student attended a district public school through and including the 2010-11 school year (third grade) and received special education services beginning in the 2009-10 school year (see Tr. pp. 950-58, 1097-98, 1165-66; see also Dist. Ex. 9).

On June 10, 2011, a CSE subcommittee convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (see Joint Exs. 7 at p. 1; 12 at p. 1; see also

Joint Ex. 25; Parent Ex. NN).<sup>1</sup> Finding that the student remained eligible for special education and related services as a student with autism, the June 2011 CSE subcommittee recommended placement in a regular education classroom with the following related services: one 30-minute session of a small (5:1) social skills group per six-day cycle; one 30-minute session of individual counseling per six-day cycle; one 30-minute session per month of occupational therapy (OT) consult services; and daily 15-minute sessions of individual skilled nurse services (Joint Ex. 7 at pp. 1, 13).

The student was accepted at WDS on or about September 6, 2011 and the parent signed an enrollment contract for the 2011-12 school year on September 7, 2011 (Joint Exs. 20; 21 at pp. 1-2). The hearing record additionally reflects that the student attended WDS for the 2011-12 school year (see Tr. p. 1165; see generally Parent Ex. U). In February 2012, the parent entered into an enrollment contract with WDS for the 2012-13 school year (Joint Ex. 22 at pp. 1, 3).

The CSE or the CSE subcommittee convened on March 2, 2012 to conduct the student's annual review and to develop an IEP for the 2012-13 school year; however, it does not appear that an IEP was generated as a result of that meeting (see Joint Ex. 12 at p. 1).<sup>2</sup> A CSE subcommittee convened on June 1, 2012 to develop an individualized educational services program (IESP) for the student for the 2012-13 school year (see Joint Ex. 16 at p. 1). The IESP indicated that the parent "unilaterally placed the student at [WDS]" and offered the related service of one 30-minute OT consult per month (*id.* at pp. 1, 7). According to the hearing record, at the June 2012 CSE subcommittee meeting, the parent requested placement at WDS but district personnel informed the parent that it could not recommend WDS because it was not a State-approved nonpublic school (Joint Exs. 12 at p. 1; 16 at p. 1). The parent testified that, at the June 2012 CSE subcommittee meeting, she verbally "informed the district that [she] would be filing . . . a due process complaint" (Tr. p. 1138).

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

In a second amended due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years and that WDS was an appropriate unilateral placement (see IHO Exs. 3 at pp. 3, 6; 3B at pp. 1-2).<sup>3</sup> Regarding the 2011-12 school year, the parent alleged the following: (1) the district did not conduct "appropriate assessments," including a functional behavioral assessment (FBA); (2) the student's classroom utilized a behavior plan without having first conducted an FBA; (3) the district did not

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<sup>1</sup> Review of joint Exhibit 7 reveals an inconsistency in pagination, in that the handwritten page numbers skip page "6 of 16" (see Joint Ex. 7). Given this inconsistency and the fact that the handwritten page numbers are not legible on every page (see *id.*), the exhibit will be cited by reference to its consecutive pagination.

<sup>2</sup> Contemporaneous meeting minutes indicated that the meeting was "tabled" in order for the CSE to gather additional information on possible placement recommendations (Joint Ex. 12 at p. 1).

<sup>3</sup> The parent originally filed a due process complaint notice on June 26, 2012 and amended two pages of the due process complaint notice twice, with the district's permission, during the course of the impartial hearing (Tr. pp. 116-19, 1064-65; see IHO Exs. 3; 3A; 3B). Thus, the parent's second (and final) amended due process complaint is comprised of the first three pages of the original due process complaint notice (IHO Ex. 3 at pp. 1-3), two pages that were the subject of the two amendments (IHO Ex. 3B at pp. 1-2; see also IHO Ex. 3A at pp. 1-2), and the final three pages from the original due process complaint notice (IHO Ex. 3 at pp. 6-8).

timely respond to the parent's request for an FBA; (4) district evaluations were not conducted by a "specialist with certification or knowledge in the area of suspected disability"; (5) the district did not "acknowledge and/or address" the student's sensory needs; (6) the district did not make a "good faith" effort to assist the student in achieving his IEP annual goals, as evidenced by his lack of progress; (7) the district did not "make efforts to provide additional services or resources" to help the student make progress; (8) the June 2011 IEP did not include appropriate progress reports; (9) the student's present levels of performance were not accurately ascertained at the June 2011 meeting because the CSE did not consider reports from the student's special education teacher or social worker; (10) the June 2011 CSE was improperly composed because it did not include a school psychologist; (11) the June 2011 CSE did not review or consider a May 2011 psychological evaluation; (12) a follow-up meeting was scheduled at the June 2011 CSE meeting but not held; (13) the district did not timely respond to a parental request for an assistive technology evaluation; (14) the district did not inform the parent that it refused her request to amend the student's records; and (15) the district did not inform the parent of her due process rights (IHO Ex. 3B at pp. 1-2).

