The University of the State of New York

The State Education Department
State Review Officer
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No. 11-056

Application of a STUDENT WITH A DISABILITY, by his 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:
Law Offices of Regina Skyer and Associates, attorneys for petitioners, Abbie Smith, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request that respondent (the district) reimburse them for their son's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be sustained in part.

Limited Issues on Appeal

Before turning to the merits of the appeal, I note that during the impartial hearing, the district conceded that it did not offer the student a free appropriate public education (FAPE) for the 2010-11 school year and the impartial hearing officer adopted its concession (Tr. p. 9; IHO Decision at p. 22). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Although I have conducted a thorough, independent review of the hearing record, given the limited issues remaining in this appeal, the parties' familiarity with the student's educational history and the impartial hearing officer's decision will be presumed and only those facts necessary to render a decision will be recited.

Background

At the time of the impartial hearing, the student was attending a kindergarten class at the Aaron School and was also receiving private speech-language therapy, occupational therapy (OT), and supervised "play date" services provided by an applied behavior analysis (ABA) therapist (Tr. pp. 42-45, 48, 111, 113, 115). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The Committee on Special Education (CSE) convened on March 15, 2010 for a "Turning Five" meeting of the student and to develop an individualized education program (IEP) for the 2010-11 school year (Tr. pp. 90, 91; Dist. Ex. 2 at pp. 1, 2).[1] The March 2010 CSE determined that the student was eligible to receive special education programs and related services as a student with a speech or language impairment (Dist. Ex. 2 at p. 1). The resultant March 2010 IEP described the student as exhibiting weaknesses in attention, expressive language organization, social interactions, fine motor skills, and skills relating to activities of daily living (ADL) (id. at p. 3). It also indicated that the student required "facilitation to complete tasks and models to expand upon social interactions with peers and teachers" (id.). The March 2010 IEP also indicated that the student "demonstrate[d] pre-academic skills in a rote style with well-known materials" and that he understood "simple academic concepts in a concrete manner" (id.). It further reflected that the student's reading, writing, and math skills were at a "PK.5" instructional level (id.).

Related to the student's social/emotional performance, the March 2010 IEP stated that the student "expresse[d] some interest in his peers" and that he "struggle[d] with finding an appropriate way to approach the other children" (Dist. Ex. 2 at p. 4). According to the IEP, during playtime the student was happy to "play alone or parallel to his classmates" and he did not demonstrate "strong emotional feelings in the form of like/dislike toward a particular classmate" (id.). The March 2010 IEP also stated that at times the student had difficulty asserting himself when necessary (id.). With respect to the student's health and physical development, the March 2010 IEP indicated that the student was in overall good health, but that he had a severe dairy allergy (id. at pp. 1, 5). The March 2010 IEP included annual goals and short-term objectives relating to learning and cognitive skills; speech-language and pragmatic skills; social skills; play skills; gross motor, fine motor, and visual motor skills; the use of sensory information; impulsivity; and transitioning (id. at pp. 6-14).

The March 2010 CSE concluded that a public school program was not appropriate for the student and recommended that he be referred to the district's central based support team (CBST) for determination of an appropriate 12:1+1 program in a State-approved nonpublic school (Dist.

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

Ex. 2 at pp. 1, 16; see Tr. p. 148). The March 2010 CSE also recommended that the student receive adapted physical education as well as speech-language therapy, OT, and PT as related services (Dist. Ex. 2 at pp. 1, 17).

According to the student's mother, subsequent to the March 2010 CSE meeting, she contacted a number of State-approved nonpublic schools (Tr. p. 95). She stated that except for one, which was not admitting boys, the student had "missed the cutoff" date for applications to the schools (Tr. pp. 95, 110, 119-20). The student's mother visited the Aaron School after the March 2010 CSE meeting and on March 22, 2010, completed an application for admission (Tr. pp. 108-09, 110; Dist. Ex. 14). On April 28 and May 4, 2010, the parents signed an enrollment contract with the Aaron School and paid a nonrefundable deposit to the school (Tr. pp. 116-17; Dist. Ex. 22 at pp. 1, 3).

