



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-037

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Educational Advocacy Services, attorneys for respondents, Jennifer A. Tazzi, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it offered an appropriate educational program to respondents' (the parents') son, but ordered the district to continue to fund the student's private placement at the Sinai School (Sinai) through the conclusion of the 2010-11 school year under pendency. The parents cross-appeal from the impartial hearing officer's determination which found that the district's educational program was appropriate and denied their request for payment of their son's tuition costs at Sinai for the 2010-11 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student attended Sinai, which is a special education high school located within a mainstream high school (Tr. pp. 55-56; Parent Ex. B at pp. 1, 5).¹ The student also received speech-language therapy and occupational therapy (OT) as a part of his program at Sinai (Tr. p. 79). Sinai is a private out-of-State school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1 [d], 200.7).

¹ The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

The student demonstrates difficulties with reading, math, writing, cognition, gross motor and fine motor skills, as well as with receptive, expressive, and pragmatic language (Tr. p. 81; Dist. Ex. 1 at p. 3; Parent Exs. H at pp. 1-2; J at pp. 1-3). The student has received a diagnosis of cerebral palsy (Tr. pp. 80-81; Dist. Ex. 1 at p. 5). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

Background

The hearing record is sparse regarding the student's educational history. The student has been eligible to receive special education programs and services since at least 2006 when he was an elementary school student (Tr. p. 96). The student attended Sinai since the 2008-09 school year (Tr. p. 87; Tr. pp. 4-6, 55-56, 97; Parent Ex. B).

The student's speech-language pathologist at Sinai prepared a progress report dated April 13, 2010 (Parent Ex. H). The progress report provided information regarding the student's services, functioning, and progress, and also set forth annual goals and short-term objectives for the student (*id.*). At the time of the report, the student was receiving three sessions per week of group speech-language therapy to address pragmatic language and one session per week of individual speech-language therapy (*id.* at p. 1).

The speech-language pathologist reported that the student demonstrated significant deficits in expressive and receptive language (Parent Ex. H at p. 1). She also reported that the student's language and vocabulary delays negatively affected his conversations with peers (*id.*). The student's speech-language pathologist further reported that the student's pragmatic language including conversational skills, self-advocacy, and problem-solving "remain[ed] an area of great challenge" (*id.*). The speech-language pathologist noted that the student lacked self-advocacy skills in that he would typically remain quiet rather than alert staff to his concerns (*id.*).

According to the speech-language progress report, the student's annual goal related to expressive and pragmatic language and addressed such skills as problem solving, asking for clarification, self-advocating, following directions, and conversational skills (Parent Ex. H at p. 1). With respect to the student's progress, the speech-language pathologist indicated that the student followed his schedule and demonstrated an increased awareness of his surroundings (*id.*). Related to problem solving strategies, the student had learned to identify a problem, determine the severity of the problem, and offer a solution to the problem (*id.* at p. 2). She reported that the student was encouraged to "stretch his logical reasoning" and offer more than one solution to a given problem (*id.*). She indicated that this was difficult for the student at times, but that he was capable of producing desired information when prompted (*id.*). The speech-language therapist advised that the student continued to benefit from speech-language services to improve his pragmatic language skills, with particular emphasis on self-advocacy, independent problem solving, and overall expressive language skills (*id.*). The speech-language pathologist also reported that the collaborative language model implemented for the student at Sinai reinforced his speech-language skills throughout the curriculum (*id.*). She advised that within the collaborative language model "[s]trategies for improving problem solving, following increasingly complex directions, sequencing, and applying conversational skills [were] being utilized daily both in and out of the classroom" (*id.*).

The speech-language pathologist indicated that the student's teacher required him to repeat an entire thought or sentence rather than speaking telegraphically and that over time, the technique had been modified to reduce teacher prompting (Parent Ex. H at p. 1). She also noted that the student advocated more effectively after being provided with strategies that targeted self-advocacy skills (*id.* at p. 2). The student's future speech-language therapy sessions were to address pragmatic language skills including initiating conversations, independently solving problems, and organizing expressive language (*id.*). The speech-language therapist recommended that the student receive three sessions per week of group speech-language therapy (*id.*). She also recommended the use of a collaborative language approach with the student (*id.*).

The Committee on Special Education (CSE) convened on April 26, 2010 for the student's annual review and to develop his individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 1). The April 2010 CSE participants included a district special education teacher, who also acted as the district representative; the student's mother; a district school psychologist; an additional parent member; a district social worker; an administrator at Sinai (the director) who participated telephonically; and an advocate for the parent (*id.* at p. 2).²

The April 2010 CSE determined that the student was eligible for special education services as a student with multiple disabilities (Dist. Ex. 1 at p. 1). The resultant April 2010 IEP described the student's present levels of academic performance and learning characteristics, his social/emotional performance, and his health and physical development including information relating to the student's diagnosis of cerebral palsy, as well as his academic needs, speech-language needs, fine motor and gross motor skills and abilities, self-advocacy, language processing, balance and equilibrium, visual-perceptual and visual-motor skills, and activities of daily living (*id.* at pp. 3-5B). Among other things, the April 2010 IEP indicated that the student exhibited severe delays in receptive and expressive language, that he continued to struggle with the retrieval of language, that he had processing difficulties, that his language and vocabulary deficits significantly affected his ability to meaningfully communicate; and that his academic performance in reading, writing, and math was significantly delayed (*id.* at p. 3). The April 2010 IEP contained 14 annual goals and 28 short-term objectives in the areas of reading, math, writing, fine motor skills, gross motor skills, visual-motor skills, visual-perceptual abilities, graphomotor skills, receptive language, and expressive language (*id.* at pp. 6-11). The April 2010 IEP reflected that the student would not participate in State and local assessments due to cognitive and functional delays, and would instead be assessed by "[t]eacher made materials, portfolio assessment and classroom observations" (*id.* at p. 16). The April 2010 IEP also included a transition plan that contained information relating to long-term adult outcomes with respect to community integration, postsecondary placement, independent living, and employment (*id.* at pp. 17-18).