With respect to the 2012-13 school year, the parent alleged that: (1) the June 2012 CSE did not identify the student's "unique needs"; (2) did not offer an "appropriate program and placement"; (3) the June 2012 CSE's "inappropriate suggestions of a program and placement" did not represent the LRE for the student; (4) the district provided inadequate notice for the June 2012 CSE meeting; (5) the June 2012 CSE did not include a Boards of Cooperative Educational Services (BOCES) representative; and (6) neither the May 2012 CSE nor the June 2012 CSE considered a May 2011 psychological evaluation (IHO Ex. 3B at p. 2).

As a remedy, the parent sought the costs of the student's tuition at WDS for the 2011-12 and 2012-13 school years (IHO Ex. 3 at p. 6). The parent further averred that the student was "thriving" at WDS as evidenced by progress reports submitted by WDS (*id.*).

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

Following a prehearing conference on August 1, 2012 (*see* Tr. p. 4), an impartial hearing convened on September 6, 2012 and concluded on November 4, 2012 after seven non-consecutive days of proceedings (Tr. pp. 1-1468). At the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2012-13 school year (Tr. pp. 900-01; *see also* IHO Decision at pp. 2, 4, 63, 93). In a decision dated December 24, 2012, the IHO found that the district also failed to offer the student a FAPE for the 2011-12 school year but that tuition reimbursement was not warranted for either school year because WDS was not an appropriate unilateral placement for the student (IHO Decision at pp. 83-101).

The IHO first considered the program offered to the student for the 2011-12 school year (IHO Decision at pp. 83-93). As a preliminary matter, the IHO determined that the relevant IEP was the IEP "the parent had at the time [she] . . . removed the child from the public school and unilaterally enrolled the [student at WDS]"; namely, the June 2011 IEP (IHO Decision at pp. 83-84). The IHO concluded that multiple procedural violations in the drafting process and the IEP itself denied the student a FAPE (*id.* at pp. 85-93). The IHO found that, although the hearing record indicated that a district psychologist conducted a psychoeducational evaluation in

anticipation of the June 2011 CSE meeting, there was no indication that the CSE reviewed it (id. at pp. 86-87). The IHO found that this failure constituted a procedural error that "impeded the [s]tudent's right to [a] FAPE" (id. at p. 87).

Turning to the June 2011, the IHO found that the annual goals failed to "fully address [the student's] social/emotional needs, as identified in the body of the IEP" (IHO Decision at pp. 87-88). Specifically, the IHO found that the June 2011 IEP's present levels of performance identified several areas of need for which corresponding annual goals were not developed; specifically, the student's "problematic behaviors"; difficulties with peers; failure to interpret social cues; inability to regulate behavior; difficulties accepting others' opinions and listening without interruption; and general social skills (id. at p. 88). Further, the IHO noted that the district did not rebut the parent's testimony that the student's annual goals were not discussed at the June 2011 CSE meeting (id.). The IHO found that the deficiencies in the June 2011 IEP's annual goals constituted procedural violations that "significantly impeded the [p]arents' opportunity to participate in the decision-making process" (id. at p. 89).

The IHO found two additional infirmities with the June 2011 IEP; namely, that it did not include a "small social skills group" (IHO Decision at pp. 89-90) and that neither an FBA nor a behavioral intervention plan (BIP) was developed in conjunction with the IEP (id. at pp. 90-92). With respect to the social skills group, the IHO found such a related service "most appropriate" for the student and determined that the June 2011 CSE's failure to recommend this, "coupled with its failure to include the supplementary aids and services/program modifications/accommodations that were to be provided to the student" constituted a procedural violation of the IDEA (id. at pp. 89-90). The IHO further found that, although the June 2011 IEP recommended that an FBA and a BIP be developed, the district failed to do so (id. at pp. 91, 92). The IHO noted that the district did not conduct an FBA in spite of numerous recommendations therefor by teachers, as well as both district and private evaluators (id. at pp. 90-91). The IHO rejected the district's argument that the June 2011 IEP otherwise addressed the student's behavioral needs, observing that "no specific strategies [we]re described in the IEP to address the [s]tudent's behaviors" (id. at p. 92). Accordingly, the IHO found the district's failure to conduct an FBA "during the 2011/12 school year" constituted a denial of FAPE (id.).

Based upon the procedural violations detailed above, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at p. 93). With respect to the 2012-13 school year, the IHO noted the district's concession at the impartial hearing that it did not offer the student a FAPE (id. at p. 93).