On May 6, 2010, the CBST received the student's referral from the CSE (Tr. pp. 150, 151). On May 7, 2010, a staff person from the CBST spoke with the student's mother and discussed the CBST process (Tr. p. 210; Dist. Ex. 28). On May 10, 2010, the CBST sent referral packets containing the student's March 2010 IEP and evaluative information to 15 State-approved nonpublic schools for students with a speech or language impairment, including the School for Language and Communication Development (SLCD) (Tr. pp. 100, 159-61, 164-67, 189, 217, 250; Dist. Exs. 28; see Dist. Ex. 29-32; see also Parent Exs. E-M). Shortly thereafter, a number of the State-approved nonpublic schools contacted the parents, the student's mother spoke with several of the schools, and she visited one of them (Tr. pp. 96, 97-99, 101-102, 130-32; Dist. Exs. 28; 30; 31 at p. 1; 32 at p. 1). The hearing record reflects that by June 7, 2010, all but three of the schools had reported back to the CBST and had declined to accept the student (Tr. p. 171; Dist. Ex. 28 at pp. 1-2; see Dist. Exs. 29-31; 32; Parent Exs. E-M).

On May 19, 2010, SLCD's supervisor of psychological services, who was also the school's supervisor of admissions, telephoned the parents and left a message (Tr. pp. 286-87). The supervisor of admissions telephoned the parents a second time and spoke to the student's mother, who advised the supervisor that she was not interested in a screening interview for the student (Tr. pp. 258, 262-63, 267-68, 270-71, 286-87; see Dist. Exs. 28 at p. 3; 31 at p. 1). Subsequently, by letter dated May 26, 2010, SLCD reported to the CBST that it had rejected the student's referral because the parent declined bringing the student to the school for a screening due to the location of the school (Dist. Exs. 28 at p. 3; 31 at p. 1).

Thereafter, on July 14, 2010, the student's mother visited SLCD (Tr. pp. 99, 131). At the end of the parent's visit, school personnel indicated that she could complete an application that would be reviewed to determine whether the student was appropriate for an interview (Tr. p. 138). The student's mother reported that she did not complete an application because she did not believe that the school was appropriate given the student's severe dairy allergy, the length of the student's trip to and from the school because of the student's allergy, and the functioning level of the other students at SLCD (Tr. pp. 100, 122-23, 124-27, 129, 138-39).

By letter dated August 24, 2010, the parents advised the district of their intent to unilaterally place the student at the Aaron School for the 2010-11 school year and seek tuition

reimbursement from the district for this placement (Parent Ex. N). Among other things, the parents stated that they were rejecting the March 2010 IEP, which did not include a specific school for the student (id.). The parents also contended that they had "fully cooperated in the CBST process" and had "responded to inquiry," and that "[n]one of the schools recommended by CBST were appropriate or accepted [the student]" (id.).

Due Process Complaint Notice

By due process complaint notice dated September 15, 2010, the parents asserted that the district failed to offer the student a FAPE "on procedural and substantive bases" and requested an impartial hearing (Dist. Ex. 1 at p. 1). The parents alleged that the district had not offered the student a specific placement by the beginning of the 2010-11 school year and that the March 2010 IEP was deficient (id. at p. 4). In particular, the parents contended that the district had "failed to provide a specific, appropriate placement recommendation" for the student within 30 school days of the March 2010 CSE's recommendation that the student attend a nonpublic school (id. at pp. 2-3, 4). The parents also asserted that they had "diligently pursued" each of the recommended placements received by them and that all of the nonpublic schools recommended by the CBST were inappropriate for or did not accept the student (id. at pp. 2, 3). With respect to SLCD, the parents alleged that the student's mother had visited the school in July 2010 and had determined that the school was inappropriate for the student (id. at p. 2). The parents also contended that their placement of the student at the Aaron School was appropriate and that equitable considerations weighed in their favor (id. at p. 4). As relief, the parents requested tuition reimbursement for the student's attendance at the Aaron School for the 2010-11 school year (id.).

On September 24, 2010, the district responded to the parents' due process complaint notice (Parent Ex. A). Among other things, the district asserted that the CBST timely provided numerous appropriate nonpublic schools for the student's placement, but that the parents declined interviews for all of these schools (id. at pp. 2-3).

Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on January 24, 2011, which concluded on March 16, 2011, after three nonconsecutive days of proceedings (Tr. pp. 4, 144, 237, 310). During the impartial hearing, the district conceded that it had not offered the student a FAPE for the 2010-11 school year, and further contended that it was not able to do so because the parents had not cooperated with the district's efforts to find a placement for the student (Tr. pp. 9, 92, 129-30, see Tr. p. 320).

In a decision dated April 27, 2011, the impartial hearing officer denied the parents' request for reimbursement of the student's tuition costs at the Aaron School for the 2010-11 school year (IHO Decision at p. 26). Among other things, the impartial hearing officer adopted the district's concession that it had not offered the student a FAPE for the 2010-11 school year (id. at p. 22). The impartial hearing officer also found that the parents did not meet their burden of proof to show that their unilateral placement of the student at the Aaron School for the 2010-11 school year was appropriate (id. at pp. 22-23, 24).

In particular, the impartial hearing officer found that the evidence did not show that the educational instruction at the Aaron School was "'specially designed to meet the unique needs'" of the student (IHO Decision at p. 23, citing Bd. of Educ. v. Rowley, 458 U.S. 176, 188-89 [1982]). The impartial hearing officer found that there was insufficient evidence to support a finding that the individual needs of the student were considered in the development of the Aaron School's "Curriculum Level" goals or that any of its goals were tailored to meet the student's specific needs (IHO Decision at p. 23). The impartial hearing officer noted that the "Curriculum math goals" were the same for all kindergarten students at the Aaron School, regardless of their particular classifications (id.). Regarding the related services provided by the Aaron School, the impartial hearing officer noted that it was the policy of the Aaron School to provide a maximum amount of related services to each student in the school, regardless of a student's needs, and that the student in this case had been receiving services outside of school since mid-November 2010 (id. at pp. 23-24). She therefore determined that because of the related services the student was receiving outside of the Aaron School, the school was "apparently not meeting" the student's related services needs (id. at p. 24). Moreover, the impartial hearing officer concluded that there was "no way to determine how much, if any, of the [student's] progress [was] a result of his attendance at [the Aaron School], rather than a result of the outside services, or a combination of the two" (id.).

The impartial hearing officer also concluded that equitable considerations supported the district (IHO Decision at pp. 24, 26). The impartial hearing officer noted that she was basing her equities analysis solely on the parents' conduct as it related to the district's referral to SLCD, and she concluded that the parents did not "cooperate fully" with the district in finding an appropriate placement for the student (id. at pp. 24-26).[2] Specifically, the impartial hearing officer found that the parents rejected the screening offered by SLCD without giving the district and SLCD an opportunity to address their concerns (id. at p. 25). She further found that there was no evidence that the parents voiced any concerns to SLCD about the student's travel time to the school because of his allergy when the student's mother spoke to SLCD in May 2010 (id.). The impartial hearing officer also found that since the student's mother visited SLCD two months after she had rejected the school, the concerns she voiced after her visit were not relevant to the impartial hearing officer's decision (id.). In addition, the impartial hearing officer addressed and dismissed the district's argument that the Aaron School's for-profit status precluded tuition reimbursement (id. at p. 26 n.12). Thus, the impartial hearing officer denied the parents' request for reimbursement of the costs of the student's tuition at the Aaron School for the 2010-11 school year (id. at p. 26).