The April 2010 CSE recommended that the student be placed in a 12:1+1 special class in a specialized school (Dist. Ex. 1 at p. 1). The CSE also recommended that the student receive related services of three 30-minute sessions per week of speech-language therapy in a group of three, two 60-minute sessions per week of individual OT, and two 45-minute sessions per week of individual physical therapy (PT) (*id.* at p. 16). According to the April 2010 IEP, the CSE considered the student's placement in a special class in a community school, but rejected such a placement because it was considered insufficient to address the student's academic and cognitive

² I note that the resultant April 2010 IEP states that the representative from Sinai was a classroom teacher (*see* Dist. Ex. 1 at p. 2; *see also* Tr. pp. 33, 36, 47, 55).

needs at that time (*id.* at p. 15). The April 2010 CSE also recommended a 12-month school year for the student, including a special class in a specialized school and related services (*id.* at p. 1). With respect to this recommendation, the April 2010 CSE recommended that the student attend a specific camp program during July and August 2010 (*id.*). The IEP reflected a projected initiation date of July 2010 (*id.* at p. 2).

Based on the student's physical needs, the April 2010 IEP also recommended adapted physical education in a 12:1+1 setting, "[p]rogram [a]ccessibility," and special education transportation (Dist. Ex. 1 at pp. 1, 5A). The April 2010 IEP reflected that it was sent to the parents on April 26, 2010 (*id.* at p. 2).

In a notice to the parents dated April 27, 2010, the district summarized the recommendations made by the April 2010 CSE (Parent Ex. D at p. 1). The notice stated that the CSE believed that it may be in the best interest of the student to defer the placement recommended in the April 2010 IEP until July 2010 so that a new program could begin at the start of a new school year (*id.*). The notice advised the parents that they would receive a final notice of recommendation on or before June 15, 2010 (*id.*).³ On April 29, 2010, the parents consented to deferring the student's placement recommendation until July 2010 (*id.* at p. 2).

In a June 7, 2010 Sinai academic progress report, the student's teachers provided information regarding his functioning and progress in the areas of language arts, math, and writing (Parent Ex. J). With regard to reading, the student's language arts teacher indicated, among other things, that the student was able to identify main characters and answer factual questions after reading passages from a chapter book on his reading level (*id.* at p. 1). The progress report further reflected that toward the end of the year, the student began to read short stories to strengthen reading comprehension skills (*id.*). The student also retained the factual information contained in the story, but struggled to produce the language needed to answer questions in class (*id.*). The progress report further advised that the student demonstrated significant difficulty with reading comprehension (*id.*). Therefore, the language arts teacher provided 2:1 instruction and implemented a modified curriculum in reading comprehension activities (*id.*). The teacher stated that the student demonstrated strong decoding skills but exhibited difficulty distinguishing between similar vowel sounds (*id.*). The progress report stated that the student solved everyday problems when provided with additional time (*id.*). According to the student's language arts teacher, the student was extremely motivated, always prepared for class, and eager to complete his work (*id.*). In addition, the teacher indicated that the student was more comfortable during the 2009-10 school year regarding peer interactions and following his schedule (*id.*).

The student's math teacher stated in the progress report that, among other things, the student maintained his attention during class and persevered regarding class work (Parent Ex. J at p. 2). She wrote that the student retained his skills over time and integrated previously learned material with new skills (*id.*). The student also completed assignments with ease and consistency once he clearly understood the directions (*id.*). According to the math teacher, the student demonstrated a relatively strong background in basic math facts (*id.*). The student's math teacher indicated that he "consistently" counted money including bills and coins up to ten dollars (*id.*). The math teacher also stated that the student demonstrated great progress, including being prepared for class with his binder and completing his homework (*id.*). She wrote that the student continued to learn to

³ The April 27, 2010 notice erroneously stated a date of June 15, "2009" (*see* Parent Ex. D at p. 1).

problem solve and to ask for clarification during class (id.). The math teacher noted that she provided the student encouragement to pace himself during assignments to allow him ample time to process information (id.).

The student's writing teacher indicated in the progress report that the student was a "concrete learner" who benefited from structure and predictability (Parent Ex. J at p. 3). According to the writing teacher, the student was able to identify multiple details related to the main idea when provided with sufficient processing time (id.). The writing teacher indicated that the student was familiar with the structure of a basic sequential paragraph and that the student wrote supporting details of a paragraph with support (id.). The progress report further indicated that the student omitted the connecting words in his writing; however, he was learning to include the necessary words when the teacher provided further explanation (id.). According to the writing teacher, the student appeared more confident during the 2009-10 school year (id.). The writing teacher further reported that the student often developed "leisure plan[s]" to implement during class breaks (id.). In addition, the student was quicker to identify his problems and advocate for assistance (id.). The progress report noted that he followed his schedule independently and was generally prepared and on time for class (id.). The writing teacher indicated that the student had "made great strides" in the writing class (id.).

In a notice to the parents dated June 8, 2010, the district summarized its recommendations made in the April 2010 IEP and assigned the student to a particular specialized school (Dist. Ex. 2 at p. 2).

The student's mother visited the assigned school in June 2010 (Tr. p. 81). By facsimile transmission on June 16, 2010, the parents returned the district's June 8, 2010 notice with a handwritten statement that the student's mother had visited the assigned school and did not find the school to be appropriate for the student (Parent Ex. E at p. 2). The student's mother further stated that the class the student would be placed in had children three years younger than the student and that the student needed "a lot more redirection than would be available" in a 12:1+1 class (id.). The student's mother wrote that "for these reasons and others," the student would be enrolled in Sinai and an impartial hearing would be requested for the 2010-11 school year (id.).

