



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-075

**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:**

Law Offices of Regina Skyer & Associates, LLP, attorneys for petitioner, William M. Meyer, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at Academic West for the 2013-14 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that equitable considerations weighed in favor of the parent's request for relief. The appeal must be sustained. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the

opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

In this case, the parent referred the student to the CSE for an initial evaluation in a letter dated May 8, 2013 (see Dist. Ex. 2 at p. 1).<sup>1</sup> With the referral letter, the parent enclosed a copy

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<sup>1</sup> The parent testified that the student attended nonpublic schools for kindergarten through the conclusion of 10th grade (see Tr. pp. 106-07, 155-56).

of the student's January 2013 neuropsychological evaluation report and indicated her consent for further evaluations of the student (id.; see Parent Ex. E at pp. 1-23). Upon securing the parent's consent on June 11, 2013 to evaluate the student, the CSE completed a June 2013 initial social history, a June 2013 psychiatric evaluation, and a June 2013 level I vocational assessment (see Dist. Exs. 3-4; 7-8).

On July 15, 2013, the CSE convened to conduct the student's initial review and to develop an IEP for the 2013-14 school year (see Tr. pp. 125; Parent Ex. B at p. 2). At that time, the July 2013 CSE deferred the student's placement to the Central Based Support Team (CBST) for consideration of a State-approved nonpublic school (see Tr. pp. 125-29).

By letter dated August 23, 2013, the parent notified the district of her intention to place the student at Academics West because, to date, she had not received any information from the CSE or the CBST regarding a placement for the student for the 2013-14 school year (see Parent Ex. B at pp. 1-2).<sup>2</sup> The parent further indicated that if the student did not receive a timely placement, she would seek funding from the district for his placement at Academics West (id. at p. 2).

On September 13, 2013, the parent executed an enrollment contract with Academics West for the 2013-14 school year (see Parent Ex. J at pp. 1, 5).

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

By due process complaint notice dated September 11, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. A at p. 1). The parent asserted that although the July 2013 CSE deferred the student's placement to the CBST, the district failed to locate or recommend a placement in a nonpublic school (id. at pp. 1-2). As relief, the parent requested reimbursement for the costs of the student's tuition at Academics West (id. at pp. 2-3).

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

On December 11, 2013, the parties proceeded to an impartial hearing, which concluded on February 25, 2014 after three days of proceedings (see Tr. pp. 1-279). At the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2013-14 school year (see Tr. pp. 13-14, 23-24). In a decision dated April 22, 2014, the IHO concluded that the parent failed to establish that Academics West was an appropriate unilateral placement (see IHO Decision at pp. 20-23). Initially, the IHO found that Academics West was not a "school," but rather a "'tutoring service' that ha[d] 'specialized tutors'" (id. at pp. 20-21). In addition, the IHO found that although witness testimony indicated that the student attended a "homeschooling program" through Academics West, neither Academics West nor the parent filed documents with the district for this purpose (id. at p. 21).

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

Next, the IHO noted that the "restrictiveness" of the Academics West program was an "issue" because the student received 1:1 instruction in a classroom with up to three students, who also worked individually with instructors (see IHO Decision at p. 21). The IHO indicated that it would be "important" for the student—who had received a diagnosis of Asperger's syndrome—to interact with other students on a "regular basis," and the hearing record did not contain evidence that Academics West "encouraged" such interactions or provided the student with individual counseling, as recommended (id. at pp. 21-22). In addition, the IHO noted that the hearing record did not include any "specific information" about the weekly group meeting, which the IHO found to be the "only direct support" given to the student for social skills (id.). With respect to the specific amount of daily and weekly instruction provided to the student, the IHO found "discrepancies" between the testimonial evidence and the hearing record, and therefore, the IHO deemed the witnesses' testimony about the student's "schedule" as "not credible" (id. at p. 22).

Next, the IHO found that to address the student's anxiety and executive functioning issues, the student's "tutor" sat next to him to ensure homework completion, however, none of the student's selected instructors held certifications in either special education or general education (IHO Decision at pp. 22-23). The IHO also indicated that because one witness misidentified the student's English teacher, that witness's testimony was not "credible" and therefore, the same witness's testimony about the student's "progress at Academics West should be viewed with this mindset" and in particular, "any progress in English" (id. at p. 23). In addition, the IHO noted that the student's receipt of "good grades" did not mean that Academics West was an appropriate placement (id.).

Finally, the IHO indicated that to address the student's anxiety, his instructors provided him with breaks and check-ins; the organizational skills class focused on strategies for executive functioning, although the evidence did not indicate how it addressed the student's specific issues; and during supervised study hall, the student received individual support for homework completion (see IHO Decision at p. 23). Based upon the foregoing, the IHO concluded that Academics West did not provide the student with "educational instruction specially designed" to meet the his needs and denied the parent's request for tuition reimbursement; however, the IHO did indicate that equitable considerations did not otherwise preclude relief in this case (id. at pp. 23-24).

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

The parent appeals, and asserts that the IHO erred in concluding that the student's unilateral placement at Academics West was not appropriate. The parent argues that contrary to the IHO's conclusion, Academics West provided the student with educational instruction specially designed to meet his needs and was reasonably calculated to enable the student to receive educational benefits. Moreover, the parent contends that it is well settled law that a unilateral placement need not meet State standards or requirements, and therefore, Academics West need not employ certified teachers or be designated as a "school" by any accrediting authority. In addition, the parent argues that whether Academics West issued diplomas is irrelevant to the applicable standard for determining the appropriateness of a unilateral placement. The parent also argues that the student made progress at Academics West.

With regard to the IHO's finding that Academics West was overly restrictive, the parent asserts that the restrictiveness of a unilateral placement in this circumstance weighs less as a factor to consider because the district failed to offer any alternative placement for the student. Finally, the parent argues that the alleged "discrepancies" about the student's schedule did not warrant the IHO's conclusion that the witnesses' testimony was not credible. Similarly, the parent asserts that the misidentification of the student's English teacher does not justify the IHO's finding that the witness lacked credibility. As relief, the parent seeks to overturn the IHO's finding that Academics West was not an appropriate unilateral placement, and she requests an order directing the district to reimburse her for the costs of the student's tuition at Academics West for the 2013-14 school year.<sup>3</sup>

In an answer, the district responds to the parent's allegations with general admissions and denials and otherwise argues to uphold the IHO's finding that Academics West was not an appropriate unilateral placement for the 2013-14 school year. In a cross-appeal, the district seeks to overturn the IHO's finding that equitable considerations weighed in favor of the parent's request for relief, arguing the unreasonableness of the costs of the student's tuition at Academics West as a basis upon which to reduce or deny the parent's request for reimbursement.

## **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 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

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<sup>3</sup> The parent attached additional documentary evidence to the petition for review for consideration on appeal (Pet. Exs. 1-2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, while the additional documentary evidence submitted for consideration on appeal was not available at the time of the impartial hearing, the evidence is not now necessary to render a decision; therefore, I decline to accept the additional documentary evidence.

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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

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**

#### **1. Credibility Findings**

The parent contends that neither the alleged "discrepancies" in the hearing record noted by the IHO nor the misidentification of the student's English teacher in testimony warranted the IHO's broad conclusions that the witnesses' testimonial evidence on these issues was not credible. The district asserts that the IHO properly found the witness's "conflicting testimony" about the identity of the student's English teacher was not credible. An SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this case, a review of the non-testimonial evidence and the entire hearing record compels conclusions contrary to those made by the IHO.<sup>4</sup>

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<sup>4</sup> Both of the witnesses provided testimony via telephone, which further calls into question the IHO's ability to make credibility findings related to their respective testimony (see Carlisle Area Sch., 62 F.3d at 527-28; see

First, while noting "discrepancies" between the testimonial evidence and the documentary evidence with respect to the student's weekly schedule of instruction, the IHO did not explain the discrepancies or how the alleged discrepancies resulted in a finding that the testimonial evidence was not credible (see IHO Decision at p. 22; Tr. pp. 83-85; Parent Ex. G). Furthermore, even if the testimony did not comport exactly with the documentary evidence—namely, the student's weekly schedule of instruction—the testimonial evidence explained the flexibility of the student's schedule, and as argued by the parent, the evidence in the hearing record also indicated that Academics West contractually agreed to provide the student with up to 20 hours per week of instruction and five hours of supervised independent study per week (see Tr. pp. 51-52, 190; Parent Exs. G; J at p. 1). Similarly, the IHO did not provide any rationale explaining how the witness's misidentification of the student's English teacher justified a finding that her testimony was not credible, especially with regard to the student's progress in English (see IHO Decision at pp. 22-23). Here, the witness—realizing her error—testified that she misspoke and corrected the error (see Tr. pp. 185-91; Parent Ex. I at p. 1). Consequently, the evidence in the hearing record does not support the IHO's findings.

## **B. Unilateral Placement**

In this case, the district conceded that it did not offer the student a FAPE for the 2013-14 school year; therefore, the next issue to determine is whether the parent's unilateral placement of the student at Academics West for the 2013-14 school year was appropriate. For the reasons described below, the hearing record does not support the IHO's finding that Academics West was not appropriate, and therefore, the IHO's determination must be reversed.

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

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the remaining disputed issue to be resolved—namely, whether the student's unilateral placement at Academics West was appropriate.

According to the evidence in the hearing record, the parent privately obtained a neuropsychological evaluation of the student in January 2013, which she provided to the district with her initial letter of referral in May 2013 (see Parent Exs. C at pp. 1-2; E at pp. 1-23). At that time, the parent referred the student for an evaluation due to concerns regarding his inability to do or complete work, difficulties with focus, social isolation, and sensory issues (see Parent Ex. E at p. 1). Based upon the administration of both formal and informal assessment tools, the evaluator determined that the student's difficulties with attention, executive function, anxiety, graphomotor skills, and relationship skills warranted the following diagnoses: Asperger's syndrome, attention deficit hyperactivity disorder—inattentive type (ADHD), developmental coordination disorder, and mood disorder (id. at pp. 2-4, 13-15). The evaluator noted that all of the diagnoses "negatively" affected the student's "initiation of tasks, planning/organization skills, ability to shift, attend to details, self-monitor, maintain a steady attention level," and relate appropriately in a "social arena with his peers" (id. at p. 14). The evaluator also noted that

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also Sims v. Barnhart, 442 F.3d 536, 537-38 [7th Cir. 2006] [declining to overturn a credibility finding because the reviewing court lacked the opportunity to "observe the claimant testifying"]).

although the student did not present with a specific learning disability, his deficits affected his academic output, specifically in areas that required greater concentration, faster response time, and more detailed written expression (id.).

Overall, the January 2013 neuropsychological evaluation revealed the student's many cognitive and academic strengths, including verbal comprehension skills (very superior range), perceptual reasoning skills (above average range), and academic skills (average to above average); however, the evaluator noted significant concerns with respect to the student's attention; anxiety; coping skills; difficulty fitting in socially with peers; and ability to plan, organize, and manage the expectations and requirements for classes (see Parent Ex. E at pp. 13-20). In addition to his strengths, the evaluation also revealed relative weaknesses in the student's ability to manage tasks that required "rote memory" (average range) and in his processing speed (low average range) (id. at p. 13). Further, while the student demonstrated a strong ability to "analyze syllables and sound sequences within words and decode real and pseudowords," he exhibited reading fluency skills "well below his potential" (id.). The evaluation also revealed "highly developed" spelling skills and written expression skills that fell within the average range due to the student's "weaker executive functioning skills" (id.). The student's writing fluency fell within the average range (id.). With respect to mathematics, the student demonstrated strong skill levels on "numeric operations/calculation tasks, and applied mathematical reasoning problems" (id.). However, due to the student's difficulty with attention and energy level, he often made careless mistakes on seemingly "easier problems" because he "rushed through it" (id. at pp. 13-14).

Next, the evaluator indicated that pursuant to reports by both the parent and the student's teachers, he exhibited difficulties with attention and executive functioning (see Parent Ex. E at p. 14). In this regard, the evaluator opined that in order for "efficient, systematic, and organized problem solving" to occur, "one need[ed] to be appropriately emotionally 'in control' and not anxious" (id.). The evaluator further explained that "one's ability to regulate affect" served as the "foundation of executive functioning" (id.). For this student, his ability to "organize, plan, and shift [were] compromised by the underlying anxiety as well as his pattern of thinking" that simple tasks did not require the "amount of energy or level of thinking" as complex tasks (id.). Assessments revealed that the student's ability to "attend to more meaningful auditory information was variable" (low average to superior ranges) and depended upon his level of "energy, attention, and processing speed" (id.).

To address the student's identified needs, the evaluator included recommendations in the January 2013 neuropsychological evaluation report (see Parent Ex. E at pp. 14-15). With respect to an academic setting, the evaluator indicated that notwithstanding the student's "many strengths," he was "overwhelmed by the demands of his mainstream high school" and could not remain "organized, plan, or manage the individual expectations and requirements for each of his individual classes" (id. at p. 14). Consequently, the student became "withdrawn and more anxious," with a diminished self-esteem and self-worth (id.). In addition, while testing results did not identify a specific learning disability, the student's "deficits clearly affect[ed] his academic output, specifically in the areas that require[d] greater concentration, faster response time, and more detailed written expression" (id.). Therefore, in light of the student's "significant difficulties with organization, attention, and anxiety, compounded by his challenges related to his

rigid profile and difficulty fitting in socially with his mainstream peers," the evaluator recommended a "small, structured, self-contained special education program for similarly bright students with academic and social challenges" (id. at pp. 14-15). In addition, the evaluator recommended that the student's academic setting provide "specialized instruction and support for learning compensatory strategies to assist with organization, planning, and task initiation, with ample opportunity for 1:1 support and very small group instruction" so the student could remain engaged in both the curriculum and in his performance (id. at p. 15). According to the evaluator, the student's academic setting should be "skilled in working with emotionally fragile students, offering counseling and social skills support" to assist with the following: developing coping strategies for stress and frustration, understanding multiple perspectives, developing more flexible thinking patterns, and support with understanding how his behavior affects others (id.). In addition to making recommendations related to the student's academic setting, the evaluator also recommended individual psychotherapy, social skills therapy, organizational skills support, the use of a laptop for all writing assignments, access to teacher's notes, and extended time on all tests and quizzes (id.).

In addition to the January 2013 neuropsychological evaluation report, the evidence in the hearing record also included a June 2013 psychiatric evaluation of the student administered by the district (see Dist. Ex. 8 at p. 1). In the report, the evaluator indicated the student's major diagnosis of Asperger's syndrome, and further described the student as "considerably anxious" despite his present psychotropic medication treatment and nearly three year history of psychotherapy (id. at pp. 3-5).<sup>5</sup> The evaluator further noted that the student's anxiety level had progressed to panic attacks, and more recently, "almost" reached the level of agoraphobia (id. at p. 4). As noted by the evaluator, the student demonstrated symptoms of obsessive-compulsive disorder, which when combined with the student's diagnosis of Asperger's syndrome, resulted in depression (id. at pp. 4-5). In comparison, however, the student's attention and focusing issues were noted to be "mild" (id.). The evaluator recommended that the student continue with his current medication regimen and psychotherapy; in addition, the evaluator agreed with the parent's endeavor to locate a "small protected environment for high functioning Asperger's syndrome" students that would also address "[the student's] anxiety, agoraphobia, and panic issues" (id. at p. 5).

Finally, a review of the information the parent provided to the district to complete the June 2013 initial social history demonstrates that her understanding of the student's cognitive, academic, and social/emotional needs was commensurate with the results of the January 2013 neuropsychological evaluation, the June 2013 psychiatric evaluation, and information provided by the student's treating psychologist (compare Dist. Ex. 4 at pp. 1-4, with Parent Ex. E at pp. 1-23, and Parent Ex. F at pp. 1-4, and Dist. Ex. 8 at pp. 1-5).

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<sup>5</sup> In a letter dated August 12, 2013, the student's treating psychologist reported that the student's therapy focused on "social issues, strategies for dealing with his depression[,] feelings of self-worth and esteem and anxieties/fears about travel and engaging with the outside world in a meaningful and productive manner" (Parent Ex. F at p. 2).

## 2. Academics West

The parent argues that the IHO erred in finding that Academics West did not provide the student with educational instruction specially designed to meet his needs and was overly restrictive. In opposition, the district asserts that the IHO properly concluded that Academics West was not appropriate because it failed to provide the student with sufficient academic instruction to advance academically, it was overly restrictive, and the student did not receive counseling services. A review of the evidence in the hearing record supports the parent's assertions, and therefore, as explained more fully below, the IHO's findings must be reversed.

At the impartial hearing, the director of academics (director) at Academics West described the organization as a "tutoring practice" (Tr. pp. 33-37). Generally, Academics West employed certified special education teachers, as well as "experts in content areas," and provided content tutoring, test preparation, and remediation of learning issues (Tr. p. 37). Academics West also provided students with an "alternate therapeutic academic setting," and offered a "homeschooling program" as well (Tr. pp. 37, 44-46). The director testified that Academics West created an instructional model referred to as "clinically informed tutoring," which primarily consisted of two components: consultation and supervision by educational psychologists, and teacher training on evidence-based techniques and interventions (Tr. pp. 37-38).

In this case, the director testified that the student's program at Academic West consisted of 1:1 instruction in core academic subjects consistent with a traditional high school program—including mathematics (Pre-calculus), European history, English, and science (advanced placement physics)—in a classroom with two other students who also received 1:1 instruction (see Tr. pp. 39-40, 42-43, 48; see also Parent Ex. H at pp. 1-9). In addition, the student's "four primary teachers" developed a curriculum individualized for his learning style (Tr. pp. 39-40). In particular, the student received his mathematics and science instruction through online programs facilitated by his individual subject instructors, and for English and history, the student's instructors developed a curriculum that met "core requirement[s]" and "matche[d] his own profile and what work[ed] for him" (Tr. pp. 44, 46-47). The director explained in testimony that the student received direct instruction during "supervised learning," and then the student would be required to "practice and reinforce instruction and do homework;" however, due to the student's anxiety and executive functioning issues, he required "somebody literally sitting next to him" to make sure he completed his work in a "timely manner" (Tr. p. 47). The director also testified that although Academics West created a daily schedule for the student, the "inherent flexibility of [their] program" allowed them to accommodate the student's relatively recent medical issues and concomitant anxiety by providing instruction at home, transporting the student to Academics West, or delaying the start of his day (Tr. pp. 51-52, 190; Parent Ex. G).

The director further testified that the student's program at Academic West also focused on his weaknesses, such as study skills and learning strategies (see Tr. p. 39). The student worked collaboratively with the other students in his class during a weekly drama club, which provided all of the students with a "good expressive opportunity" (Tr. p. 43). In addition, the students attended a weekly group meeting—led by a psychologist—that essentially served as small group

counseling to discuss school, the students' "situation," and to facilitate social skills (id.; see Tr. pp. 65-67).<sup>6</sup>

At the impartial hearing, the director described the student's learning style as a "constellation of issues" that Academics West attempted to address (Tr. pp. 40-42). The director testified that while "extremely adept" at mathematics and science, the student exhibited difficulties with the "output of written expression" (Tr. p. 40). Moreover, the student's executive functioning issues and "comorbid anxiety" made it difficult for him to "approach" and "organize" material, "produce work," and get "things done" (id.). Oftentimes, the instructors "chunked" materials for the student into "fairly small pieces" so he could accomplish tasks in a timely manner and within his comfort level (id.). To address the student's dysgraphia, Academics West provided him with access to a computer or keyboarding, which also facilitated the student's output of work (id. at pp. 40-41). To address the student's executive functioning and ADHD, the student received "breaks, one-on-one, [and] a lot of clarity in how things [were] explained and presented to him" (id. at p. 41).

The director also described the student's social/emotional profile, noting that he was a "very polite, kind, well-spoken young man" who had "certain perceptual deficits in his social cognition" (Tr. p. 41). For example, the director testified that in a room filled with people the student would be "in the corner maybe looking at his computer" and would not otherwise socially engage; in addition, the student's difficulty with abstract reasoning affected his social interactions, and he often missed "social cues" and experienced social anxiety (Tr. pp. 41-42). Overall, the director testified that the student's "profile"—including his attention issues, executive functioning issues, and anxiety—corresponded to other students' profiles at Academic West (Tr. p. 50). In addition, the director testified that Academic West was "well-equipped to handle" the student's issues with social functioning and anxiety because these issues were "typical for our target students" (Tr. pp. 50-51).

To address the student's attention, executive functioning, and working memory needs, the director testified that his instructors provided modifications and accommodations to the student, such as prompting and redirection to keep him on task, previewing material to decrease his anxiety and increase his ability to attend, breaking assignments into smaller tasks with deadlines, making sure the student internalized information before moving forward, and repetition (see Tr. pp. 54-55; Parent Ex. I at p. 2). In addition, during supervised study hall the student received supports and services related to his organizational and executive functioning needs, as well as academic supports—such as answering questions and homework assistance (see Tr. pp. 59-60; Parent Ex. G). During an organizational study skills class, the student received instruction on "meta-cognitive strategies, how to store information, how to memorize things, different templates or graphic organizers for writing," and any other strategies to remediate the student's executive functioning issues and "overall organizational process" (Tr. p. 60). In addition, the student's instructors modified his courses to allow extra time to work on retention and study skills (see Parent Ex. I at p. 1). The coordinator of academic services (coordinator) at Academics West also testified that instructors modified the "pace" of the curriculum and reduced the content

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<sup>6</sup> The student received two sessions per week of individual counseling with his treating psychologist, who remained in consistent contact with the director and an educational psychologist at Academics West (see Tr. pp. 65-66, 149-50).

of the curriculum to allow him to delve deeper into concepts (Tr. pp. 176-79, 195). The coordinator also testified that getting the student to write presented a challenge in the beginning of the year because he was a perfectionist and avoided writing (see Tr. pp. 184-85). Instructors focused on using graphic organizers and presented the student with strategies to enable him to write without worrying whether or not his essay was perfect (see Tr. p. 185). In addition, the coordinator testified that the 1:1 instruction allowed instructors to "handle anxiety issues on the spot" with the student and to more readily identify the student's "non-verbal cues" associated with his increasing anxiety (Tr. pp. 192-93, 209-10). Instructors offered the student frequent breaks and "check-ins" for his anxiety, and instructors could bring the student to a psychologist on staff if his anxiety became severe (see Tr. pp. 203-04). In addition, an educational psychologist at Academics West checked in with the student almost every day (see Tr. p. 65).

Next, the director described the supervision provided to the student's instructors (see Tr. pp. 62-63). According to his testimony, the instructors met weekly with the coordinator and a supervising educational psychologist to assess how the student was doing, to review curriculum and lesson plans, to discuss strategies if the student was "not responding to something," and to learn techniques to assist with the student's anxiety or attention needs (*id.*). Instructors also received quarterly training on strategies and interventions to address different disorders, such as anxiety, depression, and Asperger's syndrome (see Tr. pp. 64-65).

Based upon the evidence in the hearing record, Academics West addressed the student's social skills formally and informally during lunch, drama club, weekly group meetings, and periodically when a school psychologist at Academics West would take the student out to lunch to practice pro-social skills (see Tr. pp. 43, 66, 94). The school psychologist also worked with instructors to create and encourage pro-social behavior through their interactions with the student by getting him to ask for things from other people, be assertive, reflect, and talk to others (see Tr. p. 94). In addition, the coordinator testified that the student had opportunities to have meaningful peer interactions during breaks, lunch, drama club, and community meetings (see Tr. pp. 207-08).

Therefore, based upon the foregoing and contrary to the IHO's conclusion, the evidence in the hearing record establishes that Academics West provided the student with educational instruction specially designed to meet his needs. In addition, although the IHO considered the restrictiveness of Academics West as a factor in determining whether it was an appropriate unilateral placement, the Second Circuit recently held that while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836-37 [2d Cir. 2014]; Frank G., 459 F.3d at 364 ; Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1<sup>st</sup> Cir. 2002]; M.S v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000] [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 552 [S.D.N.Y. 2010]; W.S. v. Rye City School Dist., 454 F. Supp. 2d 134,138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]). Consequently, under the facts and circumstances of this case the restrictiveness of Academics West does not otherwise preclude a finding that it was appropriate to meet the student's needs.

### 3. Progress

Finally, the parent argues that, although not dispositive, the hearing record contains evidence to support a finding that the student made progress at Academics West. With respect to the student's progress at Academic West, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K. v Northeast School Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).<sup>7</sup> However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27).

In this case, the evidence in the hearing record also shows that the student made progress while at Academics West during the 2013-14 school year (see Parent Ex. I at pp. 1-4). In particular, a January 2014 progress report reflected that the student received passing grades in his core academic subjects (id.).<sup>8</sup> The coordinator testified that the student made progress with respect to writing more, completing more homework, engaging in discussions, and approaching assignments in a step-by-step process instead of trying to rush (see Tr. pp. 195-96, 217).<sup>9</sup> In addition, the coordinator testified that at the beginning of the school year the student would not entertain someone else's opinion, but had improved in his "flexible thinking" by listening to other ideas and perspectives and exhibiting more empathy (see Tr. pp. 195-96, 219). According to the parent, the student made progress in the following areas since attending Academics West: trying to be more independent, trying to get work done, loving school, talking about the future for the first time, engaging in discussions and practicing social skills with teachers, becoming friendly with two teenagers, and having a friend over to the house a few times (see Tr. pp. 145-49).

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<sup>7</sup> The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

<sup>8</sup> In contrast, during the 2012-13 school year the student "barely" attended school and his social/emotional issues worsened to the point that he was expelled from his then-current school (Dist. Ex. 4 at p. 3). While the parent enrolled the student in a different school to complete the 2012-13 school year, the student's social/emotional issues continued to interfere with his school attendance and output of work (see id.).

<sup>9</sup> In contrast, during the 2012-13 school year the student could not follow through, organize, focus, or meet the overall demands of 10th grade (see Dist. Ex. 4 at p. 3). In addition, during the 2012-13 school year, the student did not attend all of his classes (see Tr. pp. 116-17).

Therefore, based upon the foregoing, the evidence in the hearing record established that Academics West was an appropriate unilateral placement for the student for the 2013-14 school year. As noted, Academics West provided the student with educational instruction to meet his needs and was reasonably calculated to enable the student to receive educational benefits.

### **C. Equitable Considerations and Relief**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required," and further that "[t]otal reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"].

Here, the district cross-appeals the IHO's conclusion that equitable considerations weighed in favor of the parent's request for tuition reimbursement, arguing that the tuition costs for a 10-month school year program at Academics West is excessive. Based upon the unreasonableness of the costs of the student's tuition, the district seeks to either preclude an award of tuition reimbursement or to otherwise reduce the amount awarded.

While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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). As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996] [finding that "[t]he appropriate amount (of reimbursement) thus bears a relationship to the quantum of services that the state would have been required to furnish"] [emphasis added]; J.P. v County Sch. Bd., 447 F. Supp. 2d 553, 591 [E.D. Va. 2006], rev'd on other grounds 516 F.3d 254 [4th Cir. 2008] [explaining that the district "must reimburse the parents for the reasonable costs of educating (the student) at the (private school) and any related services and accommodations that would have been covered under the IDEA had (the district) provided (the student) with an appropriate education"]. However, courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see also Forest Grove, 557 U.S. at 230).

Under the circumstances of this case, and in light of the district's conclusory assertion that the tuition costs at Academics West were excessive, the evidence in the hearing record does not support the district's assertion or otherwise support a reversal of the IHO's findings. As the IHO noted, the parent cooperated with the district and the CSE process—including sharing evaluative information about the student, consenting to and participating in the district's own evaluations of the student, attending the CSE meeting, and providing timely notice of the student's unilateral placement when the district failed to provide the parent with a copy of the student's IEP or offer the student a nonpublic school for the 2013-14 school year (see IHO Decision at pp. 23-24). Accordingly, the IHO's determination will not be disturbed.

## **VII. Conclusion**

In summary and contrary to the IHO's conclusion, the evidence in the hearing record demonstrates that the parent sustained her burden to establish that Academic West was an appropriate unilateral placement for the student for the 2013-14 school year, and consistent with the IHO's conclusion, that equitable considerations weighed in favor of the parent's request for tuition reimbursement.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated April 22, 2014, is modified by reversing that portion which found that Academics West was not an appropriate unilateral placement; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated April 22, 2014, is modified by reversing that portion which denied the parent's request to be reimbursed for the costs of the student's tuition at Academics West for the 2013-14 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for the costs of the student's tuition at Academics West for the 2013-14 school year.

**Dated:**            **Albany, New York**  
                         **August 7, 2014**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**