Therefore, the IHO next considered whether WDS offered specially designed instruction to meet the student's needs (IHO Decision at pp. 93-100). As a preliminary matter, the IHO observed that the parent did not offer "testimony from any of [the student's] teachers" at the impartial hearing or "reports . . . that shed any light about how [the student] perform[ed] during the 2012/13 school year" (id. at p. 95). The IHO proceeded to engage in a review of the testimonial and documentary evidence introduced at the impartial hearing and concluded that no evidence in the record demonstrated that the program at WDS was "specifically designed" to

meet the student's unique needs (id. at p. 100; see id. at pp. 93-100).<sup>4</sup> The IHO further found that the student "continued to experience the same social, emotional, and behavioral issues" he experienced in the public school system (id. at p. 100). Specifically, and among other behaviors, the IHO noted that the student: required reminders to stay focused; "growl[ed]" at students; placed his arms in front of his face when he disagreed with a peer; did not verbalize his feelings; argued with others in the classroom; and produced written work that failed to "reflect [his] high level of intellectual prowess" (id. at p. 99).

Having concluded that WDS did not provide the student with specially designed instruction to meet his unique needs, the IHO did not consider whether equitable considerations served to preclude or diminish an award of tuition reimbursement (IHO Decision at pp. 100-01).<sup>5</sup> Accordingly, the IHO denied the parent's request for tuition reimbursement at WDS for the 2011-12 and 2012-13 school years (id. at p. 101).

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

The parent appeals, arguing that WDS was an appropriate placement for the student because it offered specialized instruction to meet his needs and, further, that the student made progress in this setting. The parent argues that the student received services and program accommodations at WDS during the 2011-12 school year comparable to those offered in the June 2011 IEP. Specifically, the parent contends that WDS made classroom accommodations, supervised the student during recess, and met the student's sensory needs. Additionally, the parent argues that she met the student's social-emotional needs by privately securing counseling and social skills training.<sup>6</sup>

The parent further argues that the student made behavioral and social/emotional progress at WDS. The parent contends that the student was well-adjusted in class and frequently participated. Additionally, although his behavior was "inconsistent," the parent asserts that WDS set behavioral goals for the student and that his behavior never necessitated a trip to the principal's office. Also, the parent argues that the student's writing skills improved while he attended WDS.

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<sup>4</sup> In this respect, the IHO reviewed the testimony of the head of school at WDS, whose testimony, the parent argued, supported her "assertion that the [s]tudent made tremendous personal growth at WDS" (IHO Decision at pp. 93-95). The head of school was personally familiar with the student, although he did not instruct or formally observe the student (see Tr. pp. 1334-37, 1355-57). The IHO also considered a classroom observation of the student conducted as part of an assistive technology assessment by a district evaluator (IHO Decision at pp. 96-97) and testimony from a district teacher who assisted another student in the student's classroom at WDS (id. at pp. 97-98; see Tr. pp. 1397-99) as evidence of the student's functioning at WDS.

<sup>5</sup> The IHO also declined to consider the parent's request regarding amendment of the student's educational records, finding this matter outside of her jurisdiction (IHO Decision at p. 92).

<sup>6</sup> The parent also contends, for the first time on appeal, that the district failed to ensure the delivery of necessary related services to the student during his enrollment at WDS for the 2011-12 and 2012-13 school years. However, given the IHO's unappealed determination that the district failed to offer the student a FAPE for the 2011-12 and the district's concession that it did not offer the student a FAPE for the 2012-13 school year, these claims need not be addressed further (IHO Decision at pp. 83-93; Tr. pp. 900-01).

With respect to equitable circumstances, the parent contends that no factors serve to diminish or preclude an award of tuition reimbursement. Generally, the parent contends that she attended all CSE meetings, expressed concerns, and visited the assigned public school sites where the district proposed to implement the student's IEPs. With respect to the 2011-12 school year, the parent argues that her non-compliance with the IDEA's 10-day written notice requirement should be excused because she was unaware of this requirement and was told that there would be a future CSE meeting in the summer, which the district did not convene. Further, the parent argues that the district was actually aware of her concerns regarding the June 2011 IEP because she refused to sign a consent form at the CSE meeting and, on September 1, 2011, requested that the district provide the student's educational records to WDS. As for the 2012-13 school year, the parent avers that their due process complaint notice contained the pertinent information found in a 10-day letter.

In an answer, the district argues that it could not formulate a response to the petition because the petition does not contain numbered paragraphs as required by State regulations. The district additionally submits a memorandum of law which responds to the parent's material assertions and argues that the IHO correctly determined that WDS was not an appropriate unilateral placement. The district additionally argues in its memorandum of law that equitable considerations weigh against an award of tuition reimbursement because the parent did not provide notice of her intent to remove the student from the public school system at least 10 days before doing so for both the 2011-12 and 2012-13 school years.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

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 must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, 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, quoting Frank G., 459 F.3d at 364-65).