By letter dated July 26, 2010, the parents' advocate wrote to the district (Parent Ex. F at p. 1). Referencing the statement sent by facsimile transmission to the district on June 16, 2010, the advocate advised the district that the parents had rejected the recommended placement and did so "because it was not appropriate" (id.). The letter stated that the parents were requesting another placement for the student because they were "interested in a [p]ublic school if it is an appropriate placement," and that they were making such a request before the student's mother registered her son in the Sinai program (id.).

The parents executed a tuition contract with Sinai on August 20, 2010 (Parent Ex. L). The parents paid a non-refundable registration fee to the school on August 25, 2010 and began making payments to the school on August 30, 2010 (Parent Ex. M; see Parent Ex. L).

Due Process Complaint Notice

By due process complaint notice dated September 3, 2010, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) "on procedural as well as substantive grounds," and that the district also "failed to draft an IEP and recommend a

placement that [was] reasonably calculated to confer educational benefit[s]" on the student for the 2010-11 school year (Parent Ex. A at p. 1). Among other things, the due process complaint notice asserted that the parents would "question" the composition of the April 2010 CSE because "some of the professionals who had previously worked with [the student] were absent" from the CSE and "there was no effort to contact those professionals during the meeting" (*id.* at p. 2). The due process complaint notice further stated that the parents would "question" the accuracy of the present levels of performance on the April 2010 IEP as they related to the student's reading composition; the appropriateness of certain annual goals on the April 2010 IEP and/or the lack of discussion at the April 2010 CSE meeting relative to certain annual goals and the student's lack of progress; the appropriateness of the recommended 12:1+1 placement and that the April 2010 CSE did not consider concerns expressed at the CSE meeting regarding such a large program; that the April 2010 CSE considered only one other program; and that the district did not recommend a placement for the student that provided him with a reasonable opportunity to progress academically, socially, and emotionally (*id.* at pp. 2-3). With respect to the assigned class, the parents asserted that the class was inappropriate because the students in the class were three years younger than the student in this case and because it was too large, thus it would not provide the student with the individualized attention he required (*id.* at p. 3).

Regarding pendency, the parents requested that the impartial hearing officer order that a previously unappealed impartial hearing officer decision constitute the student's pendency placement (Parent Ex. A at pp. 3-4). As a proposed resolution, the parents sought direct payment "and/or" tuition reimbursement from the district with respect to the student's attendance at Sinai for the 2010-11 school year; that the district provide the student with the related services recommended on his "last agreed upon IEP;" and that the district provide school bus transportation to and from Sinai (*id.* at p. 3).

Impartial Hearing Officer Decision

The impartial hearing began on February 28, 2011, and concluded on March 1, 2011, after two days of proceedings (Tr. pp. 1-102). In a decision dated March 15, 2011, the impartial hearing officer found that the district's program was appropriate and reasonably calculated to provide educational benefits to the student for the 2010-11 school year (IHO Decision at pp. 3, 4, 5).⁴ With respect to the student's opportunity to be exposed to nondisabled peers, the impartial hearing officer concluded that, notwithstanding that the assigned school was "a self-contained special education school," the district's witness testified that the student "would be participating in a work

⁴ I note that the parties and the impartial hearing officer used the words "program" and "placement" interchangeably when referring to the setting recommendations in the IEP and the particular school site to which the student was later assigned. The Second Circuit has established that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortar' of the specific school" (*T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419-20, *cert. denied*, 130 S. Ct. 3277 [2010]; see *K.L.A. v. Windham Southeast Supervisory Union*, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ.*, 629 F.2d 751, 756 [2d Cir. 1980]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (*T.Y.*, 584 F.3d at 419-20). To avoid confusion in this decision, I have referred to the setting on the continuum identified in the IEP as the student's "placement."

setting outside the school" for at least the same amount of time provided by Sinai's "Lunch Buddy" program (*id.* at p. 4).

The impartial hearing officer further stated that while he did not need to reach the issue of the appropriateness of Sinai, the parents "would easily" have showed that Sinai was appropriate (IHO Decision at p. 4). The impartial hearing officer noted that Sinai had previously been deemed to be appropriate by a prior impartial hearing officer, that the hearing record did not suggest that this had changed, and that the district acknowledged that it had relied on Sinai's "representations and assessment about the progress made in the private school" (*id.*).

Further, the impartial hearing officer found that Sinai was the student's pendency placement and concluded that it was "too late in the school year" to afford "a reasonable opportunity for transition" from Sinai to an entirely new setting (IHO Decision at p. 4). Therefore, the impartial hearing officer ordered that the student continue at Sinai at the district's expense until the completion of the 2010-11 school year on June 30 (*id.*). The impartial hearing officer also stated that he made this determination in part because the district "was not able to clarify what classes the [student] would have been programmed into if he were to attend" the assigned school during the 2010-11 school year (*id.*). The impartial hearing officer further ordered "as a matter of the equities," that his finding and order not be implemented until the start of the 2011-12 school year (*id.* at pp. 4, 5).

Appeal for State-Level Review

The district appeals, requesting an order annulling those parts of the impartial hearing officer's decision that found that the district was to continue to fund the student's placement at Sinai. Specifically, the district asserts that the impartial hearing officer erred by determining that the district offered the student an appropriate program and nevertheless ordered that the student remain at Sinai at the district's expense until the completion of the 2010-11 school year. The district contends that the impartial hearing officer erred in directing that his decision not be implemented until the start of the 2011-12 school year. The district further asserts that the impartial hearing officer erred in concluding that Sinai was appropriate based on a previous impartial hearing officer's decision regarding a different school year. The district contends that Sinai was not appropriate because it was a ten-month program and the student needed a 12-month program. The district also alleges that the impartial hearing officer did not ensure that the impartial hearing progressed in an expeditious manner, improperly held his order in abeyance until the beginning of the 2011-12 school year, and misapplied the law with respect to the parents' burden relative to the appropriateness of Sinai.

