



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-066

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:

Partnership for Children's Rights, attorneys for petitioner, Todd Silverblatt, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, 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 that the respondent (the district) directly pay her son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

With respect to the student's educational history, during the 2010-2011 school year, the student attended sixth grade in a general education classroom in a district public school and received integrated co-teaching (ICT) services (Tr. pp. 168-169, 277-78; Dist. Ex. 16 p. 1).¹ On February 4, 2011, the district advised the parent that the student's promotion to the next grade level was in doubt because he was not meeting his modified promotion criteria (Parent Ex. R).

¹ The terms ICT and collaborative team teaching (CTT) are used interchangeably at certain points in the hearing record (see, e.g., Tr. p. 278). For consistency in this decision, the term ICT will be used.

In February 2011, the student underwent a private psychoeducational evaluation (see generally Parent Exs. I; J). The evaluator offered diagnoses of: mixed learning disorder, severe for reading and writing; mixed receptive-expressive language disorder, significant for expressive language; and adjustment disorder with mixed anxiety and depressed mood (Parent Ex. J at pp. 3-4). On April 5, 2012, the parent requested that the CSE re-evaluate the student's program because she felt that he was "behind in all of his classes" (Dist. Ex. 4).

On May 13, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (Dist. Ex. 3 at pp. 1, 10). Finding the student eligible for special education as a student with a speech or language impairment, the CSE recommended a 12:1 special class placement in community school for mathematics, English language arts (ELA), social studies, and sciences (Dist. Ex. 3 at pp. 1, 6). In addition, the May 2011 CSE recommended related services of one 40-minute session of individual counseling per week and two 40-minute sessions of speech-language therapy per week in a small group (3:1) (id. at p. 6). The May 2011 CSE also recommended supports for the student's management needs (1:1 and small group settings to increase the student's attention span), seven annual goals, testing accommodations (extended time, small group location, and questions read aloud), and modified promotion criteria (id. at pp. 2-5, 7, 11). During the May 2011 CSE meeting, the parent was advised that, for the 2011-12 school year, the district intended to assign the student to attend the same public school site that he attended during the 2010-11 school year (Tr. pp. 173, 302).

On July 13, 2011, the parent signed an enrollment contract with Winston Prep for the student's attendance during the 2011-2012 school year (Parent Ex. B at pp. 1-2).²

By letter, dated August 22, 2011, the parent rejected the district's "proposed special education program for [the student] because it d[id] not appropriately address his special education needs" (Parent Ex. T at p. 1). Specifically, the parent notified the district of her concerns with the "proposed program," including that it failed to: (1) provide for a 1:1 or small group "specialized intensive reading program"; (2) address the student's "severe expressive/receptive language delays and in a manner . . . commensurate with his grade level"; (3) recommend "a language-based multisensory program"; (4) recommend appropriate testing accommodations; (5) address the student's social/emotional and behavioral needs; (6) provide measurable annual goals; and (7) recommend assistive technology (id.). The parent also indicated that "to date" she had not received "a notice of proposed placement" for the 2011-12 school year (id.). Based on the foregoing, the parent notified the district of her intention to place the student at Winston Prep for the 2011-12 school year at public expense (id. at pp. 1-2).

² The evidence in the hearing record also includes an enrollment contract relative to the student's attendance at Winston Prep during the 2011-12 school year, executed by a third party on August 30, 2011 (see Dist. Ex. 18 at pp. 1-2).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated June 12, 2012, the parent alleged: that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-2012 school year; that Winston Prep was an appropriate unilateral placement for the student; and that the equitable considerations weighed in favor of the parent's request for relief (Dist. Ex. 14 at p. 4).

Initially, with respect to the composition of the May 2011 CSE, the parent alleged that two members of the CSE who signed the attendance page of the IEP did not, in fact, attend either in person or by telephone (Dist. Ex 14 at p. 4). In addition, the parent contended that the May 2011 IEP failed to set forth evaluative criteria, evaluation procedures, and schedules to be used in measuring the student's progress toward achieving his annual goals (id. at p. 1). Next, the parent alleged that the student would be "unable to learn" in the 12:1 special class setting recommended on the May 2012 IEP (id. at p. 2). The parent indicated that the student exhibited reading, spelling, and writing skills around the second grade level despite being in sixth grade and that, due to his "complex difficulties," the student required a small, structured school setting with students with cognitive, learning and behavioral profiles similar to the student (id.). The parent further claimed that she never received a final notice of recommendation (FNR) identifying a particular public school site for the student to attend for the 2011-2012 school year (id.).

The parent also claimed that Winston Prep offered small groupings and "extensive support for its students' special academic, social and therapeutic needs" and, therefore, constituted an appropriate unilateral placement for the student (Dist. Ex. 14 at p. 4). Further, with respect to equitable considerations, the parent alleged that she cooperated with the school district in every respect (id.). As relief, the parent requested that the IHO order the district to fund the costs of the student's tuition at Winston Prep for the 2011-2012 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 11, 2012 and concluded on December 18, 2012, after five days of proceedings (Tr. pp. 1-343). By interim decision, dated January 10, 2013, the IHO denied the parent's motion to preclude an exhibit, which the district sought to introduce, that reflected the existence of an amended student enrollment contract with a third party and Winston Prep relative to the student's attendance for the 2011-2012 school year (Interim IHO Decision at pp. 2, 4; see Dist. Ex. 18 at pp. 1-2). The parent moved to preclude the amended enrollment contract from evidence because it was not disclosed within five days of the impartial hearing (see Interim IHO Decision at p. 2). Although the document was disclosed beyond the five-day rule, the IHO found that the document was relevant and material to the issue of the parent's financial obligation to pay the private school tuition and there was no prejudice to the parent because she knew or should have known of the document (id. at p. 4). Further, the IHO noted that the parent did not argue that she was prejudiced by the admission of the amended agreement into evidence (id.).