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. Form Requirements for Pleadings**

In its answer, the district challenges the parent's petition as noncompliant with the form requirements set forth in the practice regulations applicable to proceedings before the Office of State Review. State regulations require that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). In addition, a petition, answer, reply, and memorandum of law "shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (8 NYCRR 279.8[b]). Moreover, all pleadings must "set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][3]).

The district is correct that the parent's petition does not comply with State regulations as it does not "set forth" allegations "in numbered paragraphs" (8 NYCRR 279.8[a][3]). However, there is no evidence that the district was prejudiced by the parent's noncompliance with this provision as the district was able to generate a 20-page memorandum of law that addresses each of the parent's arguments presented on appeal (see Ans. Memo of Law at pp. 1-20). Therefore, although State regulations provide that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer", I decline to exercise my discretion to dismiss the parent's petition in this instance (8 NYCRR 279.8[a]). Should the parent submit an appeal to the Office of State Review again, she is cautioned to comply with the pleading requirements expressly prescribed by State regulations or risk dismissal of an appeal (see Application of a Student with a Disability, Appeal No. 11-117).

## **B. Unilateral Placement**

Because the district does not appeal the IHO's determination that it failed to offer the student a FAPE for the 2011-12 school and conceded that it did not offer the student a FAPE for the 2012-13 school year, the next issue is whether the parent's unilateral placement of the student at WDS during the 2011-12 and 2012-13 school years was appropriate (IHO Decision at pp. 83-93; Tr. pp. 900-01).<sup>7</sup> For the reasons described below, the hearing record supports the IHO's finding that WDS did not offer the student specially designed instruction to meet the student's needs.

### **1. The Student's Needs**

In this instance, although the accuracy of the student's needs—as identified in certain evaluations and assessments in the hearing record—are not directly in dispute on appeal, a discussion thereof provides further illumination of the remaining issue; namely, whether the student's unilateral placement at WDS was appropriate.

The hearing record indicates that the student presented with behavioral and social/emotional difficulties that impacted his performance in the classroom (see generally Tr. pp. 352-75, 397, 453-54, 487, 492-93, 523-24, 639-51; Joint Exs. 6; 12; Parent Ex. GGGG). The hearing record further indicates that the student exhibited age appropriate academic skills and, though it was reported that he struggled with written expression, several assessments showed that he possessed grade level writing skills (Tr. pp. 350-52, 481-82; Joint Exs. 6 at p. 4; 11 at pp. 3, 9, 11; 13; Parent Exs. B; WWWW).

With regard to academics, the student's special education teacher for second and third grade testified that the student presented as a "strong student academically," particularly in reading and math, but had difficulty with writing (Tr. p. 350; see Tr. pp. 350-51). She further indicated that, in second grade, the student read above grade level and exhibited strong skills in both operations and word problems, but would become frustrated with the writing process (Tr. pp. 351-52). The special education teacher also reported that, by the end of third grade, the student did not need any academic goals for the following school year because he was an "A student" (Tr. pp. 380-81). The district regular education teacher, who was also the student's teacher for second and third grade, testified that the student earned "excellent" grades, although he was reluctant to write (Tr. pp. 472-73). She further indicated that the student performed on grade level for reading, math, social studies and science in second grade and did well academically in third grade but made minimal progress in writing due to his "[r]eluctance to write" (Tr. p. 473, 481-82).

According to a November 2010 academic intervention services (AIS) progress report, the student had been referred for push-in AIS to support his writing (Parent Ex. B). The reading/AIS teacher noted that the student was "an independent thinker who prefer[red] to do things his way"

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<sup>7</sup> Because the district has not appealed the IHO's adverse determination that it failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at pp. 83-93), the IHO's determination is final and binding on the parties and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

and speculated that the student was referred for AIS because he had not shown mastery of grade two required skills despite being "perfectly capable" of meeting these goals (id.).

A June 2011 psychoeducational re-evaluation reported the student's scores on the written expression subtest of the Woodcock Johnson III Tests of Achievement (WJ-III ACH), which placed the student in the upper end of the average range (Joint Ex. 6 at p. 4). Additionally, scores from a May 2011 administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) placed the student solidly within the average range in reading, mathematics, and written language (Parent Ex. WWWW).<sup>8</sup>

The June 2011 CSE subcommittee requested an October 2011 assistive technology assessment to determine if the student required additional writing assistance (Joint Ex. 11 at p. 2). The assessment indicated that the student reported difficulty getting his "ideas down on paper quickly before he forgets" (id. at p. 3). The evaluator expressed concerns related to the student's processing and organizational skills but indicated that the student seemed to have "very good critical thinking skills and verbal expression" and that he wrote more on subjects that interested and motivated him (id. at p. 9). Furthermore, the evaluator opined that the student seemed able to write but struggled with organizing ideas and putting them down on paper in a logical sequence (id. at p. 11). Recommendations in the October 2011 AT assessment included suggestions for strategies to address the student's needs in writing and concentration/distractibility/disorganization, as well as recommended technology trials to assist the student in his organization and writing (id. at pp. 12-20). The above assessments and testimony suggest that the student was capable of producing age-appropriate writing but was reluctant to do so (Tr. pp. 350-52, 380-81, 472-73, 481-82; Joint Exs. 6; 11; 13; Parent Exs. B; WWWW).

