



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-041

### **Application of a STUDENT WITH A DISABILITY, by their parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

#### **Appearances:**

Educational Advocacy Services, attorney for petitioners, Jennifer A. Tazzi, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Tracy Siligmueller, Esq., of counsel

#### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for direct payment of and/or to be reimbursed for, their son's tuition costs at the Robert Louis Stevenson School (RLS) for the 2009-10 school year. The appeal must be sustained in part.

During the 2009-10 school year, the student was an eleventh grade student at RLS and was also receiving private counseling (Tr. pp. 14, 113, 114, 115). RLS is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

#### **Background**

The hearing record is sparse regarding the student's educational history and the student's early educational history is gleaned from the student's mother's testimony at the impartial hearing. According to the parent, the student was born with external hydrocephalus, and as an infant exhibited developmental delays (Tr. p. 87). The student received speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Tr. pp. 87-88). At age two and a half the student began walking, and at age three he began to talk (Tr. p. 88). Subsequently, the student

attended a special needs preschool followed by a "special needs kindergarten class" in a public school (Tr. pp. 88-89). For first grade, the student attended a different public school within the district where he remained through fifth grade (Tr. pp. 89, 110).<sup>1</sup> According to the student's mother, the "classroom size" at the public school was small and when the student experienced "meltdowns," staff removed him from the class and calmed him down (Tr. pp. 89-90).

The student attended a public middle school but, according to the student's mother, due to his processing delays and inability to engage in conversation, the student became increasingly isolated and picked on by other students (Tr. pp. 90-91, 111). The student's mother explained that in seventh grade, the student composed notes in which he threatened to harm himself and others, and as a result he was suspended from school for "over a period of a year" (Tr. pp. 91-92, 112-13). At that time, the parents obtained a private neuropsychological evaluation of the student (Tr. pp. 92, 113-14). According to the student's mother, the evaluator concluded that the student demonstrated "Asperger-like" qualities and processing delays, and that the student should be placed in a special school (Tr. pp. 92-93). The student's mother testified that subsequent to the evaluation the student began seeing a private therapist, whom he continued to see (Tr. pp. 113-15).

The student entered RLS in eighth grade at the beginning of the 2006-07 school year and has remained at RLS since that time (Tr. pp. 111-112, 117).

In July 2009, between tenth and eleventh grade, the district conducted a psychoeducational evaluation of the student pursuant to a request from the student's mother for cognitive testing (Dist. Ex. 5). The evaluation included the administration of standardized intelligence and achievement tests, completion of a vocational assessment, a clinical interview, and a review of the student's records by a bilingual certified school psychologist (*id.* at pp. 2, 4). The evaluating psychologist described the student's demeanor as reserved but socially appropriate (*id.* at p. 1). She noted that the student initially appeared tense, but that after rapport was established he became sociable and engaging (*id.*). According to the psychologist, during the clinical interview the student was "very" well spoken and articulate and he engaged in an appropriate amount of eye contact and conversational exchanges (*id.*). She noted that the student had an extensive repertoire of words in his expressive vocabulary and that his drawing revealed that he tended to be meticulous and detail oriented (*id.*). The evaluating psychologist noted that "[p]rojective measures revealed that [the student] may at times feel a deep sense of sadness and gloom" (*id.*). She also noted that data indicated that the student may feel the need to be guarded (*id.*).<sup>2</sup>

The psychologist reported that during testing the student approached tasks in a contemplative and well thought out manner (Dist. Ex. 5 at p. 1). She noted that when presented with challenging tasks, the student made an effort and at times seemed to vacillate and appraise the situation before giving up (*id.*). With respect to his school social life, the psychologist indicated that the student "did not have much to offer" except that he "talk[ed] to people" (*id.*).

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<sup>1</sup> The student's mother did not indicate whether the student received special education and/or related services from first through fifth grade.

<sup>2</sup> The psychoeducational evaluation report did not identify the projective measures used to assess the student's emotional functioning. Nor did it reflect the data used by the psychologist to draw conclusions regarding the student's emotional functioning.

The psychologist evaluated the student's intellectual functioning using the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) (Dist. Ex. 5 at p. 2). Administration of the WISC-IV yielded the following composite scores, percentile ranks, and descriptive classifications: verbal comprehension 138 (99th percentile, very superior); perceptual reasoning 106 (66th percentile, average); working memory 116 (86th percentile, high average); processing speed 78 (7th percentile, borderline); and full scale IQ 115 (84th percentile, high average) (*id.*). The psychologist indicated that the student's performance on the WISC-IV produced scores that "revealed a significant degree of variability" which did not allow the student's global intellectual functioning to be summarized "in a single score" and advised that the student's intelligence was "best understood by his performance in each factor index" (*id.*). According to the evaluator, the student's performance on the verbal comprehension index indicated that this domain was a relative strength for the student when compared to his other scores, as well as to other adolescents his age (*id.* at pp. 3, 4). In contrast, the student's performance on the processing speed index, which measured the speed and efficiency with which the student was able to process information, was considered a relative weakness for the student when compared to his other scores, as well as to other individuals his age (*id.* at p. 3). The psychologist indicated that the student's processing speed was an area of "significant concern" and noted that there may be extenuating factors, such as mood lability and motivation that contributed to the student's performance in this area (*id.*).

With respect to the student's academic functioning, the psychologist assessed the student's academic achievement using subtests from the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (Dist. Ex. 5 at p. 3).<sup>3</sup> According to the psychologist, the student's performance on the WJ-III ACH indicated that both his oral language and academic skills were "[h]igh [a]verage" when compared to others at his grade level (*id.*). The psychologist stated that the student was performing above the twelfth grade level in reading, written expression, and oral language, and at the tenth grade level in math (*id.*). She indicated that the student demonstrated a relative weakness in the area of oral language (*id.*). In a subsequent section of her evaluation report, however, the psychologist indicated that the student was performing above grade level in math as well as above grade level in reading and oral language (Dist. Ex. 5 at p. 4).<sup>4</sup>

The psychologist administered the Harrington-O'Shea Career Decision Making System-Revised to assess the student's career interests (Dist. Ex. 5 at p. 3). The psychologist reported that the student expressed interest in a career area associated with the arts (*id.*). Work values associated with the student's interest in the arts included creativity, independence, leadership, and variety (*id.* at p. 4).

With respect to the student's social/emotional development, the psychologist stated that the student presented as a reserved but polite young man who was cautious around strangers (Dist. Ex. 5 at p. 4). She described the student's socialization skills as "adequate" and reported that the student's eye contact and conversational exchanges were appropriate (*id.*). The psychologist

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<sup>3</sup> The psychoeducational evaluation report did not identify which subtests of the WJ-III ACH the psychologist administered to the student. Nor did it include information regarding the standard scores or percentile ranks attained by the student.

<sup>4</sup> The evaluation report indicated that the student was performing at the 10th grade level in math, which the psychologist characterized as being above grade level (Dist. Ex. 5 at pp. 3, 5). However, the WJ-III ACH was administered to the student in July 2009, after he had already completed the 10th grade.

reported that the student was motivated to do his best and that he persisted on challenging tasks (id.). The psychologist noted that projective data indicated that the student might be experiencing sadness and a feeling of insecurity and may also feel the need to be guarded (id. at pp. 1, 4).

Also in July 2009, a district social worker completed an updated social history, with the student and his mother serving as informants (Dist. Ex. 4 at pp. 1, 4). The resultant social history update report stated that the student "was a general education student with related services" at RLS (id. at pp. 2, 3). According to the social worker, the student's mother reported that her son was a "very bright, articulate student" who strove to be a perfectionist (id.). The social worker also stated that the student's mother reported that the student had "major problems" when his school work was not perceived as perfect and that he worked tirelessly and diligently to appear exemplary in all of his classes (id. at p. 2). By parent report, the student received letter grades of A in creative writing, literacy, history, geometry, environmental science, and art (id.). According to the student's mother, the student participated during instruction and responded well to praise and positive reinforcement, which the student's mother believed kept the student motivated and allowed him to validate his intelligence (id.). The student's mother also reported that the student maintained good relationships with all of his teachers as he desired to have their support at all times and that the teachers enjoyed working with the student (id.). According to the social worker, the student's mother could not comment on whether distractibility was ever "a factor" for the student nor on the student's relationships with peers (id.). According to the student's mother, in school the student was respectful, pleasant, or simply withdrawn (id.).

The student's mother reported to the social worker that at home, the student worked on his daily homework assignments independently (Dist. Ex. 4 at p 2). According to the social worker, the student was perceived by his parents as a competent person who wanted everything to be right and would not accept anything less than perfect (id.). At home, the student reportedly completed his chores without reminders, was very responsible, and took pride in what he did for his parents and himself (id.). The student's mother also advised that the student was having more telephone and face-to-face discussions with girls and that she was happy that the student was able to make regular contact with a select group of peers when he chose to (id.). According to the social worker, the student made an effort to respond to his parents' directives, although some reminding was necessary (id.).

The student was described as very active, adventurous, and sometimes moody (Dist. Ex. 4 at p. 3). As noted by the student's mother, the student believed he needed to always produce schoolwork that was "A" quality or he would become saddened and criticize himself (id.). According to the parent, the student enjoyed art and writing short stories, which provided him with a chance to show his creativity (id.).

According to the updated social history report, the student was known for his "meltdowns" during school hours, which usually occurred when unexpected changes occurred and the student's school schedule was disrupted (Dist. Ex. 4 at p. 3). Additionally, the student hated being criticized or teased by peers and was unable to cope with changes or "mistreatment" (id.). The student shut down and remained quiet and disconnected, but was not violent during these episodes (id.). With respect to discipline, the student's mother reported that the student responded to behavior management techniques, was receptive to positive feedback and affection from his mother, and was not difficult to handle (id.). The student's mother described him as a relatively friendly person who liked being around others at times (id.). The student's mother stated that the student had

"Asperger-like" traits although he did not have a formal diagnosis of the disorder (id.). The student was "socially isolated" and did not have many friends; however, the student participated in a theater group that provided him with a safe place to develop peer relationships and feel supported by peers (id. at pp. 3-4). The student's mother reported that the student was not taking regularly prescribed medication (id.).

The social history update report included the names and contact information for various professionals involved with the student, including his pediatrician, orthopedist, psychologist/therapist, and also information about the student's extracurricular theater group (Dist. Ex. 4 at p. 4). The social worker who conducted the updated social history stated in his report that he provided the student's mother with a procedural safeguards notice and explained the parents' due process rights (id.).

By letter dated August 10, 2009, the parents informed the district that the Committee on Special Education (CSE) had failed to conduct a timely annual review, draft an individualized education program (IEP) for the student, and offer the student a placement for the 2009-10 school year (Parent Ex. E). The parents also advised the district that they intended to enroll the student in RLS for the 2009-10 school year (id.). Among other things, the parents stated that the August 10, 2009 letter would serve as their "10-day notice" and that it was not a hearing request (id.).

The CSE convened on August 11, 2009 for the student's annual review (Dist. Ex. 3 at p. 2; Tr. p. 34).<sup>5</sup> The CSE was composed of a school psychologist, who also served as the district representative; a regular education teacher; a special education teacher; an additional parent member; and the parents (Tr. p. 14; Dist. Ex. 3 at p. 2). The August 2009 CSE continued the student's eligibility for special education programs and related services as a student with an emotional disturbance (Dist. Ex. 3 at p. 1). The resultant IEP included descriptions of the student's present levels with respect to academic performance and learning characteristics, social/emotional performance, and health and physical development, which included information and test results from the district's July 2009 psychoeducational evaluation and updated social history report (id. at pp. 3, 4). The August 2009 CSE recommended that the student be placed in a general education class for 11th grade, receive the related service of counseling two times per week for forty minutes in a group of five, and that his OT services be terminated (Tr. pp. 18-19, 35-36; Dist. Ex. 3 at p. 10). The August 2009 IEP stated that the student had no academic deficits that required remediation and it did not identify any environmental modifications or human/material resources needed to address his academic management needs (Dist. Ex. 3 at pp. 4, 9). With respect to the student's social/emotional needs, the August 2009 IEP indicated that the student might profit from positive behavioral reinforcement and counseling to minimize anxiety and insecurity (id. at p. 4). The August 2009 IEP included two annual goals. The first related to being a perfectionist; the second related to the development of positive peer interactions (id. at p. 7). The August 2009 IEP recommended that the student be provided with testing accommodations, and in particular, extended time (1.5) for tests and the administration of exams in a separate location (id. at p. 10). The August 2009 IEP also included a transition plan, which included long-term adult outcomes; particularly that the student would integrate into the community independently, attend a post-secondary educational program, live independently, and be competitively employed (id. at p. 11).

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<sup>5</sup> The student's August 11, 2009 IEP indicated that notice of the August 11, 2009 meeting was sent to the parents on July 24, 2009 (Dist. Ex. 3 at p. 2).

According to the student's mother, she voiced her disagreement with the CSE's recommendation for a general education class at the end of the August 11, 2009 meeting, stating that the student would be "lost" (Tr. pp. 96-97, 103-04).

In a notice dated August 27, 2009, the district summarized the recommendations made by the August 2009 CSE and notified the parents of the student's assigned school (Dist. Ex. 8).

On or about September 1, 2009, the parents returned the district's August 27, 2009 notice with a handwritten note stating that they could not accept or reject the placement at the assigned school until they had the opportunity to visit it when school resumed (Parent Ex. D). The parents indicated that after observing the assigned school, they would notify the district whether they believed that it was appropriate for the student (id.). The parents also wrote that, as they indicated at the August 11, 2009 CSE meeting, they did not believe that a general education class was appropriate for the student (id.). On September 9, 2009, the student's father executed a contract for the student's enrollment at RLS for the 2009-10 school year (Parent Ex. M).

On September 23, 2009, the parents faxed the district a copy of its August 27, 2009 notice to the parents with a handwritten note stating that they had visited the assigned school and found it to be inappropriate for the student (Parent Ex. D). According to the parents, the classes that they observed included 32-35 students and school personnel expressed concern regarding their son being placed in a class with so many students (id.). The parents opined "that it would be totally overwhelming for the student to negotiate such a challenging social environment" (id.). The parents advised the district that the student would be attending RLS and that an impartial hearing would be scheduled to obtain tuition for the 2009-10 school year (id.).

The student attended RLS for the 2009-10 school year where he participated in algebra II, art, creative writing, modern history, modern literature, and physics courses (Parent Exs. G; H; I; J; L).

### **Due Process Complaint Notice**

In a due process complaint notice dated September 30, 2010, the parents requested an impartial hearing (Dist. Ex. 1 at p. 1). The parents alleged that the district had failed to offer the student a free appropriate public education (FAPE) by failing to draft an IEP and offer a special education placement that was reasonably calculated "to allow the student to progress academically, socially, and emotionally" (id.). In particular, the parents alleged that the district failed to understand how the student's disability affected his functioning and as a result, the district's recommendation that the student be placed in a general education setting was not appropriate for the student (id. at p. 2). The parents further alleged that the recommended placement with the related service of counseling was insufficient to allow the student to function socially and emotionally in a general education classroom (id.). For relief, the parents sought reimbursement or, alternatively, direct payment to RLS for the student's tuition at RLS for the 2009-10 school year (id. at pp. 2-3).

### **Impartial Hearing Officer Decision**

The impartial hearing was held on February 4, 2011 (Tr. pp. 1, 120-22). In a decision dated February 28, 2011, the impartial hearing officer denied "the parent[s]' request for tuition

reimbursement" (IHO Decision at p. 5). The impartial hearing officer concluded that the August 2009 CSE "had an incomplete team and incomplete information" because "no one from the student's school was available due to vacation" (*id.* at p. 4). However, based upon evidence adduced at the hearing, the impartial hearing officer also concluded that there was no additional information that the IEP did not already contain (*id.*). The impartial hearing officer also found that the parents improperly withheld information from the district regarding reports from the student's private therapist (*id.*). The impartial hearing officer noted that the student's mother did not inform the August 2009 CSE that she had concerns about the student having thoughts of harming himself and instead said that the student would be "lost" in the recommended placement (*id.* at pp. 4, 5). The impartial hearing officer also concluded that the August 2009 IEP was reasonably calculated to enable the student to receive educational benefits (*id.* at p. 4).

The impartial hearing officer also concluded that the testimony of the student's mother was not credible on the basis that after the student had written notes threatening to harm himself, the parents placed the student at RLS which was described as a school with no counselors, therapists, or psychologists (IHO Decision at pp. 4-5). The impartial hearing officer also noted that (1) the student's mother became aware of the student's wish to harm himself through the student's notes but did not bring the student to a psychiatrist or a psychologist; (2) according to the student's mother, the neuropsychologist noted the student's "Asperger-like qualities and processing delays," but failed to describe what the neuropsychologist found as to suicidal ideation; (3) the neuropsychologist's report was not admitted into evidence and (4) the student went to a therapist regularly but no reports were admitted into evidence or given to the district. As a result of her determinations, the impartial hearing officer denied the parents' request for tuition reimbursement for RLS (*id.* at p. 5).

### **Appeal for State Level Review**

The parents appeal, requesting that the impartial hearing officer's decision be reversed and that the parents be awarded the cost of the student's tuition at RLS for the 2009-10 school year. In the alternative, the parents request an order directing the district to conduct "a complete and independent social-emotional assessment" including an independent psychiatric evaluation, a functional behavior assessment and behavioral intervention plan, a classroom observation, and any other evaluations deemed appropriate. The parents also request permission to submit a 2005 neuropsychological evaluation report of the student as additional evidence.

The parents assert that the August 2009 CSE's recommendation of a general education program denied the student a FAPE because it was not based on an appropriate evaluation of the student's needs in all areas of his disability. In particular, the parents contend that the August 2009 CSE failed to properly evaluate the student's social/emotional needs prior to recommending a general education classroom. The parents contend that the district failed to conduct a classroom observation, had no data concerning the student's current academic and social/emotional performance at RLS, and that the August 2009 CSE did not include a special education teacher of the student and other personnel from RLS who were most familiar with the student's current emotional needs. According to the parents, the district's failure to adequately seek out and consider "significant existing medical information" regarding the student's emotional condition required the August 2009 CSE to conduct a psychiatric evaluation. The parents contend that the August 2009 CSE was also required to conduct a psychiatric or neuropsychological evaluation prior to recommending a general education program given the student's classification as a student with an

emotional disturbance and due to his "low" processing speed. The parents assert that without a psychiatric evaluation, the August 2009 CSE did not adequately evaluate and identify the student's social/emotional needs, which in turn impeded its ability to develop an appropriate IEP to address those needs. The parents additionally contend that the district's July 2009 psychoeducational report considered by the August 2009 CSE was inadequate because it did not provide any meaningful information about the student's social/emotional needs, and because the examining school psychologist did not speak to the student's therapist, administer any tests or assessments to the student's teachers and/or providers at RLS; or review any prior neuropsychological and/or psychiatric reports in the student's file.

The parents also allege that (1) the social/emotional performance section of the August 2009 IEP included material "cut and pasted" from the district's July 2009 psychoeducational evaluation, (2) the August 2009 CSE wrote counseling goals for the IEP without information from RLS providers or anyone who provided therapy to the student, (3) the student's counseling goals were changed despite the fact that they had not been met, (4) the August 2009 IEP did not contain goals relating to the student's "borderline processing speed," (5) at the August 2009 CSE meeting the student's mother expressed her disagreement with the CSE's recommendation for a general education program and the CSE ended the meeting without responding to her concerns, (6) the student would not be able to keep up in the recommended class, and (7), the assigned school would not have been appropriate for the student.

The parents further assert that RLS was an appropriate placement for the student and that equitable considerations support their request for tuition reimbursement. With respect to the impartial hearing officer's conclusion that the student's mother's testimony was "incredible," they assert that the impartial hearing officer's conclusion was based on "sheer speculation unsupported in the record."

In its answer, the district objects to the additional evidence proffered by the parents and asserts that it offered the student a FAPE for the 2009-10 school year. According to the district, the parents' contentions that the August 2009 CSE did not have sufficient evaluative information and failed to include a special education teacher of the student should not be considered by a State Review Officer because they were not raised in the parents' due process complaint notice. Alternatively, the district alleges that the August 2009 CSE had sufficient evaluative information regarding the student's educational needs. Regarding the parents' assertion that the district failed to offer a FAPE because there was no psychiatric or neuropsychological evaluation, the district states that a district school psychologist conducted an evaluation in July 2009 which was considered by the CSE. Regarding the parents' assertion that the August 2009 CSE lacked a special education teacher of the student, the district alleges that the student has been attending RLS for the past three years, that the district contacted RLS and was informed that no one from the school was available to participate at the August 2009 CSE meeting, and that the absence of a special education teacher of the student was a procedural violation that did not cause a denial of a FAPE. The district also asserts that the August 2009 CSE recommended positive behavioral reinforcement and counseling to address the student's anxiety and insecurity. The district additionally contends that the parents' claim that the assigned placement was inappropriate is speculative as the student never attended the assigned school, and that further, the hearing record shows that the assigned school could have met the student's needs as set forth in the August 2009 IEP.

With respect to the student's unilateral placement, the district contends that the parents failed to show that RLS was appropriate, asserting among other things, that there was insufficient evidence to show that RLS met the student's unique special education needs and that, while the August 2009 IEP recommended group counseling and included counseling goals, RLS did not provide counseling to the student. The district also asserts that equitable considerations do not support the parents' claim for relief because the parents did not provide notice of their rejection of the district's offered placement and of their intent to enroll the student in RLS at public expense as required by the Individuals with Disabilities Education Act (IDEA). Finally, with respect to the parents' request for direct payment to RLS of the student's tuition costs for the 2009-10 school year, the district asserts that the parents have not submitted evidence sufficient to show that they are "financially unable to front the cost of the unilateral placement."

In their reply, the parents contend that their claim that the August 2009 CSE did not have sufficient evaluative information should be considered as it was the subject of extensive testimony at the impartial hearing. They further contend that the district's allegation that equitable considerations do not favor the parents lacks merit and should not be considered by a State Review Officer because it was not raised during the impartial hearing.

### **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 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 least restrictive environment (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**

### **Procedural Matters**

#### **Additional Evidence**

As a preliminary matter, I will address the parents' request to submit additional evidence on appeal. The district objects to such evidence, asserting that, among other things, the evidence was available at the time of the impartial hearing and is not necessary to render a decision. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Bd. of Educ., Appeal No. 10-111; Application of a Student with a Disability, Appeal No. 10-062; Application of the Dep't of Educ., Appeal No. 10-047; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-104; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the additional evidence was available at the time of the impartial hearing. The additional evidence is also not necessary in order to render a decision in this case. I therefore decline to accept the proffered evidence.

#### **Impartial Hearing – Scope**

I will next address the parties' dispute relating to whether the due process complaint notice encompassed the issues of the CSE composition and the adequacy of the evaluative information before the August 2009 CSE. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.P.G., 2010 WL 3398256, at \*8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Application of a Student with as Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

In this case, the parents' due process complaint notice does not assert any claims that may be reasonably read to include a challenge of improper composition of the August 2009 CSE due to the lack of a special education teacher of the student (see Dist. Ex. 1). Accordingly, the parents may not raise this issue now for the first time on appeal and I decline to consider it. However, with respect to the parents' claim that the district did not understand how the student's disability affected his functioning at the time his August 2009 IEP was formulated, I find that the due process complaint notice may be reasonably read to include the issue of whether the August 2009 CSE had

sufficient evaluative information with regard to the student (see Application of a Student with a Disability, Appeal No. 11-002).

### **Adequacy of Evaluative Information before the August 2009 CSE**

Turning to the merits, the parties dispute whether the August 2009 CSE had adequate information about the student's special education needs. An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

In this case, the August 11, 2009 CSE had information available to it, which indicated that the student had academic and social/emotional difficulties that could potentially affect his ability to function in a general education classroom setting. The district's school psychologist, who evaluated the student in July 2009, indicated that the student's "borderline" processing speed was of "significant concern" and noted that there may be extenuating factors, such as mood lability and motivation that contributed to the student's performance in this area (Dist. Ex. 5 at p. 3).<sup>6</sup> Further the psychologist concluded, based on the results of projective testing, that the student may at times experience a deep sense of sadness and gloom (*id.* at p. 1). The only information considered by the CSE regarding the student's classroom functioning was provided by the student's mother, via the updated social history report (see Dist. Ex. 4). In that report, the student's mother described the student as "moody" and indicated that at school the student was "respectful, pleasant or simply withdrawn" (*id.* at pp. 2, 3). She also reported that the student was known for his meltdowns during school and that he was unable to cope with changes in his schedule or mistreatment by peers (*id.* at p. 3). The student's mother stated that in such instances the student would shut down and remain quiet and disconnected (*id.*). The student's mother further noted that the student had

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<sup>6</sup> The school psychologist who conducted the July 2009 psychological evaluation of the student was not the same school psychologist who participated the August 11, 2009 CSE meeting (compare Dist. Ex. 3 at p. 2 with Dist. Ex. 5 at p. 4).

"Asperger-like" traits and was socially isolated (*id.*). Under the circumstances of this case, I find that the information provided by the school psychologist and the student's mother warranted further assessment of the student's ability to function in a general education setting. However, no further assessment took place.

Further, it is undisputed by the parties that no one from RLS participated in the August 2009 CSE meeting (Pet. ¶ 47; Answer ¶¶ 3, 28). According to the district representative, the district sent a letter to the parents requesting that they submit provider reports to the CSE for its review (Tr. pp. 22-23). The district representative testified that the CSE did not have copies of the student's current RLS progress reports or report cards and the hearing record does not show that upon failing to receive the reports from the parents that the district made efforts to seek the parents' consent to obtain the reports directly from RLS or the student's private providers (Tr. pp. 22-23). Based on the evidence presented in the hearing record in this case, I find that the district did not demonstrate that the August 2009 CSE's recommendation of a general education program was substantively appropriate insofar as the CSE lacked information from the student's then-current educational placement with respect to his social/emotional needs and academic performance, as well as from his private therapist.

Accordingly, I therefore find that the district has not offered the student a FAPE for the 2009-10 school year as the August 2010 IEP was developed without adequate information regarding the student's individual needs (Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

### **Applicable Standards – Unilateral Placement**

Having found that the district failed to offer the student a FAPE, I must now consider whether the parents have met their burden of proving the appropriateness of their placement of the student at RLS for the 2009-10 school year. With respect to this, 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 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).

### **Parents' Unilateral Placement – 2009-10 School Year**

In this case, the impartial hearing officer did not reach the issue of whether RLS was an appropriate placement for the student. Based on a careful review of the hearing record, I find that the evidence shows that the student's placement at RLS for the 2009-10 school year was appropriate.

The hearing record indicates that RLS "serves a broad range of students who can be described as 'underachieving,'" including students who "may have struggled with adjustment difficulties, problems with peers, mild depression or anxiety" (Parent Ex. B at p. 1). The clinical director of RLS testified that students who attend the school are generally bright, high-achieving students who, due to emotional reasons or learning needs, were not able to excel to their potential (Tr. p. 68). Students at RLS range in age from approximately 13 to 18 years old (Tr. p. 67). The average class size at the school is eight students or less to one teacher (Tr. p. 74). At RLS, instructional support systems, such as individual tutoring and regular attention to organizational and study skills, are integrated throughout the program (Parent Ex. B at p. 2).

RLS employs approximately 20 teachers, the majority of whom have a Masters degree, some of whom have degrees in education (Tr. p. 67). The clinical director of RLS testified that some of the school's teachers are certified by New York State to teach special education (id.). She noted that the teachers have "a lot" of experience with children and adolescents with special needs, which allows them to intervene appropriately (id.). The teachers at RLS are provided with professional development on a monthly basis (Tr. p. 68). The clinical director further testified that RLS did not offer a broad-based parent training program, but provided parent training based on individual needs (Tr. p. 69).

According to the hearing record, RLS uses an "[a]dvisor [s]ystem" where all students are assigned to a teacher who becomes the primary school person for the student (Tr. p. 75; Parent Ex. B at p. 2). The advisors are supervised by licensed psychologists (Tr. pp. 65, 84). The advisor meets individually with a student up to three times a day and assists in aspects of a student's functioning ranging from punctuality and attendance, class assignments and academic expectations, to problems with peers or difficulties with teachers (Tr. p. 76; Parent Ex. B at p. 2).<sup>7</sup> In addition to individual advisor meetings, students also participate in a "group modality" once a week (Tr. p. 76). According to the RLS clinical director, students have access to their advisors throughout the day except for the time when an advisor would be teaching in his or her classroom (Tr. pp. 76-77). The RLS psychologists collaborate with students' outside therapists (Parent Ex. B at p. 2). Among other things, the RLS psychologist informs the private therapists about their patients' functioning and mails full reports to them four times during the year (id.).<sup>8</sup>

The clinical director of RLS testified that she was familiar with the student as she consulted with the school's teachers in terms of students' emotional functioning and was involved in discussions about the student regarding his academic and emotional functioning (Tr. p. 70). She testified that she was a licensed psychologist and that she supervised the student's advisor during the 2009-10 school year (Tr. pp. 83, 84). She further testified that she did not provide the student with individual intervention and that her role was to provide crises services (id.). The clinical director testified that the student's advisor was a teacher at RLS, that the advisor was "licensed in the State," and that she thought that the advisor had special education certification (Tr. p. 84).

With respect to the student in this case, the clinical director testified that at the beginning of the 2009-10 school year, the student continued to struggle with emotional functioning, including interactions with peers, and also with anxiety (Tr. p. 70). She testified that the student's anxiety manifested itself in the classroom and also with respect to relationships (Tr. pp. 70-71). She reported that in the classroom the student tended to be a perfectionist and established very high standards for himself (Tr. p. 71). The clinical director noted that the student was very bright and that RLS tried to get the student to "balance that for himself" (id.). The clinical director testified that even though the student was bright, he struggled with processing information and sometimes, when the student was faced with a novel situation, his anxiety interfered with his ability to carry out the task (id.; see Tr. pp. 72-73). She opined that even though the student did well in class, the size of the class provided the student's teacher with the ability to "hone in" on the student, "talk him through" things (Tr. p. 72; see Tr. p. 76). The clinical director also reported that sometimes,

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<sup>7</sup> The clinical director testified that the students met with their advisors in the morning, at midmorning, and at the end of the day.

<sup>8</sup> The hearing record does not include reports from RLS to the student's private therapist.

if because of his processing difficulties and anxiety the student did not understand something immediately, RLS staff tried to get the student to use problem solving and relaxation techniques to take one step at a time in order to integrate information into his functioning (Tr. p. 71).

The clinical director opined that if the student did not receive individual attention he would fall behind and would not want to participate, and that this would affect the student's grade (Tr. p. 43). She indicated that the student needed to participate in order to show mastery of the class material and that without 1:1 feedback and encouragement from teachers, the student would not be able to do as well, "as he is fully able to" (Tr. pp. 73-74). The clinical director reported that the RLS environment nurtured the student in a way that made it emotionally manageable for the student (Tr. pp. 74, 78). She further testified that the school structure "facilitated" the student and his progress (Tr. p. 74).

With respect to the student's interaction with peers, the RLS clinical director testified that the student struggled with anxiety in social situations (Tr. p. 74). She also testified that the student had difficulty establishing eye contact and that it was hard for him to engage in a spontaneous interaction with peers (Tr. pp. 74, 75). She also testified that the student struggled to socially connect with others and to discuss things that were unrelated to academics (Tr. p. 75). The clinical director further testified that in response to this challenge the student sometimes received a lot of guidance from his advisor (Tr. pp. 74-75). The clinical director explained that the advisor played a key role in the student's emotional and academic development, including providing the student with praise and encouragement and a forum for alleviating his anxiety (Tr. pp. 76-77). When asked if the student took advantage of the advisor's availability, the clinical director reported that although he did, the student did not want to present as needing help and that a focus of staff was getting the student to use his advisor independently (Tr. pp. 77-78). The clinical director indicated that because of the student's reluctance to ask for help staff checked in with the student even though he seemed to be doing okay (Tr. p. 77).

The clinical director reported that the student's delayed processing speed affected his ability to take in novel information and to integrate such information at a quick pace and in a way that became helpful to him (Tr. pp. 80-81). She indicated that, for example, after being given an assignment to read, the student would be reluctant to participate when the teacher asked spontaneous questions as a means of evaluating the student's ability to integrate information (Tr. pp. 81-82). The clinical director explained that even though the student knew what he wanted to say, it would take him time to verbalize his response despite being very verbal and that such a situation would "rattle" the student (Tr. p. 82). The clinical director testified that RLS had worked with the student on internalizing his confidence to help address his processing difficulties (Tr. p. 73).

With respect to the student's behavior, the clinical director testified that the student did not have a formal behavior modification plan at RLS during the 2009-10 school year (Tr. p. 85). She explained that the school operated on a counseling model and its treatment plans focused on the needs of its students (*id.*). She testified that the school was not a behavior modification program but that it did use some behavioral interventions, such as consequences for behavior (*id.*). In reviewing some of her notes, the clinical director indicated that during the 2009-10 school year, "the biggest thing" was that the student was increasingly anxious (*id.*). She reported that the student was anxious in how he performed in creative writing, even though an A was received in the end, and that he was very anxious about math (Tr. pp. 85-86). The clinical director explained

that the focus of the student's treatment plan was to provide the student's teachers with the support to be able to "pull him out," "calm him down," and "refocus" the student using calming behavioral strategies, to decrease his anxiety and enable him to return to the classroom (Tr. p. 86).

The clinical director testified that it was her opinion that the individualized instruction, small classroom environment, and access to "mega" help at RLS were pivotal in the student having done so well at RLS (Tr. p. 79). With respect to a larger school environment, she opined that the student could not function in a class of 25-34 students with counseling twice a week for 40 minutes (*id.*). She testified that the student would need "a lot more support," a smaller environment, and the type of ongoing support and "check-in" that he received at a program like RLS (Tr. pp. 79-80). The clinical director testified that the student "has a lot of social emotional things that he struggles with" and that the RLS school-based counseling model supported the student (Tr. p. 80). The clinical director reported that the student would need a lot of support in a class of 20 students, noting that the student would be "lost" and that he would not have done as well as he has been doing (*id.*).

Regarding the district's assertion that RLS is not an appropriate placement for the student because it does not provide counseling, I note initially that "parents need not show that a private placement furnishes every special service necessary to maximize their child's potential" (Frank G., 459 F.3d at 365). Moreover, as explained above, central to the educational program at RLS is the advisor system, whereby each student meets with an advisor, who is supervised by a licensed psychologist, individually up to three times a day and once a week in a group setting (*see* Parent Ex. B at p. 2; *see also* Tr. pp. 76, 83, 84). The hearing record reflects that the advisor and the student worked together and that the advisor provided the student with guidance and support (Tr. pp. 74-75, 76-77, 83; *see also* Parent Ex. B at p. 2). Additionally, I note that the August 2009 CSE's recommendation for group counseling and counseling goals were not based on information from the student's current educational program at the time of the August 2009 CSE meeting. I note further that the student also received private counseling, which is noted as a special condition on the RLS registration contract for the 2009-10 school year, and that the school's procedures provide that RLS and the student's private counselor communicate and work collaboratively (*see* Tr. pp. 113, 114, 115; Parents Exs. B at p. 2; M). Under the circumstances of this case, I find there is sufficient evidence in the hearing record to show how RLS's advisor system addressed the student's social/emotional needs and decline to find the placement inappropriate on the ground that RLS does not provide formal counseling to the student (*see R.K. v. New York City Dep't of Educ.*, 2011 WL 1131492, at \*27 [E.D.N.Y. Jan. 21, 2011], *adopted at* 2011 WL 1131522 [E.D.N.Y. March 28, 2011]; M.N. v. New York City Dept. of Educ., Region 9 (Dist. 2), 700 F. Supp. 2d 356, 367 [S.D.N.Y. 2010] [quoting Cerra and upholding an educational placement without related services where it was nevertheless "likely to produce progress, not regression"]).

The parents assert that the student made progress at RLS during the 2009-10 school year. A student's progress in a private school is a relevant factor that may be considered when reviewing whether a private school is appropriate (Gagliardo, 489 F.3d at 115). However, progress, by itself, does not suffice to demonstrate that such a placement is appropriate (*id.*). Nor is a finding of progress required for a determination that a student's private placement is adequate (G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; *see also* Frank G., 459 F.3d at 364). In this case, the quarterly progress reports prepared by the student's teachers at RLS indicate that the student made progress during the 2009-10 school year (*see* Parent Exs. G; H; I; J).

Comments from the student's algebra II teacher for the first three quarters indicated that the student had difficulty with organizational skills and did not always turn in his homework assignments (Parent Exs. G at p. 3; H at p. 6; I at p. 5). The student's test scores fluctuated throughout the year (Parent Ex. G at p. 3; H at p. 6; I at p. 5; J at p. 2). However, by the fourth quarter the student's algebra teacher reported that the student's organizational skills had improved tremendously and that he did not miss any homework assignments (Parent Ex. J at p. 2). The student's quarterly letter grades ranged from a B+ to an A (Parent Exs. G at p. 3; H at p. 6; I at p. 5; J at p. 2).

In physics, the student's teacher reported the student's carelessness on a first quarter examination, but in the second quarter noted that the student had improved in both the subject area and "studentship" (Parent Ex. H at p. 2). The physics teacher noted that the student's work and work habits continued to improve and that the student worked very well with his classmates as lab partners (id.). The teacher also reported that the student made up missing work quickly and thoroughly (id.). The student's physics teacher recommended that the student complete his classwork on time and that he participate and interact more with classmates (id.). During the third quarter the teacher characterized the student's attitude, motivation, and effort, as well as his relationship with his classmates, as excellent (Parent Ex. I at p. 1). For the fourth quarter, the teacher concluded that the student had a very successful year in physics and noted that the student's completed work was always very accurate with few errors (Parent Ex. J at p. 3). The student's quarterly letter grades ranged from a B to an A (Parent Exs. G at p. 2; H at p. 2; I at p. 1; J at p. 3).

According to the student's modern history teacher, the student excelled in many parts of the class and offered interesting analysis of the subject matter (Parent Exs. G at p. 5; H at p. 1). The teacher noted that although the student's style was verbose he expressed his ideas well (Parent Ex. G at p. 5). She also suggested that the student work on making his writing more succinct (id.). The modern history teacher wrote that the student's homework was often high quality and that his participation in class was often insightful and helpful for others to understand the subject matter (Parent Exs. G at p. 5; H at p. 1). However, the teacher reported that the student's third quarter final project was disorganized and that he did not put forth his best effort and that his grade had been significantly lowered (Parent Ex. I at p. 4). In the fourth quarter, however, the teacher reported that the student produced "excellent" work (Parent Ex. J at p. 1). The student's letter grade in this class ranged from a B+ to an A (Parent Exs. G at p. 5, H at p. 1; I at p. 4; J at p. 1).

The student's creative writing teacher reported that for the first quarter, the student completed all his required "prompts" (Parent Ex. G at p. 6). She also noted that the student made good use of imagery and dialogue and complimented the student on his use of humor and character development (id.). The teacher described the student's participation throughout the quarter as "consistently strong" (id.). According to the teacher, the student's creativity and writing were excellent during the second quarter (Parent Ex. H at p. 4). The teacher indicated that each of the student's prompts were original and unique (id.). As noted by the teacher, during the third quarter the student went above the ten page requirement for his short story and never turned in his completed draft (Parent Ex. I at p. 2). She suggested that because the student went so far beyond the page requirement it became difficult for him to complete the story and turn it in (id.). The teacher reported that the student participated well during the fourth quarter (Parent Ex. J at p. 5). She also reported that poetry and short stories that the student wrote were excellent but that she would have liked to have seen more genres (id.). The student's letter grades ranged from an A- to an A (Parent Ex. G at p. 6; H at p. 4; I at p. 2; J at p. 5).

In modern literature, the student's teacher advised that the student's participation during class discussions was very strong and that his journals were well written (Parent Ex. G at p. 4, H at p. 5; I at p. 3; J at p. 6). She suggested that the student stay on top of interactive reading and that he work on making his essays more concise (Parent Ex. G at p. 4). For the second quarter, the teacher complimented the student on the improvement evident in his five-paragraph essay, noting that the student's writing was thorough but concise (Parent Ex. H at p. 5). The teacher concluded the year by stating that she was pleased with the progress in the student's writing (Parent Ex. J at p. 6).

With respect to the student's needs, the student's progress reports support the conclusion that RLS was an appropriate unilateral placement for the student. As noted above, the student passed each course, with no grade in any quarter in any subject below a B (*id.*). He advanced to the twelfth grade at the end of the 2009-10 school year (Tr. p. 78). Further, the student's progress reports consistently indicate that the placement facilitated the student's ability to participate in class and interact with the other students (*see* Parent Exs. G; H; I; J).

Based on the foregoing, I find that the hearing record contains sufficient information to conclude that the parents have met their burden to show that RLS was an appropriate unilateral placement for the student for the 2009-10 school year. In reaching this conclusion, I have considered the "totality of the circumstances" and have determined that the placement reasonably served 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 (Gagliardo, 489 F.3d at 112; *see* Frank G., 459 F.3d at 364-65).

### **Equitable Considerations – Notice**

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 IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the

student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

In the instant case, the district asserts that the equities should preclude relief because the parents submitted an August 10, 2009 "form letter" that was insufficient to provide notice of their intent to enroll the student at RLS and seek tuition reimbursement for the 2009-10 school year.

The hearing record indicates that notice of the August 11, 2009 CSE meeting was sent to the parents on July 24, 2009 (Dist. Ex. 3 at p. 2). The parents notified the district by form letter dated August 10, 2009 that they would be enrolling the student at RLS for the 2009-10 school year (Parent Ex. E). The August 10, 2009 letter stated that it will serve as a "10 day notice letter" and further advised that the CSE had failed to conduct a timely review and had not offered the student a placement (*id.*). The next day, on August 11, 2009, the CSE convened for the student's annual review (Dist. Ex. 3 at p. 1). While the student's mother advised the CSE at the time of the meeting of her dissatisfaction with its recommendation of a general education program, there is no indication in the hearing record that she advised the CSE that she planned to place the student at RLS for the 2009-10 school year and seek funding for the placement from the district (see 20 U.S.C. § 1412[a][10][C][iii][I][aa]; 34 C.F.R. § 300.148[d][1][i]). On or about September 1, 2009, the parents indicated in a handwritten note on the district's August 27, 2009 notice of placement that they could not "accept or reject" the placement until they had an opportunity to visit (Parent Ex. D). The student began attending RLS on September 9, 2009, the same date that the student's father signed a contract for the student's enrollment (Parent Exs. L; M). Although the contract with RLS notes that the parent was "currently" seeking tuition reimbursement from the district on September 9, 2010, there is no information in the hearing record showing that at that point in time the parents had advised the district of this fact (Parent Ex. M). Two weeks later, in a second handwritten statement dated September 23, 2009, the parents advised the district that they were rejecting the district's recommended program upon visiting the assigned school, that the student would be attending RLS, and that an impartial hearing would be scheduled (Parent Exs. L, M).

Based on the foregoing, I find that the parents failed to satisfy the notice requirements to timely inform the district of their concerns with the adequacy of the student's evaluation and the August 2009 IEP prior to placing the student at RLS for the 2009-10 school year. Under the circumstances of this case as described above and in the exercise of my discretion in fashioning equitable relief, I find that the parents are entitled to reimbursement of 75% of the tuition costs for RLS for the 2009-10 school year (see 20 U.S.C. § 1415[i][2][C][iii]).

## Relief

The district further alleges that the parents are not seeking reimbursement of the tuition costs of RLS but rather are seeking "direct funding" for the tuition costs of that school.<sup>9</sup> However, the district also asserts that the parents have not presented evidence that sufficiently proves that they are financially unable to front the cost of the unilateral placement.

In a case of first impression, one court has recently held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A v. New York City Dep't of Educ., 2011 WL 321137 at \*22 [S.D.N.Y. Feb 1, 2011]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F.Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 358-60 [S.D.N.Y. 2009]). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A, 2011 WL 321137 at \*24).<sup>10</sup> Since the parents have selected RLS as the unilateral placement, and their financial status is at issue, I assign to the parents the burden of production and persuasion with respect to whether the parents have the financial resources to "front" the costs of RLS.

Although unnecessary to my determination in this case, I note that in Mr. and Mrs. A., the court did not establish what should be considered as part of parents' "financial resources" for purposes of determining their ability to pay the costs of tuition for a private school. For instance, it is unclear whether a determination of a parent's financial resources should take into account only his or her annual wages or whether it should also consider items such as cash or its equivalents that the parent has on hand, the parent's ability to access financing, other investments, the unrealized earning potential of a nonworking parent, or the value of luxury items belonging to the parent just to name a few (see Connors, 34 F.Supp.2d at 806 n.6 [describing that the calculation of a parent's need should be conducted by drawing from a school's experience in determining a parent's eligibility for financial aid]). However, under the circumstances of this case and as more fully discussed below, the hearing record does not contain sufficient evidence to support the conclusion that the parent lacks the requisite financial resources.

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<sup>9</sup> The parents request on appeal that the district be directed to pay the costs of the student's tuition at RLS (see Pet. ¶ 11). However, the wherefore clause of the petition for review sets forth that the parents are entitled to the relief requested in the due process complaint notice, and the due process complaint notice, in turn, seeks direct payment and/or tuition reimbursement (see Pet. at p. 20; Dist. Ex. 1 at pp. 2-3).

<sup>10</sup> The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 129 S. Ct. at 2494 n.11 see 20 U.S.C. § 1415[i][2][C][iii]).

In this case, the hearing record reflects that on September 9, 2010 the student's father entered into a contract to pay RLS \$45,000.00 for tuition costs for the student's enrollment at that school for the 2009-10 school year (see Parent Ex. M). The contract noted that the parent was "currently seeking tuition reimbursement from [the district]" and that RLS would "defer" the obligation to pay RLS until after the student's father received reimbursement from the district (id.). The contract stated that if the father did not recover the tuition from the district, the father would remain obligated to pay the RLS tuition and that RLS may avail itself of any and all legal remedies to collect the tuition (id.).

The hearing record also reflects that in 2009, the student's father's income was approximately \$82,000 (see Parent Ex. N). Other than this point, I agree with the district's contention that the evidence regarding the parents' financial resources lacks meaningful detail. The student's father testified that his financial situation is "quite strained," that he has "more bills than [he] really can cover," that he has "a large amount of debt," and that he was still making payments to RLS for a partial tuition obligation from the 2008-09 school year (Tr. pp. 117-18, 119, 120). While this could be an accurate summary of his own financial resources, it is conclusory and does not allow for a meaningful analysis of the parents' request for relief. Moreover, with respect to the student's mother, the district correctly asserts that the social history update noted that she holds a Bachelors degree and that she is talented, career oriented, employed, and qualified to work as a librarian and researcher (see Dist. Ex. 4 at p. 3). However, the hearing record contains no information regarding her income or financial resources. Under these circumstances the parents have not met their burden to establish that they lack the financial resources to "front" the student's tuition costs for the 2009-10 school year (Mr. and Mrs. A, 2011 WL 321137 at \*22).

## **Conclusion**

In summary, I find that the district failed to offer the student a FAPE, that the parents' unilateral placement at RLS was appropriate, that equitable considerations partially support the parents claim, and that the parents failed to establish that they lacked the financial resources to front the student's tuition costs at RLS for the 2009-10 school year. I will direct that the district reimburse the parents for 75% of the student's tuition costs at RLS for the 2009-10 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 decision dated February 28, 2011 denying the parents' tuition reimbursement claim is annulled, and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for 75% of the costs of the student's tuition at RLS for the 2009-10 school year upon the parents' submission of proof of payment to the district.

**Dated:** Albany, New York  
June 9, 2011

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**