Subsequently, in a final decision dated March 15, 2013, the IHO found that the district offered a student a FAPE for the 2011-2012 school year (IHO Decision at pp. 14-15). Given that the IHO found a FAPE was offered to the student, he did not address the issues of the appropriateness of the unilateral placement or equitable considerations.

The IHO first addressed the issue of the composition of the May 2011 CSE, specifically the allegation of the absence of an additional parent member and the district representative (IHO Decision at pp. 10-11). The IHO found that, despite the absence of an additional parent member at the May 2011 CSE meeting, the parent did effectively participate in the meeting by raising her concerns regarding the public school and discussing the student's deficits and annual goals and understood the CSE's recommendations (*id.* at p. 10). In addition, notwithstanding the parent's allegation that district representative did not attend, the IHO noted the parent's testimony that she had an opportunity to discuss everything she wanted to discuss about the student with the district representative (*id.*). Thus, the IHO found that, although neither an additional parent member nor a district representative attended the meeting, this did not amount to a denial of a FAPE because the parent was given the opportunity and did in fact participate in the meeting in a meaningful way (*id.* at 11).

Turning to the IEP itself, the IHO discussed the content of several evaluative documents about the student and found that the May 2011 IEP accurately reflected the description of the student consistent with the reports and supported the recommendations in the IEP for speech-language therapy and counseling services (IHO Decision at pp. 12-14). The IHO found that the May 13, 2011 IEP "mirrors and reflects" the evaluations and reports and was reasonably calculated to enable to the student to receive educational benefits (*id.* at p. 14).

Finally, the IHO found that, although the district did not provide the parent with an FNR, such a procedural violation did not rise to the level of a denial of a FAPE in this instance because the evidence showed that the district intended the student to remain in his then-current district public school in a different classroom setting, of which the parent was aware (*id.* at p. 15). The IHO also found that "[t]he uncontroverted testimony at the hearing was that the [district] could implement the IEP as required by law" (*id.*).

Although he did not reach the issue of equitable considerations, the IHO did note that "the [p]arent conceded that she did not comply" with the 10-day notice requirements regarding her intention to enroll the student at Winston Prep (IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2011-12 school year. The parent also contends that the IHO erred by failing to find that Winston Prep was an appropriate unilateral placement for the student and that the equitable considerations weighed in her favor. Initially, the parent asserts that the IHO erred in allowing the district to introduce the amended enrollment contract into evidence. She argues that the five-day rule is clear and unambiguous that the parties are precluded from offering evidence not disclosed in accordance with the rule. She contends that the IHO incorrectly interpreted the regulation as discretionary.

With respect to the composition of the May 2011 CSE, the parent contends that the IHO erred by finding that the lack of a district representative at the meeting did not rise to the level of a denial of a FAPE. The parent argues that the evidence showed that the district representative who signed the attendance sheet in the May 2011 IEP did not actually enter the room. Although a district school psychologist was present at the May 2011 CSE meeting, the parent argues that she was not assigned the role of the district representative and was not qualified to act in that capacity. The parent argues that the absence of a district representative impeded her ability to participate in the May 2011 CSE meeting in that such a member may have addressed and resolved the parent's expressed concerns regarding the recommended educational program. Further, the parent asserts that a district representative would have known that the student's then-current district public school could not implement the student's IEP as written.

The parent alleges that the district did not meet its burden of proof that it offered a FAPE to the student. The parent argues that the district failed to present evidence to address the claim set forth in the parent's due process complaint notice and previously expressed by the parent, orally and in writing, that the May 2011 IEP failed to provide the student with an intensive reading program with a 1:1 or low student-to-teacher ratio to remediate his reading delays.

The parent contends that the IHO erred in finding that the district's failure to issue an FNR for the student did not result in a denial of a FAPE and, further, that the district did not establish at the impartial hearing that the student's then-current district public school could appropriately implement the student's IEP. Here, the parent argues that, although the IEP recommended a 12:1 special class placement, the evidence showed that the district public school would have placed the student in a 12:1+1 special class. This, argues the parent, would have been inappropriate, as the student's learning needs required placement in a setting with students of similar learning profiles and not students with "acting out behaviors." The parent contends that a 12:1+1 special class placement is a distinct subset of special class designed for students whose management needs interfered with the instructional process. Therefore, the parent argues that the 12:1+1 special class placement would be a material deviation from the IEP.

Next, the parent alleges that Winston Prep was an appropriate unilateral placement for the student. The parent indicates that, at Winston Prep, the student was placed with 10 other students with language processing disorders similar to the student in all of his classes, aside from the reading class. She indicates that the student also attended a 1:1 reading program five days a week. Furthermore, in light of the student's emotional issues, the parent notes that Winston Prep had counselors on staff, who provided counseling to students as needed. Although the student did not receive speech-language therapy at Winston, the parent asserts that his teachers communicated with speech-language therapy providers on staff and collaborated with them to develop the student's curriculum. According to the parent, the student was also placed in classes specially designed to target his speech-language needs.

As to equitable considerations, the parent sets forth that she cooperated with the district, shared evaluations, and expressed her concerns at the CSE meeting. She contends that she complied with all legal notice requirements advising the school district of her rejection of the placement and intent to enroll the student at Winston Prep. The parent also disputes the IHO's

finding that she conceded non-compliance with the required notice prior to the unilateral placement.

The parent maintains that direct tuition payment by the district to Winston Prep is the proper relief in this case. She claims that she has suffered cognizable injury in this matter, in that she is under financial obligation to pay the tuition at Winston Prep and the district denied the student a FAPE. With respect to her obligation for the student's tuition, she asserts that the amended enrollment contract did not affect the validity or enforceability of the original enrollment contract between her and Winston Prep. Furthermore, the parent alleges that she is financially unable to pay for the student's tuition. In any event, the parent argues that a denial of a FAPE alone warrants an award of direct payment.