Appeal for State-Level Review

The parents appeal, requesting that the decision of the impartial hearing officer be reversed insofar as the impartial hearing officer dismissed the parents' claim for tuition reimbursement to the Aaron School for the 2010-11 school year. The parents also request a finding that the student's placement at the Aaron School was appropriate for the 2010-11 school year, that equitable

[2] The impartial hearing officer found that the other schools that contacted the parents as a result of the district's referral of the student's placement to the CBST were not appropriate placements for the student (IHO Decision at p. 24). She also noted that under the circumstances, the parents should not be faulted for entering into a contract with the Aaron School at the end of April 2010 (id. at p. 26 n.12).

considerations supported a finding for the parents, and an order that the district reimburse the parents for the costs of the student's tuition at the Aaron School. Specifically, the parents contend that the impartial hearing officer applied an erroneous legal standard when assessing the appropriateness of the student's placement at the Aaron School. The parents further assert that the Aaron School's program was designed to meet the student's unique needs and that the school's use of "'global'" goals for math did not negate the fact that the student received highly individualized instruction. In addition, the parents allege that the student's related services needs were appropriately provided by the Aaron School.

The parents also assert that equitable considerations support a ruling in their favor. The parents contend that the district did not offer the student a timely placement for the 2010-11 school year. They further contend that they cooperated with the district throughout the CSE review and placement process as well as provided the district with timely notice of their unilateral placement of the student at the Aaron School. In addition, they contend that the impartial hearing officer incorrectly considered the date that the parents visited SLCD and argue that the date of their visit is irrelevant because there is no timeline in law or equity by which a parent is required to visit a proposed placement.

In its answer, the district concedes that it did not offer the student a FAPE for the 2010-11 school year, but asserts that it was not able to do so because the parents failed to cooperate with the district's efforts to place the student. As an initial matter, the district alleges that tuition reimbursement to the Aaron School is prohibited because the school is a "for profit" entity. With respect to the appropriateness of the Aaron School, the district contends that the parents failed to show that the Aaron School provided educational instruction specially designed to meet the unique needs of the student. In particular, the district asserts that the impartial hearing officer correctly determined that the Aaron School's academic goals for the student were not tailored to the student's unique needs and that certain "Curriculum Level" goals were not designed for the student. The district further asserts that the Aaron School did not provide related services designed to meet the student's needs because the student needed more related services than what he received at the Aaron School. The district also contends that the impartial hearing officer was correct in concluding that there was no way to determine whether the student's progress resulted from his attendance at the Aaron School, his private services, or a combination of both.

The district also asserts that the impartial hearing officer was correct that the equities favored the district. The district alleges that the parents intended to send the student to the Aaron School, rather than a nonpublic school, as evidenced by the parents' actions in enrolling the student in the Aaron School and making nonrefundable payments before being contacted by any of the schools referred by the CBST. The district also asserts that the parents frustrated the district's placement process by declining to bring the student to SLCD for a screening and by failing to contact the CBST or the CSE with their concerns about SLCD. Finally, the district asserts that the concerns raised by the parents in their due process complaint notice about SLCD were unfounded or speculative.

Applicable Standards – Unilateral Placement

As noted above, in light of the district's concession at the impartial hearing and in the petition that it failed to offer the student a FAPE for the 2010-11 school year, the remaining issues before me are whether the parents established the appropriateness of the student's unilateral placement at the Aaron School and if so, whether equitable considerations favor the parents.

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 Individuals with Disabilities Education Act (IDEA) (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] 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).

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

Appropriateness of the Aaron School

Based on a careful review of the hearing record, I find that the impartial hearing officer erred in concluding that the parents' unilateral placement of the student at the Aaron School for the 2010-11 school year was not an appropriate placement. As explained more fully below, I find that the evidence shows that the parents' unilateral placement of the student at the Aaron School was appropriate for the student.

The hearing record reflects that the Aaron School is a nonpublic school for students with special learning needs (Dist. Ex. 26 at p. 2). The head of the Aaron School ("head of school")

testified that the school accepts students "who are cognitively average or better and have the potential for learning but need a small, structured multisensory approach to learning" (Tr. p. 13). The head of school also testified that students come to the school with "challenges" in the areas of speech and language, auditory processing, learning disabilities, attention and focusing, and social awareness (id.). According to her testimony, most of the school's students are classified as students with a speech or language impairment, an other health impairment, or a learning disability; with the majority of the students having a speech or language impairment (Tr. p. 22). At the time of the impartial hearing, the Aaron School enrolled 110 students and provided education services to students from kindergarten through fifth grade (Tr. p. 13). The school has a 10-month school year and an optional summer program (Tr. pp. 30, 133).

For the 2010-11 school year, the student was enrolled in a kindergarten class comprised of a head teacher, 11 other students, and two assistant teachers (Tr. p. 48). All of the students in the class were either five or six years of age (Tr. p. 49). The student's head teacher had a Masters degree in early childhood general and special education (Tr. pp. 42-43). She was also certified in New York State as a special education teacher (Tr. p. 42). The student's classroom was equipped with a "Phonic Ear" FM system, an auditory amplification device that assisted the students with language and attending difficulties by amplifying the teacher's voice above the ambient noise of the classroom (Tr. pp. 15-16, 55, 61, 62-63; Parent Ex. O at pp. 5-6). The student's head teacher, assistant teachers, and related services providers at the Aaron School had "team meetings" once per week, at which time the student's progress was discussed (Tr. pp. 44, 57).

During the 2010-11 school year, the student's academic subjects included reading/literacy, math, handwriting, language arts, science, social studies, art, computer, and music (Tr. p. 44; Dist. Exs. 16; 23; Parent Ex. O). According to the head of school, the Aaron School has developed its own curriculum based on State standards, taking into account the students' needs (Tr. p. 14). The school has standard "Curriculum Level" goals for its kindergarten students in literacy and math, as well as for other subject areas, and in homeroom functioning and social functioning (Tr. pp. 54-55, 68, 70; Dist. Exs. 19-21; Parent Ex. O at pp. 7-8). During the 2010-11 school year, the Aaron School used particular curriculum programs in a number of its subject areas to instruct the student including "Wilson Fundamentals" and "Sounds in Motion" for literacy and reading, "Stern Structural Arithmetic" for math, "Handwriting Without Tears" for handwriting, "SRA Real Science" for science, and the "Harcourt Horizons" program for social studies (Dist. Ex. 23 at pp. 1-5; Parent Ex. O at pp. 1-2). The student received reading instruction five days per week for 30 minutes in a group of four students, all of whom had similar reading skills (Tr. pp. 51, 52; Dist. Ex. 16). He also received math instruction in a small group, five days per week (Tr. pp. 54-55, Dist. Ex. 16). His math class included four students, all of whom had similar math needs and were functioning on a mid-kindergarten level (Tr. pp. 54-55).

Contrary to the impartial hearing officer's conclusion, the parents demonstrated that the Aaron School provides individualized instruction to the student based on his unique needs. The student's head teacher testified that although a standard curriculum for reading and math is used at the Aaron School, the teacher provided the student with modifications such as extra visuals, movement breaks, an adaptive seat, extra reviewing, frequent redirection, a "phonic ear," and checks for understanding to address the student's attending needs (Tr. pp. 51-55). In addition,

reports from the Aaron School further established that during the 2010-11 school year, the school provided the student with a number of accommodations, modifications, supports, and strategies to assist in his instruction and learning. For example, the school used verbal prompts, verbal cues, structured prompts, visual supports, verbal redirection, verbal and visual reminders tied to "whole body listening" as well as scaffolding, simplified language, and graphic organizers to help the student attend to lessons and to redirect the student's attention and focus so that, among other things, he would be better able to follow directions, answer questions, and understand new and abstract concepts (Parent Ex. O at pp. 2-6; see also Dist. Ex. 23 at p. 1). The student's teachers also provided him with sensory breaks and adaptive seating to increase his ability to pay attention over a given period of time (Parent Ex. O at pp. 2-6; see Dist. Ex. 23 at p. 2). The Aaron School also used teacher modeling and facilitation to assist the student's social development and to improve his social skills (Parent Ex. O at p. 6; see Dist. Ex. 23 at p. 3). Additionally, the Aaron School provided the student with supports to improve his ability to process and express language and to regulate himself, including the use of exaggerated and slowed speech, visual cues and prompts, the "Phonic Ear" auditory system, hands on experiences, a multisensory curriculum, and modified seating and instructional materials (Parent Ex. O at pp. 2-6; see Dist. Ex. 23 at pp. 1-2). As part of its multisensory curriculum in math, the Aaron School utilized manipulatives and other visual aids with the student (Parent Ex. O at p. 2; see Dist. Ex. 23 at p. 2).

Moreover, under the circumstances of this case, I decline to find that the Aaron School was an inappropriate placement for the student on the ground that its "Curriculum Level" math goals were not tailored to meet the student's unique needs because such goals applied to all kindergarten students. I note that the student's head teacher testified that the kindergarten math goals were appropriate for this particular student (Tr. p. 81; see Dist. Ex. 21). Likewise, with respect to the school's kindergarten "Curriculum Level" goals in literacy and other academic areas, upon review of these goals, I find that they were appropriate for the student given his needs (see Dist. Exs. 19; 20).

The student's head teacher further testified that the 12:1+2 instructional ratio in the student's class during the 2010-11 school year was appropriate for the student, that her class was able to address the student's special education needs, and that she thought the Aaron School was an appropriate setting for the student (Tr. pp. 48, 49, 61, 63-64). The head of school also testified that the Aaron School was an appropriate placement for the student because it offered accommodations and supports to address the student's attending and pragmatic needs (Tr. pp. 18, 37-38).

In addition to his academic instruction, the Aaron School provided the student with a social skills class once per week that focused on pragmatic language skills and instructed the student on how he could appropriately get the attention of other students (Tr. pp. 37, 62, 104; Dist. Ex. 16). The Aaron School also provided the student with speech-language therapy for 30 minutes, twice

per week; once individually and once with a peer (Tr. pp. 72-73; Dist. Ex. 17).[3] The student's October 2010 speech-language therapy plan indicated that the student's speech-language therapy goals included improving his pragmatic language skills and symbolic play skills; improving his attention, auditory, and language processing skills; improving his verbal organization skills; and improving his expressive language skills (Dist. Ex. 17). During the 2010-11 school year, the Aaron School also provided the student with 30 minutes of OT twice per week, once individually and once with a peer (Tr. pp. 73-74; Dist. Ex. 18). The student's October 2010 OT plan indicated that the student's OT goals included improving his fine motor skills; improving his graphomotor skills; improving his motor planning and body awareness; improving his ability to use sensory information; improving his strength, endurance, and postural control; and improving his self-help skills (Dist. Ex. 18). As indicated above, the student's speech-language therapist as well as his occupational therapist at the Aaron School attended the head teacher's weekly team meetings regarding the student (Tr. p. 57). Moreover, the student's head teacher testified that she communicated with the school's related services providers often daily or also via e-mail when necessary (id.). The Aaron School also provided the student with adapted physical education five days per week that addressed the student's motor skills with respect to running, walking, galloping, hopping, skipping, jumping, and leaping as well as throwing, catching, and other skills (Tr. p. 63; Dist. Ex. 23 at p. 4).

With respect to the district's argument that the related services provided by the Aaron School did not meet the student's needs as evidenced by the parents' decision to privately obtain outside related services for the student at their own expense, I note that for a unilateral placement to be appropriate, "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).[4] Moreover, the student's head teacher at the Aaron School testified that the student's related services needs were being met by the services he received during the school day (Tr. p. 57). Additionally, the hearing record reflects that the student's classroom instruction at the Aaron School also addressed particular aspects of the student's speech-language and OT needs, including those relating to pragmatic language skills and social skills as well as graphomotor skills, motor planning, and body awareness (Tr. pp. 61-62, 75, 80, 82-83; Dist. Ex. 23 at pp. 2-4; Parent Ex. O at pp. 3, 4). Further, contrary to the district's contention on appeal, I find that the hearing record does not establish that the student required additional related services during the 2010-11 school year beyond what he received at the Aaron School because as discussed above, the hearing record establishes that the

[3] The March 2010 CSE recommended that the student receive adapted physical education as well as related services consisting of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of small group speech-language therapy; one 30-minute session per week of individual OT; one 30-minute session per week of small group OT, and two 30-minute sessions of individual PT (Dist. Ex. 2 at pp. 1, 17).

[4] The hearing record reflects that since mid-November 2010, the student had received outside speech-language therapy three times per week for 45 minutes and OT twice per week for 60 minutes (Tr. pp. 111-13). Additionally, during the 2010-11 school year, the student received the services of an ABA therapist for 1 1/2 hours weekly for supervised "play date" services (Tr. pp. 109, 115). With respect to PT, the student's mother testified that in summer 2010, subsequent to the March 2010 CSE meeting, the student's physical therapist advised her that the student no longer needed PT and therefore, she discontinued those services (Tr. pp. 113-14, 342).

educational program and related services provided to the student at the Aaron School during the 2010-11 school year addressed the student's areas of need (see Dist. Exs. 9; 24).

The parents further assert that the student made progress at the Aaron School during the 2010-11 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 student's head teacher at the Aaron School testified that the student had made academic progress as well as social/emotional progress during the 2010-11 school year (Tr. pp. 59-60; see also Dist. Ex. O at pp. 1-8). Regarding the impartial hearing officer's conclusion that it was not possible to determine how much, if any, of the student's progress resulted from his attendance at the Aaron School, from the outside related services, or as a result of a combination of both, as indicated above, a finding of progress is not required for a determination that a student's private placement is adequate (G.R., 2009 WL 2432369, at *3; see also Frank G., 459 F.3d at 364). In any event, I note that the student's November 20, 2010 Aaron School "Fall Report," which assessed the student's progress at a time when he was not receiving outside related services; the student's October 2010 speech-language therapy plan; the student's October 2010 OT plan; the student's schedule at the Aaron School; and the testimony in the hearing record with respect to the Aaron School provide sufficient evidence that the student's placement at the Aaron School was reasonably calculated to enable the student to receive educational benefits (see Dist. Exs. 16-18; 23).

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

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, 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).

Equitable considerations may not support an award of tuition reimbursement where parents have failed to cooperate with a school district or have otherwise frustrated a district's attempt to offer a FAPE (see Bettinger, 2007 WL 4208560, at *6 [stating that a "major consideration" in deciding whether equitable considerations are satisfied is whether the parents have cooperated with the district throughout the process to ensure that the student receives a FAPE]; Carmel, 373 F. Supp. 2d at 411, 417 [stating that numerous courts have held that parents who refuse to cooperate with the CSE equitably forfeit their claim for tuition reimbursement]). Moreover, equitable principles dictate that parents cannot deliberately withhold their child from an intake interview and impede a district's ability to offer a FAPE and also secure a future award of tuition reimbursement at a private school of their choosing (see Bettinger, 2007 WL 4208560 at *7-*8; see also Application of a Child with a Disability, Appeal No. 06-025; Application of a Child with a Disability, Appeal No. 05-075).

In this case, the hearing record reflects that after it received the student's referral from the March 2010 CSE meeting, the CBST sent the student's IEP as well as his evaluative information to a number of State-approved nonpublic schools, including SLCD, for students with a speech or language impairment (Tr. pp. 159-61, 164-67, 189, 217; Dist. Ex. 28; see Dist. Exs. 29-32; Parent Exs. E-M). SLCD's supervisor of admissions testified that the school received the student's March 2010 IEP and a number of other evaluative documents from the CBST, that she and other SLCD staff then reviewed the student's file and contacted the parents to invite the student for a screening interview (Tr. pp. 253-56, 257-58, 262, 267, 271, 286-87; see Dist. Exs. 2-7; 9; 10; 12; 13). SLCD's supervisor of admissions also testified that students are invited for screening interviews when based upon a review of their cognitive level, academic level, social level, and behavioral issues, they are determined to be "a good candidate" for the school (Tr. pp. 251, 252, 257-58). SLCD's supervisor of admissions further testified that SLCD was not able to make a determination regarding whether to accept the student in this case without a screening interview and that the school does not typically accept students without having done a screening (Tr. pp. 261-62).

SLCD's supervisor of admissions testified that she telephoned the parents on May 19, 2010 and left a message for them (Tr. pp. 286-87). She then called the parents again at a later date and spoke with the student's mother, asking her to come in for a screening interview for the student (Tr. pp. 258, 262, 267, 286-87). SLCD's supervisor of admissions further testified that the student's mother stated that she "was not interested" in the screening interview and "declined" bringing in the student for a screening because of the location of the school (Tr. pp. 262-63, 268, 270, 286; Dist. Exs. 28 at p. 3; 31 at p. 1). As a result, SLCD sent the CBST a letter dated May 26, 2010,

reporting that the "parent declined [the] screening due to [the] location of the school" (Tr. pp. 252-53; Dist. Ex. 31).[5]

Here, the hearing record does not reflect that the parents provided the district or SLCD with an opportunity to address their concerns about SLCD either before they rejected the screening or prior to any final determination as to whether SLCD was an appropriate placement for the student. I note further that the parents did not bring their specific concerns about SLCD to the district's attention until their September 15, 2010 due process complaint notice; almost four months after they had been offered and rejected a screening interview by SLCD in May 2010, and more than two months after the student's mother visited to the school in July 2010 (see Dist. Ex. 1).[6]

Although the parents' assert that they were never contacted by SLCD after the parent's July 2010 visit to the school, as indicated above, the parent had rejected SLCD's offer for a screening interview in May 2010, several weeks before the visit. Regarding the parents' assertion that SLCD never offered the student a placement, the hearing record reflects that the parents declined the school's offer of a screening, which the school required prior to any offer of admission (Tr. pp. 258, 261-62, 267-68, 269, 286-87). Therefore, the parents in this case withheld the student from a required intake interview and impeded the district's ability to offer a FAPE (see Bettinger, 2007 WL 4208560 at *7-*8). Moreover, the student's mother testified that when she visited SLCD in July 2010, she was provided the opportunity to fill out an application and she did not do so because she believed that the placement was not appropriate (Tr. pp. 138-39).

Finally, there is insufficient evidence in the hearing record to require a finding that the parents "reasonably determined" that their son's placement at SLCD was not appropriate and that therefore a screening would not be necessary, particularly here where the parents did not specifically identify their concerns about SLCD to the district (see Shenendehowa, 2008 WL 53181, at *5). Under the circumstances of this case, I will not disturb the impartial hearing officer's decision that equitable considerations do not support the parents' request for tuition reimbursement.

Conclusion

For the reasons discussed above, I will annul the impartial hearing officer's decision insofar as she found that the parents' unilateral placement of the student at the Aaron School was not appropriate, but I will uphold her determination that equitable considerations do not support an

[5] I note that SLCD's supervisor of admissions testified that she inserted a comment into the response form that the parent had declined the screening due to location of the school and further, that a mistake had been made on the form as the box which set forth that SLCD had rejected the student's referral "because the parent would not agree to an interview or missed scheduled appointment," should have been checked (Tr. pp. 270-71).

[6] The parents' letter to the district dated August 24, 2010 merely asserted that "none of the schools recommended by CBST were appropriate or accepted [the student]" (Parent Ex. N). The letter did not mention SLCD by name, raise any particular concern with respect to that school, and did not provide any explanation of why the parents had declined the school's offer of a screening interview for their son (see id.).

award of reimbursement for the costs of the student's tuition at the Aaron School for the 2010-11 school year.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision, dated April 27, 2011, which determined that the parents' unilateral placement of the student at the Aaron School was not appropriate for the 2010-11 school year is annulled.

Dated: **Albany, New York**
August 4, 2011

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STEPHANIE DEYOE
STATE REVIEW OFFICER