Turning next to the student's behavioral and social/emotional needs, a private pediatrician completed a March 2009 developmental-behavioral evaluation at the parent's request (Joint Ex. 3 at pp. 1, 6). The March 2009 evaluation indicated that the student presented as cooperative and made good eye contact and that he exhibited good memory and concentration skills (id. at p. 4). However, the evaluator noted that the student showed impaired judgment and insight as a result of his "difficulty seeing the world from other[s]' perspectives" (id. at pp. 4-5). The evaluator described the student as "very bright and verbal" but also noted that the student had difficulties carrying on a reciprocal conversation, interacting with peers, exhibiting flexibility with routines and preoccupations, and making transitions throughout the day (id. at p. 5). The evaluator concluded that the student met the criteria for diagnoses of Asperger's syndrome, a mild articulation disorder, some fine motor deficits, and that there were "questions about signs of ADHD" (id. at p. 5). Recommendations from the March 2009 developmental-behavioral evaluation included an integrated classroom with a special education teacher who had experience working with gifted children on the autism spectrum and an FBA conducted by "individuals with expertise working with children with Asperger's [s]yndrome" (id.). The evaluator also recommended speech-language therapy, primarily to assist the student's communication abilities but also to assist with the student's articulation disorder (id.). The evaluator further

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<sup>8</sup> The evaluator suggested, however, that the student's inconsistent performance, attributable to his giving up on difficult tasks, as well as "possible interference from various behaviors and influences," may have resulted in an inaccurate assessment of the student's global intelligence and scholastic performance (Joint Ex. 6 at p. 3).

recommended OT to improve the student's fine motor coordination and to provide him with sensory strategies to help reduce his frustrations (id.). Finally, the evaluator recommended that the student receive social skills training outside of school and that the parent organize play dates, whereby the student could practice his social skills with one child at a time (id. at p. 6).

Contemporaneous session notes taken by the student's social worker during the 2010-11 school year revealed serious concerns regarding the student's social-emotional functioning (see Tr. pp. 627-35; see generally Parent Ex. GGGG). The district social worker, who worked with the student between 2007 and 2011, described several incidents of social and behavioral difficulties that occurred between the student and peers, faculty, staff, and his parents (Parent Ex. GGGG at pp. 1-5). Additionally, in her session notes, the social worker expressed concerns with the student's use of dark themes or "death themes" on class assignments, suicidal and homicidal ideations, and threats to "blow up the school"—concerns reiterated in her testimony at the impartial hearing (Tr. pp. 641-45, 663, 672; Parent Ex. GGGG at pp. 1-5). Further, the social worker indicated that the student had a "hate list" that he began in kindergarten and continued in third grade (Tr. p. 639). The trait the social worker "observed the most" was that the student exhibited "no empathy" (Tr. p. 638). The social worker attended the June 2011 CSE meeting and, at that meeting, recommended a program for the student where he could receive therapeutic intervention "on the spot" when he displayed these behaviors (Tr. p. 656).

An April 2011 triennial speech-language evaluation indicated that the student made "excellent progress" in his articulation skills and that he exhibited intelligibility and quality of speech "well within normal limits" (Dist. Ex. 16 at p. 1). The evaluator indicated that, based on formal language assessments, the student demonstrated functional communication skills for "communication within the classroom" and, further, that the student's ability to use language exceeded his receptive language score (id.). The evaluator further reported that, although the student struggled socially and behaviorally in terms of his interaction with his classmates during the 2010-11 school year, the student's pragmatic language deficits did not cause the student's difficulties; instead, the evaluator opined that the student's feelings about himself, others, his environment, his behavior, and/or his personal interests may have resulted in the social/emotional and behavioral difficulties and recommended that these concerns be discussed with a school counselor, social worker, or psychologist (id. at p. 2). Given the student's progress, the evaluator recommended that the student be discharged from speech-language intervention services with further consultation to be provided upon a teacher or counselor's request (id. at p. 2).

A June 2011 addendum to the April 2011 triennial speech-language evaluation, requested by the parent, formally assessed the student's pragmatic language skills (Dist. Ex. 17). The addendum described the student as attentive, on task, and thoughtful in his responses (id.). The addendum reported the results from the Test of Pragmatic Language (TOPL) and indicated that the student's responses "fell solidly within the average range" (id.). Further, the addendum described the student's responses to subtests from the Comprehensive Assessment of Spoken Language (CASL), which targeted higher level pragmatic skills, as thoughtful and responsive (id.). The evaluator noted that the student interpreted meanings quickly and accurately during the early portion of the tests but with less accuracy as the test progressed (id.). The addendum also included results from the Pragmatic Judgment Test, which indicated that the student was

able to judge the appropriateness of language used in a specific situation and utilize appropriate language in such situations (id.). The addendum offered "[n]o additional recommendations," other than to reiterate the April 2011 triennial speech-language evaluation's recommendation to discharge the student from speech-language intervention (id.).

A May 2011 OT triennial report indicated that the student presented with low to normal muscle tone throughout his trunk and upper extremities (Joint Ex. 5 at p. 3). The OT report indicated that, in the sensory profile, the student demonstrated needs to a degree "much more than others" in the areas of registration, avoiding, and behavior, but exhibited only a "typical difference" (similar to others) in sensitivity and seeking (id.). The evaluator opined that the student's difficulties were not sensory based but indicated that a sensory integration approach with behavior intervention could assist the student in his areas of need (id.). The evaluator further explained that a sensory integration approach would not have much effect on changing behaviors without "other therapeutic approaches being explored" (id.). The evaluator further indicated that the student had been working on sensory processing skills to help him within the classroom environment, and that he had been participating in heavy work, relaxation techniques, and yoga activities to increase vestibular and proprioceptive input (id.). The evaluator recommended that the student receive an OT consultation once per month during the 2011-12 school year (id.).

The June 2011 psychoeducational re-evaluation, discussed above, also assessed the student's behavioral and social functioning using the Achenbach Child Behavior Checklist (CBCL) and Teacher Report Form (Achenbach) to obtain information from the student's parents and teachers (Joint Ex. 6 at p. 4). The results indicated that the student received a score within the normal range on the Component Profile section of the CBCL, which included component scores on scales identified as "activities," "social," and "school," as well as within the normal range on the CBCL Syndrome Profile scales for withdrawn/depressed, somatic complaints, social problems, thought problems, attention problems, and rule-breaking behavior (id. at p. 5). However, the student scored within the borderline clinical range on the scales designated anxious/depressed and aggressive behavior (id.). Broader scales for internalizing and externalizing syndrome resulted in scores within the borderline clinical range and the clinical range, respectively (id.). On the DSM-Oriented scales of the CBCL, the student received scores within the normal range for affective problems, attention deficit/hyperactivity problems and somatic problems but within the borderline clinical range for anxiety problems, oppositional defiant problems, and conduct problems (id.).

The June 2011 psychoeducational re-evaluation also reported the responses of the student's classroom teachers on the Achenbach teacher report form, which indicated that the student's total adaptive functioning score fell within the normal range (Joint Ex. 6 at p. 5). The student's total adaptive functioning score included component scores for "working hard" and "learning" ("about average"), "happy" ("slightly less than average"), and "behaving" ("somewhat less than average") (id.). While the student scored within the normal range in academic performance, somatic complaints, social problems, attention problems, and rule-breaking behavior, he scored within the borderline clinical range on the anxious/depressed, withdrawn/depressed, internalizing, externalizing, and total problems scales (id.). The June 2011 psychoeducational re-evaluation additionally reported scores from DSM-Oriented scales of the

Achenbach teacher report form, which indicated that the student fell within the normal range on affective problems, anxiety problems, and somatic problems and within the borderline clinical range on attention deficit/hyperactivity problems and conduct problems (id.). The student also scored within the clinical range on the oppositional defiant problem scale (id.). The evaluator summarized that these results indicated the student's behavioral and social/emotional "adjustment within the school and home settings" demonstrated "both appropriate and problematic functioning" and further indicated that these concerns did not seem to have a significant impact on the student's academic performance (id. at p. 5-6).<sup>9</sup>

The June 2011 psychoeducational re-evaluation recommended "exposure to low-stimulus, predictable academic settings wherein expectations are clearly stated, limits are consistently applied and support and guidance around potential behavioral, social and performance issues are available," continued counseling intervention services, an informal or formal BIP and "curricular enrichment and/or acceleration options that might stimulate [the student's] interest" (Joint Ex. 6 at p. 6).

Contemporaneous meeting minutes from the June 2011 CSE subcommittee meeting indicated that, at the time of the meeting, the student displayed age appropriate academic skills and was "doing very well" according to his then-current teacher (Joint Ex. 12 at p. 1). However, the student's then-current teacher also reported that the student would blurt out, interrupt, and tell others, including teachers, what to do (id. at p. 2). Furthermore, the student's then-current teacher indicated that the student did not like written work or school and was "bored" in the classroom (id.). The June 2011 CSE subcommittee meeting minutes also summarized information provided by the student's then-current social worker (id.). The social worker indicated that the student showed improvement in his self-esteem but had a distorted perception of what happened in school, experienced difficulty engaging in self-reflection, and refused to take accountability for his actions (id.). She further reported that the student "[s]till ha[d] a persecution list of individuals, adults included" and that the student had strong beliefs as to what others had done to him (id.). The social worker indicated that the student made improvement with maintaining friendships and was using less "mind games" (id.).<sup>10</sup>

## **2. Specially Designed Instruction**

Turning to the program at WDS for the 2011-12 and 2012-13 school years, the evidence in the hearing record supports the IHO's determination that WDS did not provide the student

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<sup>9</sup> The evaluator noted "significant inconsistency in [the student's] performance among the various measures" and surmised that the student's behaviors, which affected his performance to some extent, were responsible for this inconsistency (Joint Ex. 6 at p. 3). Specifically, the behaviors that affected the student's performance were described as a limited ability to tolerate frustration, sensitivity to failure, use of coping strategies, such as giving up when challenged or defending incorrect answers, and a tendency to stop trying when faced with tasks that were difficult (id. at p. 2).

<sup>10</sup> The student's special education teacher described "mind games" as when the student would attempt to engage one student in order to get another student to behave inappropriately, which seemed to have occurred primarily on the playground (Tr. p. 364-65, 492-94; Parent Exs. AA; LLL; NNN; UUU; GGGG at pp. 1-5). "Mind games" are referred to in several emails between faculty and the parent, and specific incidents are described throughout the district social worker's session notes from the 2010-11 school year (see Parent Exs. AA; LLL; NNN; UUU; GGGG at pp. 1-5).

with specially designed instruction designed to meet his needs. State regulation defines specially designed instruction as "adapting, as appropriate, to the needs of an eligible student . . . the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In this instance, as detailed above, the student's primary needs were social/emotional and behavioral in nature. The student also struggled to develop the motivation to engage in writing. A review of the hearing record reveals only anecdotal or unsubstantiated evidence that WDS offered specially designed instruction to meet these needs.

According to the head of school at WDS, the school's mission is to "bring out [the] potential of each student to meet the student where the student is" and he described the school environment as "pretty unstructured," likening it to a relaxed, home environment (Tr. pp. 1332, 1344-45). The WDS Handbook describes the school's mission to inspire academic, social and creative success, and further describes several of the school's goals, such as teaching students social skills needed to live and work in a group, to emphasize social responsibility, to develop curricula and programs that embrace the different ways students learn, and to value the individuality, feelings, and opinions of each student (Parent Ex. AAAAA at p. 3). The head of school also testified that WDS's enrollment consisted of approximately 200 students in grades nursery through twelfth, with approximately 14 to 15 students in each class (Tr. pp. 1336-37).

With respect to the student's writing needs, the parent testified at the impartial hearing regarding academic accommodations provided by WDS to the student, including testing accommodations and the use of a computer for some of his written work (Tr. p. 1105). The parent also testified that, during fourth grade, the student worked on the fifth grade spelling curriculum and was provided with opportunities to read higher grade level books for book reports (Tr. pp. 1151-52). However, while WDS further encouraged the student to develop his writing abilities, there is no evidence in the hearing record that WDS took any steps to overcome the student's reluctance to write. This is evidenced by the quarterly language arts assessments contained in the student's WDS report card for the 2011-12 school year (see Parent Ex. U at pp. 2, 6, 10, 13). According to the report card, the student improved in his writing over the course of the year and, by the end of the year, used complex language and word choices to produce lengthy, descriptive pieces (*id.*). However, the report card also indicated that, by the third quarter of the 2011-12 school year, the student had become increasingly resistant to writing responses in independent reading, producing "quite brief" pieces of writing that "d[id] not reflect [his] high level of intellectual prowess" (*id.* at p. 10). By the end of the school year the student tended to do the minimum amount of work possible if he found assignments uninteresting, unnecessary, or unimportant (*id.* at p. 13). This was the same problem the student experienced within the district and there is no evidence in the hearing record indicating that WDS offered any strategies or services to encourage the student to overcome his reluctance to write.<sup>11</sup>

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<sup>11</sup> Additionally, the evaluator who conducted the October 2011 assistive technology evaluation observed the student in his language arts class at WDS on October 5, 2011 and October 13, 2011 (Joint Ex. 11 at pp. 1, 4-5, 7). The evaluator noted that the "teacher ha[d] a very creative, but structured environment" that provided students with the day's schedule in advance and distributed graphic organizers to the student (*id.* at p. 7). While these strategies may have assisted the student, they similarly failed to address the student's reluctance to write.

With respect to the student's social/emotional and behavioral needs, the hearing record contains only subjective or unsubstantiated evidence that WDS offered specially designed instruction to address the student's needs in these areas. For example, WDS's head of school testified at the impartial hearing regarding the progress he noticed in the student, describing the student as "hugely more happy, [and] confident," with "no evidence of any kind of hostility or anger" (Tr. pp. 1340-41). The head of school further explained that the student developed respect for the school and its staff and exhibited substantial personal growth (Tr. pp. 1340-41).<sup>12</sup> However, the head of school did not indicate whether WDS offered any social/emotional or behavioral supports to the student to facilitate this growth.

Additionally, although the parent described general social/emotional and behavioral accommodations provided to the student at WDS, no testimony or evidence was introduced into the hearing record explaining what these accommodations entailed or how frequently they were employed. The parent testified that the student's teacher at WDS made changes to the student's program based on his needs throughout the school year and that the teacher instituted such changes when the student experienced difficulties "so [they] didn't become a problem" (Tr. pp. 1104-05). The parent also described how the teachers at WDS provided direct supervision on the playground and would intervene immediately to discuss any incidents involving the student "on the spot" (Tr. pp. 1120-21). While these accommodations may have served to target the student's social/emotional and behavioral needs, the hearing record does not contain sufficient evidence as to the nature, implementation, frequency, or duration of these accommodations (see Tr. pp. 1104-05; 1120-21). Moreover, the evaluative information detailed above demonstrates that the student presented with substantial social/emotional and behavioral needs, and it does not appear that the accommodations described by the parent were sufficient to address these needs.

Contemporaneous meeting notes for the June 2011, March 2012, and June 2012 CSE meetings provide some evidence, albeit unsubstantiated, that WDS offered specially designed instruction to meet the student's writing and behavioral needs (see Joint Ex. 12 at pp. 1-2). At the March 2012 CSE meeting, the student's teacher from WDS reported that behavioral goals had been established for the student (*id.* at p. 1). And at the June 2012 CSE meeting, the teacher reported that the student "engage[d] with other students" and, further, had improved in his work over the course of the year and was producing lengthy writing pieces (*id.*). While these comments suggest some targeted instruction by the school or progress by the student, without more, they do not provide a sufficient evidentiary basis to establish specially designed instruction.

Finally, the parent argues on appeal that privately-obtained counseling and social skills training services should be considered in evaluating the appropriateness of the parent's unilateral placement. Privately obtained services are a relevant consideration in the analysis of the appropriateness of the unilateral placement (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014] [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral

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<sup>12</sup> Similarly, the parent described behavioral improvements that the student made in art and music and indicated that the student became a willing participant in both classes (Tr. pp. 1110-16).

placement did not provide], quoting Frank G., 459 F.3d at 365). However, in this case, the parent did not introduce any information at the impartial hearing as to what these private counseling or social skills services entailed (see Tr. pp. 1220-22 [student's frequency of counseling sessions "varied"; student received counseling for only a portion of the 2011-12 school year]; see also L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that privately-obtained counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011], aff'd sub nom., 471 Fed. App'x 77, 2012 WL 2218712 [2d Cir. 2012] [rejecting the parents' argument that private speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"]. Accordingly, the privately-obtained related services cannot, under the circumstances of this case, cure the lack of specially designed instruction at WDS.

### 3. Progress

In support of her argument that WDS was an appropriate unilateral placement for the student, the parent contends that the student made progress at WDS. In support thereof, the parent introduced the student's WDS report cards for the 2011-12 school year (see generally Parent Ex. U). However, progress alone, while "relevant to [a] court's review," cannot, in this instance, compensate for the lack of evidence that WDS provided the student with specially designed instruction (Gagliardo, 489 F.3d at 115; D. D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. 2012] [finding that "academic progress alone is not a dispositive indicator of appropriateness"]; see C.L., 744 F.3d at 836 [holding that although a student's "grades, 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 [must] consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"] [alteration in the original], quoting Frank G., 459 F.3d at 364). Moreover, the student's 2011-12 report card reveals that the student continued to experience problems relating to his social/emotional and behavioral needs (see Parent Ex. U at pp. 2, 7, 10-14). This is reinforced by the parent's testimony at the impartial hearing that the student remained resistant to completing class assignments at WDS and would become argumentative and disrespectful to his teacher if he was given an assignment he did not want to do (Tr. pp. 1200-01).

Therefore, while the subjective and anecdotal information discussed above suggests that the student made some progress with regard to his behavioral and social/emotional skills, the hearing record is bereft of objective evidence demonstrating that WDS offered the student specially designed instruction to meet his areas of need (Rowley, 458 U.S. at 188-89; see Gagliardo, 489 F.3d at 113, 115; Frank G., 459 F.3d at 364, 365). Thus the evidence in the hearing record does not support the parent's contention that WDS was an appropriate unilateral placement for the student.

## **VII. Conclusion**

Having determined that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement at WDS for the 2011-12 and 2012-13 school years, the inquiry is at an end and it is not necessary to determine whether equitable considerations weigh in favor of the parent's request for relief (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 27, 2014**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**