In an answer, the district responds to the parent's petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year. Initially, with respect to the IHO's interim decision regarding the admissibility of the amended enrollment contract, the district contends that the regulatory language of the five-day rule allows the IHO discretion with respect to the admission of evidence. Moreover, the district argues that the five-day rule does not apply where it is material and relevant and the parent knew or should have known of the document.

The district contends that the alleged lack of a district representative at the May 2011 CSE meeting did not deprive the student of a FAPE. The district argues that the district school psychologist, who attended the meeting, was qualified to serve as a district representative and had the necessary knowledge to field questions from the parent. It is the district's position that, from a practical standpoint, the school psychologist served as the district representative. Nonetheless, the district asserts that the absence of the district representative was not a procedural defect that rendered the IEP legally inadequate because the parent was able to fully participate in the meeting.

Further, the district asserts that the May 2011 IEP accurately described the student's academic performance and functional levels, social/emotional functioning, and health and physical development and offered an appropriate educational program, consisting of the 12:1 special class and several annual goals targeted to the student's needs. The district asserts that the May 2011 CSE considered private evaluations and, based on the review, recommended changing the student's placement from a general education class placement with ICT services to a 12:1 special class.

Next, the district argues that State regulations do not require an FNR. Moreover, the district asserts that the failure to issue an FNR did not deprive the student of a FAPE. The district argues that the parent was advised verbally that her son was to return to the same district public school for the upcoming school year. It is the district's position that the IHO decided this issue properly. Further, the district urges that it is speculation for the parent to argue that the assigned public school site would have been an inappropriate setting because the student did not enroll there for the 2011-2012 school year and the parent enrolled the student at Winston Prep prior to the availability of any details regarding the proposed classroom, including a classroom profile. The district argues that a spot existed for the student in a 12:1+1 special class with

students of similar age and academic levels. Further, the district asserts that the student would have received all of his mandated related services at the assigned public school site.

It is the district's argument that Winston Prep was not an appropriate unilateral placement because it did not offer the related services set forth in the IEP. The district contends that the "Focus program" at Winston did not meet the requirements of the IEP because it did not have a speech component. Further, argues the district, Winston did not offer counseling services as recommended in the private evaluation report.

The district argues that the equitable considerations did not favor the parent because she did not give the district adequate notice of her intent to enroll the student at Winston Prep. The district argues that the parent waited over four months after the May 2011 CSE meeting and one month after signing the enrollment contract with Winston Prep before sending a letter rejecting the IEP. The district contends that the parent's act of requesting a re-evaluation of the student was a means of achieving placement of the student at Winston Prep at public expense.

Finally, the district disputes that direct payment is appropriate relief because it argues that Winston Prep has no intention of enforcing either the enrollment contract signed by the parent or the agreement signed by the third-party family friend. The district cites that the parent did not file her due process complaint notice until February 2012 and her time to pay the student's tuition for 2011-2012 had already expired. However, the district notes that the student was able to attend the entire school year despite the non-payment of tuition. It is the district's position that these agreements are a "sham" and the parent is not obligated to pay tuition at Winston Prep.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the

"academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters—Admissibility of Evidence at the Impartial Hearing

Initially, the parent asserts that the IHO erred in allowing the district to introduce the amended enrollment contract with Winston Prep into evidence. While impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]), each party has the right to prohibit introduction of any evidence which has not been disclosed at least five business days before the hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). In addition, the impartial hearing officer "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the

conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161, 2011 WL 2321461 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294, 2010 WL 1408296 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

In the present case, it appears that the district offered the amended student enrollment agreement into evidence, to which the parent objected because it was disclosed late in violation of federal and State regulations (see Tr. pp. 245-55). While the IHO indicated that the district had disclosed the exhibit to the parent in a timely manner on October 4, 2012 for presentation at the hearing date of October 11, 2012 (see Interim IHO Decision at p. 2), Columbus Day, a federal holiday, fell on October 8, 2012. Therefore, the district's disclosure was provided only four business days prior to the October 11, 2012 continued hearing date. Nonetheless, based on the authority cited above, the IHO did not abuse his discretion in admitting the amended student enrollment agreement signed by the parent's friend (see generally Dist. Ex. 18). As the IHO observed, the document was relevant and material to the proceeding as evidence of whether the parent had a financial obligation to the private school (see Interim IHO Decision at p. 4). Recognizing the need to build a hearing record, the relevance of the document itself to the issue of the parent's claim for direct funding, and the fact the parent knew or should have known of the document's existence, the IHO did not err in admitting the district's exhibit 18 into evidence.

B. CSE Composition

Turning to the parent's allegation that the IHO erred in finding that the irregularities in the composition of the May 2011 CSE meeting did not result in the denial of a FAPE, State and federal law requires the attendance of a district representative at the CSE meeting (see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; 8 NYCRR 200.3[a][1][v]). Such a member of the CSE is described as a representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist, provided that such individual meets the above statutory qualifications (8 NYCRR 200.3[a][1][v]).

The attendance page for the May 2011 CSE meeting includes the signatures of the following individuals: a district representative, a district school psychologist, and the student's then-current speech-language therapist and special education teacher, and a teacher from an ICT

class setting (see Dist. Ex. 3 at p. 13; see also Tr. pp. 145-48).³ However, the individual who signed the form as the district representative testified at the impartial hearing that she "never fully entered the room" where the May 2011 CSE meeting was held and did not participate in discussions regarding the development of the student's IEP (Tr. pp. 111-12; see also Tr. pp. 182-83, 275, 284). Instead, the hearing record indicates that, at the end of the May 2011 CSE meeting, the purported district representative inquired of the parent whether "everything was fine" and whether the parent had questions or concerns (Tr. pp. 99-100, 110, 115-16, 174-75, 176-77).

While the district is reminded of its obligation to ensure the presence of a district representative at every CSE meeting held for a student with a disability, in this instance, this particular procedural violation did not (a) impede the student's right to a FAPE, (b) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) cause 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]). It is undisputed that a district school psychologist attended the entirety of the May 2011 CSE meeting (Tr. pp. 114, 141, 285; see Dist. Ex. 3 at p. 13). The district school psychologist testified that, at the time of the May 2011 CSE meeting, he had approximately 18 years of experience participating in CSE meetings and had prior experience serving as a district representative (Tr. pp. 171, 185-86; see also Tr. pp. 114-15). Further, the parent testified that she was previously familiar with the school psychologist, and both the parent and the school psychologist testified that the school psychologist was able to answer the parent's questions during the May 2011 CSE meeting (Tr. pp. 171-72, 285). Based on the facts noted above, this procedural defect did not rise to the level of a denial of a FAPE.

C. May 13, 2011 IEP—12:1 Special Class Placement

With respect to the 12:1 special class placement recommended on the student's May 2011 IEP, initially, although the hearing record indicates that, if the student attended the assigned public site, he would have been placed in a 12:1+1 special class, rather than the 12:1 special class placement as set forth in the May 2011 IEP (see Tr. pp. 100-02; Dist. Ex. 3 at p. 6), such evidence constitutes impermissible retrospective testimony and may not be considered in evaluating the appropriateness of the May 2011 IEP. The Second Circuit has explained that under the "snapshot" rule, this evidence may not be considered to the extent that it constitutes "retrospective testimony" regarding services that the district failed to list in the IEP (R.E., 694 F.3d at 185-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of the parents' placement decision and that "retrospective testimony" regarding services not listed in the IEP may not be considered, but rejecting a rigid "four-corners rule" that would prevent consideration of evidence explicating the written terms of the IEP]; see Reyes v. New York City Dep't of Educ., 2014 WL 3685943, at *6-*7 [2d Cir. July 25, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 5-6, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-77 [S.D.N.Y. 2012]; Ganje v. Depew Union

³ While the parent's original CSE composition claim also alleged a procedural violation based on the absence of an additional parent member, the parent does not pursue this issue on appeal. In any event, the evidence in the hearing record shows that the parent signed a form declining the participation of a parent member (see Dist. Ex. 5).

Free Sch. Dist., 2012 WL 5473491, at *10 [W.D.N.Y. Sept. 26, 2012], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]). Thus, the district may not rely upon testimony that the student would have in fact attended a 12:1+1 special class to rehabilitate the deficient IEP by effectively amending or modifying the recommendation for a 12:1 special class (see R.E., 694 F.3d at 187 [offering as an example of retrospective testimony that which modifies the recommended staffing ratio]).

Based on a careful and thorough review of the evidence in the hearing record, as detailed below, the 12:1 special class placement as provided in the May 2011 IEP did not offer the student a FAPE. Contrary to the IHO's finding that the May 2011 IEP mirrored the recommendations included in the evaluative information before the CSE (see IHO Decision at pp. 13-14), a review of the hearing record reveals that the 12:1 special class would not have provided adequate support to address the student's significant academic deficits as they were described in the IEP and the February and March 2011 private evaluations (see generally Dist. Ex. 3; Parent Exs. I; J).⁴

State regulations provide that a special class placement is designed for "those 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]). The May 2011 CSE recommended the student be placed in a 12:1 special class in a community school (Dist. Ex. 3 at pp. 6, 10). As described below, the hearing record demonstrates that the student's educational needs go beyond the provision of specialized instruction.

Although the 2011 private evaluation recommended a "self-contained" special class setting, it did not specify a particular class size or student-to-teacher ratio (Parent Ex. J at p. 4). However, it did provide detailed information regarding the student's academic functional levels, management needs, expected rate of progress, and his learning style, which the CSE included in the May 2011 IEP, upon which the CSE could base its recommendations (see Dist. Ex. 3 at pp. 1-2; Parent Exs. I; J).

Specifically, the May 2011 IEP reflected the student's scores as reported in the private psychoeducational evaluation, including that his reading skills were well below age and grade level expectations (compare Dist. Ex. 3 at p. 1, with Parent Ex. I at p. 10). Specifically, consistent with the private psychoeducational evaluation, the May 2011 IEP reported that the student exhibited: decoding skills at approximately a second grade equivalent and in the borderline range of functioning; word reading efficiency and phonemic awareness in the borderline range; reading comprehension in the borderline to low average range and at an early to mid-second grade level; and sound/symbol association and phonemic decoding efficiency in the extremely low range of functioning (compare Dist. Ex. 3 at p. 1, with Parent Ex. I at pp. 10,

⁴ The February 2011 private evaluations of the student consisted of both a psychological and a psychoeducational evaluation report (see Parent Ex. I at pp. 1, 7). In addition to the February 2011 private evaluations, the hearing record also includes a March 2011 "team conference summary," completed by the private evaluators, which contains a summary of the above mentioned psychological and psychoeducational evaluation reports, a February 8, 2011 speech/language evaluation, and the evaluation team's impressions, diagnoses, and recommendations (see Parent Ex. J at pp. 1-4).

12). The IEP reflected that the student's written expression skills were also well below age expectation and in the borderline range (compare Dist. Ex. 3 at p. 1, with Parent Ex. I at p. 10).