The district further requests that any tuition award be reduced by 12 percent, asserting that the parents are not legally entitled to receive tuition reimbursement for time spent devoted to religious instruction and that 12 percent of the student's school week at Sinai is devoted to such instruction.

The parents submitted an answer and cross-appeal. In its answer, the parents contend that the impartial hearing officer determined an appropriate equitable remedy and that the district's objection to the exercise of that equitable authority has been rendered moot because the district is now obligated to pay the student's tuition through the end of the 2010-11 school year as a matter of pendency. With respect to the placement of the student at Sinai, the parents assert that the impartial hearing officer correctly held and the parents met their burden to show that their

unilateral placement was appropriate. Specifically, they assert that the hearing record does not show that the student experienced substantial regression after his parents decided not to enroll him in a 12-month program and further, that the student did not require a 12-month program to maintain his academic skills. With respect to the district's allegations that the impartial hearing officer engaged in misconduct and/or incompetence, the parents deny the district's allegations in relevant part, and further assert that the district waived its objection to the requests for an adjournment of the impartial hearing dates. The parents agree with the district that a tuition award should be reduced by 12 percent to take into account time spent in religious instruction at Sinai.

The parents cross-appeal the impartial hearing officer's finding that the district's proposed program at the assigned school was appropriate and reasonably calculated to provide educational benefits to the student. In particular, the parents contend that the impartial hearing officer did not analyze the appropriateness of the annual goals developed as a part of the April 2010 IEP and that none of the student's annual academic goals included short-term objectives. The parents further contend that the recommended 12:1+1 placement at the assigned school was not appropriate for the student; that the impartial hearing officer erred in finding that the recommended placement was the least restrictive environment (LRE) for the student; and that the district did not meet its burden to show that the student would have been suitably grouped for instructional purposes with students of similar needs. As a remedy, the parents request that the impartial hearing officer's decision be reversed to the extent that it found the April 2010 IEP and assigned school were appropriate for the student. The parents further request that the district's petition be dismissed in its entirety and that the district be ordered to reimburse the parents for tuition at Sinai for the 2010-11 school year.

The district answered the parents' cross-appeal, asserting that it offered the student a FAPE. Further, the district denies the parents' allegations in relevant part, except admits that the impartial hearing officer did not make specific findings with respect to the annual goals and short-term objectives developed as a part of the April 2010 IEP. Among other things, the district asserts that its objection to the impartial hearing officer's order that the district fund the student's program at Sinai until the end of the 2010-11 school year, and that his finding that the district had offered the student an appropriate program and the effect of that finding on the student's pendency placement not be implemented until the start of the 2011-12 school year, has not been rendered moot.

Applicable Standards

Two purposes of the Individuals with Disabilities Education Act (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 v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors

render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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, 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 C.F.R. § 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Annual Goals

I will first turn to parents' cross-appeal and their argument that the impartial hearing officer did not analyze their claims that the annual goals in the April 2010 IEP were inappropriate and that none of the student's academic annual goals included short-term objectives. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]).

The hearing record reflects that the student's annual goals targeted the student's areas of identified need reflected in the April 2010 IEP in reading, writing, math, communication, language processing, visual-motor, visual-perceptual, and fine and gross motor skills. On appeal, the parents do not challenge the appropriateness of the student's present levels of performance as reflected on the April 2010 IEP and, as discussed below, the hearing record reflects that the annual goals contained in the IEP are reflective of those present levels.

With respect to the student's reading, writing, and math needs, based on information provided by the student's speech-language therapist and reflected in the April 2010 IEP, the student continued to make "slow progress in reading comprehension and written expression" (Tr. p. 40; Dist. Ex. 1 at p. 3). Further, according to the April 2010 IEP, the Sinai representative who attended the April 2010 CSE meeting reported that the student was making "slow but steady progress," and provided information that the student's overall instructional grade level in reading/writing and in math was 3.2 (Tr. pp. 40-41, 43-44, 45-47; Dist. Ex. 1 at p. 3). In light of this information, I find that the April 2010 CSE's recommendations that by the end of the 2010-11 school year, the student demonstrate particular third grade level reading skills and particular fourth grade level math skills were consistent with the student's needs and abilities (Dist. Ex. 1 at pp. 3, 6; see 8 NYCRR 200.4[d][2][iii][a]). Further, with respect to the student's fine and gross motor needs, the district's April 2010 IEP included annual goals as well as some short-term objectives that targeted the

student's graphomotor skills, visual-perceptual abilities, visual-motor skills, walking skills, balance, stair walking, and running (Dist. Ex. 1 at pp. 5A, 5B, 6, 9-12). These annual goals and short-term objectives related to the student's fine motor and gross motor skills and were aligned with the student's needs as described in the April 2010 IEP's present levels of physical development (id.).

Moreover, the parents assert on appeal that none of the student's academic annual goals in the April 2010 IEP contain short-term objectives. The student's annual academic goals are measurable and, as discussed above, are consistent with the student's needs and abilities. Additionally, the April 2010 IEP reflects that the student's annual goals relating to his needs in adapted physical education, speech-language, graphomotor skills, visual perceptual/visual motor skills, fine motor skills, and gross motor skills do include short-term objectives (Dist. Ex. 1 at pp. 6, 8, 9, 10, 11). However, the remaining annual goals on the April 2010 IEP do not contain short-term objectives (Dist. Ex. 1 at pp. 6, 7, 12, 13). I remind the district that for students who participate in State alternate assessment, the IEP "shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]). In this case, the hearing record supports a finding that the district offered the student a FAPE, notwithstanding that some of the IEP annual goals did not contain short-term objectives (Application of a Student with a Disability, Appeal No. 09-016). Overall, the annual goals – read together with the short-term objectives accompanying a portion of the goals – were not so vague or immeasurable as to deprive the student of the opportunity to receive educational benefits.

Recommended Placement

I next consider the parents' contention that the district did not establish that the 12:1+1 recommended placement was appropriate for the student because a class of that size was too large to address the student's needs. For the reasons set forth below, I agree with the impartial hearing officer that the 12:1+1 program recommended by the April 2010 CSE was appropriate.

As indicated above, the student demonstrates difficulties with reading, math, writing, cognition, gross motor and fine motor skills, as well as with receptive, expressive, and pragmatic language (Dist. Ex. 1 at p. 3; Parent Exs. H at pp. 1-2; J at pp. 1-3). The student has also received a diagnosis of cerebral palsy (Tr. pp. 80-81; Dist. Ex. 1 at p. 5).

The district's school psychologist testified that the April 2010 CSE recommended a "small class" because the student needed assistance within a classroom setting (Tr. p. 42). As discussed above, the April 2010 IEP reported a diagnosis of cerebral palsy and resulting delays in cognition, academic performance, fine motor and gross motor skills and abilities, balance and equilibrium, visual-perceptual and visual-motor skills, and activities of daily living (Dist. Ex. 1 at pp. 3-5B; see Tr. pp. 49-50). The April 2010 IEP also reported that the student's present levels of academic and functional performance with respect to his overall reading/writing, and math skills were at the 3.2 grade level (Dist. Ex. 1 at p. 3).⁵ Further, the April 2010 IEP reported that the student presented with severe delays in receptive and expressive language (id.). Additionally, the April 2010 IEP

⁵ The composite score on the IEP referred to the student's abilities in the areas of reading comprehension, decoding, and writing (Tr. pp. 43-44, 45-47; see Dist. Ex. 1 at p. 3).

reflected that the student was making "slow but steady" progress in school, and "slow progress" in reading comprehension and written expression (*id.*). The April 2010 IEP also reported that the student exhibited difficulty with language processing and retrieval, and that the student had a difficulty with self-advocacy (*id.*). With respect to the student's present levels of social/emotional performance, the April 2010 IEP reported that his language and vocabulary deficits negatively affected his ability to have "meaningful conversations" (*id.* at p. 4). Further, the April 2010 IEP advised that the student's needs precluded his participation in a general education environment and recommended a special education class in a specialized school (*id.* at p. 14).

In light of the student's cognitive, academic, and speech-language needs set forth in the April 2010 IEP, I find that the April 2010 CSE's recommended 12:1+1 special class program was an appropriate educational setting for the student. I also note that the April 2010 IEP identified a number of academic and social/emotional management needs; in particular, preferential seating, shortened assignments, remedial/tutorial instruction, highlighting/underlining important information, providing the student with concrete examples for abstract material, books on tape, providing extended time for classroom assignments when necessary, and providing the student with positive reinforcement (Dist. Ex. 1 at p. 3). These program modifications and accommodations would have facilitated the student's learning in the recommended 12:1+1 placement. I also note that the April 2010 CSE recommended that the student be provided with related services of OT and PT, which would have addressed the student's health and physical development needs as reflected on the IEP (Tr. pp. 33-34, 42, 43, 49-50; Dist. Ex. 1 at pp. 5A-5B, 9-12, 16). The April 2010 CSE also recommended that the student receive three 30-minute sessions of group speech-language therapy, which would have addressed the student's delays in language processing and communication skills (Tr. p. 33; Dist. Ex. 1 at pp. 3, 16). The hearing record does not support the parents' contention that a 12:1+1 class would not have met the student's needs.

Least Restrictive Environment

I will now consider the parents' contention that the impartial hearing officer erred in finding that a 12:1+1 special class in a specialized school was the LRE for the student. The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][1], [2], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], [ii], 300.116[a][2], 300.117; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as

possible to the student's home" (8 NYCRR 200.1[cc]; see 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116).

Moreover, "[i]n providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in [34 C.F.R.] § 300.107, each public agency must ensure that each [student] with a disability participates with nondisabled [students] in the extracurricular services and activities to the maximum extent appropriate to the needs of that [student]" and "[t]he public agency must ensure that each [student] with a disability has the supplementary aids and services determined by the [student's] IEP Team to be appropriate and necessary for the [student] to participate in nonacademic settings" (34 C.F.R. § 300.117). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

To apply the principles described above, the Second Circuit has adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). In Newington, the Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).⁶

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in

⁶ The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

As indicated above, the April 2010 CSE recommended that the student be placed in a specialized school, which does not include any general education classes located in the school building or provide its students with regular interaction with their mainstream peers during the school day (Tr. pp. 23-24; see Dist. Ex. 1 at pp. 1, 14). In determining that the recommended placement was the LRE, the impartial hearing officer relied solely upon testimony at the impartial hearing that the student would have had opportunities to interact with nondisabled peers by participating in a work setting outside of the school (IHO Decision at p. 4).

Upon a careful review of the hearing record, I find that the April 2010 CSE's recommended placement was not the LRE for the student (see 20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][1], [2]; 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]). With respect to the first prong of the Second Circuit's test in Newington, whether education in the general classroom with the use of supplemental aids and services can be achieved satisfactory for a given student, I note that the parents did not assert in their due process complaint notice or at the impartial hearing that the student should be provided educational instruction in a general education classroom and in fact, testified that he needed to be in a "smaller class" than the recommended 12:1+1 classroom (see Tr. pp. 82, 88). The hearing record further reflects that the parents enrolled the student in a self-contained special education program, which did not provide for academic mainstreaming but was located within a mainstream school and provided the student with opportunities for interaction with nondisabled students (see Tr. pp. 55-57, 64-67, 70, 74-76, 82-83). Moreover, as explained above, because of the student's cognitive, academic, and speech-language needs, a special class placement was appropriate and was reasonably calculated to enable the student to receive meaningful educational benefits. Although the parents argue on appeal that the district failed to meet its burden with respect to the first prong of the Newington test, I note that this argument has been improperly raised for the first time on appeal and, more to the point, neither party argues in earnest that the student should have been placed in a general education setting instead of a special class setting. In view of the foregoing evidence, I find that the district's recommended placement satisfied the first prong of the Newington test.

With respect to the second prong of the Newington test, whether the district mainstreamed the student to the maximum extent appropriate, the hearing record does not reflect that the student could not benefit from mainstreaming opportunities; nor does the district assert such an argument. The district's school psychologist who was a member of the April 2010 CSE testified that she thought that, for "this" student, the recommended placement was the LRE (Tr. p. 35). However, the April 2010 IEP reflected that the student could participate in all appropriate school activities with nondisabled students (Dist. Ex. 1 at p. 16). Although the April 2010 IEP indicated that the student's language and vocabulary deficits negatively impact the student's ability to have meaningful conversations, it also sets forth that the student is "shy, yet charming;" that he "is eager to please all those around him;" that "[h]e relates well with his peers and teachers;" that he "has become a 'leader' for some newer students;" and that "[h]e is always willing to help anyone in need" (id. at p. 4). Further, with respect to the student's transition to adulthood, the long-term adult outcomes in the April 2010 IEP's transition plan included that he would "integrate into the community independently" and that he would also "live independently with minimum support" (id. at p. 18). The information set forth in the April 2010 IEP regarding the student's functioning

supports placing the student in a community school and weighs against minimizing his contact with nondisabled peers by placing him in a specialized school.

I also disagree with the impartial hearing officer's rejection of the parents' argument that the recommended placement failed to provide the student with access to nondisabled peers based upon witness testimony at the impartial hearing that the student would be participating in a work setting outside of the assigned school (IHO Decision at p. 4). Where, as here, the student did not attend the public school and was instead unilaterally placed at Sinai, the sufficiency of the district's recommended placement in this case is determined on the basis of the IEP itself and the parents were not required to try out the school district's proposed program (see Forest Grove, 129 S.Ct. at 2496; R.E. v. New York City Dep't of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at *9 [S.D.N.Y. Mar. 14, 2011] [noting that it was appropriate to consider testimony regarding the nature of a proposed educational placement set forth in the IEP and citing authorities that disapproved of reliance on additional evidence of programs or services that were not mentioned in the IEP]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *20 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).⁷ Moreover, even if the student had attended the district's proposed placement, the hearing record does not support the impartial hearing officer's conclusion that the student in this case would have been participating in the school's community work program. The district's witness testified that "some" of the classes in the assigned school would have had the opportunity to participate in the work program (Tr. p. 24). The hearing record also reflects that the district's witness testified that the school had "two classes" that had "inclusion" with another district high school (id.). However, this testimony regarding the mainstreaming opportunities the work program and the "inclusion" classes may have provided is insufficient to show that the student in this case would have been provided any mainstreaming opportunities.

After carefully reviewing the April 2010 IEP in its entirety and, in addition, the evidence described above, I find that the district failed to establish that the recommended placement of the student in a specialized school mainstreamed the student to the maximum extent appropriate and was therefore the LRE for the student (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][ii], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see also Newington, 546 F.3d at 120, 122; Oberti, 995 F.2d at 1218; Daniel R.R., 874 F.2d at 1050; J.G. v. Kiryas Joel Union Free Sch. Dist., 2011 WL 1346845, at *36-*37 [S.D.N.Y. Mar. 31, 2011]; Application of a Student with a Disability, Appeal No. 09-119).

Unilateral Placement

Having found that the district failed to offer the student a FAPE in the LRE, I now consider whether the parents have met their burden of proving the appropriateness of their unilateral

⁷ By the same token, although the parents have successfully challenged the adequacy of the IEP, they also challenged the district's implementation of the IEP by claiming the student would not have been suitably grouped with other students at the school assigned by the district; however, matters such as grouping are not required to be set forth on a student's IEP and challenges to the implementation of an IEP are speculative where, as here, the student did not actually attend the public school placement (see Application of the Bd. of Educ., Appeal No. 11-040; Application of the Bd. of Educ., Appeal No. 11-025; Application of the Bd. of Educ., Appeal No. 11-016.). In cases in which a student does not attend a the public school placement due to the parents' decision to unilaterally place the student in a private school, the district is not required to establish that it appropriately implemented the challenged IEP (see Application of the Bd. of Educ., Appeal No. 11-040).

placement of the student at Sinai for the 2010-11 school year (see Burlington, 471 U.S. at 369-70).⁸

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, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (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 at 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 C.F.R. § 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

⁸ I agree with the contention of the district on appeal that the impartial hearing officer erred in opining that the parents' placement of the student at Sinai was appropriate for the 2010-11 school year because a prior impartial hearing officer had determined that Sinai was appropriate during a prior school year and there was "nothing in the record to suggest that that had changed" (IHO Decision at p. 4). Each school year is to be analyzed separately when determining whether a FAPE was provided to the student (see 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; see eg., Application of the Bd. of Educ., Appeal No. 11-005).

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).

Based on a careful review of the hearing record and for the reasons set forth below, I find that the parents' unilateral placement of the student at Sinai for the 2010-11 school year was appropriate.

For the 2010-11 school year, the student is attending a Sinai high school program for students with developmental disabilities (Tr. pp. 55-56). The Sinai high school program is located within a mainstream high school (Tr. p. 55). The student's academic program is provided in self-contained special classes where the student receives instruction with other students with developmental disabilities (Tr. pp. 55-57). The director testified that the student participates in a "functional" academic program where he receives "some academic instruction," life skills instruction, and prevocational development/work study (Tr. p. 56; see Parent Ex. K). She further testified that the student's program, except for the vocational work study component, is provided within the mainstream high school building within which Sinai is located (Tr. pp. 55-57, 59-60). The hearing record also reflects that the student's program at Sinai includes speech-language therapy, OT, and "supplemental instruction" (Tr. pp. 63, 79; see Parent Ex. K). The director testified that Sinai staff develops "in-house IEPs" for its students that reflect their academic and life skills goals, as well as biyearly transition plans (Tr. pp. 73-74; see Parent Ex. I).⁹

The student's academic instruction at Sinai includes courses in math, reading, writing, and in listening comprehension (Parent Ex. K). The director testified that the Sinai staff developed a life skills program based on the student's needs in order to reinforce his skills and to build upon them within the context of the community and his need for meaningful activities (Tr. p. 57). For example, she testified that during the life skills program, the student learns skills in the areas of reading, writing and math related to money concepts and then integrates these skills within functional scenarios and settings to help him learn to generalize these skills to community settings (Tr. pp. 58-59). She further testified that the student's prevocational training includes two off-site work settings twice per week for about four hours (Tr. p. 59; see Parent Ex. K). With respect to

⁹ The hearing record includes an undated 2010-11 Sinai "IEP Form" (Parent Ex. I). In that form, the student's teachers in math and language arts describe the student's math and reading goals for the 2010-11 school year (id.). The student's math goals addressed skills in the areas of money concepts, calculation, rounding, problem-solving, and community awareness (id. at pp. 1-2). The student's reading goals addressed reading comprehension, vocabulary, compare/contrast concepts, and relating stories to life experiences (id. at p. 3).

this, the student has been assigned to an elementary school and a nonprofit business office where he has engaged in tasks including copying, filing, sorting, and labeling (Tr. p. 60).

The director testified that the student's classes include from three to five other students (Tr. p. 62).^{10, 11} She explained that the Sinai school building is "fully accessible" to the student (Tr. p. 69). The director also testified that the student has demonstrated progress in language processing, communication skills, response time, answering questions, money concepts, and reading (Tr. p. 63). She testified that in addition to OT and speech-language therapy, the student's program also includes three periods per week of 1:1 "supplemental instruction," which is coordinated by the speech-language pathologist to address the student's language processing, communication, the quickness and accuracy of his language responses, and his expressive language (Tr. pp. 63-64, 69-70; see Parent Ex. K). The director testified that the goal of this supplemental instruction is to increase the quality of both the student's overall functioning in the community and his social interactions (Tr. p. 64).

The director testified that the student's program at Sinai was appropriate for him because, among other things, it offered individual instruction, the "supplemental instruction," vocational development, and a functional instruction that integrated life skills with the student's academic instruction (Tr. pp. 69-70; see Parent Ex. K). Upon review of Sinai's IEP, I find that the annual goals in the areas of money concepts, problem-solving, reading comprehension, vocabulary, and community awareness are consistent with the student's needs in math, reading, and post-secondary transition (Parent Ex. I at pp.1-3; see Dist. Ex. 1 at pp. 3, 4, 17-18). I also note that the student's prevocational and off-site work study program at Sinai is consistent with the student's needs (Tr. pp. 57-59).

The hearing record further reflects that the student participates "in a variety of ways within the social structure" of the mainstream school, including trips, programs, "special activities," "special programs," speakers, and "Lunch Buddies" (Tr. pp. 57, 64, 65).¹² Further, the director testified that both the Sinai program and the mainstream school within which it is located use the same hallways, the same cafeteria, and the same public and common areas (Tr. pp. 74-75). The director testified that Sinai is "looking to foster the relationships between the mainstream students and the Sinai students in all sort[s] of various ways"(Tr. p. 66).

As part of Sinai's mainstreaming activities, the student's educational program at Sinai includes a program entitled "Lunch Buddies" (Tr. pp. 64, 75; Parent Ex. K). In this program, Sinai has paired the student with a general education student for one 40-minute period per week (Tr. pp. 64, 74-75). The student and his "Lunch Buddy" typically socialize over lunch at a local restaurant; with a goal to facilitate continuing social contact and interaction in the school hallway and during regular lunch and breakfast periods and other unstructured time during the school day (Tr. pp. 64-65, 75). The student's father testified that his son "looks forward" and is "excited about" the Lunch

¹⁰ According to the director, the student receives instruction from four different teachers throughout the school day (Tr. p. 67).

¹¹ The director testified that an "assistant teacher" is often present to assist in the student's classes (Tr. p. 62).

¹² The director testified that one such special program was a "reverse mainstreaming" weekend retreat attended by both general education and special education students (Tr. p. 66).

Buddies program (Tr. p. 83). The student's father also testified that this program provides the student with necessary life skills (Tr. pp. 83-84).

The director testified that the student's mainstreaming opportunities are very relevant and meaningful for the student and that the student "feels very good about" his interactions with nondisabled students (Tr. p. 65). She also testified that Sinai found that the student responds very well to all of the school's mainstreaming activities and opportunities and that such opportunities are "maximizing the level to which he can have relationships at this point in his life" (Tr. pp. 66, 76). The director further testified that the student's program at Sinai was appropriate in part because Sinai offered the student "the opportunity to be fully integrated on a social level within a mainstream environment" (Tr. p. 70).

Regarding the district's assertion that Sinai is not appropriate for the student because it is a 10-month program and the district's IEP recommended a 12 month school year, I note that the April 2010 IEP recommended a 12-month school year, which would begin on July 1, 2010 (Dist. Ex. 1 at pp. 1, 2). In particular, the IEP recommended that the student be enrolled in a special class in a specialized school with related services, and for July and August 2010 "only," that the student attend a specific camp program (*id.* at p. 1). However, the hearing record does not explain what this program consisted of or whether the student attended it. Further, there is nothing in the hearing record, including the student's needs reflected on the April 2010 IEP, that establishes that the student would or did demonstrate substantial regression without being provided with a 12-month program (see 8 NYCRR 200.1[aaa], 200.6[k]; Dist. Ex. 1 at pp. 1-18; Parent Exs. H; I; J). I note further that the district did not assert at the impartial hearing that Sinai was not an appropriate unilateral placement because it was a 10-month program. Although the district is not precluded from offering services to a student above and beyond what the student requires in order to be provided with a FAPE, in this case, the hearing record does not reflect that the student required a 12-month program; therefore, I decline to reject the parents' placement of the student at Sinai as inappropriate on that basis.

Accordingly, I find that the hearing record contains sufficient information to conclude that the parents have met their burden to show that Sinai was an appropriate unilateral placement for the student for the 2010-11 school year. In reaching this conclusion, I have considered the "totality of the circumstances" (see Frank G., 459 F.3d at 364) and have determined that the evidence shows that the parents' unilateral placement reasonably serves the student's individual needs, providing educational instruction specially designed to meet the student's unique needs, supported by such services as are necessary to permit the student to benefit from instruction (*id.* at 364-65).

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 ["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"]). 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., 2009 WL 857549, at

*13-14 [S.D.N.Y. March 30, 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 parties do not dispute whether equitable considerations such as cooperativeness or appropriate notice of the parents' unilateral placement should result in a reduction or denial tuition reimbursement. Having conducted an independent review of the hearing record, I find that these bases are not factors in this case. I note, however, that the parties agree in this appeal that any reimbursement to the parents should be reduced by 12 percent of the "base tuition" charged by Sinai, exclusive of the school's registration fee, to take into account that part of the instruction at Sinai devoted to religious instruction (see Pet. ¶ 57; Answer ¶¶ 5, 26, p. 19). Based on my review of the hearing record, and considering all relevant factors, I find that equitable considerations do not support a reduction in the parents' award by an amount greater than the 12 percent reduction in the "base tuition" charged by Sinai that the parties have agreed to.

Impartial Hearing Officer Misconduct/Incompetence

Turning to the issue of impartial hearing officer misconduct or incompetence, in this case, I decline to find that the impartial hearing officer engaged in conduct that constituted incompetence or misconduct (see 8 NYCRR 200.21[b][4][iii]). With respect to whether the impartial hearing officer ensured that the impartial hearing progressed in an expeditious manner, I note that a failure of an impartial hearing officer to comply with the IDEA's time limit for the issuance of impartial hearing office decisions may constitute a violation of due process rights provided for under the act (Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236, 247 [S.D.N.Y. 2000]). In this case, however, the district admits in its petition that it did not object to requests for adjournments (Pet. ¶ 47). Although I note that the parents' due process complaint notice was dated September 3, 2010 and the impartial hearing did not begin until almost six months later, on February 28, 2011, under the circumstances in this case, I decline to find impartial hearing officer misconduct or incompetence on this basis. However, I find that the hearing record does not support a determination that the impartial hearing officer complied with the timelines set forth in the federal and State regulations (see 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]) or regulatory provisions dictating that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and that he must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR200.5[j][5]). The impartial hearing officer is reminded that it is his obligation, regardless of the parties' positions, to ensure compliance with the 45-day timeline for issuing a decision (see Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-064).

Additionally, I note that in this case the impartial hearing officer ordered the district to continue to fund the parents' unilateral placement of the student at Sinai for the balance of the 2010-11 school year, notwithstanding that he found that the district had offered the student a FAPE (IHO Decision at pp. 3-4). The impartial hearing officer also ordered that his decision not be implemented until the beginning of the 2011-12 school year (id. at p. 5). As the district asserts on

appeal, in Application of the Dep't of Educ., Appeal No. 08-061, a State Review Officer determined that a similar order by the same impartial hearing officer was contrary to law. It is well established that an award of tuition reimbursement will not be made in circumstances where the district has offered the student a FAPE (see Carter, 510 U.S. at 7, 12-13; Burlington, 471 U.S. at 369-70; see also Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 08-78). The impartial hearing officer supported his order that the student should remain in the parents' unilateral placement at district expense until the completion of the 2010-11 school year on July 30, stating that the parents' unilateral placement was the student's pendency placement at the time of the impartial hearing (IHO Decision at p. 4). The law is clear, however, that a claim for tuition reimbursement pursuant to pendency is evaluated independently of a claim for tuition reimbursement pursuant to the provision of a FAPE (Mackey v. Bd. of Educ. for the Arlington Cent. Sch. Dist., 386 F.3d 158, 161 [2d Cir. 2004]). Therefore, I find that the impartial hearing officer did not properly set forth a basis to order the district to continue to fund the parents' unilateral placement of the student at Sinai through the end of the 2010-11 school year and also to determine that his finding and order should not be implemented until the start of the 2011-12 school year. In this instance, I decline to find that this error of law rose to the level of impartial hearing officer incompetence or misconduct; however, this is the second time this impartial hearing officer has been cautioned regarding the same issue. Should this matter continue to arise, repeated refusal to apply appropriate legal analysis when awarding tuition costs may constitute a basis for findings pursuant to 8 NYCRR 200.21(b)(4)(iii).

Conclusion

Having concluded that the district did not offer the student a FAPE in the LRE, that the parents' unilateral placement at Sinai was appropriate, that the parties have agreed to reduce any award to the parent by 12 percent of the "base tuition" charged by Sinai to take into account that part of the instruction at Sinai devoted to religious instruction, and that equitable considerations are not at issue, I will direct that the district reimburse the parents for tuition costs at Sinai for the 2010-11 school year. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's conclusion that the district offered the student a FAPE in the LRE is annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's order that the student is to remain in the current unilateral placement at district expense until the completion of the 2010-11 school year notwithstanding that the district offered the student an appropriate program and on the basis set forth in that decision is annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's determination that the effect of his decision should not be implemented until the start of the 2011-12 school year is annulled; and

IT IS FURTHER ORDERED that the district shall, upon proof of payment provided by the parents, reimburse the parents for the registration fee paid to Sinai and 88 percent of the student's tuition costs at Sinai for the 2010-11 school year.

Dated: **Albany, New York**
 June 15, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER