



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-047

**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 Board of Education of the [REDACTED]**

### **Appearances:**

Barger & Gaines, attorneys for petitioner, Paul N. Barger, Esq., of counsel

Harris Beach PLLC, attorneys for respondent, Susan E. Fine, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Change Academy Lake of the Ozarks (CALO) during 2014 and 2015. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilateral placement at CALO was appropriate to address the student's needs. The appeal must be dismissed. 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**

The material facts underlying this appeal are generally undisputed. The student was born in a foreign country and came to the United States shortly before reaching seven years of age (Parent Ex. H at p. 4; see generally Dist. Ex. 50). Shortly before coming to the United States, the student was reportedly evaluated "by a medical committee" in his country of origin and received diagnoses including an unspecified disorder of psychological development, disarthria ("faulty articulation due to organic impairment or general weakness of fine-motor movements of the

speech-producing organs"), and astigmatism, far-sightedness ( Parent Ex. H at p. 5). The hearing record indicates that the student was enrolled in school as a first grade student midway through the 2004-05 school year upon his arrival in the United States, and that he repeated the first grade the following year to permit him the opportunity to mature socially (Tr. pp. 1337-38).

While attending other school districts that are not parties to this proceeding, student engaged in behaviors that ultimately led to his departure from those districts (Tr. p. 63; see Tr. pp. 1342-45).<sup>1</sup> After one incident, the student was placed in the custody of the Office of Children and Family Services for placement at the Montfort Therapeutic Residence (Montfort) by order of the Family Court, dated June 24, 2013 (Parent Ex. B).

The student was registered in the district in fall 2013. In a letter dated October 4, 2013, the parent notified the district that the student had been placed at Montfort by Family Court and was expected to be discharged on October 24, 2013 (Dist. Ex. 9). The parent also stated that she was registering the student in the district, noted the student had received diagnoses of "PTSD [post traumatic stress disorder], ADHD [attention deficit hyperactivity disorder], ODD [oppositional defiant disorder], and Conduct Disorder," and requested the district convene a CSE "to determine [the student's] eligibility for an Individualized Educational Plan [sic]" (id.; see Tr. pp. 149, 275-76, 1365; Dist. Exs. 13 at p. 1; 16 at p. 1).

The hearing record reflects that on or about October 23, 2013, the parent and the district's CSE chairperson met to discuss the parent's referral of the student to the CSE for an evaluation of the student's eligibility for special education (Tr. pp. 794-98, 1171-73, 1362-64). After discussing the referral with the CSE chairperson, the parent withdrew her referral and requested that the district convene a committee under Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]) (Dist. Exs. 10; 11; see Tr. p. 1449). The district's section 504 committee met on November 6, 2013, and developed a section 504 accommodations plan for the student that recommended program modifications (check for understanding, special seating arrangements, refocusing and redirection, and additional time to complete assignments) and testing accommodations (extended time, separate location, language in directions simplified, and on-task focusing prompts) (Dist. Ex. 19 at pp. 1-2).

In January 2014, the student was involved in an incident which caused him to be suspended for five days (Tr. pp. 1370-71; Dist. Ex. 8 at pp. 1, 3).<sup>2</sup> As an additional consequence of his suspension, Family Court returned the student to Montfort (Tr. pp. 1371-72; Parent Ex. C; see Tr. p. 77). In a letter dated January 15, 2014, the parent referred the student to the CSE and requested an expedited CSE meeting (Dist. Ex. 23 at p. 1; see Dist. Ex. 26). The district completed a social history of the student in January 2014 with the parent serving as the reporter (Dist. Ex. 27). In addition, the district obtained a psychiatric evaluation of the student, conducted on February 8, 2014 (Dist. Ex. 31).<sup>3</sup>

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<sup>1</sup> Although I have reviewed the student's history as it appears in the hearing record, it is unnecessary for purposes of the disposition of this appeal to further belabor the student's various difficulties in school years prior to the time he was enrolled in the district.

<sup>2</sup> The details of these incidents are not relayed to protect the student's privacy.

<sup>3</sup> The IHO identified the psychiatric evaluation by the date the report was received by the district (IHO Decision

The student remained at Montfort from January 15, 2015, until February 10, 2015 (Dist. Exs. 66 at p. 1; 67 at pp. 3, 6). Shortly after returning to the district, the student was involved in an incident which resulted in another five-day suspension (Tr. pp. 88-91; Dist. Ex. 8 at pp. 2-3). The student returned to Montfort on March 3, 2015, where he was expected to remain until June 24, 2014 (Tr. pp. 91, 309-10; Dist. Exs. 22 at pp. 22, 26; 66 at pp. 1-2; 67 at p. 9; Parent Ex. C at pp. 6-7).

On March 17, 2014, the CSE convened to determine the student's initial eligibility for special education and related services (Dist. Ex. 34 at p. 1). Participants in the March 2014 CSE meeting included the parent, the CSE chairperson, the district school psychologist, a district special education teacher, the student's social studies teacher, a high school guidance counselor, the assistant principal, who also served as the student's mentor, the Montfort program director, a district social worker, and counsel for the district and the parent (Dist. Ex. 34 at p. 1; see Tr. pp. 65-66, 103).

The hearing record reflects the March 2014 CSE considered a March 2013 neuropsychological evaluation report, a privately-obtained May 2013 psychiatric summary, a October 2013 psychiatric summary from Montfort, a CSE-requested February 2014 psychiatric evaluation report, and a privately-obtained February 2014 developmental, neuropsychological, and educational evaluation report (combined assessment report) (Dist. Ex. 34 at pp. 2-3; see Dist. Exs. 16; 17; 31; Parent Exs. H; R).<sup>4</sup> The hearing record also shows the CSE considered the student's district discipline report, his then-current modifications and accommodations contained in his Section 504 accommodations plan, as well as input from his teachers regarding his academic performance (Dist. Ex. 34 at p. 2). Based upon its discussion, the March 2014 CSE found the student eligible for special education and related services as a student with an emotional disturbance, and developed an IEP recommending placement in a State-approved residential school (id. at pp. 1-2).<sup>5</sup>

Comments attached to the March 2014 IEP indicated the student had received diagnoses of depressive disorder-unspecified, generalized anxiety disorder and PTSD-chronic (Dist. Ex. 34 at p. 2). Additionally, the comments reflect the student demonstrated adequate academic functioning, while also detailing the need for the completion of a functional behavioral assessment (FBA) "when the district has access" to him (id.). The meeting comments presented the CSE's collective conclusion that district programs were "not restrictive enough to support the student's emotional and educational needs" (id.). The comments further delineate district efforts to identify an alternative program more suited to the student's needs (id.). Finally, the comments

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at p. 5; Dist. Ex. 31 at p. 1). For the sake of clarity, the psychiatric evaluation report is identified herein by the date the evaluation was completed (Dist. Ex. 31 at p. 1).

<sup>4</sup> The March 17, 2014 IEP lists the document referred to herein as the "combined assessment report" as a "neuropsychological" (Dist. Ex. 34 at p. 3).

<sup>5</sup> The hearing record contains a variety of terms used in documents and testimony to refer to the type of residential placement recommended for the student by the CSE (see, e.g., Tr. pp. 305, 554, 1395; Dist. Exs. 34 at p. 14; 43; 52). For the purposes of this decision the term "approved residential school" will be used.

attached to the IEP articulate the parent's disagreement with the "choice of school[s]" to which the CSE determined to send application packets and noted that she "did not sign consent to release information to schools on the day of the meeting," adding the CSE would reconvene when new information was received regarding the status of the applications to approved residential schools (id.; see Tr. pp. 299-301). Despite the parent's refusal to provide consent to release information to approved residential schools, the district sent application packets to six such schools (Dist. Ex. 35).<sup>6</sup>

A letter dated March 17, 2014, indicated the student had been accepted to CALO, and on March 31, 2014, Family Court "vacated" its placement of the student in the custody of OCFS in anticipation of the student's immediate placement at CALO (Tr. pp. 1397-99, 1459; Dist. Ex. 33 at p. 1; Parent Ex. D at p. 1; see Dist. Ex. 22 at p. 26; Parent Exs. X; AAA at p. 2).<sup>7</sup> The CSE reconvened on April 23, 2014, to discuss the student's placement and progress at CALO and to discuss the district's ongoing efforts to secure a placement for the student at an approved residential school (Tr. pp. 310-315, 836, 1400, 1461; Dist. Exs. 46-47; see Dist. Ex. 49). By that time, three approved residential schools had indicated they did not have an appropriate program for the student (Dist. Exs. 37; 39; 43). Two other schools had expressed interest in interviewing the student to determine if he was a good candidate for their programs (Dist. Exs. 38; 40-41). On April 25, 2014, the district sent application packets to an additional four approved residential schools (Dist. Ex. 51).

On June 20, 2014, the CSE reconvened and developed an IEP that is identified throughout as a "draft" (Dist. Ex. 60). By this time, all but one of the approved residential schools to which the district had sent application packets had rejected the student, with the one remaining school indicating that it could not determine whether or not to accept the student without conducting a screening interview (Dist. Exs. 52-54; 60 at p. 2). According to the June 2014 draft IEP, participants included the parent, the district school psychologist, who also served as the CSE chairperson, the district director of pupil personnel services (PPS director), a district special education teacher, the student's social studies teacher, a district social worker, counsel for the parent and the district, the Montfort program director, and by telephone, the owner and founder of CALO (Dist. Ex. 60 at p. 1; see Tr. pp. 190, 198). The draft IEP prepared at the June 2014 meeting is generally consistent with the March 2014 IEP, with the exceptions that the June 2014 draft IEP recommended additional counseling services, indicated that the student was determined to be eligible for 12-month school year services, and recommended a specific approved residential placement for summer 2014; furthermore, while the March 2014 IEP recommended placement in an approved residential school, the June 2014 draft IEP did not identify a placement in the body of the IEP, despite noting the recommendation for an approved residential school in the attached comments (compare Dist. Ex. 34 at pp. 1-2, 11-12, 14, with Dist. Ex. 60 at pp. 1-2, 12-13, 15).

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<sup>6</sup> The district school psychologist who attended the March 2014 CSE meeting testified that the district sent the application packets in an effort to secure a placement for the student (Tr. p. 311; see Tr. pp. 816-17).

<sup>7</sup> A letter from CALO's clinical supervisor dated May 22, 2014, reported the student was admitted to CALO on April 1, 2014 (Dist. Ex. 59 at p. 1; Parent Ex. Y). The parent testified that she was aware of the student's acceptance at CALO sometime prior to the March 2014 CSE meeting (Tr. pp. 1470-72).

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

The parent filed a due process complaint notice dated July 14, 2014, which contained a number of factual allegations alleging that the district failed to offer the student a free appropriate public education (FAPE) (Dist. Ex. 1).<sup>8</sup> As relevant here, the parent asserted a number of procedural inadequacies regarding the conduct of the district prior to the March 2014 CSE meeting (*id.* at pp. 4-6). The parent also argued that the district failed to recommend a placement or finalize an IEP for the student (*id.* at pp. 6-7). The parent further contended that although the CSE informed the parent that approved residential schools required a screening process before the student could be accepted, the student's therapists believed that it would be harmful to the student to participate in the screenings (*id.* at pp. 6-7). The parent also asserted that the unilateral placement at CALO was appropriate for the student and the student was making progress there (*id.* at p. 7). Finally, the parent contended that equitable considerations weighed in favor of awarding reimbursement to the parent for the costs of the student's attendance at CALO (*id.* at pp. 5, 7-8).