In addition, while both the district's November 2010 academic testing and the February 2011 private academic testing similarly reflect the student's significant needs in the areas of reading, spelling, and writing, a comparison of the student's scores on mathematics subtests indicates a decline in the student's performance (compare Dist. Ex. 6 at p. 4, with Parent Ex. I at p. 12). According to the private psychoeducational evaluation, the student's performance dropped on various subtests, relative to the district evaluation, including: on the applied problems subtest from a standard score (SS) of 98 in the average range to a SS of 90 in the limited range of functioning; on the calculation subtest from a SS of 108 in the average to advanced range of functioning to a SS of 91 in the limited to average range; and on the brief math cluster from a SS of 102 in the average range to a SS of 89 in the limited to average range (id.).

The May 2011 IEP also described the student's social/emotional functioning as an area of need (Dist. Ex. 3 at p. 2). While the IEP reflected that the student presented as sweet, engaged, eager to please, and attentive during the evaluation, it also notes the parent's concern regarding the student's mood, his lack of motivation and lack of interest, and that he was often lethargic at school (id.). The IEP also reflected that the student was taking medication for depression (id.).

The May 2011 IEP included academic management strategies that the student required in order to progress in his educational placement, including the provision of a small structured setting, both 1:1 and small group instruction to increase his attention span, and reminders to focus on tasks (Dist. Ex. 3 at pp. 1, 2). The IEP further noted that the student was both a visual and tactile learner, learned at a slow pace, and benefit from repetition of directives (id. at p. 1). The May 2011 IEP further recommended testing accommodations, including extra time (1.5), testing in a small group in a separate location, and questions read and re-read one or two more times than standard (id. at p. 7).

While the hearing record reflects and the IHO noted that the CSE considered the private evaluations, review of the hearing record demonstrates that the CSE did not appropriately consider and address the severity of the student's needs when making its decision to recommend a 12:1 placement (see IHO Decision at p. 14; Tr. pp. 149-50). The district school psychologist who participated in the CSE meeting testified that the student's academic performance "was fine" despite the low test scores that were before the May 2011 CSE and the student's report cards, which indicated that the student had received failing grades during the 2010-11 school year (Tr. pp. 151-52; Dist. Ex. 3 at p. 1; Parent Exs. J at p. 2; N-P). While the district school psychologist minimized the student's level of need, it should be noted that, as the student would be in seventh grade for the 2011-12 school year, and because the ability to read would be an integral part of the student's education in all subject areas at that grade level, his reading and related deficits in spelling and writing would negatively impact the student's ability to learn in all subject areas (see Parent Ex. J at p. 3). Furthermore and consistent with the parent's concern regarding the student's lack of motivation and lethargy, the team impressions section of the private evaluation reflected that "[b]ecause of [the student's] deficient skills combined with his current academic context, school work is persistently being demanded of him that he is not able to do, resulting in

high frustration and low self-esteem" (*id.*). The private evaluation indicated the student required "an intensive, structured, cumulative, multisensory, language based reading program that targets both word analysis skills and comprehension," yet the IEP did not include any annual goals related to decoding or word analysis that would address the student's severe reading deficits (*see* Dist. Exs. 3 at pp. 3-5; Parent Ex. J at p. 3).

In sum, considering the extent to which the student was behind academically, his slow rate of learning, his need for visual and tactile modes of instruction as well as 1:1 and small group instruction, his attention needs, and his lack of interest and lethargy at school, the 12:1 special class placement was not reasonably calculated to provide the student with educational benefits. It is unreasonable to expect one teacher to provide the level of support required by the student in the recommended placement, especially considering that his need for reading support would permeate all subject areas. The hearing record demonstrates that the student's academic, social/emotional, and management needs warranted additional support in the classroom in order for him to receive meaningful educational benefit.

D. IEP Implementation

1. Final Notice of Recommendation

The parent argues that the district failed to issue a timely FNR, arguing that such failure resulted in a denial of a FAPE. While it is uncontroverted that the district did not provide the parent an FNR (*see* Tr. pp. 189, 308), for the reasons set forth below, the omission was inconsequential and does not contribute to a finding that the district failed to offer the student a FAPE in this instance.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; *Cerra*, 427 F.3d at 194; *K.L. v. New York City Dep't of Educ.*, 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], *aff'd*, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. 2013]; *B.P. v. New York City Dep't of Educ.*, 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; *Tarlowe*, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting *Bettinger v. New York City Bd. of Educ.*, 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; *see* 20 U.S.C. § 1414 [d]; 34 CFR 300.320). In order to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (*see* *K.L.A. v. Windham Southeast Supervisory Union*, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. 2010]; *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419-20 [2d Cir. 2009]). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (*see* *Luo v. Baldwin Union Free Sch. Dist.*, 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], *aff'd*, 556 Fed. App'x 1, 2013 WL 6726899 [2d Cir. Dec. 23, 2013]; *J.L. v. City Sch. Dist. of New York*, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; *see also* *F.L.*, 553 Fed. App'x at 7

[noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]; R.E., 694 F.3d at 191–92 [district may select a specific public school site without the advice of the parents]).

However, nothing in the IDEA, State law, or the regulations implementing these statutes, requires a district to formally provide parents with a notice of placement recommendation in a specified format in order to either offer the student a FAPE or in order to implement the student's IEP. Although the district did not issue an FNR after the CSE meeting, the hearing record indicates that the parent was advised at the May 2011 CSE meeting that the student would be returning to the district public school he attended during the 2010-2011 school year (see Tr. pp. 172-73, 179-80). Indeed, the parent admitted at the impartial hearing that she was so advised and testified that she informed the CSE that she did not wish for the student to return to the particular district public school (Tr. pp. 270, 288-289). The evidence in the record demonstrates that the parent was aware of the assigned public school site for the 2011-2012 school year. Therefore, the failure of the district to issue an FNR did not amount to a denial of a FAPE.

2. Challenges to the Assigned Public School Site

The parent argues that, although the May 2011 IEP recommended a 12:1 special class placement, the evidence showed that the district public school would have placed the student in a 12:1+1 special class. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim., 346

F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).⁵

When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on her claims regarding implementation of the May 2011 IEP because a retrospective analysis of how the district would have implemented the student's May 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that, on August 23, 2011, prior to the commencement of the school year, the parent rejected the assigned public school site that the student would have attended, and instead chose to enroll the student in a nonpublic school of her choosing (see Tr. pp. 270-271, 288-289; Parent Exs. B at p. 1-2, T at 1-2, U). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have executed the student's May 2011 IEP at the assigned public school site is not an appropriate inquiry (see K.L., 530 Fed. App'x at 87).

Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington

⁵ As noted above, while the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y., 584 F.3d at 420; see K.L.A., 371 Fed. App'x at 154). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the May 2011 IEP.⁶

E. Unilateral Placement

Having concluded that the district failed to offer the student a FAPE for the 2011-12 school year, a determination must be made regarding whether Winston Prep was an appropriate unilateral placement for the student.

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 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 (id. at p. 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

⁶ While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13 [S.D.N.Y. July 24, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo, 2013 WL 1182232, at *5; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L., 2013 WL 625064, at *10; Ganje, 2012 WL 5473491, at *15; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R., 910 F.Supp.2d at 676-78; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

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).

1. Specially Designed Instruction

For the reasons discussed below, after a careful and complete review of the testimonial and documentary evidence contained in the hearing record, the parent has met her burden to prove that Winston Prep provided the student with educational instruction specially designed to meet the student's unique needs during the 2011-12 school year.

The headmaster of Winston Prep testified that, like the student in the instant case, the school provided instruction for students with "primary academic learning struggles" (Tr. p. 218). He testified that, during the 2011-12 school year, the student's class was comprised of 11 students (Tr. p. 202). The headmaster further indicated that students were grouped according to

learning style and needs, that all of the students in the class exhibited language processing disorders, such as dyslexia, and that, due to the similar needs, decoding and encoding were taught within all subject areas (Tr. p. 196). The headmaster testified that Winston Prep employed a "continuous feedback system," wherein they created a curriculum plan for each student during the summer based on their understanding of each student's needs that they continually updated based on the student's work during the school year (Tr. p. 195; see Parent Ex. F at pp. 2-3). The headmaster testified that, because the student in the instant case has received a diagnosis of dyslexia but also presented as very "bright" , "the curriculum ha[d] to continu[ally] . . . be fixed so that [instructors] [were] teaching him decoding and encoding, . . . yet reaching [him] in a very rich content area" (Tr. p. 195).

The headmaster described the "Focus" program at Winston, wherein each student received daily 1:1 instruction for 42 minutes in their area of greatest need (Tr. pp. 195-96, 202). For the student in the instant case, the Focus teacher primarily addressed decoding and encoding, as well as writing and study skills; however, according to the headmaster, the Focus teacher also helped students become independent learners (Tr. pp. 202-03). The student's Focus teacher testified that, while she used the March 2011 private psychoeducational evaluation to get her initial understanding of the student, she created goals based on assessments and observations of the student (Tr. pp. 223-24, 233). She indicated that, for the 2011-12 school year, the student's goals focused on decoding, encoding, expressive language, reading comprehension, and fluency (Tr. p. 224). The Focus teacher also indicated that she collaborated with the student's content teachers, as well as the Focus coordinator, to review assessment results, collect feedback regarding the student's needs, and review the student's goals through "sort of an approval process," emphasizing that such goals were not created in isolation (Tr. pp. 230-31). Additionally, she indicated that the goals were modified throughout the year based on the student's evolving needs, and his progress (Tr. p. 237).

With regard to the student's reading instruction, the Focus teacher testified that she primarily followed the Wilson program sequence and that, because the student was not yet using any strategies, he needed to start at the very beginning, at level 1.1 (Tr. p. 225). She indicated the student progressed sequentially through the program using multisensory interventions and finished on the level four at the end of the 2011-12 school year (id.).⁷ The student's Focus teacher indicated that the student required a lot of repetition but that, by the end of the school year, he was independently using all of the tools and strategies that they had been reinforcing throughout the school year (Tr. p. 226). Specifically, the student was tapping and blending sounds, was better able to spell, and was more willing to spell and write (id.).

A review of the student's Winston Prep fall 2011 progress report reveals a detailed description of the curriculum that was designed to address the student's needs in each academic area (Parent Ex. F at pp. 1-9). In addition to identifying goals in each area of the student's need, the report also included specific methods that would be utilized with the student to achieve the specific skills related to those goals (id.). For example, to address the student's deficits in phonemic awareness, the student would practice discriminating each of the short and long vowel

⁷ The Focus teacher's testimony indicated that there are 12 levels in the Wilson decoding program; however, they do not correspond to grade levels (Tr. p. 225). She further indicated that level four covered multisyllabic works and silent "e" patterns and closed syllables (id.).

sounds and individual phonemes in words (id. at p. 2). The report indicated that, as the student had particular difficulty distinguishing between short "e," "i," and "o," as well as between words with two or more consonant phonemes in a row (such as street), "[t]hrough various exercises, such as games, flashcards, and worksheets, [the student would] practice listening for different phonemes in words, identifying the correct phoneme, and comparing phonemes to one another" (id.). The report reflected that the "100% Listening Primary" program would be the primary source utilized to improve the student's phonemic awareness and that the student would use it to practice listening for rhyming words, beginning sounds, ending sounds, and changing sounds (id.). The student would also be taught to use a tapping method to separate a word into individual phonemes (id.). The student would also enhance his understanding of sound-symbol relationships through a sequential study of common sound-symbol relationships based on "observed gaps" in his knowledge, which, at the time of the report included short and long vowels, consonant digraphs, and silent "e" syllables (id.). The report indicated that a variety of resources would be used to create an individualized decoding curriculum for the student but that the primary source would be the Wilson Reading program and that spelling instruction would directly correlate with the student's current decoding lessons (id.).

