The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No.11-135

Application of a STUDENT WITH A DISABILITY, by her parent, 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 Anton Papakhin, PC, attorneys for petitioner, Anton Papakhin, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

DECISION

Petitioner (the parent) appeals from that part of the decision of an impartial hearing officer which denied her request for direct payment of her daughter's tuition costs at the Judge Rotenberg Educational Center (JRC) from May 31, 2011 through June 30, 2011 of the 2010-11 school year. Respondent (the district) cross-appeals from those portions of the impartial hearing officer's decision which found that equitable considerations did not preclude an award of tuition costs in favor of the parent for the 2010-11 school year, and ordered certain relief for the 2011-12 school year without considering the equities. The appeal must be sustained. The cross-appeal must be dismissed.

Background

At the time of the impartial hearing, the student was attending JRC (Tr. pp. 267, 395). JRC is a nonpublic out-of-State residential school that has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's classification as a student with an emotional disturbance is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

A brief review of the pertinent history relating to the instant case indicates that the student had a history of psychiatric hospitalizations and running away from home and school (Tr. pp. 41-

42, 221-235, 238-54; Dist. Exs. 5 at pp. 1-3; 8 at pp. 3-4; 13; 14 at pp. 1-2; 15; 16 at p. 5; 18 at pp. 3-4; 23 at p. 4; 25 at p. 3; Parent Exs. A; C; D; E). The hearing record reflects that based upon a request for a review and change of placement by the parent, the CSE convened on January 20, 2011 and recommended a 12-month program in a State-approved residential nonpublic school (NPS 1) (Dist. Exs. 15 at p. 1; 23 at pp. 1-2).[1] The CSE noted that other programs/services were considered but rejected, citing the student's history of hospitalization and a consensus that the student required a highly structured, therapeutic, and supportive 24 hour residential program to meet her significant emotional needs (Dist. Ex. 23 at p. 10). The hearing record reflects that the student was admitted to NPS 1 on January 21, 2011 (Parent Ex. D). On February 18, 2011, a psychologist at NPS 1 conducted a psychological evaluation and prepared a report dated February 25, 2011 (Dist. Ex. 16). The hearing record further reflects that on March 4, 2011, NPS 1 prepared a comprehensive treatment plan (Dist. Ex. 14). The hearing record reflects that the student ran away from NPS 1 three times in a short period of time (Tr. pp. 238-43, 247-53; Dist. Ex. 15 at p. 1; Parent Exs. A, D).[2] On March 22, 2011 and March 28, 2011, a social history update was conducted by the district based upon the parent's request for a CSE review meeting to discuss another change in schools for her daughter (Dist. Ex. 15).

On March 22, 2011, the CSE conducted an annual review (Dist. Ex. 18). At the time of the CSE meeting, the student had been missing since March 10, 2011 and her whereabouts were unknown (Tr. pp. 41-42; Parent Ex. D). Participants at the meeting included the district representative who also served as the district social worker, a district regular education teacher, and the parent's educational advocate[3] (Dist. Ex. 18 at p. 2). The principal of NPS 1, a social worker from NPS 1, a teacher from NPS 1 and the parent participated by telephone (id.). The CSE continued the student's classification as a student with an emotional disturbance and recommended a State-approved residential nonpublic school 12-month program, with an 8:1+1 student to teacher ratio and related services of individual and group counseling (Dist. Ex. 18 at pp. 1, 13). The hearing record reflects that at the CSE meeting, participants from NPS 1 were asked about using a 1:1 paraprofessional with the student to prevent the student from leaving the school property, but the participants from NPS 1 did not believe that a 1:1 paraprofessional would be helpful because the school could not physically prevent the student from leaving the school (Tr. pp. 41-42, 333). The parent objected to the student's continued placement at NPS 1 and asserted that the student needed to be in a more secure environment (Tr. pp. 44, 47-48, 50; see Dist. Ex. 15 at pp. 1, 3). At the CSE meeting, the parent and parent's advocate requested that the student be transferred from NPS 1 to JRC (Tr. p. 332). The parent's advocate reported that although the CSE stated its belief

[1] The student had previously attended a day program from April 2010 until September 2010 when she ran away from home (Tr. pp. 231-33). After the student was found a few days later, she was hospitalized until the middle of November when she began attending a residential school (Tr. p. 233). The residential school had weekend visits and the student ran away from home during Thanksgiving weekend of 2010, was located the first week in December 2010, and was hospitalized and remained in the hospital until January 2011 when the CSE recommended that the student attend a State-approved residential nonpublic school (NPS 1) for the remainder of the 2010-11 school year (Tr. pp. 234-36; Dist. Ex. 23 at p. 1).

[2] The student ran away from NPS 1 on March 2, 2011, and was returned on March 4, 2011 (Parent Ex. D). The student ran away again on March 10, 2011, and when she was located and picked up by the staff at NPS 1, she ran away from their care while being transported back to NPS 1 (Tr. p. 247-50, 253; Parent Ex. D).

[3] The parent's advocate was the director of referrals for JRC (Tr. p. 322).

that because NPS 1 could not secure the student on the campus, it was no longer appropriate, the CSE was not prepared to discuss a different program (Tr. p. 334). The CSE issued a final notice of recommendation (FNR) on March 22, 2011, listing NPS 1 as the school to which the district assigned the student (Dist. Ex. 17).

On April 4, 2011 the student was found and brought to a hospital for a psychiatric evaluation (Parent Ex. D). In a letter dated April 6, 2011, in response to a request by the parent, a social worker at NPS 1 wrote a letter to the parent outlining the student's progress at NPS 1 since the student's admission on January 21, 2011 (id.). In a letter dated April 7, 2011, the parent wrote to the district informing it that she objected to the March 22, 2011 placement recommendation at NPS 1 since the student had run away from NPS 1 three times, and further advising the CSE that she would place the student at JRC if she did not receive a response to the letter within 10 days (Tr. pp. 246-47; Parent Ex. A). The student's then-current treating psychiatrist at the hospital prepared an undated referral summary based upon his assessment and recommended that the student be placed in a highly structured residential treatment facility that was secure with a "strong behavioral therapeutic component" (Parent Ex. E).

In a letter dated April 11, 2011, the student was accepted into the residential program at JRC and JRC advised that the student would be appropriate for "immediate enrollment" (Parent Ex. H).

The CSE reconvened for a requested review on April 12, 2011 (Tr. p. 53; see Dist. Exs. 6; 8 at pp. 1-2). Participants at the meeting included the district representative who also attended as a district social worker and a district psychologist (Tr. pp. 53-54; Dist. Ex. 8 at p. 2). A special education teacher from NPS 1, the principal of NPS 1, a social worker from NPS 1, the student's psychiatrist and the parent all participated by telephone (Dist. Ex. 8 at p. 2).[4] The April 2011 CSE continued the student's classification as a student with an emotional disturbance and deferred to the district's Central Based Support Team (CBST) to locate an alternative State-approved nonpublic residential placement (Dist. Exs. 8 at p. 1; 9; 12). The rationale cited for deferral to the CBST included the student's psychiatric hospitalizations, the belief of the parent that NPS 1 was not secure enough because the student absconded three times during a short period of time, and the recommendation by the student's psychiatrist for a change to a more restrictive setting (Dist. Ex. 13).

The CBST referred the student to 11 State-approved nonpublic schools, which included three out-of-State schools, but did not refer the student to JRC (Tr. p. 163; Dist. Ex. 5). The student was placed at JRC on May 31, 2011 by her parent (Tr. pp. 267, 395; Parent Ex. P at p. 1).

Due Process Complaint Notice

In a due process complaint notice dated April 21, 2011, the parent requested an impartial hearing (Dist. Ex. 1). The parent asserted that the student was denied a free appropriate public education (FAPE) on substantive and procedural grounds for the 2010-11 school year (id. at pp. 1-2). The parent specifically alleged that the student's placement at NPS 1was not sufficient to

[4] A note on the IEP indicated that the parent declined the participation of an additional parent member (Dist. Ex. 8 at p. 2).

meet her educational and emotional needs; that any attempt to improve the student's behavior through counseling and therapeutic services at NPS 1 failed; that the student's behavior and academic performance continued to deteriorate, resulting in the student leaving NPS 1 without permission three times; that the student was hospitalized as a result of the most recent incident where she ran away; that the parent "repeatedly requested" that the CSE reconvene to change the student's placement; that the CSE did not agree to change the student's placement until April 12, 2011 at which time it deferred the case to the CBST in order to locate an appropriate State-approved residential school; that the CBST has failed to make an appropriate placement recommendation; and that the student remained hospitalized in a psychiatric hospital pending her discharge to an appropriate residential school (id. at p. 2).

The parent further asserted that JRC was an appropriate school; that it was the least restrictive environment (LRE) for the student; and that the parent cooperated with the CSE (Dist. Ex. 1 at pp. 2, 3). Relief sought by the parent included "immediate residential placement at JRC" and that the student's IEP be amended to reflect the recommended placement at JRC (id.). In addition, the parent requested a Nickerson letter that would allow the student to attend a State-approved nonpublic school;[5] or in the alternative, an order that the parent was entitled to tuition funding at JRC for the 2010-11 school year (id. at p. 3). The parent further requested an order that the student was entitled to remain at JRC for the 2011-12 school year (id.).

Impartial Hearing Officer Decision

The impartial hearing began on June 16, 2011 and concluded on July 19, 2011, after three days of proceedings (see Tr. pp. 1-490). In a decision dated September 9, 2011, the impartial hearing officer found regarding the 2010-11 school year, that the educational program recommended by the district for the student was not appropriate (IHO Decision at p. 17). Specifically, the impartial hearing officer found that the district had failed to place the student in a school that was able to supervise her sufficiently in order to keep her "secure and safe," noting that the student was "AWOL" or in a psychiatric hospital "largely" because of this failure (id. at pp. 17-18). In addition, the impartial hearing officer found that the parent provided proper notice of her intent to remove the student from NPS 1 and place her unilaterally at JRC (id. at p. 18). Furthermore, the impartial hearing officer found that the parent had requested that the district consider JRC, and that it was inappropriate for the CSE to not consider JRC in their search for an appropriate State-approved nonpublic residential placement (id.). The impartial hearing officer further found that the district's decision not to include JRC in the search was "arbitrary" and "denied the parent the right to full participation in securing a school which could address the student's needs," noting that JRC was a State-approved school and the parent's preference (id.).

[5] A "Nickerson letter" is a letter from the New York Department of Education authorizing a parent to place a student in a New York State approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner (see Application of the Dep't of Educ., Appeal No. 09-114; Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

Next, the impartial hearing officer found that the parent did not meet her burden to show that JRC was an appropriate placement for the student for the 2010-11 school year, concluding that it was not able to meet the student's academic needs (IHO Decision at pp. 17-18). The impartial hearing officer found that JRC was able to secure the student's safety with its video cameras and intensive staff-to-student ratio, but that there was insufficient evidence to show that the student was being educated (id.). The impartial hearing officer noted that the parent's witness from JRC was "unable to identify one book the student had read in the six weeks she was there at the time of the hearing;" that it appeared the student was "being taught by computer software and not an experienced teacher;" that the student's educational program "looked more like a holding pen than a school;" and that it was not clear that the student needed such an intense level of supervision (id. at pp. 18-19).

The impartial hearing officer also determined that there was nothing in the hearing record regarding the 2010-11 school year that would lead to a conclusion that the equities did not favor the parent (IHO Decision at p. 19).

In ordering relief, the impartial hearing officer denied the parent's request for tuition costs for the student at JRC for the 2010-11 school year (May 31 through June 30, 2011); granted the parent's request for a Nickerson letter for the 2011-12 school year (July 1, 2011 through June 30, 2012); and ordered the district to schedule a CSE meeting within 30 days of the decision to consider the present levels of functioning of the student and develop an appropriate program to address both her academic and social/emotional needs for the remainder of the school year at JRC (IHO Decision at p. 20).

Appeal for State-Level Review

The parent appeals, and seeks reversal of that part of the impartial hearing officer's decision denying the parent's request for direct payment of tuition at JRC from May 31, 2011 through June 30, 2011, based on the ground that the parent failed to demonstrate the appropriateness of the student's placement at JRC. The parent asserts that the hearing record supports a finding that JRC was reasonably calculated to confer educational benefits on the student and meet her academic needs. The parent attaches as additional evidence to the petition the student's JRC quarterly progress report covering June 13, 2011 through September 12, 2011, asserting that the document was unavailable at the time of the impartial hearing and that it is necessary to complete the record and render a proper decision. As relief, the parent seeks direct payment of tuition for the student's placement at JRC from May 31, 2011 through June 30, 2011. In the alternative, the parent seeks a Nickerson letter to fund the student's placement at JRC from May 31, 2011 through June 30, 2011, and further seeks an alternative order directing the district to place the student at JRC for the remainder of the 2010-11 school year and to develop an IEP reflecting such placement recommendation.

In an answer, the district responds to the parent's allegations with general admissions and denials, asserting that the impartial hearing officer's finding which determined that JRC was an inappropriate placement should be affirmed and further asserting that the student was not functionally grouped at JRC and was not receiving instruction that was commensurate with her functional level. The district further asserts that the parent is not entitled to direct funding of tuition at JRC because there was no objective proof of the parent's inability to pay and the parent did not

demonstrate the student's father's financial ability. In addition, the district objects to consideration on appeal of the additional evidence submitted by the parent.

The parent replies to the district's answer, asserting, among other things, that the district failed to raise the claim at the impartial hearing that the parent was not entitled to direct funding of the student's tuition, and therefore, it should not be considered on appeal. In addition, the parent asserts that legal authority supports admission of the additional documentary evidence.

In a cross-appeal, the district asserts that the portion of the impartial hearing officer's decision which concluded that the equities favored the parent should be annulled. The district asserts that the parent did not cooperate with the district in securing an appropriate placement, failed to make the student available for interviews with two schools interested in the student, intended to enroll the student at JRC and was not open to other placements, and that the parent explicitly informed the district that her refusal to make the student available for interviews was because she wanted a more secure facility. In addition, the district asserts that the impartial hearing officer erred in granting a Nickerson letter for the 2011-12 school year because the parent impeded the district's efforts to secure an appropriate placement by refusing to make the student available for interviews with schools that had expressed interest. Alternatively, the district asserts that since the parent rejected the placements offered by the district, the parent is not entitled to a Nickerson letter, and the correct analysis would be an analysis for tuition reimbursement; therefore, the impartial hearing officer's finding that the parent did not prove that JRC was appropriate would apply for the 2011-12 school year. As relief, the district requests reversal of the portion of the impartial hearing officer's decision that awarded a Nickerson letter for the 2011-12 school year, and that the parent's petition be dismissed.

In an answer to the district's cross-appeal, the parent responds to the district's allegations with general admissions and denials, asserting, among other things, that the cross-appeal was untimely served and moot and that the district waived its right to cross-appeal by implementing the impartial hearing officer decision and order without protest or challenge - convening an October 4, 2011 CSE meeting, creating a new IEP for the 2011-12 school year referencing JRC, and issuing the Nickerson letter entitling the parent to place the student at JRC for the 2011-12 school year. Regarding mootness, the parent asserts that the district issued the parent a Nickerson letter; that the parent enrolled the student at JRC; that the school accepted the student based upon the Nickerson letter; that there is no longer any live controversy relating to the parties' dispute over the student's placement for the 2011-12 school year; and that nothing entitles the district to withdraw, revoke, or rescind the Nickerson letter unilaterally. In addition, the parent asserts that the district cannot contest its responsibility to pay for the student's residential placement at JRC for 2011-12 after it developed an agreed upon IEP that recognized JRC as an appropriate placement for the student. Regarding equitable considerations, the parent's assertions include that the equities supported her requested relief because the district denied her an opportunity to participate in the development of the student's program and placement by refusing to consider JRC as a possible placement for the student. In addition, regarding the district's assertion that the parent refused to make the student available for interviews with prospective nonpublic schools, the parent's assertions include that she was unable to bring the student to interviews because the student was hospitalized during the CBST process; that the district failed to arrange to interview the student while she was an inpatient at the hospital; and that the CBST case manager did not advise the parent that the prospective nonpublic schools could not make an acceptance decision until the

student was interviewed and did not advise the parent in writing regarding her alleged noncooperation.

The parent further asserts that the only remaining issued to be addressed is whether the impartial hearing officer erred in denying the parent's request for direct payment of tuition at JRC for the 2010-11 school year. In addition, the parent asserts that the impartial hearing officer correctly determined that equitable considerations supported the parent's requested relief, specifically contending that the parent did not refuse to make the student available for an interview, but rather she was unable to bring the student to several schools because the student was hospitalized and she did advise that the student could be interviewed at the hospital. Moreover, the parent asserts that regarding equitable considerations, the district intentionally failed to consider the parent's request to place the student at JRC. The parent attaches as additional evidence a copy of the student's October 2011 IEP and Nickerson letter, as well as a 2007 stipulation and agreement of settlement.

