



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-084

**Application of a STUDENT WITH A DISABILITY, by his 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 Office of Lisa Isaacs, PC, attorney for petitioner

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

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Bishop Ahern School (Bishop Ahern) for a portion of the 2011-12 school year. The appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

In this case, the CSE met on March 31, 2011, May 16, 2011, and October 10, 2011 to develop the student's IEP for the 2011-12 school year (Parent Exs. E; F; G). Finding that the student remained eligible for special education and related services as a student with autism, the CSE recommended placing the student in a 12-month school year program at a State-approved nonpublic school with related services of speech-language therapy, physical therapy (PT), and occupational therapy (OT), as well as a full-time, 1:1 health paraprofessional (Parent Exs. E at pp. 10-11, 15; F at pp. 1, 15; G at pp. 1, 18).<sup>1</sup> In addition, the CSE recommended special education transportation, adapted physical education, and assistive technology (Parent Exs. E at pp. 2, 11, 14, 15; F at pp. 1, 5; G at pp. 1, 6).

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<sup>1</sup> The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

For the 2011-12 school year, the student was attending a State-approved nonpublic school through the issuance of a Nickerson letter (Tr. pp. 7, 86).<sup>2</sup> On or about January 3, 2012, the parent decided that the State-approved nonpublic school was no longer appropriate for the student and she unilaterally removed him from the State-approved nonpublic school and placed him at Bishop Ahern for the remainder of the 2011-12 school year (Tr. pp. 7-9, 71-74, 79, 86-88, 100-01; see Parent Ex. B).

### **A. Due Process Complaint Notice**

By letter dated December 7, 2011, the parent notified the district of her dissatisfaction with the State-approved nonpublic school and requested an impartial hearing (Parent Ex. B).<sup>3</sup> The parent also informed the district that she would be unilaterally placing the student at Bishop Ahern (id.). According to the parent, the program at Bishop Ahern was a less restrictive environment with opportunities for the student to interact with his typically developing peers on a daily basis (id.). The parent requested that the district provide transportation and related services authorizations (RSAs) for the student's related services on his "most recent IEP," as well as an RSA for an "independent health paraprofessional" (id.). The parent further requested that the district pay the student's tuition costs at Bishop Ahern for the remainder of the 2011-12 school year (id.).

On January 17, 2012, the parent filed another due process complaint notice requesting an "expedited impartial hearing to attain [a] pendency" placement for her son at Bishop Ahern and to have his related services of OT, PT, and speech-language therapy "reinstated during litigation" (Pet. Ex. B at p. 1).<sup>4</sup> On January 23, 2012, the district submitted a challenge to the sufficiency of the parent's January 17, 2012 due process complaint notice (id. at p. 2). Also on January 23, 2012, the district and the parent entered into a partial resolution agreement regarding the parent's initial due process complaint notice dated December 7, 2011 (Pet. Ex. A; see also Pet. Ex. C at p. 1). The resolution agreement reflects that the student would continue to receive a full-time, 1:1 health paraprofessional as well as daily transportation (Pet. Ex. A).

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<sup>2</sup> A "Nickerson letter" is a remedy for a systemic denial of FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. v. Ambach decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see 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).

<sup>3</sup> The district assigned case number 137400 to this due process complaint notice (see Pet. Ex. C; see also Pet. ¶3a; Answer ¶9). A document entitled "case details" reflects that the district noted that case number 137400 was initiated by the parent on January 9, 2012 (Pet. Ex. C). For purposes of this decision, I will refer to case number 137400 as the parent's December 7, 2011 due process complaint notice.

<sup>4</sup> The district assigned case number 137510 to this due process complaint notice (see Pet. ¶3b; Answer ¶11).

On January 24, 2012, the parent filed a third due process complaint notice in which she requested payment of the student's tuition costs at Bishop Ahern (Parent Ex. A).<sup>5</sup> In mid-February 2012, the December 7, 2011 and January 2012 due process complaint notices were consolidated (see Pet. Ex. C; see also Pet. ¶ 3d; Answer ¶ 13).<sup>6</sup>

### **B. Impartial Hearing Officer Decision**

In an interim order dated January 27, 2012, the IHO noted that both parties agreed that the student's pendency (stay put) placement was determined by the program and services recommended in his March 24, 2010 IEP (Interim IHO Decision at p. 2).<sup>7</sup> Accordingly, the IHO ordered that the student continue to receive as pendency the following in-school related services: two individual 30 minute sessions of OT per week; two individual 30 minute sessions of PT per week; two individual 30 minute sessions of speech-language therapy per week; and a full-time, 1:1 health paraprofessional five days per week for the entire school day (id.). The IHO also ordered that the student receive two individual 30 minute sessions of OT and two individual 45 minute sessions of speech-language therapy after school (id.).

On February 27, 2012, an impartial hearing was held (Tr. p. 1; IHO Decision at p. 2).<sup>8</sup> In a decision dated March 13, 2012, the IHO found that the district conceded that it failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at pp. 2, 4; see Tr. pp. 5-6). The IHO then determined, among other things, that the parent had not met her burden in showing the necessity for a specific 1:1 private paraprofessional, "instead of one provided by the [d]istrict" or in demonstrating that Bishop Ahern provided education instruction specially designed to meet the student's unique needs (id. at pp. 3-4, 7-8). According to the IHO, Bishop Ahern did not meet the student's individual needs because it did not provide the full-time 1:1 paraprofessional required by the student, the age range in the student's class was inappropriate, and the classroom teacher was not certified to instruct students of his age (id. at p. 7). Having determined that Bishop Ahern was an inappropriate placement, the IHO declined to address equitable considerations and denied the parent's request for relief (id. at p. 8).

### **IV. Appeal for State-Level Review**

On appeal, the parent asserts that the IHO did not conduct the impartial hearing in a proper manner and exhibited bias. According to the parent, the only issue that was before the IHO was the appropriateness of Bishop Ahern as the parties had executed a resolution agreement with respect to the other issues the parent raised in her due process complaint notice. The parent further asserts that the IHO improperly requested evidence outside of the scope of the hearing and "shut

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<sup>5</sup> Both parties appear to agree that the January 24, 2012 due process complaint notice was intended to amend the parent's January 17, 2012 due process complaint notice and was filed in response to the district's notice of insufficiency (Pet. ¶ 3b; Answer ¶ 11).

<sup>6</sup> Both the IHO's January 27, 2012 interim decision and March 13, 2012 final decision in this matter bear the case number 137510. Case number 137400 was treated as withdrawn (Pet. Ex. C at p. 2).

<sup>7</sup> The hearing record reflects that the IHO held a hearing on January 26, 2012; however there is no record of this proceeding (see IHO Interim Order). I remind the IHO that there must be a written or electronic verbatim record of all proceedings before her (8 NYCRR 200.5[j][3][v]).

<sup>8</sup> The parent was unrepresented by counsel at the impartial hearing.

down" the pro se parent in her attempts to clarify the issues. In addition, the parent argues that the IHO erred both procedurally and substantively in denying the parent's request for tuition reimbursement. As relief, the parent requests annulment of the IHO's decision and findings that: (1) the district failed to offer the student a FAPE for the 2011-12 school year; (2) Bishop Ahern was an appropriate placement; and (3) equities favor an award of tuition reimbursement. The parent also requests an order directing the district to pay the student's tuition for the portion of the 2011-12 school year that the student attended Bishop Ahern and provide all of the student's related services through RSAs, through summer 2012.

In its answer, the district asserts that the petition should be dismissed because it fails to clearly indicate the reasons for challenging the IHO's decision with regard to the appropriateness of Bishop Ahern, and instead improperly incorporates those assertions into the accompanying memorandum of law in violation of State regulations. The district also asserts that the IHO did not act improperly when conducting the impartial hearing. Specifically, the district asserts that the IHO did not act improperly by asking questions of counsel or witnesses because she was seeking clarification and completeness of the record. The district asserts that the IHO correctly determined that Bishop Ahern was not appropriate for the student and seeks to uphold the IHO's decision in its entirety.

## **V. Discussion - Preliminary Matters**

### **A. Sufficiency of the Petition**

The district asserts that the petition does not clearly indicate the reason for challenging the IHO's decision regarding her determination that the parent failed to demonstrate that Bishop Ahern was an appropriate unilateral placement and asks that the petition be dismissed as "procedurally defective" under State regulation. State regulation requires a party appealing to an SRO to "clearly indicate the reason for challenging the [IHO's] decision" and to identify the findings, conclusions, and orders of the IHO with which the party disagrees in its petition for review (see 8 NYCRR 279.4[a]). SROs have exercised their discretion and dismissed petitions that failed to comply with 8 NYCRR 279.4(a) (see, e.g., Application of a Student with a Disability, Appeal No. 09-110; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024).

In this case, the parent asserts in her petition that the IHO erred in finding that the parent had not established the appropriateness of Bishop Ahern for the student (Pet. ¶ 9). In addition to alleging that the IHO erred procedurally and substantively in denying her claim for tuition reimbursement, the parent argues that the IHO abused her discretion in the conduct of the hearing (Pet. ¶ 10). The petition further indicates that the parent seeks remedies, among others, in the form of reversal of the IHO's decision and an award of tuition reimbursement for the portion of the 2011-12 school year that the student attended Bishop Ahern (Pet. "wherefore" clause). Under these circumstances, where the parent identified the findings, conclusion, and orders to which she disagreed, I decline to exercise my discretion to dismiss the petition as insufficient.

### **B. IHO Bias/Conduct of the Hearing**

Turning next to the parent's assertions regarding the IHO's conduct during the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance

of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

In addition, an IHO has the responsibility to ensure that there is an adequate record upon which to render findings and permit meaningful review (Application of a Student with a Disability, Appeal No. 11-004; Application of a Student with a Disability, Appeal No. 10-086; Application of a Student with a Disability, Appeal No. 10-035; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*10 [S.D.N.Y. Aug. 5, 2013]; B.M. v New York City Dep't of Educ., 2013 WL 1972144, at \*5-\*6 [S.D.N.Y. May 14, 2013]; Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, based on my review, and contrary to the contentions of the parent, I find that the hearing record does not support a reversal of the IHO's decision on the basis that she acted with bias or abused her discretion in the conduct of the hearing. An independent review of the hearing record demonstrates that the parent was provided an opportunity to be heard at the impartial hearing, which I also find was conducted in a manner consistent with the requirements of due process (see e.g., Tr. pp. 7-11, 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]). A review of the hearing record further shows that the IHO attempted to assist the parent who was unrepresented by counsel (see, e.g., Tr. pp. 28-33, 36-37, 43; 8 NYCRR 200.5[j][3][vii]). The IHO also acted within the scope of her authority when she asked a series of questions of the student's teacher at Bishop Ahern in order to more fully develop the hearing record on the issue that was presented to her to resolve (Tr. pp. 52-55; 8 NYCRR 200.5[j][3][vii]). Moreover, while the IHO may have mistakenly exceeded the scope of the issues before her by addressing the appropriateness of the parent's chosen paraprofessional in light of the resolution agreement between the parties, this error does not constitute misconduct, incompetence, or impropriety in this case (8 NYCRR 200.21[b][4][iii]).

## VI. Applicable Standards – Appropriateness of Unilateral Placement

Turning to the merits of the case, 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]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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; see 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 CFR 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 Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Bd. of Educ. v. Rowley, 458 U.S. 176, 188-89 [1982]; 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]).

## **VII. Discussion - Appropriateness of Bishop Ahern**

The hearing record establishes that Bishop Ahern is a private school that serves students with disabilities, and is affiliated with a neighboring general education high school (Tr. pp. 55, 57-58). At the time of the impartial hearing, the student was in an 11:1+1 class at Bishop Ahern (see Tr. p. 54). The academic supervisor from Bishop Ahern testified that all of the teachers at the school were State certified and licensed in special education (Tr. p. 61). She also testified that the student transitioned well from the nonpublic school to the program at Bishop Ahern (Tr. p. 57). She also testified that the students at Bishop Ahern receive peer tutoring and socialization provided by four students that attend a neighboring high school (Tr. pp. 57-58).

The student's special education teacher at Bishop Ahern testified that she holds special education teacher certification for birth to second grade levels, and that while the student was 14 years old, academically he was functioning on the second grade level (Tr. p. 50). She also testified that the student tends to become distracted, but that his 1:1 paraprofessional kept him on track (id.). The teacher also testified that the student had progressed socially in the two months that he had been at Bishop Ahern; he shook other students' hands in morning; he knew his numbers, colors, and shapes; he could answer "wh" questions on "his machine;" his head was usually up; he answered questions on the smart board with "his machine;" during free time, the student would share his iPad with a friend and play games; and the student also played games on a computer with a friend by using the mouse (Tr. pp. 39-41). The teacher also testified about a typical day for



students in her class (Tr. pp. 52-53). The teacher testified that she follows the Functional Academic Curriculum for Exceptional Students (FACES) (Tr. p. 48). The teacher also testified that the student got pulled out from class for PT (Tr. p. 54). Although the student's teacher testified that she was not sure if the student received OT (id.), the parent testified that the student received all of his OT services, although at home rather than at the school (Tr. pp. 89-90). The hearing record also reflects that the student received approximately four sessions of speech-language therapy per week at Bishop Ahern (Tr. pp. 27-31, 46).

With regard to the 1:1 paraprofessional, the IHO determined that it was undisputed that the student required this related service and Bishop Ahern did not provide it (IHO Decision at p. 7). However, as a result of the partial resolution agreement reached between the parties, the hearing record reflects that the student was receiving 1:1 paraprofessional services (Pet. Ex. A).<sup>9</sup> The hearing record also demonstrates that the parent originally hired the student's paraprofessional as a tutor to work with the student during his preschool year, and that the paraprofessional has remained with the student since (Tr. pp. 21-22, 93-94).

In determining the appropriateness of a unilateral placement, a parent does not have to show that the private school provides every special service that the student needs, only that the private school 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). As discussed above, the hearing record demonstrates that the student was receiving the special education programs and services that were necessary for him to benefit from instruction at Bishop Ahern. While the student was receiving OT at home and not at the school, and it is unclear whether the district was funding some of the services provided to the student at Bishop Ahern, the hearing record demonstrates that overall, the student received related services specially designed to meet his unique needs; therefore, I find that Bishop Ahern was an appropriate placement for the student for the 2011-12 school year.

### **VIII. Conclusion**

Based on the foregoing, I find that Bishop Ahern was an appropriate placement for the student for the 2011-12 school year (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70). In light of this determination, it is not necessary that I address any of the parties remaining issues.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated March 13, 2012, is modified by reversing the portion which found that Bishop Ahern was not an appropriate placement for the student for the 2011-12 school year and denied the parent's request for reimbursement of the student's tuition at Bishop Ahern for the 2011-12 school year; and

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<sup>9</sup> The parent testified that she "hired" the student's tutor as his paraprofessional for the 2011-12 school year (Tr. pp. 93-94). It is unclear who was funding the paraprofessional; the district or the parent, however, it is clear that the student was receiving those services for the school year at issue.

**IT IS ORDERED** that the district shall reimburse the parent for the student's tuition at Bishop Ahern for the 2011-12 school year upon proof of payment.

**Dated:**           **Albany, New York**  
                          **August 15, 2013**

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