In a response to the due process complaint notice dated July 29, 2014, the district admitted and denied the parent's assertions, specifically stating that the only reason the CSE was unable to offer the student a FAPE was due to the parent's "refusal to cooperate in the approved residential school application and screening process" and that CALO was not appropriate to meet the student's needs and was overly restrictive (Dist. Ex 2 at p. 9).

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

An impartial hearing convened on October 1, 2014, and concluded on December 10, 2014, after six days of proceedings (*see* Tr. pp. 1-1496). In a decision dated March 20, 2015, the IHO found that the IEP developed during the March 2014 CSE meeting "was procedurally and substantively appropriate and could have provided [the student] with [a] FAPE," but for the parent's failure to cooperate in the placement process by refusing to allow the student to be screened or interviewed by any of the approved residential schools that may have accepted the student (IHO Decision at p. 27). The IHO also concluded that CALO was an appropriate program for the student at the time the parent made the decision to unilaterally place the student there, but that equitable consideration precluded an award of tuition reimbursement for the costs of the student's attendance at CALO (*id.*).

First, the IHO found that the district did not inappropriately influence the parent to withdraw her October 2013 referral of the student to the CSE and that nothing occurred between that time and the parent's second referral of the student in January 2014 that triggered the district's obligation to refer the student to the CSE (IHO Decision at pp. 31-32). Next, the IHO found that the district erred in failing to act on the parent's request for an expedited CSE meeting, but that the error was minimal and did not deny the student a FAPE (*id.* at p. 32). The IHO also

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<sup>8</sup> The copy of the due process complaint notice originally included in the hearing record filed with the Office of State Review was redacted; the district was directed to file an unredacted copy of the due process complaint notice.

found that the March 2014 CSE meeting itself was procedurally appropriate in that the CSE was properly composed and the parent was provided with an opportunity to participate in the development of the student's IEP, among other reasons (*id.* at pp. 27, 32-34).<sup>9</sup> The IHO also determined that the March 2014 IEP recommending an approved residential school, had it been finalized, offered the student appropriate services to meet his needs (*id.* at pp. 27, 34).

Regarding the parent's unilateral placement of the student at CALO, the IHO determined that CALO addressed the student's social/emotional and behavioral needs by providing an intensive level of therapeutic services in a structured and highly supervised setting (IHO Decision at p. 36). In addition, the IHO found that CALO adequately addressed the student's academic needs, was "approved by Missouri and accredited," and provided instruction delivered by certified teachers (*id.* at pp. 36-37).

Next, the IHO found that equitable considerations precluded any award of tuition reimbursement due to the parent's lack of cooperation in the placement process during IEP development and because the parent failed to provide adequate notice to the district of her intent to unilaterally place the student at public expense (IHO Decision at p. 37). Regarding the parent's failure to cooperate with the application process at the approved residential schools the CSE identified as potential placements for the student, the IHO found that the application process was mandated by State guidance that required the CSE to refer a student to appropriate in-state programs (*id.* at p. 34). The IHO found that the parent's failure to cooperate with the application process prevented the CSE from determining if there was an appropriate approved residential school for the student, from securing a placement for the student, and from finalizing the IEP (*id.* at pp. 34-36). The IHO dismissed the parent's assertion that her refusal to allow the student to be screened was justified because the screening could expose the student to potential "re-traumatization" (*id.* at pp. 37-38). Specifically, the IHO found that the parent had unilaterally decided that CALO was the only appropriate placement for the student, that the fear of re-traumatization was a "rationalization after the fact," and that the screenings could have been accomplished remotely via videoconferencing as the district had suggested (*id.* at pp. 22, 38).

Lastly, in an separate decision also dated March 20, 2015 the IHO denied the district's motion to reopen the record to admit evidence concerning the student's discharge from CALO, finding that the evidence would not affect his determination that CALO was an appropriate placement for the student at the time the placement decision was made (IHO Ex. VIII; *see* IHO Decision at pp. 39-40; IHO Exs. III at p. 7; VI-VII).

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

The parent appeals, challenging the IHO's failure to find that equitable considerations favored her request for reimbursement of the costs of the student's attendance at CALO. Specifically, the parent contends that the district's "proposed programs" were inappropriate to meet the student's educational needs and that the IHO erred in failing to address the

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<sup>9</sup> The IHO noted that the parent's claims regarding annual goals, the lack of an observation of the student, and the amount of counseling services recommended in the IEP were not raised in the parent's due process complaint notice and were therefore not properly before him (IHO Decision at p. 33).

appropriateness of the proposed approved residential schools in his decision. The parent also contends that the IHO failed to consider the district's "child find" obligation, the failure to provide an expedited CSE meeting, and the delay in finding the student eligible for special education in weighing equitable considerations and the reasonableness of the actions of the parties. The parent asserts that her refusal to make the student available for interviews at approved residential schools did not "thwart" the CSE process and was justified given the recommendations she received from the student's providers at CALO. Attached to the petition as proposed exhibits are two letters from CALO's residential therapist, dated May 14, 2014, and May 22, 2014, which are offered as additional evidence (see Pet. Exs. A; B). The parent also asserts that she provided sufficient notice to the CSE of her intent to unilaterally place the student at CALO by informing the CSE of her preference for CALO at the March 2014 CSE meeting.

In an answer and cross-appeal, the district responds to the parent's petition by variously admitting and denying the allegations raised and asserting that the IHO correctly declined to award the parent the requested relief. As an initial matter, the district asserts that the petition should be dismissed because it fails to specifically request reversal of the IHO's denial of tuition reimbursement as a requested remedy. The district also asserts that the additional evidence attached to the petition should be rejected because it was available at the time of the impartial hearing. Attached to the answer and cross-appeal as exhibits are two documents related to the student's discharge from CALO dated March 6, 2015, and February 12, 2015, which are offered as additional evidence (see Answer Exs. 1; 2).

The district also contends that the IHO correctly determined that the district complied with its "child find" obligations after the parent voluntarily withdrew her referral to the CSE and did not give her consent to have the student evaluated for eligibility for special education and related services. The district admits that the parent requested an expedited CSE meeting and asserts that the IHO correctly determined that the CSE's failure to conduct an expedited review did not deprive the student of a FAPE. The district next asserts that the IHO correctly determined that the district could have offered the student a FAPE but could not recommend a specific placement because the parent thwarted the application process at the approved residential schools. The district also asserts that the IHO correctly determined that the approved residential schools were required to conduct a screening interview prior to accepting the student and further that the parent's "vague" fear of the risk the student would be "re-traumatized" did not justify the parent's refusal to cooperate in the application process. Lastly, the district asserts that the IHO correctly determined that the parent failed to provide adequate notice of her intent to unilaterally place the student at CALO and that equitable considerations preclude an award of reimbursement.

In its cross-appeal, the district asserts that the IHO erred in finding that CALO was an appropriate unilateral placement for the student because CALO did not provide adequate support for the student, was not capable of delivering instruction that met New York State standards, was too far away from the student's home district to satisfy least restrictive environment (LRE) considerations, and the student did not make adequate progress while at CALO.

In an answer to the district's cross-appeal, the parent argues that the IHO correctly determined that CALO was an appropriate unilateral placement for the student because CALO addressed the student's unique needs in the LRE.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the

potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

## 1. Sufficiency of Pleadings

The district contends that the petition should be dismissed because it fails to specifically request reversal of the IHO's denial of tuition reimbursement. State regulations require that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]).

Although the district is correct that the parent's petition does not specifically request reversal of the IHO's denial of tuition reimbursement, there is no evidence that the district was prejudiced by the lack of a specific claim, as the district was able to generate a 20-page answer and cross-appeal and a 19-page memorandum of law that address each of the parent's arguments presented on appeal. Moreover, the parent's petition raised challenges to the IHO's decision and referenced the evidence in the hearing record in a manner adequate to permit review of the issues, and an overall reading of the petition makes it sufficiently clear what relief she is seeking. Therefore, I decline in this instance to dismiss the parent's petition on this basis.

## 2. Additional Evidence

Both the parent and the district submitted additional documentary evidence for consideration on appeal (see Pet. Exs. A-B; Answer Exs. 1-2). Generally, documentary evidence not presented at an impartial hearing is 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. 15-026; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO would be unable to render a decision]). In this case, the additional evidence submitted is not necessary to render a decision in this case and will not be considered. The parent submitted two letters from the student's therapist at CALO, dated May 14, 2014, and May 22, 2014 (Pet. Exs. A-B).<sup>10</sup> The request to admit the May 22, 2014 letter is duplicative as it is already a part of the hearing record, and the student's therapist and the parent testified during the impartial hearing to the matters the parent now seeks to introduce through the additional evidence (Tr. pp. 1028-30, 1074-75, 1401, 1408-09; Dist. Ex. 59). The district submitted two documents pertaining to the student's release from CALO in February 2015 (Answer Exs. 1-2). The IHO found that he was not empowered to reopen the hearing record after it had been declared closed, and reasonably determined that these documents were in any event irrelevant to the question of whether CALO was an appropriate unilateral placement for the student at the time the parent placed the student there, and there is no reason to depart from the IHO's determination that it was insufficiently relevant (IHO Ex. VIII).<sup>11</sup>

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<sup>10</sup> The student's therapist is identified in the hearing record by a variety of titles (Tr. pp. 988, 990, 996-97; Parent Ex. BB at p. 1).

<sup>11</sup> While evidence of progress at a unilateral placement is a relevant factor to be considered (Gagliardo, 489 F.3d at 115), a lack of progress does not bear the same relevance as the IDEA does not guarantee that a student will achieve a specific level of benefit under the Act. In other words, just as a IEP is viewed prospectively and courts will not engage in Monday-morning quarterbacking on a parent's behalf guided by knowledge of a

## B. CSE Process

### 1. Child Find

The parent alleges that the district's "child find" duty was triggered in October 2013 by the parent's initial referral and that her subsequent decision to withdraw her referral to the CSE had no impact on the district's obligation because the district knew or should have known that the student was potentially eligible for special education at that time. The purpose of the "child find" provisions of the IDEA is to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 224-25 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (Forest Grove, 557 U.S. at 245). The "child find" requirements apply to "[c]hildren who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1]).

A district's child find duty is triggered when there is "reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability" (J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. 2011], quoting New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). Once a building administrator or employee of a school district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 school days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (8 NYCRR 200.4[a][2][ii], [iv][a]; see also 34 CFR 300.300[a]). State regulations also provide that, upon receiving a referral, a building administrator may request a meeting with the parent to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services, or any other services designed to address the learning needs of the student (8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE "from continuing its duties and functions" (8 NYCRR 200.4[a][9][iii][a]-[b]). Upon receiving the parent's consent to conduct an initial evaluation of the student, the district must complete that evaluation within 60 days (20 U.S.C. § 1414[a][1][C][i][I]; 34 CFR 300.301[c][1][i]-[ii]; 8 NYCRR 200.4[b][1]).

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student's subsequent progress at a unilateral placement when evaluating an IEP, the district cannot reasonably expect a finder of fact to engage in Monday morning quarterbacking on the district's behalf and find that a unilateral placement was inappropriate because, months after the student was placed the circumstances continued to evolve and the student was removed from the school.

The hearing record reflects that the district's PPS director and the parent met on October 23, 2013, to discuss the CSE referral (Tr. pp. 794-97, 1362-1364). The PPS director testified the parent decided that she did not want to go through the CSE process and indicated that she would "go to the 504 committee" (Tr. pp. 795-97; see Dist. Ex. 11 at p. 1). In contrast, the parent testified that she rescinded her referral only after the PPS director informed her that the student would not be found eligible for special education and related services (Tr. p. 1363).

The parent did not assert in her due process complaint notice that the district failed to have procedures in place to refer students it suspects of being eligible to receive special education to the CSE for an evaluation (see generally Dist. Ex. 1). The IHO credited the testimony of the district director of PPS and found that the district did not inappropriately influence the parent to withdraw her October 2013 referral of the student to the CSE and that nothing occurred between that time and the parent's second referral of the student, in January 2014, that triggered the district's obligation to refer the student to the CSE (IHO Decision at pp. 31-32). The hearing record provides no basis to depart from the IHO's finding. During the October 2013 meeting with the CSE chairperson, the parent voluntarily withdrew her request for an evaluation and did not give consent for an evaluation (Tr. pp. 794-98, 1190-92, 1445-49; Dist. Exs. 10-11). Those facts, along with the fact that the parent acquired testing and other accommodations from the district via the Section 504 process, provide a rational justification for the district to decide not to evaluate the student (id.; Dist. Exs. 19-21; see A.P., 572 F.Supp.2d at 225, citing L.M., 478 F.3d at 313).

## **2. Timeliness of Evaluations**

The IHO determined that the district erred in failing to grant the parent's January 2014 request for an expedited evaluation of the student pursuant to State regulation allowing for expedited evaluations when a request is made to evaluate a student—who is not presumed to have a disability for discipline purposes—during a time the student is suspended from school (IHO Decision at p. 32; see 8 NYCRR 201.6). The district does not contest this finding on appeal. The hearing record demonstrates that the student was suspended at the time the parent made her request for an expedited evaluation (see Tr. pp. 79-82, 799-800, 1370, 1372; Dist. Exs. 23-25; 26 at p. 1; 27 at p. 12). The IHO found that although the evaluation was not conducted within the 15-day expedited time-frame imposed by the State regulation, the delay in the evaluation was not caused by the district (IHO Decision at p. 32). The IHO further found that the district acted immediately to secure an evaluation and the March 2014 CSE meeting occurred "as soon as practicable" (id.). Although not entirely clear from the decision, in light of the IHO's finding elsewhere in the decision that the March 2014 draft IEP was procedurally and substantively appropriate, it appears that the IHO did not find the district's failure to convene an expedited CSE meeting was an independent basis for determining that the district failed to offer the student a FAPE (see IHO Decision at p. 27). I concur with the IHO's finding that the district should have conducted an expedited evaluation of the student. However, because the district failed to offer the student a FAPE by failing to finalize an IEP for the student as set forth below, it is unnecessary to determine if the failure to conduct an expedited evaluation constituted an independent basis for finding that the district failed to offer the student a FAPE. Nonetheless,

the district's failure to conduct an expedited evaluation of the student is a factor that will be considered below in weighing the equitable considerations.

### **3. Failure to Develop a Final IEP**

According to the CSE chairperson, the March 2014 CSE was unable to finalize the student's IEP at the meeting because the student had not been accepted at an approved residential school, and the CSE intended to reconvene and finalize the IEP after an acceptance had been secured (Tr. p. 308). On appeal, the district does not assert that the CSE ever created a final IEP for the student that it was prepared to implement, and the district conceded as much by letter to the parent dated July 21, 2014 (see Dist. Ex. 64). Setting aside the parent's request for an expedited evaluation, even under the standard timeline for development and implementation of an IEP for a student not previously identified as having a disability, the district must arrange for the appropriate special education programs and services to be provided within 60 school days of the receipt of consent to evaluate (8 NYCRR 200.4[d]). In the event the CSE recommends placement in an approved in-state or out-of-state private school, "the board [of education] shall arrange for such programs and services within 30 school days of the board's receipt of the recommendation of the committee" (8 NYCRR 200.4[e][1]). Under the facts of this case, the district's failure to provide the student with a final IEP constituted a procedural error that impeded the student's right to a FAPE and the district failed to offer the student a FAPE during the time period in question in this appeal (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).<sup>12</sup>

### **C. Unilateral Placement**

In its cross-appeal, the district asserts that CALO was not an appropriate unilateral placement for the student because CALO did not provide adequate support for the student, it was not capable of delivering instruction that met New York State standards, it was too far away from the student's home district to satisfy LRE considerations, and the student did not make adequate progress while at CALO.

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 offers an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). 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. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions,

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<sup>12</sup> The CSE chairperson testified that the an IEP could not be finalized without a specific approved residential school identified due to the constraints imposed by the computer software the CSE used to aid in generating the IEP (Tr. p. 308; see Tr. p. 1237). Although State regulations mandate that IEPs be developed using a form prescribed by the Commissioner, the regulations do not mandate using a particular computer software program in doing so (see 8 NYCRR 200.4[d][2]).

'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365).

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

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

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

While the student's performance on measures of intellectual and academic measures indicated his overall functioning was generally within the low average to average range, considerable concern was expressed regarding the student's social/emotional and behavioral functioning (see generally Dist. Exs. 16; 17; 31; Parent Exs. H; R). A review of the various evaluative reports indicates the student was offered a number of diagnoses regarding his social/emotional functioning, some of which reflected agreement between the evaluators, and some that appeared to contradict one another (compare Dist. Ex. 31 at p. 4, with Parent Ex. H at p. 23; compare Dist. Ex. 31 at p. 4, with Dist. Ex. 17 at p. 8, and Parent Ex. R at p. 1).

Despite the disparate interpretations of the student's social/emotional status and related behaviors, a careful review of the evaluative reports reveals recurrent themes of social/emotional difficulties, with numerous concomitant episodes of noncompliant behavior (Dist. Exs. 16 at p. 1; 17 at pp. 1-3, 6-8; 31 at pp. 1-2, 4-5; Parent Exs. H at pp. 6-7, 17-25; R at p. 1).

Greater consensus was evidenced in terms of recommendations offered to address the student's needs, especially with regard to his need for counseling services (Dist. Exs. 17 at p. 9; 31 at pp. 4-5; Parent Ex. H at pp. 26-27). In addition, both the February 2014 psychiatric evaluator and the author of the February 2014 combined assessment report asserted the student's need for a therapeutic placement (Dist. Ex. 31 at p. 5; Parent Ex. H at p. 26). Furthermore, as highlighted in the combined assessment report, an appropriate program would provide a "full-day specialized self-contained educational environment with integrated special education remedial and therapeutic services" that "specialize[d] in addressing complex childhood trauma" (Parent Ex. H at p. 26).

According to the district school psychologist, the Montfort program director affirmed that the student "needed something that was much more supportive" than what Montfort could provide for the student (Tr. pp. 303-05). The hearing record describes CALO as a program that "specializes in working with students who struggle with emotion, trauma and attachment" (Parent Ex. HH). CALO has also been accredited by the Missouri Department of Education as an approved private agency to work with students with emotional and other behavioral impairments (Tr. p. 958). According to CALO's assistant academic director and registrar (assistant director), CALO had "successfully help[ed] students meet their graduation requirements per their state" and CALO's academic director testified that in addition to complying with the Missouri state curriculum, the student's academic program consisted of courses that were aligned with New York State standards (Parent Ex. HH; see Tr. pp. 954-58, 960).

As described by CALO's founder, CALO afforded students with "milieu therapy [and] canine therapy," in an "emotionally nutrient-rich environment" that "changes the brain to be able to receive parental control and to function in prosocial ways in school and at home"(Tr. pp. 909, 917-18, 923). When queried, the CALO founder described the "bulk" of CALO's milieu as "the general living environment of the student," including such things as the group of students with whom the student was teamed, "the canines they are working with, and particularly the residential coaches that we have on staff" (Tr. p. 923).

According to the CALO academic director, the school staff consisted of eight teachers and two administrators (Tr. p. 953). Students attended single-sex academic classes for four hours per day; in addition, students earned academic credit while participating in CALO's instructional program for working with dogs, as well as participating in "adventure therapy" (Tr. p. 953).<sup>13</sup> Students also participated in art and PE classes (id.). The academic director added

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<sup>13</sup> According to the CALO academic director, instruction in the adventure therapy program was not provided by teachers, but by separate staff "devoted to doing that" (Tr. p. 975). The academic director further testified that he was unaware of the certifications of the adventure therapy staff or the qualifications of the staff that provided canine instruction (Tr. pp. 975-76).

there students could receive extra help during a daily homeroom period (Tr. 954). The academic director indicated the maximum class size was 12 students, but the "typical count is about six to eight" (id.).

The hearing record reflects that in addition to academics, the student participated in counseling three times per week; during the first session, the student met one-on-one with his CALO therapist, the second session was family therapy conducted via videoconferencing, and the third session was described as a "special time," when the student and his therapist would "just hang out and be together and connect" (Tr. pp. 997-98). The student's therapist also reported that he met with the student during group therapy and that the student participated in two hours of group therapy per week (id.). Informally, the student's therapist testified he met with the student at least four out of five days per week, including having lunch together or "connecting with him in the hallway," (Tr. pp. 997-98).

While the hearing record does not include a CALO-developed IEP, the treatment team summary reports included in the hearing record provide insight into the student's program (Parent Exs. II; JJ; KK; LL; YY; ZZ). Each of these reports listed the student's then-current "diagnostic summary," and identified his specific goals, objectives, and progress (see id.). The summary reports also detail family involvement and visits; annotate significant events; note the student's current academic grades; comment on the student's performance in school, adventure therapy, "milieu," and canine interaction; list the student's medications and medical appointments; and discuss the student's "need for further RTC treatment/length of stay," and "plan for aftercare" (see id.).

Academically, the summary reports reflect that, in general, the student was doing well in his classes, with intermittent notations of transgressions such as missing assignments, and becoming involved in altercations or " inappropriate conversations with peers" (Parent Exs. LL at p. 2; YY at p. 2; ZZ at p. 3).

The team summary reports show that goals and objectives related to social/emotional and behavioral needs were developed and reviewed at regular monthly intervals; they were also revised as needed with student input (Tr. pp. 959, 1006; Parent Exs. II at p. 1; JJ at p. 1; KK at p.1; LL at p. 1; YY at p. 1; ZZ at p. 1). As an example, the initial summary report listed three goals: to participate in individual and family therapy; to begin to share and express feelings to peers, staff and family; and to explore how the student saw himself at CALO (Parent Ex. II at pp. 1). A brief narrative described the student's progress with each goal, as well as his resistance to engage in efforts to attempt related activities, as exemplified in the student's assertion that he did not "want to participate in this process" and that he found "most staff aggravating and annoying" (id.). In contrast, the next month's summary report indicated the student felt the individual and family therapy sessions had "gone well" and the student was sharing his feelings with others (Parent Ex. JJ at p. 1). In addition, the second summary report indicated a new goal was added, in that the student wanted "to be able to explore how he sees himself as and what type of person he is" (id.). The summary reports follow a pattern of identifying progress, while articulating challenges and setbacks, and identifying the addition or modification of goals (Parent Ex. II at p.1; JJ at p. 1; KK at p. 1; LL at p. 1; YY at p. 1; ZZ at p. 1). For example, the third summary

report noted the student felt it important "to create a new goal or he thought he was staying stagnant," which he felt "he could not do" (Parent Ex. KK at p. 1).

When considering the student's needs as articulated in the available evaluation reports, the IHO reasonably found that "CALO was an appropriate program for the student because it addressed the specific emotional and behavioral issues that interfered with his education, and provided a sufficient academic component" (IHO Decision at p. 36). In addition, the hearing record does not support a finding that CALO was not an appropriate placement based upon LRE considerations. Although the restrictiveness of a parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). The district has a valid concern regarding the distance between CALO and the student's home in New York; however, in this instance the concern is not paramount because the parties were already in agreement at the time of the CSE meetings that the student required a residential placement, one of the most restrictive options on the LRE continuum.

#### **D. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to 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]; 34 CFR 300.148[d]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified and whether the parent provided adequate notice]).

#### **1. Parent Cooperation**

The Supreme Court has stated that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06). The Second Circuit has held that where parents cooperate with a district in its attempts to develop an appropriate educational program for their child, "their pursuit of a private placement [i]s 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., 744 F.3d at 840). The parent asserts that her refusal to make the student available for interviews at approved residential schools did not "thwart" the CSE process and was justified given the recommendations she received from the student's providers at CALO. The district contends that the IHO correctly determined that the approved residential schools were required to conduct a screening procedure prior to accepting the student and further that the "vague" fear the student would risk being "re-traumatized" did not justify the parent's refusal to cooperate in the application process.

State regulations and guidance require, when a district intends to place a student in an approved residential school, that the district first refer the student to in-State approved residential schools that may be appropriate, even if the student is already placed in an out-of-State approved residential school (8 NYCRR 200.6[j][1][iii][e]; see "Placement of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ., [March 2013], at p. 3, available at <http://www.p12.nysed.gov/specialed/publications/OOSPlacementMemo-2013.pdf>).<sup>14</sup> While the concerns of a parent must be considered, a parent's disagreement with a placement, or preference for another school, is not, on its own, justification for the CSE to fail to recommend an approved in-state program that has accepted the student (*id.* at p. 4). The guidance further states that "districts do not have authority in law to place students with disabilities in nonapproved schools" (*id.* at p. 5). Most pertinent to the facts of this case, the guidance sets forth the expected roles of parents and districts in the referral and placement process:

Parents are integral partners in the referral process and are expected to cooperate fully in the intake interview and screening process for the residential school. While the CSE must consider the concerns of the parents in the placement process, the district must take responsibility to secure an appropriate placement for the student in the least restrictive environment even in the instance where a parent does not fully engage with the referral and placement process (*id.* at p. 6).

In a question and answer attachment to the guidance, in response to the query of what recourse a district has if a parent impedes the district in its effort to secure an approved residential school, the guidance directs:

In the unusual circumstance that a parent is impeding the referral process of a student to an approved private school program, the district should meet with the parent to discuss his/her concerns and explain why the district is seeking a less restrictive placement for the student. Ultimately, the district must take affirmative actions to make arrangements for the student to complete the process. If an in-State program accepts the student, the CSE must consider the concerns of the parent in making the placement recommendation. (*id.* at Attachment 1, p. 2).

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<sup>14</sup> The guidance document takes the form of a "Special Education Field Advisory" issued by the Office of Special Education, and is updated annually; the citation provided is to the version of the guidance in effect at the time of the March 2014 CSE meeting.

Prior to the March 2014 CSE meeting, the parent researched CALO as a possible placement for the student, visited the CALO campus, submitted an application for the student's attendance, and learned that the student had been accepted to CALO (Tr. pp. 1389, 1393-95, 1470-72; see Dist. Ex. 33). The hearing record demonstrates that the CSE informed the parent of the approved residential school application and screening procedures at the March 2014 CSE meeting (Tr. pp. 299, 813-14, 1393-94, 1463). As noted above, the parent did not consent to the CSE sending application packets to the approved residential schools identified and discussed during the meeting as potential placements for the student; however, the district nonetheless began the application process in an attempt to fulfill its obligation to provide the student with "an appropriate educational placement" (Tr. pp. 816-17 Dist. Exs. 34 at p. 2; 35).

After the March 2014 CSE meeting, two approved residential schools contacted the parent and the district, expressing an interest in conducting interviews with the student and scheduling visits in order to determine if the programs could meet the student's needs (see Dist. Exs. 38; 40; 41). According to the parent, she "vetted" both of the schools and determined for herself that neither of the schools could offer an appropriate program to the student (Tr. pp. 1384-86, 1388-89; Dist. Ex. 60 at p. 2; Parent Ex. AAA at p. 1; see Tr. p. 444). However, the parent did not make the student available for screening interviews or visit either of the schools (Tr. pp., 1464, 1474; see Tr. pp. 561, 832; Dist. Ex. 60 at p. 2).

According to meeting minutes of the April 2014 meeting recorded on the June 2014 draft IEP, at the April CSE meeting the CSE discussed the status of the application process and the parent stated that she was concerned that the screening process would further traumatize the student because he was settling in at CALO at that time (Dist. Ex. 60 at p. 2; see Tr. pp. 438-39; 1466). The parent and the CSE discussed the possibility of conducting the intake screening via videoconference or by telephone; as was the option of the parent visiting the approved residential schools without the student (see Tr. pp. 312-13, 439-40, 1461-62). However, the parent ultimately declined to permit the student to undergo any screening interviews (Tr. pp. 446, 1466). This impasse was never resolved.

Following the April 2014 CSE meeting, both of the approved residential schools that were interested in screening the student agreed to conduct intake interviews by videoconference (Tr. pp. 444, 560-61). Additionally, a third approved residential school contacted the parent and the district and offered to conduct an "on- or off-campus or televideo conference interview so that we can further determine appropriateness for acceptance and admission" (Dist. Ex. 53 at p.1).

At the June 2014 CSE meeting the CSE engaged in a discussion of the student's program at CALO and reviewed the status of the application process at the approved residential schools (Dist. Ex. 60 at p. 2). The comments section of the IEP indicates that the first two approved residential schools that were interested in screening the student had "rejected the student due to non-participation of the screening process" (Dist. Ex. 60 at p. 2). The third approved residential school interested in screening the student was discussed and, according to the meeting minutes, the CSE determined that the program "is appropriate for the student at this time," but the parent disagreed with the committee's recommendation (id.). The parent testified that she "vetted" the third approved residential school interested in screening the student and determined that it was

inappropriate for the student because it "was a generalist program that did not meet any of the requirements" recommended by the combined assessment report privately obtained by the parent (Tr. pp. 1387-88). The parent confirmed that she did not allow the student to be screened by any in-State approved residential schools (Tr. p. 1464).

In testimony the parent asserted that if, during her vetting of the approved residential schools, she had found a program that addressed some of the recommendations in the combined assessment report she would have "immediately visited the program" (Tr. p. 1485). However, according to the CSE chairperson, the third approved residential school interested in screening the student "mirrored what CALO had," including group counseling, family visits, family counseling, adventure therapy, and canine therapy and had treated students similar to the student (Tr. pp. 320-22; compare Parent Ex. H at pp. 26-27, with Dist. Ex. 53). Nonetheless, the parent never visited any approved schools, and concluded "[a]t some point" that none of the approved schools was appropriate to meet the student's needs (Tr. p. 1474).

With respect to the parent's contention that her refusal to allow the student to be screened at an approved residential school was justified based on the advice of the student's therapist at CALO, several facts in the hearing record contradict the parent's position. There is no indication in the hearing record that the parent shared this concern with exposing the student to the screening process with the March 2014 CSE, at the time she declined to provide consent to have application packets sent to the approved residential schools (Dist. Ex. 34 at p. 2). Following the March CSE meeting, the parent petitioned Family Court to allow the student to leave Montfort and the student entered CALO on April 1, 2014 (Tr. pp. 1397-99, 1457-59; 59 at p. 1; see Dist. Ex. 22 at p. 26; Parent Ex. D at p. 1). A detailed letter from the student's therapist dated April 22, 2014, discussing CALO's program and the student's placement there made no mention any concerns with exposing the student to intake screening at other programs (see Dist. Ex. 49 at pp. 1-3). The need for intake screening interviews and the parent's expressions of concern with exposing the student to the application process first appears in the hearing record in relation to the April 2014 CSE meeting (Dist. Ex. 60 at p. 2; see Tr. pp. 438-40, 1400-01).<sup>15</sup> After the April CSE meeting, the parent contacted the student's therapist to relay her concerns regarding the CSE's attempts to have the student "screened and interviewed" and to solicit the therapist's opinion (Tr. pp. 1408-09). At the parent's request, the therapist composed a letter stating that any "conversation or implication" that the student may have to be moved to another program would "significantly impede his treatment, ha[d] a high probability of re-traumatizing him and could have dire consequences" (Dist. Ex. 59; see Tr. pp. 1408-09). The parent testified during the impartial hearing that the reason she did not cooperate with the intake screenings at the approved residential schools was because "they were inappropriate placements" (Tr. pp. 1488-89).

On July 21, 2014 the district's Director of PPS wrote the parent, stating that "[t]he most significant reason the CSE could not finalize a recommendation for [the student] was your refusal to permit any screening by the residential placements that requested one" and that the

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<sup>15</sup> The parent indicated that at the time the district sought her consent to send application packets to approved residential schools, her "concern was for an interview"; however, she did not specify whether she shared this concern with the district (Tr. pp. 1393-94).

student was not accepted by the approved residential schools in question because, "in each case, the placements indicated that they would not accept [the student] in the absence of a screening" (Dist. Ex 64; see Dist. Exs. 54; 60 at p. 2).

In light of the above, the parent's lack of cooperation with the CSE process unreasonably interfered with the district's attempt to develop a program that could offer the student a FAPE, and equitable considerations do not support her request for reimbursement.<sup>16</sup>

## 2. Notice of Unilateral Placement

With regard to notice, the IDEA allows that reimbursement may be reduced or denied if parents do not provide notice 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]). 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 (Frank G., 459 F.3d at 376, citing Voluntown, 226 F.3d at 68).

The parent asserts that the IHO erred in finding that she did not provide the district with the required notice of her intent to unilaterally place the student at district expense (see IHO Decision at p. 37). The parent provided written notice to the district on April 4, 2014, after the March 2014 CSE meeting and after the student was placed at CALO (Parent Ex. Y). However, the parent correctly asserts that notice of unilateral placement may be provided at the most recent CSE meeting prior to removing the student from public school, and the hearing record reflects that the parent discussed her preference for CALO during the March 2014 CSE meeting, including requesting that the district consider placing the student there, as well as her disagreement with the approved residential schools contemplated by the district (Tr. pp. 1393-97, 1458; Dist. Ex. 34 at p. 2). However, it is not clear that the parent informed the district of her intent to enroll the student in CALO at public expense at the March 2014 CSE meeting. For example, the parent testified that she believed that she shared that she had "started to research CALO" at the meeting (Tr. p. 1393; see Tr. p. 1458). The parent could not recall whether her attorney informed the March 2014 CSE of the parent's intent to have Family Court release the student from Montfort so the student could attend CALO or if the court date had been scheduled as of the time of the CSE meeting (Tr. pp. 1441-42, 1457-58). The parent also testified that she had not made the "final decision" to send the student to CALO at the time of the March 2014 CSE meeting (Tr. p. 1457-59), thus making it fairly unlikely that she or her attorney notified the district during the meeting of her intent to seek reimbursement from the district for the student's program at CALO. In light of the above, the IHO's determination that the parent failed to

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<sup>16</sup> With regard to the parent's assertion that the district's failure to conduct an expedited evaluation of the student weighs equitably against the district, at the time the district reasonably believed that the student would remain at Montfort until June 2014 and, as discussed below, the parent did not inform the district of her intent to remove the student from Montfort and place him at CALO until after his removal from the district (see Tr. pp. 394-95, 1374-75, 1397-99). Thus while the regulatory violation was noted above, the evidence does not reveal how the violation factors heavily in equitable considerations.

provide the district with adequate notice of her intent to unilaterally place the student at CALO at district expense is supported by the hearing record.<sup>17</sup>

## **VII. Conclusion**

In summary, a review of the hearing record supports the IHO's determinations that although CALO was an appropriate unilateral placement for the student, equitable considerations preclude an award of tuition reimbursement. I have considered the parties' remaining contentions and find them to be without merit or unnecessary to address in light of the determinations made herein.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 29, 2015**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>17</sup> However, the PPS director testified that the parent informed her in January 2014 of her desire to place the student at CALO and have the district fund the placement (Tr. pp. 804-06).