The district replies to the parent's answer to the district's cross-appeal, asserting that the cross-appeal is not moot because although the district issued a Nickerson letter for the 2011-12 school year, a favorable decision on appeal would end the district's obligation to fund the student's placement at JRC for the duration of the school year. In addition, the district asserts that it timely served its answer to the parent's petition and as such 8 NYCRR 279.4(b) permitted the district to cross-appeal with the answer. The district further asserts that the parent should be precluded from introducing the additional evidence with her answer to the district's cross-appeal, as two of the attached exhibits could have been offered at the time of the impartial hearing and none of them were relevant.

Discussion

Preliminary matters

Timeliness of Cross-Appeal

The parent asserts that the district's cross-appeal is untimely. State regulations provide that respondent shall, within 10 days after the date of service of a copy of the petition, answer the same, either by concurring in a statement of facts with petitioner or by service of an answer, with any written argument, memorandum of law, and additional documentary evidence (8 NYCRR 279.5). A cross-appeal shall be deemed timely if it is included in an answer that is served within the time permitted by section 279.5 of the state regulations (8 NYCRR 279.4[b]). I have reviewed the district's pleadings and affirmation of service and I find that its answer is consistent with the provisions of section 279.5 and that its cross-appeal is timely (see Application of a Child with a Disability, Appeal No. 07-133; Application of a Child with a Disability, Appeal No. 00-040; 8 NYCRR 279.5).

Additional Documentary Evidence

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 11-158; Application of

a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In reviewing the documents submitted by the parent with the petition and with the answer to the district's cross-appeal, I find that the Nickerson letter issued by the district is admissible because it was not available at the time of the impartial hearing and is necessary to render a decision in this matter, and therefore such additional evidence will be considered on appeal. Regarding the remaining additional evidence submitted by the parent, I find that although the student's progress report and October 2011 IEP were not available at the time of the impartial hearing, both documents as well as the other additional evidence (which was available at the time of the hearing) are not necessary to render a decision in this matter, and therefore, such additional evidence will not be considered.

Scope of Review

Initially, I note that the district has not appealed the impartial hearing officer's determinations that the district did not offer the student an appropriate program for the 2010-11 school year and that the district did not offer the student an appropriate placement for the 2011-12 school year within the required time period (see IHO Decision at pp. 17, 19). 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]; see also Application of a Student with a Disability, Appeal No. 11-027; Application of a Student with a Disability, Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-115; Application of a Student with a Disability, Appeal No. 10-102). Therefore, whether the district offered the student a FAPE for the 2010-2011 or 2011-12 school years is not at issue on appeal, and the remaining issues that are determinative of the parent's claim are whether the parent established the appropriateness of the student's unilateral placement at JRC and if so, whether equitable considerations favor the parent's request for tuition costs at JRC for a portion of the 2010-11 school year.

Applicable Standards—Unilateral Placement

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo 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]).

Appropriateness of Parent's Unilateral Placement

The impartial hearing officer determined that the parent did not meet her burden to demonstrate that JRC was able to meet the student's academic needs (IHO Decision at p. 18). The parent asserts that the hearing record supports a finding that JRC was reasonably calculated to confer educational benefits on the student and meet her academic needs. For the reasons explained below, the hearing record supports a finding that JRC was an appropriate placement for the student for the portion of the 2010-11 school year that is at issue in this appeal.

A review of the hearing record shows that at the time of the April 2011 CSE meeting, the student's cognitive abilities were judged to be in the average range; however, she demonstrated delays in reading comprehension and mathematical problem solving (Dist. Ex. 8 at p. 3). The April 2011 IEP detailed her history of significant social/emotional difficulties and behavioral problems and indicated that she required a structured, therapeutic, 24-hour residential setting (id. at p. 4). The student's most recent psychiatric diagnoses included a schizoaffective disorder and polysubstance abuse (Dist. Exs. 8 at p. 5; 14 at p. 7).

The NPS 1 reported that the student attended classes with an 8:1+1 student/staff ratio (Dist. Ex. 14 at p. 4). The student's English, algebra, global studies, gym, and music teachers reported that her performance was satisfactory and that she cooperated with staff and students (id.). The student's study skills teacher reported that the student did excellent work and had a positive attitude (id.). The school behavior specialist reported that the student displayed appropriate behavior in school and that at the time, a functional behavioral assessment (FBA)[6] was not recommended, but that the student would be monitored (id.).

The psychologist at NPS 1 who conducted a February 18, 2011 psychological evaluation, reported that the student showed little insight into the reasons for her placement there (Dist. Ex. 16 at p. 2). The psychologist indicated that although the student's self-description may be one of potential worthiness, she had internalized a "'bad me'" self-image (id. at p. 3). According to the psychologist, the student questioned her identity and feared self-exploration (id.). The psychologist explained that as a result of her discomfort, the student was likely to maintain

[6] An FBA means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. It shall include, 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]).

relations with others at an arms length (id.). She reported that the student experienced feelings of inadequacy and chronic anxiety, and that when her emotional turmoil became intolerable she was likely to be at a heightened state of awareness and at risk for following negative peers (id.). The psychologist opined that the student struggled to view her family life as warm and inviting and was likely to make attempts to meet her need for nurturance elsewhere, such as through negative peers or behaviors (id.). A psychiatrist at NPS 1 reported that the student's insight and judgment appeared quite poor (Dist. Ex. 14 at p. 6). The psychiatrist noted that although the student's speech was mostly goal directed, she was at times tangential and there was some loosening of association, indicating the possibility of a thought disorder (id. at p. 7).

Regarding the appropriateness of JRC, the hearing record shows that for the period of May 31, 2011 through June 30, 2011, JRC addressed the student's academic and social/emotional needs through a variety of means. The student was admitted to JRC on May 31, 2011 (Parent Ex. P at p. 1). Upon arrival, she participated in an orientation period during which she met with her treatment team to discuss her program in detail, including the reasons for her placement at JRC and a list of problem behaviors that the team wanted to target and improve (Tr. pp. 396-97; Parent Ex. P at p. 1). The treatment team also identified for the student more socially appropriate behaviors that they wanted to see increase and conducted a functional assessment of the student's behaviors (Tr. p. 397).

The student's clinician at JRC reported that during the orientation period, the student was "very quick in the classroom to begin working on materials" (Tr. p. 398). He opined that the student wanted to be challenged and to "show off" her academic strengths that were clearly evident (id.). He indicated that by the end of the first week, the student had already done the majority of the work presented to her in the classroom and had participated in group lessons (Tr. p. 399). The clinician further reported that the student was very amiable and able to make friends quickly (Tr. p. 398). He commented that the student was also very agreeable to staff requests, following directions, and learning the rules (id.).

According to the JRC initial progress report dated July 6, 2011, the student began a full behavior modification program on June 7, 2011, which the hearing record reflects met the needs of the student and was consistent with the behavioral intervention plan (BIP) recommended by the April 2011 CSE (Parent Ex. P at p. 1; see Dist. Ex. 8 at p. 15).[7] The full program consisted of a variety of behavioral contracts that offered the student the opportunity to obtain rewards or engage in preferred activities if she was able to refrain from engaging in a defined list of inappropriate behaviors (Tr. pp. 399-400, 443-46; Parent Ex. P at p. 2; Q; see Parent Exs. J at p. 3; K at pp. 3-5; L). According to the progress report, in addition to the contracts, the student was also able to earn school money for meeting daily academic goals set by her teacher (Parent Ex. P at p. 2). The school money could be used for online shopping, visiting the school's contract store, or spending in the community during social outings (id.).

[7] A BIP means a plan that is based on the results of an FBA and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs, and intervention strategies that include positive behavioral supports and services to address the behavior (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

The JRC progress report showed that between May 31, 2011 and July 3, 2011, the student successfully refrained from exhibiting high totals of "major inappropriate behaviors" (Tr. pp. 468-70; Parent Ex. P at p. 3). The most severe forms of inappropriate behavior exhibited by the student included arguing with staff, making rude comments, speaking in an inappropriate tone of voice, and talking out (Tr. pp. 470-71, 485-86; Parent Ex. P at p. 3). The JRC progress report indicated that despite being faced with frustrating situations, the student had refrained entirely from dangerous or disruptive behaviors, had not committed any aggressive or "health dangerous" actions, and had not made any attempts to run away or threats to elope (Parent Ex. P at p. 3).[8] While at times the student presented as mildly agitated, she was aware of the supports available to help her reduce and replace her reaction with positive responses such as requesting breaks, drafting letters to treatment team members, or listening to music (id.).

In addition to the behavior modification program, the initial progress report indicated that the student participated in individual counseling twice weekly as well as a once weekly group counseling session, which was consistent with the recommendations of the April 2011 CSE (Tr. pp. 401-03; Parent Ex. P at p. 2; see Dist. Ex. 8 at p. 13). The student's program also included behavioral counseling on an as needed basis with her JRC clinician (Tr. pp. 439-43; Parent Ex. P at p. 2; see Parent Ex. K at p. 5). Applied behavior analysis (ABA) was employed "across the board" at JRC, and in group therapy students worked on identifying problem behaviors, as well as the triggers and consequences of those behaviors (Tr. p. 435). According to the JRC progress report, the student regularly attended all scheduled counseling sessions during which she exercised ways to cope with frustrating situations and challenging scenarios without resorting to inappropriate behaviors (Tr. pp. 402-04; Parent Ex. P at p. 2). The student's frustration, elopement, and high risk behaviors were also addressed during counseling (Tr. pp. 403-05, 412, 413-15, 426, 441-43, 463-64). The progress report indicated that self-management techniques and education of anger management would continue to be provided to the student to build upon her repertoire of positive behaviors (Tr. pp. 442-43; Parent Ex. P at p. 2). The student's clinician reported that he was on call 24 hours per day in the event that there were any issues regarding the student's treatment (Tr. p. 458).

The hearing record also shows that JRC had preventative measures in place that made it difficult for the student to elope from the school property (Parent Ex. K at pp. 8-9). The director of referrals testified that JRC had an advanced audiovisual monitoring system that covered "virtually all" treatment areas in the residences, as well as the school building and all of the school's transport vehicles (Tr. p. 352; see Parent Ex. K at pp. 8-9). He indicated that the school monitored the staff and students 24 hours per day, 7 days per week (Tr. p. 352). The director of referrals further testified that JRC residences had advanced alarm systems, including door and window alarms and motion detectors in all of the bedrooms (Tr. p. 353; see Parent Ex. K at p. 8). He indicated that staff monitored the audiovisual systems and knew right away the room in which an alarm went off and could monitor the activity in that room (Tr. p. 353). The director of referrals further explained that staff within the residence could then be alerted immediately to prevent a student from leaving (id.). He noted that JRC had permission from parents to prevent students

[8] As detailed in the initial progress report, examples of dangerous or disruptive behaviors included swearing, yelling, threatening others, or engaging in property destruction (Parent Ex. P at p. 3). Examples of "health dangerous" actions included cutting, threats of self-harm, or threats of suicide (id.).

from leaving the program and that staff viewed running away from the program as very dangerous, especially for someone like the student who has significant emotional disabilities (Tr. pp. 353-54). He noted that staff was trained in the use of physical restraint in emergency situations (Tr. pp. 350-51, 356-58).

With respect to academics, the student's clinician reported that when the student first entered JRC, the school conducted placement testing, which showed that the student's reading and math fluency were at the 12th grade level and above (Tr. pp. 406-07, 421-22). According to the clinician, the student's spelling and reading comprehension were age and grade appropriate and the student was not exhibiting any severe deficits (Tr. p. 407). The clinician indicated that the student's greatest academic difficulty was with math computation, where she was functioning at approximately a sixth grade level; however, he noted that her teacher reported that she was motivated in the classroom (Tr. pp. 407, 409). The clinician testified that the student was working on reading, spelling, and math (Tr. p. 408). He stated that the student had mastered a number of math lessons; however, described her as "reserved" when working on math skills in a group (Tr. p. 407). The clinician reported that the student met with subject area tutors and was very willing to get more information regarding what she needed to do to pass Regents exams and move on to higher education (Tr. p. 408).

The student attended a classroom of 10 students ages 14-16 that was staffed by a special education teacher and teacher assistant (Tr. pp. 408, 480; Parent Ex. P at p. 3; see Dist. Ex. 13). The JRC program included content area teachers and tutors who provided group instruction in the classroom or pulled students out for specific 1:1 sessions (Tr. pp. 452-53). The clinician reported that classroom instruction was hands on and included group lessons, but teachers refrained from lecturing due to students' limited attention spans (Tr. p. 479). Regarding the district's assertion that the functional grouping at JRC was not appropriate, the student's JRC clinician estimated that the student's cognitive ability was in the average range and that the cognitive abilities of her classmates were average or slightly below the student's (Tr. p. 419). The clinician indicated that all of the students in the class were classified as having an emotional disturbance (Tr. p. 420). According to the clinician, the students' reading levels ranged between the fifth and ninth grades and their math skills fell in a similar range (id.). He noted, however, that the students' individual needs varied and that IEPs were individually carried out based on students' needs (Tr. pp. 436, 455). The student's clinician testified that some of the other students in the 10:1+1 class demonstrated behaviors similar to the student's (Tr. p. 437).

The clinician reported that JRC was implementing the student's IEP dated "June 2010" and that because the IEP was from New York State, JRC was following the New York State standards (Tr. p. 451).[9] He noted that the student was on a "Regents track" and therefore the subject area tutors, regular education teacher, and special education teacher would follow a Regents curriculum (id.).

The clinician reported that the student's reading curriculum addressed reading comprehension; however, noted that compared to reports from NPS 1, JRC staff did not observe the student as having as much difficulty in that area (Tr. pp. 456-57). According to the student's

[9] The recommended goals and related services in the student's June 2011 IEP were the same as in her April 2011 IEP (compare Dist. Ex. 8, with Dist. Ex. 25).

clinician, the JRC reading program included computer-based reading programs, which were not used with the student because she demonstrated higher level reading skills (Tr. p. 450). He indicated that the student received language arts instruction in her classroom through her teacher and that the instruction was student specific, generally consisting of projects and book reports (id.). In addition to the computer programs, the class used a language arts textbook (Tr. pp. 480-81). Likewise, the clinician reported that the student's math instruction consisted of group instruction or computerized math programs (Tr. pp. 477-78). He noted that the teachers at JRC worked individually with each student for 25-30 minutes per day (Tr. pp. 450-51).

The initial progress report revealed that the student had passed numerous lessons in spelling, math, and language arts (vocabulary skills) at JRC (Tr. p. 408; Parent Ex. P at p. 3). According to the progress report, the student's teacher indicated that the student was active in group lessons and participated well among her peers (Parent Ex. P at p. 3). The report also reflected that he student was at times distracted by her peers, but was generally focused on her schoolwork and did well avoiding interruptions caused by peers (id.).

In summary, between the time the student entered JRC on May 31, 2011 and the end of the 2010-11 school year on June 30, 2011, JRC staff provided the student with an orientation to the school's program, assessed the student's academic and social/emotional needs, developed behavior contracts for the student, and provided her with counseling and academic instruction, all of which were reasonably calculated to confer educational benefits on the student and meet her academic needs. In assessing the propriety of the student's unilateral placement I have considered the "totality of the circumstances" and have determined that the placement reasonably served the student's individual needs, providing educational instruction specially designed to meet the unique needs of the student, supported by services necessary for the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).[10] Accordingly, I find that the parent met her burden of demonstrating the appropriateness of the student's unilateral placement at JRC from May 31, 2011 to June 30, 2011 and the impartial hearing officer erred in finding that JRC was not appropriate during that time period.

Applicable Standards - 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

[10] I note that the district does not assert on appeal that JRC is not the student's LRE and that the LRE mandate is only a factor to be considered when considering a parent's unilateral placement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S., 231 F.3d at 105; see 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 also Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428).

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.D. v. South Orangetown, 2011 WL 6307563 [S.D.N.Y. Dec. 16, 2011]; S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

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 S.D., 2011 WL 6307563, at *11-*12 [stating that refusal by the parent to attend intake session, refusal to take student with her to other intake interviews, and outright rejection of programs constituted conduct equating to a "veto," decision making power not granted to parents by the IDEA]; 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 S.D., 2011 WL 6307563, at *11-*12; Bettinger, 2007 WL 4208560, at *7-*8; see also Application of the Dep't of Educ., Appeal No. 11-131; Application of a Child with a Disability, Appeal No. 06-025; Application of a Child with a Disability, Appeal No. 05-075).

In New York, the Office of Special Education has explained the process for identifying out-of-State facilities by which a CSE's recommendation for residential placement should be effectuated (see "Placements of Students with Disabilities in Approved Out-of-State Residential Schools and Emergency Interim Placements for the 2011-12 School Year," April 2011, located at http://www.p12.nysed.gov/specialed/applications/outofstateplacement-memo-411.pdf) (April 2011 policy guidance). The April 2011 policy guidance describes the process by which the CSE must discuss with the student's parents or guardians the requirement that districts first refer students to appropriate in-State programs, even if the student is already placed in an out-of-State approved private school or emergency interim placement, as well as the need of the parents to cooperate with the district's efforts to identify a facility that will accept the student (id.).[11] The responsibility in the process extends to the parents who are "integral partners" in the referral process and must cooperate with the intake process (id.).

In addition, if the CSE rejects a proposed placement that has accepted the student the district must provide information and documentation supporting the CSE's actions that is linked to the student's IEP (April 2011 policy guidance).[12] Regarding the referral and placement process, the April 2011 policy guidance indicates that while it is the "sole responsibility" of the school districts to ensure completion of placement activities, the out-of-State approved schools have the responsibility of making students available for screening and intake procedures, providing access to educational records, and providing access to the student for observation (id.). Additionally, even if an approved prospective residential facility does not have all records from the student's school, the facility must make its determination based upon information available to it.[13]

Discussion – Equitable considerations

In this case, the impartial hearing officer determined that there was nothing in the record regarding the 2010-11 school year that would lead to a conclusion that the equities did not favor the parent (IHO Decision at p. 19). The impartial hearing officer determined that the parent cooperated "as best she could" with the district and made the student's psychiatric team available to confer with district representatives (id.). In addition, the impartial hearing officer found that the parent provided the district with proper notice of her intention to place the student at JRC (id.). The district asserts that the parent failed to make the student available for interviews with two nonpublic schools interested in the student, intended to enroll the student at JRC and was not open to other placements, and that the parent explicitly informed the district that her refusal to make the student available for interviews was because she wanted a more secure facility. Initially, I note that the district does not appeal the finding by the impartial hearing officer that the parent provided

[11] 8 NYCRR 200.6(j)(iii)(e) provides that where the CSE recommends placement of a student in an out-of-State educational facility, documentation must be provided that there are no appropriate public or private facilities available within the State. 8 NYCRR 200.6(j)(iii)(f) provides that for a reapplication, the district must provide documentation of the continuing need for placement of the student in a private school.

[12] A parent's disagreement with a placement or preference for another school does not justify a decision by the CSE to not recommend an approved in-State program that has accepted the student where there is a determination that it would be able to implement the student's IEP (April 2011 policy guidance).

[13] A district is required to submit rejection letters from the schools that are unable to meet a student's needs (April 2011 policy guidance).

the district with proper notice of her intention to place the student at JRC and accordingly, that determination is final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Upon review of the hearing record, I find that for the 2010-11 school year, equitable considerations favor the parent. As a result of the referrals provided to the 11 nonpublic schools by the district's CBST, at the time of the impartial hearing, the hearing record reflects no action taken by two of the approved schools in response to the district's referral (Dist. Ex. 5 at pp. 3-4). The hearing record further reflects that five of the schools rejected the referral (NPS 1-5) because these schools indicated that they would not be able to meet the student's needs (Tr. pp. 163-64). One school rejected the referral because it had no vacancy at the time of the referral, although it indicated it was still interviewing for possible future vacancies in July 2010 (NPS 6) (Tr. p. 164; Parent Ex. F).

Two other schools indicated that they wished to interview the student - Hillside Family Agencies and Vanderhayden Hall (Tr. pp. 164-65, 176, 184; see Dist. Ex. 5 at p. 4). Regarding these two schools, the district communicated with the parent by telephone and e-mail; however, the parent indicated that these schools were not appropriate for the student and that she wanted a secure facility (Tr. pp. 164-65, 176-77). According to the district, the parent refused to participate in interviews with these schools because she wanted a secure facility and was aware that these schools were not able to make a decision without an interview because the parent spoke with representatives of these schools (Tr. pp. 165, 176). According to the parent, she did not refuse to make the student available for interviews, but rather advised that she was not able to bring the student to several schools for an interview because the student was hospitalized (Tr. pp. 164, 259, 261, 292-93). The hearing record reflects that the parent communicated with Hillside Family Agencies and Vanderhayden Hall, informed them of her desire to place the student in a "lock down" facility, and expressed her concern that the student would be able to run away from those schools (Tr. pp. 183, 259-260). District records indicate that those two referrals were closed due to "parent refusal" on May 19, 2011 (Dist. Ex. 5 at p. 4).

On May 16, 2011, Vanderhayden Hall sent a letter to the parent referencing a telephone conversation during which the parent indicated that the student needed a "secure, locked facility" (Parent Ex. G). The letter stated that Vanderhayden Hall was "not a secure, locked facility, but an open campus," and concluded by advising the parent to contact the school if her needs changed (id.). One school that the student was referred to by the CBST, the Devereaux Mapleton School, in a letter dated June 6, 2011, advised the district of its determination that the student's needs could be appropriately met by the school and further invited the student's family to tour the program to assist in selecting an appropriate placement (Tr. p. 166; Dist. Ex. 24 at p. 2). In a memorandum dated June 8, 2011, Devereaux Mapleton advised the district that a placement had been secured for the student (Tr. p. 166; Dist. Ex. 24 at p. 1). When the district contacted the parent upon receipt of the acceptance letter, the hearing record reflects that the parent advised that the student had been placed at JRC the previous week (Tr. pp. 166-67). The hearing record further reflects that the parent informed Devereaux Mapleton that the student was a "skillful run-away," that she was a "very high flight risk," and that she required a highly secured school, and that after the conversation Devereaux Mapleton advised that it could not meet the student's needs and revoked its acceptance of the student (Tr. pp. 172-73, 292).

Based upon the facts adduced at the impartial hearing, three schools, at least initially, expressed an interest in the student. Regarding Devereaux Mapleton, I note that after the parent spoke to a representative of the school, Devereaux Mapleton revoked its acceptance based on additional information provided by the parent. While a parent may find it desirable to pre-screen and provide information to a school that has expressed an interest in offering admission to a student, the parent cannot pre-decide what facilities are inappropriate to the exclusion of the district (see S.D., 2011 WL 6307563, at *11-*12; Bettinger, 2007 WL 4208560, at *7-*8; see also Application of the Dep't of Educ., Appeal No. 11-131). Regarding Hillside Family Agencies and Vanderhayden Hall, I find that Vanderhayden Hall took itself out of the realm of possible placements by its May 16, 2011 letter, which leaves consideration of Hillside Family Agencies. I find that the hearing record does not indicate that the parent made the student available for the interview process required by that school. The hearing record also reflects that when the CBST case manager was asked whether she personally contacted the parent in writing or by phone and informed her that Hillside Family Agencies and Vanderhayden Hall were not able to make an acceptance decision because the student was not presented for an intake interview, she replied that "[t]he parent informed me that the schools were not appropriate for [the student] therefore what was the point of pursuing, that conversation?" (Tr. pp. 176-77).

When the parent was asked whether she remembered anyone from the programs affirmatively asking her to come to the school and bring the student for an intake interview, she indicated that "[t]hey said that we could come for an interview, if we liked, but it wasn't appropriate" (Tr. p. 260). When the parent was asked what she would have done if an intake interview was required, she said that she would not be comfortable "moving my daughter around after running away three times in . . . two weeks, but they could have gone to meet her or talked with her, if they liked, but they never suggested that" (id.). The parent further indicated that the previous year she had taken the student to five schools, but that because the student was hospitalized and had run away five times in five months, she was not going to take her to the schools (Tr. p. 293). Regarding the parent's cooperation, I note that the parent was in regular communication by phone and email with the CBST case manager and also stayed in contact with the CSE social worker (who was also the district representative) (Tr. pp. 260-61). When asked if she told the CBST case manager on the phone that it was not appropriate for the student to leave the hospital for an intake interview, the parent said "I cried on the phone to [the CBST case manager] several times. Absolutely. She knew how I felt about my daughter's flight risk" (Tr. p. 261). The parent also indicated that the CBST case manager never discussed with her bringing the student to the schools for intake interviews (Tr. p. 303), which is consistent with the testimony of the CBST case manager (see Tr. pp. 176-77) and inconsistent with responsibility of the CSE to emphasize to the parents the importance of the intake interview (see April 2011 policy guidance).

Moreover, in considering the equities, I note that although the parent had communicated an interest in JRC to the district, the CBST case manager did not include JRC in the list of proposed schools for referral, indicated that she had no recollection of the parent communicating her interest in JRC,[14] and that there was no reason why she did not include JRC in the group of schools (Tr.

[14] The apparent lack of knowledge on the part of the CBST case manager regarding the parent's interest in JRC may be attributed to a lack of communication between the CSE and the CBST and more specifically the CSE social worker, who the parent was in regular communication with, and the CBST case manager.

pp. 166, 188-90). Therefore, upon balancing the evidence described above, I conclude that the equitable considerations, under the circumstances of this case, favor the parent for the portion of the 2010-11 school year at issue and I will not deny this portion of the parent's reimbursement claim (compare S.D., 2011 WL 6307563, at *11-*12; Application of the Dep't of Educ., Appeal No. 11-131) [parents declination of offers for in-person interviews of student impeded district's ability to offer student a FAPE]).

As to the 2011-12 school year, I find that the equitable considerations need not be determined as explained below.

Relief

Relief ordered by the impartial hearing officer included granting the parent's request for a Nickerson letter for the 2011-12 school year (July 1, 2011 through June 30, 2012) (see IHO Decision at p. 20). The district asserts that the impartial hearing officer erred in ordering the Nickerson letter, asserting that the parent impeded the district's efforts to secure an appropriate placement by refusing to make the student available for interviews with schools that had expressed interest, and alternatively asserting that since the parent rejected the placements offered by the district, the parent is not entitled to a Nickerson letter. Upon review, I find that equitable considerations need not be considered regarding the 2011-12 school year under the facts presented in this case. Initially, I find that it is undisputed that the district issued a Nickerson letter on October 5, 2011 (see Answer Ex. X). The Nickerson letter provided that the district "is not able to provide the special education services recommended for your child. Therefore, you now have the legal right to place your child in an appropriate special education program in a New York State Education Department approved private school for the 2011-12 [s]chool year." The letter further provides that it may "be invoked for enrollment in a residential program" and that the parent should bring the student's IEP to "any approved private school you wish to consider."

Upon review, I find that by issuing the Nickerson letter, the district granted the parent's requested relief and the district's request to rescind the relief already granted is inconsistent with the purpose and intent of the IDEA (20 U.S.C. §§ 1400-1482). Two purposes of the IDEA 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]; Rowley, 458 U.S. at 206-07). I note that at no point has the district alleged that they have identified another appropriate State-approved nonpublic school for the student, and that granting the relief sought by the district, would leave the student without a placement. Moreover, based upon the finding herein that JRC is appropriate for the student and that the intent of the CBST was to find an appropriate State-approved nonpublic school for the student, and that JRC has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7), I find that there is no reasonable basis in law or fact to grant the relief requested by the district at this juncture, especially since the district has already provided the remedy imposed by the District Court consent decree in Jose P. After granting the parent's request, the district cannot, proverbially speaking, put the toothpaste back in the tube and simply undo what it has done.

Conclusion

In summary, I find that the parent's unilateral placement at JRC for the 2010-11 school year was appropriate and that equitable considerations for the 2010-11 school year favor the parent. I have considered the parties' remaining contentions, including the parent's contention that the cross-appeal is moot, and find that I need not reach them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated September 9, 2011 that determined that the parent failed to meet her burden of proving that the unilateral placement was appropriate is annulled; and

IT IS FURTHER ORDERED that that the district shall enter into a contract with JRC, as an approved nonpublic school under State regulations, for May 31, 2011 through June 30, 2011 of the 2010-11 school year, upon the submission of proof of attendance.[15, 16]

Dated: **Albany, New York**
January 20, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[15] The reason relief is being granted in the form of placement at JRC is because it has been determined on the merits to be an appropriate approved school for this student's needs and in no way constitutes administrative enforcement of the District Court's consent decree in Jose P., which is beyond the province of a administrative due process hearing officer in New York (see Application of the Bd. of Educ., Appeal No. 11-105).

[16] Placement of student from preapproved list of private schools does not violate IDEA (see S.D. v. Florida Union Free School District, 801 F. Supp. 1164, 1178-79 [S.D.N.Y. 1992]).