To address the student's needs related to his sight word knowledge and automaticity, the fall 2011 progress report specifically described how the Fry 1,000 Instant Words list would be utilized daily and noted that sight word study would be "ongoing, progressive and individualized for the entire year" (Parent Ex. F at p. 2). The report reflected that the student's decoding, encoding, and phonemic awareness instruction would consist of frequent repetition, review, and application of skills and the instruction would be modified as needed based on informal observation as well as assessment results (id. at pp. 2-3).

The report similarly noted the student's functioning in each academic area, including specific skill deficits, and described the specific methods that would be used to address increasing the student's performance on each skill (Parent Ex. F at pp. 2-9). Moreover, the report reflected that careful consideration was given to: incorporating a multisensory approach to the student's instruction; supplementing lessons with hands-on activities; and utilizing simple explanations, concrete examples, chunking of major assignments into smaller pieces, modeling, practice, repetition, review, and visual prompts (i.e., posters of the five "wh" questions and Question-Answer Relationship Strategy (QAR) questions) (id. at pp. 2, 3, 5, 7, 8). The student's difficulty focusing was to be addressed through verbal reminders, the use of mini-tasks throughout a lesson to ensure his attention and energy would be sustained for shorter periods of time, and provision of continuous assessment and feedback (id. at pp. 6, 7).

2. Related Services

The crux of the district's argument that Winston Prep was not an appropriate unilateral placement for the student rests on the assertion that it did not offer sufficient related services to meet the student's needs. However, a parent need not show that their unilateral placement provides every 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 (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9).

Moreover, review of the hearing record shows that the program at Winston Prep sufficiently addressed the student's speech-language needs. The student's Focus teacher testified that, while there were speech-language therapists on staff at Winston Prep, the student did not receive direct speech-language therapy services during the 2011-12 school year (Tr. p. 229). However, she indicated that she communicated with the speech-language therapists at Winston Prep frequently, that they knew the student, and that she had worked with them to develop his curriculum (*id.*). She stated that she coordinated with the speech-language therapist and also indicated that she developed goals for the student addressing his expressive language skills (Tr. pp. 224-29). Consistent with this testimony, the fall 2011 progress report set forth such goals, which focused on developing the student's working vocabulary, enhancing the student's writing on the sentence level, and improving his word retrieval skills, and targeted the student's language skills, such as classifying, answering true/false questions, comparing and contrasting, sequencing, stating opinions, and role projection, which, were consistent with the student's needs and goals reflected in the May 2011 IEP (Dist. Ex. 3 at pp. 4, 5; Parent Ex. F at pp. 1, 3). In addition, the fall report reflected that the student would participate in a language skills study group approximately once per week (Parent Ex. F at p. 3). During this group, the student would work with a peer on language skills, including word retrieval, using specific words, elaborating on his comments to ensure clarity, and communicating effectively in a conversation (*id.*). The Winston Prep winter 2012 progress report reflected the specific activities that were utilized to address these goals as well, as the student's progress toward them (Parent Ex. G at p. 2). In addition, the Focus teacher indicated that the parent informed her at a parent-teacher conference that the student was receiving outside speech-language therapy (Tr. pp. 229-30).⁸

With regard to counseling services, the hearing record reflects that Winston Prep offered counseling services provided by social workers within the school during the 2011-12 school year (Tr. pp. 215-16, 235). However, the headmaster testified that the student did not demonstrate a need for services (Tr. pp. 216, 217). He indicated that students often came to the school with counseling services recommended on their IEPs, however, once their learning needs were addressed at Winston Prep, they did not require the social/emotional support they needed in their previous school (Tr. pp. 218-19). He indicated that Winston Prep helped the students "understand why they [were] struggling learners [and] why they c[ould]n't read, so that they c[ould] understand [and become] self[-]advocates" (Tr. p. 219). He further indicated that "all the teachers [were] doing that, rather than just the one on one counselor" (*id.*).

For the student in the instant case, the hearing record supports that he did not require counseling services at Winston Prep. The Focus teacher testified that the student did not exhibit the behaviors described in the psychoeducational evaluation, such as anger, crying at school, or being quiet and shy (Tr. p. 227). Rather, she indicated that she saw the student "blossom" within

⁸ Related services obtained privately by the parent are a part of the unilateral placement and 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 placement did not provide], quoting Frank G., 459 F.3d at 365).

the first few weeks of starting at Winston Prep and described him as happy, friendly, and outgoing (Tr. pp. 227, 232). She testified that, after observing the student during the initial two weeks of school, there were no concerns regarding the student's behavior or emotions (Tr. p. 232). In addition, the Winston Prep fall 2011 progress report noted that the student had previously received a diagnosis of an adjustment disorder with mixed anxiety and depressed mood and indicated that the student's affect would be "closely monitored, and frequent communication with his mother w[ould] ensure that any emotional issues that ar[o]se w[ould] be immediately and appropriately addressed" (Parent Ex. F at p 1). Consistent with testimony by Winston Prep staff, the report reflected that, during fall 2011, the student presented as a "friendly, happy, timely and organized student who demonstrate[d] regulation and self-control" (*id.*). The report further reflected that the student joined the soccer team, displayed "resiliency in the face of his learning difficulties," and "faced his challenges head-on with a positive attitude" (*id.*). The winter 2012 progress report reflected that the student continued to exhibit positive social/emotional functioning (Parent Ex. G at p. 1). Moreover the student's Focus teacher testified that the student received outside counseling during the 2011-12 school year and that he discontinued the services at the end of March because he was doing so well (Tr. pp. 227, 235).

Based on the above, the hearing record demonstrates that Winston Prep provided the student with an appropriate placement that was specially designed to meet the student's needs. Now, the analysis turns to the issue of whether equitable considerations otherwise preclude an award of tuition reimbursement under the facts of this case.

F. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; 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"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge 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]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger, 2007 WL 4208560, at *4; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], *aff'd*, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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

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

The hearing record demonstrates that the equitable considerations favor the parent. The parent participated in the May 2011 CSE meeting and provided the private psychological and psychoeducational evaluations for the CSE's consideration (see Tr. pp. 150, 151, 153, 268, 270; Parent Ex. I). Furthermore, contrary to the district's assertion, the parent sent timely and sufficient notice of her intent to unilaterally place the student (see Parent Exs. T; U).

To support its assertion that equitable considerations did not favor the parent's request for relief, the district points to the school psychologist's testimony that the parent "seemed very happy" with the May 2011 IEP (Tr. p. 172). However, the parent testified that she expressed concerns and advised the CSE that she was not bringing the student back to the particular district public school (Tr. pp. 288-289). Moreover, the district's argument that the parent's request for a re-evaluation of the program was a pretext to secure a private placement at public expense similarly fails. The parent acted within her rights and reasonably by requesting a re-evaluation, particularly given that the student received multiple failing grades during the first and second quarters of the 2010- 2011 school year and received a February 11, 2011 "Promotion-In-Doubt" letter from the district (see generally Parent Exs. R; N; O).

Based on the foregoing, the equitable considerations weigh in favor of the parent's request for relief.

G. Relief---Direct Funding

The parent argues that she is entitled to direct funding because she is financially obligated to pay tuition to Winston Prep and is without the financial means to do so. The district argues that the parent should be denied an award of direct funding because the parent has no legal obligation to pay the tuition due to the circumstances regarding the signing of the enrollment contracts and the fact that the parent has not paid any funds towards the tuition.

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of

private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 2014 WL 3377162, at *8 [2d Cir. July 11, 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). The Court in Mr. and Mrs. A. held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 360). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430). Since the parent selected Winston Prep as the unilateral placement, and her financial status is at issue, it is the parent's burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Winston Prep and whether she is legally obligated for the student's tuition payments (see, e.g., Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

Initially, with respect to the parent's inability to pay the costs of the student's education, the parent testified at the impartial hearing that she earned \$100 per week as a babysitter (Tr. pp. 276-277). Moreover, the parent's 2011 federal tax return indicated that she earned a gross income of \$8,556 (Parent Ex. C at p. 1). Additionally, the parent received Supplemental Security Income (SSI) payments on behalf of the student in the amount of \$721 per month (Tr. pp. 276-277). Based upon this testimony and evidence, the hearing record shows that the parent offered sufficient evidence of her inability to pay the costs of the student's education at Winston Prep for the 2011-12 school year.

Turning to the student enrollment agreement, there are two contracts in this matter: the first is a contract signed by the parent on July 13, 2011 obligating her to pay tuition in the amount of \$44,000; and the second is an amended contract signed by a third-party on August 30, 2011, this time indicating tuition in the amount of \$49,000 (Dist. Ex. 18 at pp. 1-2; Parent Ex. B at pp. 1-2; see Tr. pp. 293-94). According to its terms, the amended enrollment agreement superseded all prior agreements between the parties (Dist. Ex. 18. p. 2). During the impartial hearing, the parent explained that the third-party was a family friend who she authorized to sign the contract on her behalf while she and the student were out of the country (Tr. pp. 293-94). The signator to the second contract was not a blood relation of the student, was not a legal guardian of the student, and had no legal obligation to support the student (Tr. pp. 324-25).

With respect to the fact that the family friend signed the subsequent contract, there is unrefuted testimony in the hearing record that the friend acted as the parent's agent in this matter (Tr. pp. 293-94, 297). Consent for actual authority may be either express or implied from the parties' words and conduct as construed in light of the surrounding circumstances: express authority is conferred by a principal to an agent by distinct and plain words, which may be communicated orally or in a written document; implied authority exists when verbal or other acts by a principal reasonably gives the appearance of authority to the agent (see, e.g., Precedo Capital Grp. Inc. v. Twitter Inc., 2014 WL 1612157, at *5 [S.D.N.Y. Apr. 21, 2014]). As the amended agreement was signed by her agent, the parent is bound by the terms of the contract, not the agent. Under New York law, it is well-established that an "agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" (Bonnant v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 467 F. App'x 4, 10 [2d Cir. 2012], quoting Mencher v. Weiss, 306 N.Y. 1, 4 [1953]). Therefore, after a careful review of the amended student enrollment agreement, the plain language of the contract binds and obligates the parent to pay the tuition in accordance with the schedule provided in the document (Dist. Ex. 18 at p. 1).

In addition, the district points to the fact that the parent has not paid any tuition pursuant to the enrollment contract and that Winston Prep has not taken any steps at this point to enforce the contract. However such facts do not warrant a determination that the parent was not obligated under the contract (see E.M., 2014 WL 3377162, at *12 [examining parental standing in light of contractual obligations to pay, as well as implied obligations to pursue remedies under the IDEA]). Therefore, under the circumstances of this case, the parent is entitled to direct funding of the student's tuition at Winston Prep for the 2011-12 school year under the factors described in Mr. and Mrs. A. (see 769 F. Supp. 2d at 406).

VII. Conclusion

A review of the evidence in the hearing record reveals that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. A further review of the hearing record reveals that the unilateral placement was appropriate and that no equitable considerations exist that would diminish or preclude an award of the costs of the student's tuition. Accordingly, the district is ordered to directly fund the costs of the student's tuition at Winston Prep for the 2011-12 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 15, 2013 is reversed and the parent is awarded direct funding of the costs of the student's tuition at Winston Prep for the 2011-12 school year

Dated: **Albany, New York**
 August 18, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER