



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-129

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

Appearances:

Law Offices of Martin Marks, attorneys for petitioners, Martin Marks, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Gan Yisroel School (Gan Yisroel) for the 2013-14 school year. Respondent (the district) cross-appeals from the IHO's determination that Gan Yisroel was an appropriate unilateral placement for the student. 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

Given the limited scope of this appeal, a full recitation of the student's educational history, as well as the facts and procedural history, is not warranted. Briefly, in April 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (third grade) (see Dist. Ex. 2 at pp. 1, 8). Finding that the student was eligible for special education services as a student with a speech or language impairment, the April 2013 CSE recommended a 12:1+1 special class placement at a community school with the following

related services: two 30-minute sessions per week of individual counseling, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 1-8).

In a letter dated August 22, "2014," the parents informed the district that they had not visited the assigned public school site because it was "closed for the summer" (Parent Ex. I).¹ The parents indicated that they would contact the assigned public school site when "school resume[d] in September" to schedule a visit, but in the meantime, the parents notified the district that the student would "begin" the 2013-14 school year at Gan Yisroel, "where she attended last year" (id.).²

On August 28, 2013, the parents signed an enrollment contract with Gan Yisroel for the student's attendance during the 2013-14 school year (see Parent Ex. B at pp. 1-3).

A. Due Process Complaint Notice

By due process complaint notice dated October 24, 2013, the parents 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 pp. 1-3). Further, the parents indicated that Gan Yisroel was an "appropriate placement" for the student for the 2013-14 school year (id. at p. 2). As relief, the parents sought tuition reimbursement and prospective payment of the costs of the student's tuition at Gan Yisroel for the 2013-14 school year (id.).

B. Impartial Hearing Officer Decision

On May 20, 2014, the parties conducted an impartial hearing (see Tr. pp. 1-100). 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. 8-10). By decision dated July 7, 2014, the IHO found that although the parents sustained their burden to establish that Gan Yisroel was an appropriate unilateral placement, equitable considerations did not weigh in favor of the parents' request for relief because the parents "never intended" to place the student in a public school (id. at pp. 6, 9-12). As a result, the IHO dismissed the parents' due process complaint notice (id. at pp. 5-12).

IV. Appeal for State-Level Review

The parents appeal, contending that the IHO erred in finding that equitable considerations did not weigh in favor of the request for tuition reimbursement at Gan Yisroel for the 2013-14 school year.

In an answer, the district responds to the parents' allegations and otherwise argues to uphold the IHO's finding that equitable considerations did not weigh in favor of an award of

¹ It appears that the parents' letter erroneously listed the year as "2014" instead of "2013" (compare Parent Ex. I, with Tr. pp. 6, 8, 74-76).

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

tuition reimbursement. In this regard, the district asserts that the parents failed to provide the district with a 10-day notice consistent with statutory obligations. In a cross-appeal, the district asserts that the IHO erred in finding that Gan Yisroel was an appropriate unilateral placement. The district also asserts that the IHO improperly shifted the burden of proof to the district with respect to equitable considerations.

In an answer to the district's cross-appeal, the parents respond to the district's allegations, and argue to uphold the IHO's finding that Gan Yisroel was an appropriate unilateral placement. The parents also assert that they sustained their burden to establish that equitable considerations weighed in favor of the requested relief.

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 the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; 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. Unilateral Placement

Since the district conceded that it did not offer the student a FAPE for the 2013-14 school year, the next issue to determine is whether the parents' unilateral placement of the student at Gan Yisroel for the 2013-14 school year was appropriate.

1. Functional Grouping and Teacher Qualifications

The district contends that Gan Yisroel was not an appropriate unilateral placement for the student because the hearing record failed to include sufficient evidence to establish that the student was functionally grouped at Gan Yisroel. In addition, the district contends that the evidence in the hearing record established that the teaching staff at Gan Yisroel was "not appropriately qualified." However, although State regulations require that public schools group students in special classes according to similarity of needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][2]), unilateral placements generally "need not meet state education standards or requirements" to be considered appropriate to address a student's needs, and furthermore, as noted above, nonpublic or private schools need not employ certified special education teachers or have their own IEP for the student (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14). Thus, the district's contentions must be dismissed.

2. Specially Designed Instruction

Next, the district asserts that the IHO erred in finding that Gan Yisroel was an appropriate unilateral placement, arguing that the parents failed to establish that the "education program" at Gan Yisroel addressed the student's specific disabilities and needs, and furthermore, that the hearing record failed to include evidence about the student's related services goals or, as discussed more fully below, the student's progress in her related services sessions. In this instance, although the student's needs are not directly in dispute, a brief discussion thereof provides context for the discussion of the issue to be resolved—namely, whether Gan Yisroel provided the student with specially designed instruction and was an appropriate unilateral placement.

Initially, to the extent that the district argues that the absence of evidence in the hearing record about the student's "related service goals" at Gan Yisroel supports a finding that Gan Yisroel did not provide the student with an "education program" that addressed the student's

specific disabilities and needs, this argument fails for two reasons. First, public school districts—and not nonpublic or private schools—are called upon to follow the procedures of the IDEA in developing an IEP that includes annual goals for each student with a disability; second, "[i]n this Circuit, courts are 'reluctant to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress'" (J.L. v City Sch. Dist. of City of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013], citing P.K. v. New York City Dep't of Educ., 819 F.Supp.2d 90, 109 [E.D.N.Y.2011]), and thus similarly, even if there was a requirement that the unilateral placement develop annual goals for the student, I would not—under these circumstances—hold that the parents' unilateral placement was substantively deficient (Gagliardo, 489 F.3d at 112 [explaining that 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement']). To hold otherwise would suggest that the parents should be held to a higher standard than the district is held. Accordingly, the district's assertion must be dismissed.

At the impartial hearing, the director of special education (director) at Gan Yisroel described the student's "two primary areas of weakness" as "focusing issues"—noting that the student was diagnosed as having an attention deficit hyperactivity disorder (ADHD)—and social anxiety (Tr. pp. 16-17, 22, 39). A January 2013 bilingual psychoeducational evaluation report revealed that the student's general cognitive ability fell within the extremely low range of intellectual functioning (see Dist. Ex. 3 at pp. 1-3). Based upon the assessment results, the evaluator opined that the student could experience "great difficulty in keeping up with peers in a wide variety of situations that require[d] age-appropriate thinking and reasoning abilities" (id. at p. 3). In addition, the student's general weaknesses in "attention, concentration, mental control, and short-term memory" affected the student's performance in a "variety of academic areas" (id. at pp. 3-4). Further, the evaluator noted that the student performed within the low range in the area of early reading skills and in the very low range in the area of reading comprehension (id. at p. 4). Similarly, the student performed within the low range in the areas of mathematics problem solving and numerical operations (id.).

At the impartial hearing, the director testified that Gan Yisroel had six self-contained special education classrooms for students ranging between first grade and ninth grade, and the special education classrooms were located within a regular education building consisting of approximately 430 regular education students (see Tr. pp. 17-19). The director testified that the student attended a classroom with 10 students—ranging between third and fourth grade—1 teacher, and 3 teaching assistants (see Tr. pp. 20-21, 29). In addition, many of the students in the classroom were classified as having a speech or language impairment, an other health impairment, or a learning disability, and most of the students' dominant language was Yiddish (see Tr. pp. 28-29). The director testified that the classroom's "morning" teacher focused on "bilingual Yiddish" and "skill based subjects," such as "oral expression, language, social skills, visualizing and verbalizing, [and] note taking skills," while the classroom's "afternoon" teacher focused on the "core subjects of reading, writing, and math" (Tr. p. 21). The director also testified that the student received related services consisting of speech-language therapy, OT, and counseling (see Tr. pp. 39-40). In addition, the director testified more specifically that the student received individual counseling to address her "social development" and "anxiety" (Tr. p. 65).

Concerning academics, the director testified that Gan Yisroel delivered reading instruction through a "balanced literacy" approach, where a teacher provided the "entire class" with "mini lessons" and then divided the students into groups based upon their individual reading levels (Tr. p. 24). According to the student's "Schedule & Curriculum" (schedule), the student received guided reading, read aloud, and independent reading as part of the balanced literacy approach (Parent Ex. G at pp. 1-3). The student's schedule also included two "literacy" or reading goals with weekly assessments to measure the student's progress toward achieving those goals (id. at pp. 2-3). In addition, the director testified that during "literacy centers," students worked in small groups using a "language program" based upon "visualizing and verbalizing" skills to aid in comprehension (Tr. pp. 31-32). Students also worked independently on spelling and writing tasks related to literacy (see Tr. p. 32). According to the student's schedule, Gan Yisroel used the Orton-Gillingham approach to teach and review encoding and decoding, and "[w]eekly assessments measure[d] students' progress in phonics while the Fontes [and] Pinnel system [was] used to assess reading comprehension and fluency" (id. at pp. 2-3).

In mathematics, the director testified that the student received instruction in a structured "hierarchy," which proceeded from "concrete to semi-concrete to semi-abstract to abstract" concepts (Tr. pp. 25-26). The student's schedule for mathematics included four goals: reviewing basic mathematics concepts; reviewing single and double-digit addition and subtraction; becoming proficient in single and double-digit multiplication and division; covering mathematics topics, such as time, tallies, calendar, and money; and solving word problems and real life problems (see Parent Ex. G at p. 2). In addition, the student's progress was measured by daily and monthly assessments (id.).

In the area of expressive writing, the student received instruction through a "workshop model" with a "group mini lesson . . . followed by guided writing and sharing" (Parent Ex. G at p. 5). The student's writing goals included learning how to "use prewriting skills" to write paragraphs or stories; learning "[c]orrect sentence and paragraph structure" in small increments, focusing on beginning, middle, and ending; and writing in various formats, such as descriptive and persuasive writing (id.).

To address the student's "lack of focusing" resulting from an ADHD, the director testified that the student was frequently prompted and "refocused" (Tr. pp. 46-47). In addition, the director testified that the student performed "best either one on one or [in] a group of one or two" students; the student also received preferential seating in the classroom or at times, received instruction in a "more secluded" area in the classroom (id.). To address the student's difficulty initiating interactions with peers, the "morning meeting" sessions included social interaction activities, and the student received "social skills" lessons in both large and small groups, as well as individual counseling to address the student's anxiety (Tr. pp. 30-31, 33, 65; Parent Ex. G at pp. 3-4). The student's schedule reflected two "[s]ocial [t]hinking [c]urriculum goals" and that the social skills curriculum focused on social rules and strategies to interact appropriately with others through conversation, role-playing, and guided practice, as well as perspective taking (see Parent Ex. G at pp. 3-4). In addition, during "morning meeting" the student could opt to explain her feelings and share news with the group (id.).

As reflected in the student's schedule, the student received training in "various strategies" and in using "different activities to practice the new skills" to address her oral expression skills, which included a goal of learning how to "speak with confidence and clarity in a wide range of settings and for a variety of functions" (Parent Ex. G at p. 4). The schedule provided that in each pragmatic category, the student would learn to practice skills in a group, then on her own, and eventually at home with complete independence (*id.*). The director testified that oral expression skills were the main focus of "morning meeting" sessions, which provided students with an opportunity to enhance their conversational language skills (Tr. pp. 30-31, 44).

Based upon a review of the hearing record, the foregoing evidence supports a finding that—contrary to the district's assertion—Gan Yisroel provided the student with educational instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365).

3. Progress

Contrary to the district's assertion, the evidence in the hearing record established that the student made progress at Gan Yisroel during the 2013-14 school year. 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 Sch. 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).³ However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

In this case, the director testified that the student made progress in reading and in mathematics (see Tr. pp. 22-25, 52-54). For example, at the end of the 2012-13 school year, the student could not complete double-digit subtraction with regrouping; however, by May 2014, the student could complete double-digit subtraction with regrouping, and she increased her "accuracy, speed and comfort" with those mathematics operations (Tr. pp. 24-25). In writing, the director testified that the student progressed from a "middle" of the first grade level to the "end" of the first grade level and the "beginning" of the second grade level in different areas; the

³ 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"]).

director also testified that the student could now write five-sentence paragraphs "about a topic using brainstorming and prewriting" (Tr. pp. 26-27, 57).

In addition to making progress academically, the director testified that the student also made progress socially, as reflected by the student's increased level of comfort in class, her "interest in interacting with others and sharing her thoughts," her beginning to initiate socializing, and her actively participating in group lessons (Tr. pp. 27-28, 36-38). Similarly, the parents testified that during the 2013-14 school year, the student's anxiety decreased, she performed "better academically," and socially, the student was "doing much better with her siblings and with her friends" (Tr. p. 77). Moreover, the parents indicated that the student could now do most of her homework on her own without prompting (Tr. pp. 77-78).

Therefore, based upon the foregoing, the evidence in the hearing record established that Gan Yisroel was an appropriate unilateral placement for the student for the 2013-14 school year. As noted, and consistent with the IHO's determination, Gan Yisroel provided the student with educational instruction, to meet her unique needs, that was reasonably calculated to enable the student to receive educational benefits.

B. Equitable Considerations

Having determined that the Gan Yisroel constituted an appropriate unilateral placement for the student, 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 [holding 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. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that 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, 315 F.3d at 27; 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 parents contend that the IHO erred in finding that equitable considerations did not weigh in favor of an award of tuition reimbursement because they had no intention of enrolling the student in a district public school. Initially, there is nothing in the hearing record to show that the parents engaged in conduct to obstruct the CSE process or its ability to provide the student with a FAPE (see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 249 [S.D.N.Y. 2010]). In addition, the Second Circuit has recently opined upon this issue, holding that where parents cooperate with the district "in its efforts to meet its obligations under the IDEA . . . their pursuit of a private placement [is] not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). Accordingly, the IHO's finding is not supported by the evidence in the hearing record or legal authority.

Next, however, the district contends that the parents' failure to provide a 10-day notice consistent with regulatory requirements should preclude relief. In this case, the evidence in the hearing record reveals that the parents provided the district with notice of their intention for the student to "begin the school year at Gan Yisroel" in a letter dated August 22, "2014" (Parent Ex. D). However, after sending the letter, the parents had no further communication with the district until the due process complaint notice, dated October 24, 2013 (see Parent Ex. A at p. 1). While the foregoing demonstrates that the parents failed to provide the district with a 10-day notice prior to removing the student from the public school consistent with their legal obligations, this failure does not, under the circumstances presented here, militate in favor of a reduction in an award of tuition reimbursement. Accordingly, I decline to exercise my discretion to reduce the amount of reimbursement on equitable grounds in this instance.

C. Relief

Finally, the district asserts that any award of tuition reimbursement to the parents must be reduced by nine percent—to account for the amount of time the student received religious instruction at Gan Yisroel. Here, the evidence in the hearing record reflects that during the 2013-14 school year, 30 minutes of every school day at Gan Yisroel was dedicated to religious prayer (Tr. pp. 31, 64-65; see Parent Ex. G at p. 1). Based upon this evidence, a nine percent reduction in the parents' award of tuition reimbursement is reasonable for that portion of the school day at Gan Yisroel devoted to religious instruction.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the IHO properly concluded that the parents sustained their burden to establish that Gan Yisroel was an appropriate unilateral placement, but that the IHO improperly found that equitable considerations did not weigh in favor of the parents' request for tuition reimbursement, the IHO's decision must be reversed in part. However, as indicated previously, such award of tuition reimbursement must be reduced by nine percent to account for religious instruction provided to the student at Gan Yisroel during the 2013-14 school year.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 7, 2014 is modified by reversing that portion which found that equitable considerations did not weigh in favor of an award of tuition reimbursement for the student's attendance at Gan Yisroel for the 2013-14 school year; and,

IT IS FURTHER ORDERED that the district shall reimburse the parents for 91 percent of the costs of the student's tuition at Gan Yisroel for the 2013-14 school year.

Dated: **Albany, New York**
 October 29, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER