



The University of the State of New York

The State Education Department State Review Officer

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No. 11-049

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, Lisa R. Khandhar, Esq., of counsel.

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel.

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents and directly fund their son's tuition costs at the Rebecca School for the 2010-11 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending an ungraded class at the Rebecca School, where he was unilaterally placed at the beginning of the 2010-11 school year (see Tr. pp. 115, 168, 220; Dist. Ex. 17; Parent Ex. I). The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

The student reportedly received a diagnosis of an autistic disorder at age two (Parent Ex. D at p. 1). He attended the district's elementary school for five years, starting in kindergarten (Tr. p. 220-21; Dist. Ex. 1 at p. 2). According to the student's mother, the student's kindergarten class was "very rigid" and he did not perform well (Tr. p. 221). Subsequently, she requested that he be

moved to a district class that employed the "Miller Method" (*id.*).¹ The student attended a class in which the Miller Method was used for two years, during which time, according to the student's mother, the student "improved" (*id.*).² Thereafter the student's mother reported that the student returned "back to the regular classroom and strategies they use" where he did "okay" (*id.*). For the 2009-10 school year, the student's teacher was changed and he was placed in a class described by his mother as employing a strict methodology and placing many demands on the student (Tr. p. 223). By November 2009, the student was demonstrating very severe, self-injurious behaviors, and his use of language decreased (Tr. pp. 221-22). As reported by the student's mother, the student engaged in aggressive outbursts, which the school could not manage and she was called "more than once" to pick up the student from school (Tr. pp. 222-23). The student also began wearing a helmet throughout the school day to control an increase in his head banging behavior (Tr. p. 223).³ The student's special education teacher confirmed that the student demonstrated "outbursts" and that his behavior deteriorated between September 2009 and December 2009 (Tr. pp. 58, 65).⁴ She reported that in fall 2009 she conducted a functional behavioral assessment (FBA) of the student (Tr. p. 85).

On December 18, 2009, the Committee on Special Education (CSE) convened for the student's annual review and to develop a new individualized education program (IEP) for the student (Dist. Ex. 5 at p. 1). Meeting participants included the student's special education teacher, who also served as the district representative; the student's occupational and physical therapists; and the student's mother (Tr. pp. 9-10; Dist. Ex. 5 at p. 2). The resultant IEP described the student's present levels of academic performance, social/emotional performance, and health and physical development (Dist. Ex. 5 at pp. 3-5). According to the IEP, at that time the student attended a 6:1+1 class with students on the autism spectrum (*id.* at p. 3). The IEP reflected that the student was able to speak in one word utterances, but required "a lot of encouragement and prompting to speak more" (*id.*). In addition, the IEP noted that the student was able to recognize his own name when prompted, write the first letter of his name, and trace highlighted letters and words (*id.*). According to the IEP, the student understood "when spoken to," but became frustrated and aggressive if he could not communicate his needs (*id.*). The student "had some receptive vocabulary" and was able to respond to simple verbal directions (*id.*). The student could also count

¹ The "Miller Method" is described in the hearing record as a "less structured approach" than applied behavior analysis (ABA) (Tr. p. 195).

² The student's intellectual, adaptive, and social./emotional and behavioral functioning were evaluated in December 2007, when the student was seven years old (Parent Ex. D). The report from an interdisciplinary conference, held on December 13, 2007, indicated that based on an informal assessment, the student appeared to be experiencing global delays, that his adaptive functioning was in the "[l]ow range," and that significant sensory integration and social functioning issues were reported (Parent Ex. E). The interdisciplinary team offered the following diagnoses of the student: an autistic disorder and a mild mental retardation (*id.*).

³ The student's mother reported that the helmet had been purchased the year before (2008) in response to the student's "head tapping" (Tr. p. 223). She noted that it was used on occasion for about 15 minutes per day, and not every day (*id.*). The student's mother stated that by November 2009, the student wore the helmet throughout the day due to his head banging (*id.*). She indicated that use of the helmet at home also increased during this time period but was not constant (Tr. pp. 228-29).

⁴ The special education teacher later testified that the student's behavior did not get worse, but that it was not changing and she felt that she needed to address it more specifically (Tr. p. 71).

to three when verbally prompted, recognize a penny, and was working on learning numbers with sets (*id.*).

With respect to the student's social/emotional performance, the December 2009 IEP reflected that the student enjoyed being read to and eating snacks throughout the day (Dist. Ex. 5 at p. 4). The IEP further noted that the student would sit for long periods of time if he enjoyed an activity and if his 1:1 paraprofessional was nearby (*id.* at p. 3). The IEP indicated that the student shared materials and snacks and that he got along with his peers; however, it noted that the student struggled to communicate his needs and had difficulty transitioning from one activity to the next (*id.* at p. 4). The IEP stated that the student engaged in loud outbursts and would grab suddenly at peoples' necks or shirts (*id.*). It further indicated that the student banged his head and arms on hard surfaces, and that he wore a helmet and elbow pads for protection (*id.*).

The December 2009 IEP stated that the student's behavior seriously interfered with instruction and that the student required additional adult support (Dist. Ex. 5 at p. 4). Attached to the IEP was a behavioral intervention plan (BIP) that described the student's interfering behaviors, as well as strategies and supports that would be employed to change the student's behavior (*id.* at p. 16).⁵ The BIP also identified the expected behavioral changes (*id.*).

The December 2009 IEP also included a description of the student's health and physical development (Dist. Ex. 5 at p. 5). The IEP reflected that when the student engaged in outbursts it took five to ten minutes to calm him down, and sensory materials helped to soothe the student when he became aggressive (*id.*). The IEP also noted that the student received adapted physical education three times per week in a 6:1+1 ratio (*id.*).

The December 2009 CSE found the student eligible for special education programs and services as a student with autism (Dist. Ex. 5 at p. 1). The CSE recommended that the student be placed in a 6:1+1 special class in a specialized school and receive the support of a 1:1 full-time crisis management paraprofessional (*id.* at p. 15). In addition, the CSE recommended that the student receive individual speech-language therapy four times per week, individual occupational therapy (OT) five times per week, and individual physical therapy (PT) two times a week, each for 30 minutes per session (*id.*). The December 2009 IEP included annual goals and short-term objectives related to improving the student's communication, turn taking, ability to sit quietly, ability to transition independently, reading, toileting, gross motor skills, and ability to self-regulate (*id.* at pp. 6-12). According to the IEP, the student would participate in alternative assessment (*id.*)

⁵ The BIP attached to the December 2009 IEP identified the following behaviors as interfering with the student's ability to learn: screaming, banging arms on desk, hitting head and legs, grabbing, and trying to bite (Dist. Ex. 5 at p. 16). The BIP listed the following expected changes in behavior: increase quiet sitting, encourage and reward sitting quietly, and decrease self-abusive behaviors (*id.*). According to the BIP, strategies that would be used to try to change the student's behavior included rewarding the student with praise and breaks for quiet sitting, having the student wear a weighted vest for part of the day, having the student wear arm splints, providing the student with sensory motor techniques (i.e. brushing, massager), and providing the student with a communication board for use across all environments (*id.*). The BIP reflected that the following supports would be employed to help the student change his behavior: attention from teachers, paraprofessionals, and therapists; behavior charts and rewards; crisis teacher availability; a swing in the therapy room; and use of a communication board in all environments (*id.*).

at p. 15).⁶ The district was scheduled to begin implementation of the IEP on January 12, 2010 (*id.* at p. 2).

Due to the student's deteriorating behavior, in January 2010 he ceased riding the bus to and from school (Tr. p. 96). In spring 2010, the student was placed in arm splints in school to prevent him from punching his face, removing his helmet, and injuring his elbows (Tr. pp. 84-85, 223-24).

In a letter to the district's school psychologist dated April 12, 2010,⁷ the student's mother requested that her son's case be "opened" for the purpose of obtaining a 1:1 transportation paraprofessional for the student for September (Dist. Ex. 7; *see* Dist. Ex. 10). On April 14, 2010 the district requested the parents' consent to conduct a reevaluation of the student, which the student's mother gave on the same day (Dist. Ex. 9).

At the request of the school psychologist, the student's special education teacher completed a teacher report on June 18, 2010 (Dist. Ex. 13 at p. 1). According to the special education teacher, the student performed best in the early morning, when he could sit for 30 minutes before needing a break (*id.*). The student communicated his needs using one-word utterances and was beginning to verbally identify pictures (*id.* at pp. 1-2). With respect to academics, the special education teacher indicated that the student was able to match letters, numbers, and pictures; trace some letters; and read simple words such as "cat" and "dog" (*id.* at p. 1). She noted that the student participated in the morning routine by providing one-word answers to questions (*id.*). The special education teacher commented that the student liked to eat snack foods frequently and that snacks were used as reinforcers to increase the student's sitting time (*id.*). The special education teacher opined that the student enjoyed school as long as his needs were met (*id.* at p. 2). She reported that some of the student's days were "difficult" and that often the student was frustrated because he could not communicate his wants to others (*id.* at pp. 1-2). The special education teacher explained that on difficult days, the student would have outbursts during which he was very aggressive toward himself and others and would need to be removed from the classroom (*id.* at p. 2). The special education teacher reported that during breaks, the student would often pace back and forth quietly in the classroom (*id.*). According to the special education teacher, the student had difficulty sitting for more than 30 minutes and he almost always had difficulty when his 1:1 paraprofessional went to lunch (*id.*). The special education teacher reported that the student enjoyed going to speech with his paraprofessional and as a result, his verbalizations were getting louder (*id.*). She indicated that lately the student had had more good days than difficult days (*id.*).

On June 21, 2010, the CSE reconvened in response to the parents' April 2010 request for review (Dist. Ex. 4 at p. 2). Meeting participants included the school psychologist, who was also the district representative; the student's special education teacher, and the student's mother (Tr. p. 44; Dist. Ex. 4 at p. 2).⁸ The June 2010 CSE recommended the addition of an individual special transportation paraprofessional to the student's IEP (Dist. Ex. 4 at pp. 2, 19). In addition, the CSE

⁶ A district "Notice of Recommendation of IEP Meeting" dated December 18, 2009, stated that the student's IEP was modified by updating his goals and short-term objectives, but that no other changes were made (Dist. Ex. 6 at p. 1).

⁷ I note that, while the letter is dated April 12, it was stamped "Received" April 10, 2010 (Dist. Ex. 7). Neither party addressed this issue at the impartial hearing, and it has no effect on the analysis herein.

⁸ The parents declined the participation of the additional parent member at the June 21, 2010 CSE meeting (Dist. Ex. 14).

developed a BIP to be used with the student while on the bus (*id.* at p. 21).^{9, 10} Also on June 21, 2010, the CSE issued a final notice of recommendation (FNR) that summarized the program offered by the district with the addition of the special transportation paraprofessional and continued the student's assignment to the same school that he was attending at the time of the CSE meeting (Dist. Ex. 16).

In a letter to the district dated August 9, 2010, the student's father stated that the 6:1+1 program recommended by the June 2010 CSE was not appropriate for the student as the student had previously attended the program and not made progress (Dist. Ex. 17). In addition, the student's father asserted that the offered program did not provide the student with the services he required as the assigned classroom was too small and there was no quiet room (*id.*). The student's father stated that he was unable to accept the offered program and that he would be enrolling his son at the Rebecca School in September 2010 and seeking tuition reimbursement at public expense (*id.*). The student's father requested that the district provide busing, including the special transportation paraprofessional (*id.*). On or about August 10, 2010, the parents signed a contract enrolling the student in the Rebecca School for the 2010-11 school year (Parent Ex. I).

In an IEP progress report dated August 2010, the district indicated that the student was making progress toward 9 of his 13 annual goals (see Dist. Ex. 5 at pp. 6-12). On September 13, 2010, the student began attending the Rebecca School (Tr. p. 119).

Subsequent to unilaterally enrolling the student in the Rebecca School, the parents obtained private psychological and speech-language evaluations of the student (Parent Exs. F; J).¹¹ In September 2010, the parents arranged for the student to be evaluated by a private neuropsychologist in an effort to help clarify the student's educational needs and understand the

⁹ The June 2010 transportation BIP reflected that the following behaviors interfered with the student's learning: grabbing, kicking, hitting and biting adults, throwing himself on the floor and/or hitting himself (Dist. Ex. 4 at p. 21). The BIP listed the following expected changes in the student's behavior: a decrease in self-abusive behaviors, an increase in appropriate interaction with adults, and an increase in appropriate sitting on the bus by remaining in a car seat (*id.*). The BIP included the following strategies and supports to be used to change the student's behavior: sensory motor techniques, verbal praise for quiet sitting, singing to calm the student down, the use of social stories, use of arm splints to address sensory concerns if behavior escalates, positive reinforcement from adults, a car seat to prevent slipping, and provision of a 1:1 special transportation paraprofessional (*id.*).

¹⁰ Although the district asserts and the parents admit on appeal that the December 2009 and June 2010 IEPs were identical in all other respects, the June 2010 IEP included additional revisions. The student's present levels of health and physical development in the June 2010 IEP were updated to reflect that the student exhibited delays in gross motor, balance, and coordination skills (Dist. Ex. 4 at p. 5). The June 2010 IEP further indicated the student had low to normal muscle tone, decreased "low" proximal stability, and a short attention span (*id.*). In addition, the student's annual goals were revised to include new academic goals related to identifying numbers and coins, as well as new attending, gross motor, fine motor, and graphomotor goals (*id.* at pp. 8, 12, 13-14, 16). At the same time, goals related to self-regulation and task completion were removed from the student's IEP (compare Dist. Ex. 4, with Dist. Ex. 5 at p. 12). Lastly, "grabbing" was removed as an interfering behavior from the student's school-based BIP (compare Dist. Ex. 4 at p. 20, with Dist. Ex. 5 at p. 16).

¹¹ The private neuropsychologist who evaluated the student reported that to address his "rage attacks," the student had begun taking medication in spring 2010 (Parent Ex. F at p. 2). She noted that the student had begun a new medication in September 2010 (*id.*). Additionally, the private speech-language pathologist reported that improvement had been noted in the student's behavior with the introduction of the second medication (Parent Ex. J at p. 1).

difficult behaviors the student was experiencing prior to attending the Rebecca School (Parent Ex. F at pp. 1, 6). In her evaluation report, the neuropsychologist included a developmental history and a school history based on information conveyed to her by the parents (Tr. pp. 187-92; Parent Ex. F at pp. 2-3). Based on her own observations, the neuropsychologist reported that the student entered the room without looking at her (Parent Ex. F at p. 5). She further noted that the student's eye contact was quite poor, but that at certain times he would look at her intently (id.). According to the neuropsychologist, the student spent much time pacing around the room and engaged in frequent whining to indicate his displeasure with the evaluation process (id.). She further reported that the student began beating his chest and arms and was restrained by his mother or father to stop (id.). The neuropsychologist observed that the student mouthed several objects including a lamp shade and carpet (id.). She indicated that it was very difficult to engage the student in joint attention (id.). In addition, the neuropsychologist reported that it was extremely difficult, if not impossible, to engage the student in formal testing and that the testing situation appeared to make the student "overall quite anxious" (id. at p. 6).

With respect to academic functioning, the neuropsychologist reported that the student could count from one to five, identify all of the letters of the alphabet, read simple stories aloud, identify coins, recognize his name, and match words with objects and colors (Parent Ex. F at pp. 4-5). She indicated that based on the parents' completion of the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), the student's language skills fell below the first percentile (id. at p. 4). She further indicated that the student's social functioning and self-care skills also fell below the first percentile (id.).¹² The neuropsychologist reported that the student was immature in his ability to relate to peers, but also reported that the student enjoyed engaging with typically developing peers in motor games like tag (id. at p. 6). The neuropsychologist concluded that based on the student's adaptive functioning and school reports, he met the criteria for mental retardation, severity unspecified, and an autistic disorder (id.).

The neuropsychologist noted that the student had been attending the Rebecca School and that the program there was "modeled on a 'floortime' approach that essentially follows the students['] interests in attempts to expand their skills from a level they already exhibit" (Parent Ex. F at pp. 6-7). She noted that the parents reported that the student's behavioral difficulties had "essentially remitted" and that he was doing "better than ever" in terms of language expression and compliance (id. at p. 7). The neuropsychologist concluded that the Rebecca School program "appear[ed] to be an appropriate fit" for the student at that time (id.).

The parents also obtained a private speech-language evaluation of the student in September 2010 (Parent Ex. J). The evaluating speech-language pathologist noted the student's prior educational history and the parents' concern that the student had regressed in the district's placement during the previous year (id. at p. 1). With regard to her evaluation, the speech-language pathologist reported that the student's unpredictable, self-injurious, and potentially dangerous behaviors precluded the administration of formal assessment protocols and noted that the information in her report was based on informal observations along with parental interviews (id. at pp. 3-4). She described the student as a self-directed, aloof, and marginally responsive student with whom rapport could not adequately be established (id. at p. 4).

¹² Although the neuropsychologist did not indicate the test used to obtain these scores, it appears that they are also based on the parents' completion of the Vineland-II (Parent Ex. F at pp. 4-5).

According to the speech-language pathologist, the student exhibited severe receptive language deficits (Parent Ex. J at p. 3). She noted that the student did not always respond to his name or utterances directed to him, and that he appeared more interested in environmental sounds than in speech (*id.*). She reported that the student was able to respond to simple one-level commands, as well as novel commands, but did so inconsistently (*id.*). The speech-language pathologist further reported that the student demonstrated awareness of early school readiness skills such as colors, shapes, letters, and some sight vocabulary (*id.*). According to the speech-language pathologist, the student's expressive speech was characterized by simple, stereotypic phrases, which were used in a repetitive, inflexible manner (*id.*). She noted that the student did not use gestures and his pragmatic language skills were markedly impaired (*id.*). The speech-language pathologist reported that the student used language to make some needs known to others (*id.*). She commented that the student also labeled familiar objects, although this did not appear to serve a specific function (*id.*). The speech-language pathologist judged the intelligibility of the student's conversational speech to be "fair," noting that there was a "generalized slur of speech" (*id.*). She opined that the student's significant language and speech concerns were consistent with an autism spectrum disorder (*id.* at p. 5). The speech-language pathologist stated that the student's communication deficits were exacerbated by severe behavioral deviations, some of which were a reflection of the student not being able to express his needs (*id.*). In addition, she opined that the student's inability to establish reciprocity with others also contributed to his poor communication skills (*id.*). The speech-language pathologist recommended that the student receive "intensive" speech-language therapy services to address his identified deficits (*id.*).¹³

Due Process Complaint Notice

In a due process complaint notice dated September 29, 2010, the parents requested an impartial hearing (Dist. Ex. 1 at p. 1). The parents asserted, as relevant to this appeal, that the CSE failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year by failing to conduct an educational evaluation of, and develop an appropriate behavior management plan for the student (*id.* at pp. 2-5).¹⁴ The parents also asserted that they were incapable of paying the student's tuition (*id.* at p. 6). As relief, the parents requested direct payment and tuition reimbursement for their unilateral placement of the student at the Rebecca School (*id.*). The parents also requested reimbursement for the cost of the private evaluations they had obtained (*id.* at pp. 5-6).

In a response dated October 5, 2010, the district stated that its recommended placement was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 2 at p. 3). In an amended response dated December 15, 2010, the district additionally asserted that the June 2010 CSE meeting was convened to augment the student's December 2009 IEP by adding a 1:1 special transportation paraprofessional and that the substantive provisions of the December 2009 IEP were to remain in effect until January 12, 2011 (Dist. Ex. 3 at p. 4).

¹³ In an undated letter to the district, the parents indicated that they were forwarding the September 2010 private evaluations to the CSE for consideration at the student's next CSE meeting (Parent Ex. M).

¹⁴ Although the parents' due process complaint notice alleged only that the "[t]he behavior management plan in the classroom is inappropriate for the student" and did not specifically challenge the district's BIP; on appeal and at the impartial hearing below, neither party has disputed that the district's BIP is at issue nor has the district asserted that the impartial hearing officer improperly made determinations regarding the BIP.

Impartial Hearing and Decision

An impartial hearing was convened on December 23, 2010 and concluded on March 4, 2011. In a decision dated April 7, 2011, the impartial hearing officer found that the district failed to offer the student a FAPE in the least restrictive environment (LRE) because the use of the arm splints and helmet "constitute[d] a significant and dramatic restriction on [the student's] freedom of movement and of his bodily autonomy" (IHO Decision at pp. 5-6). Due to this determination, the impartial hearing officer found that it was unnecessary to determine whether the district's recommended placement would have otherwise offered the student a FAPE, although he noted several concerns regarding the placement (*id.* at p. 5).

The impartial hearing officer also found that the parents' unilateral placement at the Rebecca School was appropriate, in part relying on a decision issued by the United States District Court for the Southern District of New York involving a different student that had "deemed that program categorically to be appropriate" (IHO Decision at pp. 4, 6). In addition, the impartial hearing officer found that a review of the student's IEP and the testimony of the Rebecca School staff "compelled" the conclusion that the Rebecca School's program was reasonably calculated to provide educational benefit to the student (*id.* at p. 6). The impartial hearing officer further determined that the student made "substantial and significant educational progress . . . , both affectively and cognitively," at the Rebecca School over the course of the 2010-11 school year (*id.* at pp. 6-7).

With regard to reimbursement and direct payment, the impartial hearing officer rejected the district's arguments that the Individuals with Disabilities Education Act (IDEA) precludes reimbursement of tuition paid to for-profit schools and direct payment of tuition (IHO Decision at pp. 3-4). With respect to the equities, the impartial hearing officer found that the parents gave the district "ample notice" of their concerns with the student's escalating behavioral problems, and that the district should have reevaluated the student and "sought alternative methodologies that might better have served the needs" of the student (*id.* at p. 7). Accordingly, the impartial hearing officer granted the parents reimbursement for the private evaluations they had obtained and for tuition payments they made to the Rebecca School; and ordered the district to directly pay the Rebecca School the balance of tuition owed for the 2010-11 school year (*id.*).

Appeal for State-Level Review

The district appeals, asserting that the impartial hearing officer used an improper legal standard in analyzing the student's arm splints and helmet as a component of LRE. Moreover, the district asserts that the parents raised no objections to the use of such restraints in their due process complaint notice and, in any event, the district was permitted to use such restraints pursuant to State regulations governing the use of aversive interventions. The district further asserts that the impartial hearing officer properly found that it otherwise offered the student a FAPE, as the goals in the IEP were related to the student's needs and could have been implemented in the assigned school. The district also asserts that the parents failed to show that the Rebecca School was an appropriate placement, as the school week contains fewer than 30 hours of instruction, and the Floortime methodology was insufficiently academic to enable the student to receive an educational benefit. With regard to reimbursement, the district asserts that the impartial hearing officer improperly directed it to reimburse the parents for the student's tuition costs at the Rebecca School because the IDEA prohibits reimbursement for tuition paid to for-profit schools. Additionally, the

district asserts that equitable considerations weigh against reimbursement, as the parents provided insufficient notice to the district of their intent to place the student in a private school and seek tuition reimbursement at public expense. Finally, the district argues that the impartial hearing officer incorrectly ordered it to reimburse the parents for the cost of the private evaluations, as the student was not scheduled for his triennial evaluation for several months and the parents neither requested a new evaluation nor disagreed with an evaluation conducted by the district.

The parents answer, asserting that contrary to the district's assertion in its petition, the impartial hearing officer did not find that the district offered the student a FAPE; rather, he declined to reach the question of the appropriateness of the district's offered placement because he found that it was not the student's LRE. The parents further assert that the impartial hearing officer correctly found that the district's offered placement was not the student's LRE because mainstreaming is not the only relevant issue to an LRE analysis. The parents also contend that whether the district was permitted to use the restraints is irrelevant to the question of whether their use was appropriate, and the use of the restraints was unnecessary and constitutes evidence of the inappropriateness of the district's BIP. The parents further assert that the Rebecca School was an appropriate placement tailored to meet the student's needs, inasmuch as it provided him with appropriate sensory input and regulation, therapies, and behavioral support, and the student progressed while attending the Rebecca School. The parents also assert that they are entitled to reimbursement because they cooperated with the district and provided sufficient notice of their intention to place the student at the Rebecca School. With respect to the private evaluations, the parents assert that they obtained the evaluations because the district delayed in reevaluating the student after receiving consent from the parents and the district had not evaluated the student as of the date of the impartial hearing, after his triennial evaluation was due.

Applicable Standards—IEP Development

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 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).

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

Turning first to the district's contention that the impartial hearing officer erred in awarding tuition reimbursement because it offered the student a FAPE, I note that the issue as framed by the district centers on the impartial hearing officer's adverse factual determinations regarding the arm splints and helmet that the district used to address the student's interfering behaviors. I agree with the district that the impartial hearing officer erred insofar as he analyzed the district's use of

restraints to control the student's behavior in accordance with LRE principles. 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]; 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21). In this case, the impartial hearing officer misapplied the LRE standard by examining the "restrictiveness" of the student's program in terms of the type of devices used to address the student's behavior. However, I note that the parties did not dispute the extent to which the district offered special education services to the student in the LRE and, even if this issue was in dispute, an LRE inquiry would involve the extent to which the student was offered opportunities to interact with nondisabled peers. Although I agree that the impartial hearing officer applied the incorrect standard to the issue at hand, the district's contention that the impartial hearing officer otherwise determined that the district offered the student a FAPE and that no further analysis of the issue is required is an overreaching interpretation of his decision and would, in this instance, improperly leave open the factual issue to which the district argues the wrong legal standard was applied. Accordingly, a review of the facts underlying the impartial hearing officer's determination and an analysis of whether the district appropriately addressed the student's interfering behaviors is required.

Special Factors in an IEP and Interfering Behaviors

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F.Supp.2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F.Supp.2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that the "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service

(including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a " FAPE ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysesd.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).¹⁵ State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H. v. Dep't of Educ., 2010 WL 3242234 (2d Cir. Aug. 16, 2010)).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the

¹⁵ While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d. Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹⁶ Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-needs.htm>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the behavioral intervention plan and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, as discussed in greater detail below, I find that the district failed to offer the student a FAPE because the recommendations contained in the June 2010 IEP and the BIP as formulated did not appropriately address the student's behaviors that impeded learning.

The evidence in the hearing record shows that the district's special education teacher testified that an FBA of the student had been conducted in fall 2009, and she believed that a second FBA had been conducted in April 2010 (Tr. pp. 85-86). However, no FBA was made part of the hearing record and it is not clear if in its assessment process the district followed the procedures to gather the information, as set forth in State regulations, to develop the student's BIP (see id.). However, regardless of the sufficiency of the FBAs, as discussed more fully below, I note that there is no evidence that the district monitored or documented the student's progress relative to the behavioral interventions used under the December 2009 IEP and BIP or that this information was provided to the June 2010 CSE for consideration in its revision of the student's IEP. Under these circumstances, the hearing record does not support a finding that the district complied with the procedures for considering the special factor of behavior that impeded the student's learning.

Nor, under the unique facts of this case, does the hearing record support the conclusion that the procedural inadequacy had no harmful effects on the student's educational program. The BIP attached to the June 2010 IEP did not provide sufficient information regarding how the student's self-injurious and interfering behaviors would have been addressed by the recommendations in the June 2010 IEP. The BIP developed by the June 2010 CSE identified screaming, banging arms on desk, hitting head and legs, and trying to bite as behaviors that interfered with the student's ability to learn, but provided no baseline measure of the problem behaviors including the frequency, intensity, duration, or latency of the targeted behavior (Dist. Ex. 4 at p. 20).¹⁷ While the BIP identified intervention strategies, such as providing the student with access to sensory motor

¹⁶ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

¹⁷ I note that the BIP developed at the June 2010 CSE meeting was essentially the same as the BIP developed as part of the December 2009 CSE meeting (compare Dist. Ex. 5 at p. 16, with Dist. Ex. 4 at p. 20).

activities, use of a communication board, and donning a weighted vest and arm splints; and detailed expected behavior changes, such as increased quiet sitting and decreased self-abusive behaviors; it did not include a schedule to measure the effectiveness of these interventions (*id.*). In particular, one version of the December 2009 BIP in the hearing record does not include the use of arm splints while the other version includes a handwritten notation adding the use of arm splints to restrain the student's movement (compare Parent Ex. C at p. 16, with Dist. Ex. 5 at p. 16). Additionally, neither the December 2009 or June 2010 BIPs note the district's use of the helmet as a strategy to address the his head banging behavior (Dist. Exs. 4 at p. 20; 5 at p. 16).

The hearing record also shows that the student was not recommended to transition to a new setting before his next annual IEP review, nor was it unknown whether he would exhibit interfering behaviors in his recommended educational environment. Here the hearing record shows that the district recommended that the student continue attending the same 6:1+1 special class that he had attended during the 2009-10 school year (Tr. p. 52). While receiving services under the December 2009 IEP, the student's mother testified that the student's behavior and use of language had deteriorated over the course of the 2009-10 school year (Tr. pp. 221-22). In addition, the hearing record shows that during the prior school year, the student engaged in aggressive and self-injurious behaviors that impeded his learning and placed the student and others at risk of harm or injury (Tr. pp. 15-16, 19, 58, 221-22). Although the district developed the BIP for the student in December 2009, and his teacher reported that the BIP helped to reduce the student's interfering behavior, that viewpoint is not supported by the evidence. The student required the use of additional interventions beyond those listed in the BIP to control his self-injurious behaviors as the year progressed, including the use of a helmet and arm splints to restrict the student's movement (Tr. pp. 37, 84-86, 223-24; Parent Ex. C at p. 16). The student's mother also reported that at times district staff could not manage the student's behavior and that she was "called more than once" to remove the student from school during those episodes (Tr. p. 223; see Parent Ex. F at p. 3). Furthermore, the student's teacher from the 2009-10 school year testified that she would also send the student to "a time-out room" when he had outbursts lasting longer than five minutes, so that the outbursts could "be addressed by a single person, usually a crisis intervention teacher" (Tr. pp. 53, 59-60).

In summary, the evidence shows that the June 2010 CSE also noted many of these behaviors, stating that the student had difficulty transitioning between activities, engaged in loud outbursts lasting from 5-10 minutes, grabbed at others' necks and shirts, tried to bite others, banged his arms and head on hard surfaces, required sensory materials to calm his aggressive behaviors, and required the services of a crisis management paraprofessional (Dist. Ex. 4 at pp. 1, 4, 6, 20). However, there is no evidence that the CSE reviewed any of the FBAs developed for the student with respect to these behaviors, despite the June 2010 CSE's ultimate conclusion to draft a BIP for the student. Furthermore, the student's behaviors were escalating over the course of spring 2010 and the district believed they were significant enough to warrant the use of mechanical restraints and a time out room, and ultimately require that the parents retrieve the student from school, none of which interventions were strategies that were appropriately identified in the December 2009 BIP for the student. Instead, the district offered a BIP that was unchanged in nearly all respects.¹⁸

¹⁸ As noted above (see p. 14, supra), one version of the December 2009 BIP in the hearing record does not include the use of arm splints while the other version includes a handwritten notation adding the use of arm splints to restrain the student's movement (compare Parent Ex. C at p. 16, with Dist. Ex. 5 at p. 16).

I find that the failure of the CSE to review the interventions actually used with the student or to develop a revised BIP that was designed to measure and monitor the student's self-injurious and aggressive behaviors, as well as the student's response to strategies implemented by the district, or otherwise note appropriate supplementary aids and services, in the IEP resulted in the denial of a FAPE (see R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *18-19 [E.D.N.Y. Jan. 21, 2011]; Application of a Student with a Disability, Appeal No. 10-050; Application of a Student with a Disability, Appeal No. 10-007; cf. A.C. v. Bd. of Educ., 553 F.3d at 172; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, *9 [S.D.N.Y. Mar. 14, 2011]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1217, 1220-21 [3d Cir. 1993]). Accordingly, I find that the district's failure to comply with State regulations resulted in a substantive deficiency in this instance and deprived the student of educational benefits by failing to sufficiently address the student's behaviors which impeded his learning.

Appropriateness of the Parents' Unilateral Placement

Turning to the appropriateness of the parents' unilateral placement of the student at the Rebecca School, 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 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating that "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]; Educ. Law § 4401[1]; 34 C.F.R. § 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

The district asserts that the Rebecca School's program did not provide sufficient academics to provide the student with educational benefits. For the following reasons, I disagree. The program director for the Rebecca School testified that students at the school have educational disabilities related to neurodevelopmental delays in relating and communicating, which includes children with diagnoses on the autism spectrum (Tr. p. 115). The overriding methodology employed by the school is the developmental individual difference relationship based model (DIR) (Tr. pp. 119-20). DIR is used by the school to determine each student's developmental level and to then individualize a plan for each student that includes different related services and different curricula depending on the student's needs (Tr. p. 120). At the Rebecca School, students are assessed using the functional emotional assessment scale to determine their developmental levels, which include shared attention and regulation, engagement and relating, two-way purposeful emotional interaction, and shared social problem solving (Tr. p. 124; Parent Ex. H at pp. 1-2). The Rebecca School program includes the use of Floortime, an intervention designed to specifically address these developmental levels (Tr. p. 124).

For the 2010-11 school year, the student attended a class that included five students, one head teacher, and two teacher assistants (Tr. p. 129). The student's weekly individualized program included language arts instruction, visual-spatial and regulatory-sensory processing activities, Floortime sessions, work on daily living and personal autonomy skills, music integration, and adapted physical education (Parent Ex. H at p. 1). The student's Rebecca School teacher reported that during English language arts (ELA) sessions, the class focused on reading a fairytale that included repetitive actions and dialogue (id. at p. 2). The student worked on developing skills related to word recognition, comprehension, and interest in reading (reading readiness skills) (id. at p. 3). The student's math curriculum included a visual-spatial reasoning component, described as a "vital capacity necessary for the development of body awareness" (id.). The student's teacher further reported that in terms of math and visual-spatial skills, the student was working on 1:1 correspondence, measurement, and concepts of time and space (id.). The teacher described the social studies curriculum at the Rebecca School as working to support students' core challenges of

relating and communicating with others (*id.*). Classroom instruction began with a "focus on 'me,'" but then shifted outward (*id.*). Students explored concepts of citizenship by observing their role in the classroom community through classroom rules and responsibilities (*id.*). The Rebecca School's December 10, 2010 interdisciplinary progress report included academic, Floortime, speech-language therapy, OT, and PT goals for the student (*id.* at pp. 8-10).

In addition to classroom instruction, the student received speech-language therapy three times per week, OT three times per week, and PT one time per week at the Rebecca School (Tr. p. 139). The focus of the student's speech-language therapy was on expanding the student's pragmatic, receptive, and expressive language, as well as on his oral motor skills (Tr. pp. 125, 130; Parent Ex. H at p. 6). The focus of the student's OT sessions was on providing the student with sensory input to assist him with body awareness, developing muscle tone, gradation of movements, and sequencing of motor plans (Parent Ex. H at p. 4).

The student's Rebecca School teacher reported that the student's Floortime goals included shared attention and regulation, along with increasing circles of communication, and the use of functional, non-sensory play objects (Tr. pp. 182, 202-06, 210-11). She testified that these goals were chosen for the student because they fell within the first and second levels of functional emotional development therapies (Tr. p. 203). She testified that Floortime was instructional and used in at least three 20-minute sessions throughout the day (Tr. pp. 204, 207, 210).

The student's teacher reported that his receptive and expressive language skills had improved since entering the Rebecca School. Specifically, she noted an increase in the student's one-word utterances and use of spontaneous language (Tr. pp. 126-28, 174-76, 212-13). She opined that the student had benefited from participation in morning meeting and movement activities, as his ability to communicate had increased (Tr. p. 206). The teacher testified that the student was attentive toward his teacher, that he listened to and processed what was said to him, and that the student's receptive language skills had increased (Tr. pp. 171-72). The teacher also reported that the student had made gains in literacy and on his Floortime goals (Tr. pp. 178-80, 205-06).

In addition, the student's teacher reported a decrease in the student's self-injurious behaviors. According to the teacher, when the student began attending the Rebecca School, he exhibited "a lot" of self-injurious behavior, occasionally became aggressive, and was not able to perform many tasks independently (Tr. p. 169). She estimated that most days, the student spent 90 percent of his day screaming or trying to injure himself (*id.*). To address the student's maladaptive behaviors, the Rebecca School staff focused on the student's sensory system, specifically providing the student with appropriate sensory input and modeling communication for him (Tr. p. 170). The teacher reported that the student's work with occupational and physical therapists included muscle input, deep pressure, weighted vests, using body socks, spinning in a swing, running, and squeezing (*id.*). According to the teacher, these activities resulted in a "dramatic decrease" in the student's self-injurious behaviors and an improvement in the student's ability to "co-regulate" (Tr. pp. 171, 176-78; Parent Ex. H at p. 1). The teacher stated that the student continued to exhibit self-injurious behavior, but less frequently than previously, and that he was able to use verbal communication, point to things, and was more independent (Tr. p. 171). Further, she testified that the student was very responsive to the tools that staff gave him to reduce his self-injurious behaviors and estimated that the student was aggressive or hurt himself only 10 percent of the day (*id.*). At the time she testified, the teacher reported that the student did not wear

his helmet and arm splints, except for on the bus, whereas he had required them occasionally when he first began attending the Rebecca School (Tr. pp. 172-73). The teacher estimated that during the school day, someone needed to be near the student to prevent self-injurious behavior for approximately 30 percent of the day, as opposed to 100 percent of the time when the student began attending the Rebecca School (Tr. p. 173).

Based on all of the above, I find that the parents met their burden of showing that the student's placement at the Rebecca School was specially designed to meet the unique needs of the student (see Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).¹⁹

With regard to the district's argument that the Rebecca School was inappropriate because it provided fewer than 30 hours of instruction per week, even assuming that the district's assertions were correct, the district has presented no evidence that the length of the Rebecca School's day in any way prevented the student from attaining educational benefits and, as discussed above, the Rebecca School program was appropriate to meet the student's needs in this case.

Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). 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][iiii]; 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 69 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

¹⁹ I note that the hearing record reflects that the student began taking an antipsychotic medication to address his rage attacks shortly before he began attending the Rebecca School, which the parents reported improved his behavior (Parent Exs. F at p. 2; J at p. 1). However, the parties failed to further address this issue at the impartial hearing. Such information could have been among the relevant factors to consider in determining the appropriateness of the parents' unilateral placement, specifically with regard to the manner in which the Rebecca School addressed the student's behavioral needs (see Berger, 348 F.3d at 523), however it does not appear that this factor was so prevalent as to warrant a different outcome in this case.

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, 348 F.3d at 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Before addressing the relevant equitable considerations, the district argues that the IDEA categorically prohibits relief in the form of reimbursement for tuition costs incurred at a for-profit school. The district has raised this argument multiple times before State Review Officers and concedes that it has not previously been successful. I decline to reconsider those previous holdings in the absence of any persuasive argument for departing from their reasoning (see Application of the Bd. of Educ., Appeal No. 10-104; Application of a Student with a Disability, Appeal No. 09-085; Application of a Student with a Disability, Appeal No. 09-080; see also A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 215 n.16 [S.D.N.Y. 2010]).²⁰

Turning to the equitable considerations, the district argues that the parents failed to provide it with sufficient notice of their intention to unilaterally place the student at the Rebecca School. A review of the hearing record establishes that this argument is without merit. While there is no indication in the hearing record that the parents expressed their dissatisfaction with the June 2010 IEP at the time of the CSE meeting, I note that the student's father sent a letter to the district on August 9, 2010, stating that the offered placement and assigned classroom were inappropriate and that the parents would be enrolling the student at the Rebecca School in September 2010 and seeking tuition reimbursement (Dist. Ex. 17). The next day, the parents signed an enrollment contract with the Rebecca School, which specified that the contract term began September 13, 2010 (Parent Ex. I at pp. 1-2). The district's argument that the parents withdrew the student as of the date the enrollment contract was signed is unavailing, as the contract specified that the parents would "be released from continuing responsibility for tuition payments . . . upon written notice, **no later than September 7, 2010**, that [the student] has been enrolled in a class or school recommended by the [district] in accordance with an IEP prepared by a [CSE]" (id. at p. 2 [emphasis in original]; see Tr. pp. 133-34, 141-42). Accordingly, even if the student were to be considered removed from public school prior to the beginning of the 2010-11 school year at Rebecca, the parents provided sufficient notice to the district to allow it to offer the student an appropriate placement. The district's decision not to reconvene the CSE in this case in an attempt to remedy the alleged defects in the student's IEP weighs in favor of, not against, reimbursing the parents for the student's Rebecca School tuition.

²⁰ In particular, I disagree with the district's narrow interpretation of the IDEA's remedial provisions and its argument that Forest Grove is inapplicable (see Forest Grove, 129 S. Ct. 2484).

Turning to the parents' request for direct funding, in a case of first impression, one court 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, but noting that direct payment may be required once the parents establish that their "financial circumstances eliminate the opportunity for unilateral placement in the non-approved school"]); see also S.W., 646 F. Supp. 2d at 358-60). 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).²¹ However, the district has not argued on appeal that direct funding is not available as a remedy in this case; accordingly, I will not disturb the impartial hearing officer's decision to make such an award.

Reimbursement for the Parents' Private Evaluations

State regulations require the CSE to "arrange for an appropriate reevaluation of each student with a disability if the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student, warrant a reevaluation or if the student's parent or teacher requests a reevaluation" (8 NYCRR 200.4[b][4]; see 20 U.S.C. § 1414[a][2][A]; 34 C.F.R. § 300.303[a]). Additionally, a reevaluation must be conducted at least every three years, unless the parents and district "agree in writing that such reevaluation is unnecessary" (8 NYCRR 200.4[b][4]; see 20 U.S.C. § 1414[a][2][B]; 34 C.F.R. § 300.303[b][2]). In addition to the parent's ability to request a reevaluation by the district, "[i]f the parent disagrees with an evaluation obtained by the school district, the parent has a right to obtain an independent educational evaluation [IEE] at public expense" (8 NYCRR 200.5[g][1]; see 20 U.S.C. § 1415[b][1]; 34 C.F.R. § 300.502[b]). Furthermore, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 C.F.R. § 300.502[b][5]; see 8 NYCRR 200.5[g][1]).

In the instant case, the hearing record reveals that a triennial psychological evaluation was conducted on December 5, 2007 (Parent Ex. D). Shortly after the student's mother requested that the CSE reconvene "for purposes of obtaining a [1:1] transportation paraprofessional for September" (Dist. Ex. 7), the district sought the parents' consent to reevaluate the student (Dist. Ex. 9). The consent form stated that "it has been determined that additional assessments are required as part of a requested reevaluation or mandated three-year-evaluation" (*id.*). The student's mother signed the form consenting to the evaluations on the same day the form was dated—April 14, 2010—however, such evaluations had not been conducted at the time of the impartial hearing

²¹ 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]).

(Dist. Ex. 9; see Tr. p. 67 [stipulation by the district's counsel that no evaluations were conducted by the district]). The student's mother testified that she had the student privately evaluated after the district failed to do so because she "felt like [she] needed a comprehensive assessment of his functioning and educational needs" (Tr. p. 225).

The parents argue that upon the district's failure to conduct a timely reevaluation, it became incumbent upon them to obtain the private evaluations and therefore, the district should fund those evaluations. I disagree, and find that the district was under no obligation to fund the parents' private evaluations absent a request from the parents for an IEE or the parents' disagreement with a district evaluation (see 20 U.S.C. §§ 1414[a][2][A], [B]; 1415[b][1]; 34 C.F.R. §§ 300.303[a], [b]; 300.502[b]; 8 NYCRR 200.4[b][4]; 200.5[g][1]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 (D. Conn. 2005); cf. Application of a Student with a Disability, Appeal No. 08-087 [granting reimbursement where the parents sought an IEE in their due process complaint notice, stating that they disagreed with the district's evaluations, and the district did not file a due process complaint notice to defend its own evaluations]). This conclusion is further supported by the fact that the private evaluations were conducted several months after the June 2010 CSE meeting, only weeks before the parents filed their due process complaint notice, and after the parents had already enrolled the student at the Rebecca School (see Parent Exs. F; G; I; J). As such, I find that the parents' claim for reimbursement for the private evaluations was not yet ripe at the time of the impartial hearing, as they had not yet disagreed with an evaluation conducted by the district, the district had not relied on the private evaluations in formulating an IEP, and I hold that the impartial hearing officer lacked jurisdiction over this claim (see 20 U.S.C. § 1415[b][1]; 34 C.F.R. § 300.502[b]; 8 NYCRR 200.4[b][4]; 200.5[g][1]; R.L., 363 F. Supp. 2d. at 234-35; cf. Application of the Bd. of Educ., Appeal No. 10-101; Application of the Bd. of Educ., Appeal No. 09-057).

I also note that at the conclusion of the first day of the impartial hearing, the parents' counsel stated that the parents were "withdrawing without prejudice the claim on the reimbursement for evaluations for a later, a different hearing date" (Tr. p. 103). The impartial hearing officer requested the reason for withdrawing the claim, to which the parents' counsel responded that "the evaluations ended up being done for this school year" and that "when they are provided to the [district] for this school year's IEP, then we'll submit the reimbursement" (id.). After ascertaining that the district had not conducted evaluations, the impartial hearing officer advised the parents' counsel:

"Why don't you leave the complaint as it is, and we can talk within the four walls of the complaint? And then if it's denied in my order because it had never been submitted and it was never, then you've got another opportunity. It's the same as withdrawing it without prejudice . . . The reason I say that is it's conceivable. I mean, one of the claims you make is that the [district] should have known that there was deterioration and should have done evaluations earlier than the three year requirement. If you prevail on that claim, then it seems to me one of the remedies you may be entitled to is reimbursement now for the evaluation that the parents did in preparation, in response to that experience and in preparation for this hearing. So it's, while the complaint doesn't limit the range of remedy, it seems to me we might as well, since it's in there as one of your requests . . . let's see where we get to at that point and revisit the question towards the end of the testimony. And then, if you want to withdraw it, you withdraw it and preserve it. And that seems, it just

seems a little premature now . . . Because I don't know how the different issues that you've raised in the complaint will in fact play out into which is dominant and which falls by the wayside as we explore it."

(Tr. pp. 104-06).

I remind the impartial hearing officer that his role is that of an impartial arbiter, not that of counselor to the parties. It is imperative for the impartial hearing officer to avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 10-004; Application of a Student with a Disability, Appeal No. 08-090). Providing tactical advice to one of the parties is highly improper, and I caution the impartial hearing officer to avoid any such conduct in the future (see 8 NYCRR 200.21[b][4][iii]). Moreover, an impartial hearing officer's responsibility is to encourage the parties to narrow the number of issues that must be resolved through litigation and to avoid duplicative hearings rather than promote a litigious approach to resolve disputes (see 8 NYCRR 200.5[j][3][iii], [xi]).

Conclusion

I have considered the district's remaining contentions and find that I need not address them in light of my decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED THAT the portion of the impartial hearing officer's decision, dated April 7, 2011, that ordered the district to reimburse the parents for the cost of the private evaluations is annulled.

Dated: **Albany, New York**
July 7, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER