



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-128

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Courtayne Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Law Offices of Neal Howard Rosenberg, Esq., attorneys for respondents, Jennifer D. Frank, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Aaron School (Aaron) for the 2011-12 school year. The appeal must be dismissed.

#### **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]-[B], [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 279.4[b], 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**

According to the hearing record, the student demonstrated delays in the areas of cognition, academics, attention, language processing, fine motor skills, behavior, and social/emotional functioning (Tr. pp. 24-25, 32, 120-126, 245-48, 270-71, 364-65; Dist. Exs. 3-7; Parent Ex. I). At the age of 17 months, the student received early intervention services to address his developmental delays (Dist. Exs. 4 at pp. 1-2; 5 at p. 1). Upon entering kindergarten during the 2008-09 school year, the student attended a 12:1+1 special class in a district public school (Dist. Ex. 4 at p. 2). The student experienced difficulties with learning, social skills, and behavior in this setting and, as a result, the parent transferred the student to his "local" public school where he repeated kindergarten in a regular education classroom with integrated co-teaching (ICT) services for the 2009-10 school year (Tr. p. 367; Dist. Exs. 4 at p. 2; 5 at p. 2). The student demonstrated behavioral

difficulties in the kindergarten ICT class and, midway through the school year, transferred to a different, more structured ICT class within the same school where he "did well" (Dist. Ex. 4 at p. 2).

The student continued in an ICT class for first grade during the 2010-11 school year (Tr. p. 367; Dist. Exs. 4 at p. 2; 5 at p. 2). Due to parental concerns regarding the student's difficulties with attention, behavior, and aggression during the 2010-11 school year, the parent obtained several private evaluations of the student, including a November 2010 diagnostic psychiatric evaluation and a January 2011 neuropsychological/educational evaluation (Dist. Exs. 4 at pp. 1-3; 5 at p. 2). Based on a recommendation contained in the November 2010 psychiatric evaluation, the parent asked the district to reevaluate the student to determine if he would benefit from additional services (Dist. Ex. 6 at p. 1; see Dist. Ex. 4 at pp. 9-10). In response to the parent's request, the district conducted a psychoeducational evaluation and classroom observation of the student in his ICT class on February 3, 2011 (Dist. Exs. 6, 7).

On February 14, 2011, a CSE convened to develop an IEP to be implemented between February 24, 2011 and February 13, 2012r (Dist. Ex. 11 at pp. 1, 14). Finding the student eligible for special education and related services as a student with an other health-impairment, the February 2011 CSE recommended ICT services in a regular education classroom eight times per day, a full time 1:1 behavior management paraprofessional, and the following related services: one 30-minute session per week of individual counseling; one 30-minute session per week of counseling in a group; two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group; and two 30-minute sessions per week of occupational therapy (OT) (id. at pp. 1, 12-13).<sup>1</sup>

In a final notice of recommendation (FNR) dated February 14, 2011, the district summarized the recommendations of the February 2011 CSE and identified the student's current school as the public school site to which the district assigned the student to attend (Dist. Ex. 13). The parent signed the FNR on March 4, 2011 indicating that she "agree[d] with the recommended services" (id.). The hearing record reflects that the student continued in his then-current classroom for the remainder of the 2010-11 school year (Parent Ex. G at p. 3).

In a letter to the principal at the student's current school dated May 26, 2011, the parent stated that she acquired "new documentation" indicating that the student required "additional levels of support for special education services" (Parent Ex. F). Based upon this information, the parent requested an "emergency IEP meeting" to "discuss this new documentation" (id.). The district school psychologist who served on the February 2011 CSE received a copy of the parent's letter and spoke with the parent by telephone regarding her request (Tr. pp. 214, 216; see Tr. pp. 395-98). The district did not respond or take action in response to this request.

On June 22, 2011, the parent executed an enrollment contract with Aaron and remitted a deposit, thus reserving her son's seat at Aaron for the 2011-12 school year (Parent Exs. A at pp. 3-4; B; H at p. 1).

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<sup>1</sup> The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

In an FNR dated August 5, 2011, the district again summarized the special education and related services recommendations contained in the February 2011 IEP and identified the school the student attended during the 2010-11 school year as the public school site to which the district assigned the student to attend for the upcoming 2011-12 school year (Dist. Ex. 14).

By letter dated August 8, 2011, the parent acknowledged receipt of the August 5, 2011 FNR and rejected the district's placement for the 2011-12 school year (Parent Ex. G at p. 3). The parent contended that, based on the additional documentation she acquired, the student "require[d] more special education support than [an ICT] class, such as a full time special education school" and maintained that "[an ICT] class, even with the addition of a paraprofessional, [was] too large" for the student and would "not adequately address the severity of [the student's] learning problems and speech and language disabilities" (*id.*). The parent indicated that the district failed to respond to her May 26, 2011 letter and advised that, in the absence of a response to her concerns, she had "no choice[ ] but to have [the student] start at the Aaron School in September for the 2011-12 school year" (*id.*). The parent also indicated her intent to seek tuition reimbursement for the costs of this placement (*id.*).

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

In a due process complaint notice dated October 19, 2011, the parent alleged that the district denied the student a FAPE for the 2011-12 school year (Dist. Ex. 1). Specifically, the parent alleged that: the February 2011 CSE was not properly constituted because it lacked a general education teacher; the CSE failed to reconvene in response to the parent's May 26, 2011 written request to reconvene; the annual goals and short-term objectives included in February 2011 IEP were "insufficient" to meet the student's needs; and that the recommended class was too large for the student given his need for a "full-time special education school with a small class and small school setting," as well as the student's lack of progress in an ICT setting during the preceding school year (*id.*). For relief, the parent sought tuition reimbursement, related services, and transportation to Aaron (*id.*).

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

An impartial hearing convened on January 25, 2012 and concluded on March 22, 2012, after three non-consecutive days of proceedings (Tr. pp. 1-399). In a decision dated May 15, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year, that Aaron was an appropriate placement for the student, and that equitable considerations weighed in favor of the parent's reimbursement claim (IHO Decision at pp. 6-12). With regard to the CSE's failure to respond to the parent's request to reconvene, the IHO found that the parent's request was reasonable and that the CSE should have reconvened to discuss the May 26, 2011 letter from the student's psychiatrist who "opined that the [student's current] program could do 'nothing' to address [the student's] . . . math and communication skills" (*id.* at p. 7). The IHO further found that the district's failure to respond to the parent constituted a de facto denial of her request and "precluded the parent from presenting her reasonable concerns, supported by psychiatric opinion . . . about the negative impact on the student overall from having the para[professional]" (*id.*). Further, the IHO found that the district's failure to respond to the parent's letter significantly impeded the parent's opportunity to participate in the development of the student's IEP, thereby denying the student a FAPE (*id.* at pp. 6-8).

The IHO also found that Aaron offered specially-designed instruction to meet the student's needs during the 2011-12 school year (IHO Decision at pp. 8-12). The IHO observed that the student was grouped with students by similarity of academic level and disability (id. at p. 9). Additionally, the IHO noted that Aaron provided "substantial individualized attention" to the student and addressed his "attentional and language processing difficulties" (id.). Further, the student's distractibility was addressed through "[g]raphic organizers and hand-on manipulatives" as well as the breaking down of information (id.). The IHO opined that Aaron met the student's behavioral needs by developing and utilizing an "individualized behavioral plan" and by offering classroom role-playing and a "weekly social skills class" (id. at p. 10). The IHO also found that Aaron offered both classroom and speech-language therapy services to address the student's speech-language deficits (id.).

The IHO next addressed the district's specific objections to the student's program at Aaron (IHO Decision at pp. 10-12). First, the IHO found that, although the student did not receive 1:1 paraprofessional services at Aaron, these services were not a required part of the student's program and that evaluative recommendations for these services were made within the context of a regular education classroom with ICT services (id. at p. 11). Next, the IHO found that Aaron's cap on the amount of related services it offered did not result in any harm to the student because he received speech-language therapy, OT, and counseling services at Aaron that targeted his areas of need (id.). Although the IHO noted that progress was "not mandated" when assessing the appropriateness of a unilateral placement, she found that the student made progress at Aaron in the areas of reading, speech-language, self-esteem, confidence, and social interaction (id. at pp. 10, 12).

Turning to equitable considerations, the IHO found that the parent cooperated with the CSE in the development of the student's IEP, expressed her objections regarding the February 2011 IEP, and timely requested that the CSE reconvene to consider her concerns supported by newly obtained evaluative information (IHO Decision at p. 12). Therefore, the IHO granted the parent's request for tuition reimbursement for the 2011-12 school year at Aaron "upon submission . . . of proof of payment and attendance" (id. at p. 12).<sup>2</sup>

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

The district appeals from the IHO's decision, arguing that the IHO erred by determining that the parent's May 26, 2011 request to reconvene the CSE was reasonable and that the district's denial of this request significantly impeded the parent's opportunity to participate in the IEP decision making process. The district argues that the parent's request was not reasonable because a CSE convened just three months prior at the parent's request and an insufficient amount of time had elapsed to assess the efficacy of the February 2011 IEP's recommendations. The district further argues that the parent's request was unaccompanied by any evaluative information that would have altered the February 2011 CSE's recommendations.

The district also asserts that the IHO erred in determining that Aaron was an appropriate unilateral placement for the student because Aaron did not provide the student with a sufficient

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<sup>2</sup> The IHO did not address the parent's request relief regarding transportation expenses because no evidence was offered by either party regarding the student's needs in this respect at the impartial hearing (id. at p. 12).

amount of speech-language therapy, OT, and counseling services. Aaron was also inappropriate, argues the district, because it did not constitute the LRE for the student. The district further contends that the IHO erred by finding that equitable considerations weighed in favor of an award of tuition reimbursement, because the parent never seriously considered a public school placement and "manufacture[d]" a request for tuition reimbursement by submitting her May 2011 letter.

The parent answers the district's petition, denying the district's material assertions and arguing that the IHO properly determined that the district failed to offer the student a FAPE for the 2011-12 school year by not responding to the parent's reasonable request to reconvene the CSE. The parent also asserts that she satisfied her burden of proving that Aaron was an appropriate placement for the student during the 2011-12 school year. With respect to the district's specific objections, the parent argues that the student received related services at Aaron to address his needs and that the student required a full-time special education program. The parent further contends that the IHO correctly determined that equitable considerations support the parent's tuition reimbursement claim.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E.,

694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Request to Reconvene the CSE**

In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter, the United States Department of Education indicated that parents may request a CSE meeting at any time and that, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). Although neither the IDEA nor State regulations address the type or amount of information that a district can ask a parent to provide prior to granting a parental request for a CSE meeting (see 20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[e]-[g]), the U.S. Department of Education's Office of Special Education has opined that "[i]n general, . . . such requests for information would need to be reasonable based on the individual student's circumstances" (Letter to Anonymous, 112 LRP 52263 [OSEP 2012]). A district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In order to determine whether the parent's May 2011 request to reconvene the CSE was reasonable, it is first necessary to examine the circumstances surrounding the request; namely, the evaluative material considered and recommendations made by the February 2011 CSE. According



to the hearing record, the February 2011 CSE considered a November 2010 diagnostic psychiatric evaluation; a December 17, 2010 letter from the student's private psychiatrist; a January 7, 2011 neuropsychological/educational evaluation; a report from the student's special education classroom teacher dated February 2, 2011; and a psychoeducational evaluation and classroom observation, both conducted on February 3, 2011 by the same evaluator (Dist. Exs. 3-7; see Tr. pp. 36-46, 187-88, 190, 193, 198, 225-26).<sup>3</sup>

A November 2010 psychiatric evaluation of the student indicated that the student was referred to the evaluator "for further evaluation of symptoms of hyperactivity, inattention, and aggression" (Dist. Ex. 4 at p. 1). The sources of information for the evaluation consisted of interviews with the student and parent, as well as the student's teacher, pediatrician, and prior therapist (id.). After reviewing the student's developmental, educational, social, family, and psychiatric history, the evaluator conducted a mental status examination of the student (see id. at pp. 1-6). As a result of this examination, the evaluator "confirm[ed] [the student's] prior diagnosis of Attention Deficit Hyperactivity Disorder [ADHD], Combined Type" and expressed concern regarding the effect the student's "poorly controlled hyperactivity, impulsivity, and aggression" had on his self-esteem and social/emotional functioning (id. at p. 7). The evaluator recommended that the student continue in his first grade ICT classroom and that the parent request a CSE meeting "in order to begin further evaluation for the presence of specific learning disorders" (id.). The evaluator further recommended paraprofessional services "to assist [the student] with classroom management" as well as "a full battery of neuropsychological testing . . . in an independent setting" (id. at pp. 9, 10).

In a December 17, 2010 letter addressed "[t]o whom it may concern," a private psychiatrist who evaluated the student "in consultation" on November 23, 2010 concluded that the student "[was] having significant difficulties learning and regulating his emotions and behaviors" (Dist. Ex. 3). The psychiatrist recommended that the student undergo "full neuropsychological testing to better understand his cognitive abilities and adjust his educational plan accordingly" (id.). As an "interim" measure, the private psychiatrist recommended "additional supportive measures to help maintain adequate learning and safety in school, such as a para[professional] during school hours" (id.).

A January 2011 neuropsychological/educational evaluation, obtained by the parent in accordance with the recommendation in the November 2010 psychiatric evaluation, was conducted to "delineate [the student's] learning needs in order to aid in [his] educational planning" (Dist. Ex. 5 at p. 1). The evaluator reported the parent's perception that the student's "behaviors" had become "worse[ ]" since the beginning of the school year (id. at p. 2). The evaluator reported observations from the student's special education teacher in his then-current ICT classroom who noted the student's distractibility and low self-esteem which, she surmised, were caused by his "recurrent learning challenges" (id.). The student's teacher further reported to the evaluator that the student exhibited low frustration tolerance and aggressive behaviors due to his "difficulties expressing his

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<sup>3</sup> In addition to the above documentation, the hearing record also reflects that the February 2011 CSE considered input from the student's classroom teacher, speech-language pathologist, occupational therapist, counselor, and the parent in developing the student's present levels of performance (Tr. pp. 22-24, 47, see Dist. Ex. 11 at pp. 1-4, 20).

emotions to others" which was, in turn, caused by his "significant delays in . . . speech and language" (id.).

The evaluator administered several standardized tests to the student but noted that the results "likely . . . underestimate[d]" the student's skills due to his "significant difficulties regulating his attention" during the examination (Dist. Ex. 5 at p. 7). With this caveat, the evaluator noted that the student exhibited "very significant variations" in his cognitive performance (id.). Generally, the student exhibited "major problems" in his verbal abilities, "difficulties in receptive and expressive language", and "low average to borderline performance in reading, spelling, and math" (id. at p. 8). The evaluator thought it "possible" that the student could attend in a mainstream setting, but "only if" the student was provided with "a specially trained teacher's aide whose daily involvement and support of [the student] [wa]s guided by frequent input from a special education teacher and a speech and language professional" (id.). The evaluator recommended a reevaluation of the student's attention and concentration abilities prior to the end of the 2010-11 school year to determine if the student required additional support or an alternative placement due to his behavioral and academic needs (id. at p. 10).

A teacher report dated February 2, 2011 submitted by the student's special education teacher from his ICT classroom described the student's academic levels and social/emotional functioning in the classroom (Parent Ex. I at pp. 1-3). The teacher rated the student's decoding, comprehension, and spelling skills "low" and his ability to complete "simple math calculations" as "very low" (id. at p. 1). Additionally, the teacher indicated that the student's math and written language levels were "below grade level" (id.). The report further indicated that the student "need[ed] a lot of teacher support to attend to any academic instruction"; "require[d] adult attention to insure any learning;"; and "would benefit, ideally, from greater structure [and a] specific . . . academic curriculum" (id. at pp. 1, 2, 3). The teacher recommended "extra adult support" for the student and observed that "a small class with 1:1 attention" was "beneficial" for the student (id. at p. 3).

On February 3, 2011, a district school psychologist conducted a 30-minute classroom observation of the student in his ICT class (Dist. Ex. 7 at p. 1). During the observation, the student demonstrated difficulties concentrating and focusing on classroom assignments without teacher assistance (id. at pp. 1-2). Specifically, the student "engaged in off-task behaviors which included putting his head on the desk, looking at other parts of the classroom instead of [at] the required materials, and leaving the classroom to go to the water fountain" (id. at pp. 1-2). The school psychologist also reported that the student's then-current classroom special education teacher told her that the student "required assistance throughout the school day to remain on task[]" (id. at p. 2).

Also on February 3, 2011, the same district school psychologist conducted a psychoeducational evaluation of the student to determine if the student would "benefit from additional services" (Dist. Ex. 6 at p. 1). The evaluator reviewed the aforementioned classroom observation and a February 2, 2011 report from the student's special education teacher in his ICT classroom (id. at pp. 1, 2; see Dist. Ex. 7). The evaluator also conducted interviews with the parent and teacher and performed academic as well as social/emotional assessments (id. at p. 1-9; see Dist. Ex. 7). Academically, the student achieved standardized scores ranging from the kindergarten to first grade level (Dist. Ex. 6 at p. 4). Although the student exhibited "no signs of

hyperactivity" and was able to sit and attend to testing, the student "often fidgeted" and his "attention span" fell below age-expected levels (id. at p. 3). When asked to complete a task utilizing his graphomotor skills, the student demonstrated "immature" and "impulsive" behaviors, failing to "pay[] attention to details" (id. at pp. 3, 6). Regarding the student's social/emotional functioning, the student obtained scores within the "clinically significant"<sup>4</sup> and "at-risk"<sup>5</sup> ranges indicating that he "required more support in the classroom setting" due to his difficulties with externalization and internalization of problems, school-related problems, and adaptive skills (id. at p. 7). The school psychologist further noted that the student's results on the Behavioral Systems Index demonstrated a need for adult support (id. at pp. 7-9).<sup>6</sup>

After reviewing this evaluative material and developing annual goals to target the student's areas of need, the February 2011 CSE recommended placement in a regular education classroom with ICT services, full-time 1:1 behavior management paraprofessional services, and related services of speech-language therapy, OT, and counseling (Dist. Ex. 11 at pp. 12-13, 14-15; see Dist. Ex. 12).<sup>7</sup> Additionally, the February 2011 CSE developed a functional behavior assessment and behavioral intervention plan (BIP) for the student (Dist. Ex. 11 at pp. 17-19). The hearing record reflects that the February 2011 CSE considered and rejected three alternative placements for the student: a regular education class in a community school, a regular education class with related services, and a regular education class with special education teacher support services (SETSS) because they could not adequately address the student's attention and social skill needs (id. at pp. 15-16).<sup>8</sup> The CSE also considered a special class in a community school but determined that it would be more appropriate to place the student in a setting with "cognitively similar peers" (id. at p. 16). The district implemented the recommended services contained in the February 2011 IEP, including full time 1:1 behavior management paraprofessional services, at the beginning of March 2011 (Tr. pp. 135-36; Dist. Ex. 12 at p. 1).

As a result of regularly scheduled appointments with the student's psychiatrist, as well as her interactions with the student, the parent determined that the student's placement in a regular education classroom with ICT services and a 1:1 paraprofessional was not meeting the student's

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<sup>4</sup> According to the hearing record, the student's results on the Behavior Assessment System for Children, Second Edition (BASC-2), placed him in the "clinically significant" range for externalizing problems, hyperactivity, depression, school problems, attention problems, learning problems, behavioral symptoms, withdrawal, adaptive skills, adaptability, and functional communication (Dist. Ex. 6 at pp. 7-8).

<sup>5</sup> According to the hearing record, the student's results on the BASC-2 fell in the "at-risk" range for aggression, conduct problems, internalizing problems, anxiety, social skills, leadership, and study skills (id.).

<sup>6</sup> Although not defined in the hearing record, the Behavioral Systems Index is a measure of overall maladaptive behaviors. The hearing record does not indicate the specific results to which the school psychologist referred in the psychoeducational evaluation.

<sup>7</sup> It is unclear whether the parent, in her answer, continues to allege that the student was denied a FAPE based upon alleged deficiencies with the February 2011 IEP's related service goals (see Answer at p. 4). Even assuming that the parent continues to pursue this claim, the IHO's granting of the parent's requested relief as well as the disposition of this appeal obviates the need for a discussion of this issue.

<sup>8</sup> SETSS services are not identified on New York State's continuum of special education services and the parties did not otherwise explore what SETSS services would have entailed for the student (see 8 NYCRR 200.6[d], [f]; see generally 8 NYCRR 200.6 et. seq).

needs (Tr. p. 376-78). According to the parent, the student's "processing issues were never addressed" in the classroom and the student "wasn't learning what [the classroom teachers] were teaching" (Tr. pp. 372-75, 378; see Dist. Ex. G at p. 3). The parent testified that "a few weeks" after the district initiated 1:1 behavior management paraprofessional services, she asked the classroom special education teacher "if she felt the para[professional] was working," to which the teacher responded "not as far as she c[ould] see" (Tr. p. 395). According to the parent, the student was "depressed" and told her he "hated the para[professional]" (Tr. p. 393; see Tr. p. 373). The parent further testified that she consulted with the student's private psychiatrist because the student "wasn't going anywhere" and "[t]he para[professional] wasn't working" (Tr. p. 377).

On May 26, 2011, the parent obtained a report from the student's psychiatrist, the evaluator who conducted the November 2010 psychiatric evaluation reviewed by the February 2011 CSE (compare Dist. Ex. 4 at p. 10, with Dist. Ex. 16 at p. 3). In her May 2011 report, the private psychiatrist reported that the student exhibited "significant academic, social and emotional difficulties in the classroom" and indicated that the student's current educational placement "[was] not . . . an educational setting that c[ould] adequately meet his needs" (Dist. Ex. 16 at p. 1). The private psychiatrist noted: the student's history of receiving diagnoses of a mixed receptive-expressive language disorder, a developmental coordination disorder, a learning disorder not otherwise specific, and an ADHD-combined type; his "periodic symptoms of depression and anxiety" which, she indicated, appeared to relate to his difficulties with academics and socialization; and that the results of the student's January 2011 neuropsychological/educational evaluation indicated that the student's overall cognitive abilities fell within the borderline range and included significant delays in the verbal reasoning domain that would likely negatively affect his abilities in reading, writing, and communication (id. at pp. 1-2). The psychiatrist opined that the student's difficulties with attention "[we]re not the source of his primary struggles and challenges in the classroom"; rather, she indicated, "[t]he main reason that [the student] struggle[d] in the classroom [was] that the services provided in his [ICT] classroom d[id] not adequately address the severity of his learning problems or his speech and language disabilities" (id. at pp. 1-2).

The private psychiatrist concluded that, although the addition of a 1:1 behavior management paraprofessional had assisted the student to "improve his focus on tasks and difficulties with transitions," paraprofessional "service[s] c[ould] do nothing to address the student's fundamental difficulties with acquiring core competencies in reading, mathematics skills, and communications skills . . . appropriate to his age and developmental level" (Dist. Ex. 16 at p. 2). Going forward, the private psychiatrist recommended, among other things, that the student "transition to a specialized, non-public education setting" and continue to receive the related services of speech-language therapy, OT, and counseling (id. at pp. 2-3).<sup>9</sup>

In summary, although the private psychiatrist's May 26, 2011 report contained some information which had been previously reviewed by the February 2011 CSE (compare Dist. Exs. 3-7, with Dist. Ex. 16), the new report also set forth new information; namely, the private psychiatrist's professional opinion regarding the efficacy of the district's recommended 1:1 behavior management paraprofessional in addressing the student's needs (Dist. Ex. 16 at pp. 1-3). This recommendation reinforced the parent's concern that the district's recommended ICT class,

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<sup>9</sup> The parent testified that the student regularly met with the psychiatrist "about every three weeks" (Tr. p. 378).

even with 1:1 behavior management paraprofessional services, was inappropriate to address the student's learning needs and speech and language deficits (see Dist. Ex. 16 at p. 2; Parent Ex. G at p. 3).

The hearing record reflects that, on May 26, 2011, the parent contacted the district school psychologist by telephone and advised her that she "had a new report saying that [the student] needed more than [ICT services] and a para[professional]" (Tr. pp. 213-17, 375-77). According to the parent, the school psychologist responded that "I really can't talk to you about that . . . [y]ou need to contact the principal," and that the school "would[] usually [wait] eight months to a year" before assessing the efficacy of paraprofessional services (Tr. pp. 375-76, 389-90, 395-97). The parent also testified that, in accordance with the school psychologist's directive, she forwarded her May 2011 letter requesting a CSE reconvene to the principal at the student's assigned public school for the 2011-12 school year but did not receive a response (Tr. pp. 381, 397-98; see Parent Exs. F; G at p. 3).

The district school psychologist testified that the parent did, in fact, telephone her on May 26, 2011, and that the parent advised her that she had "new documentation" and "want[ed] . . . an emergency [CSE] meeting" in order to change the student's program (Tr. pp. 146-47). The school psychologist further testified that she responded that "[i]t was . . . two-and-a-half months after the services had gone into effect," which was not "enough time with the para[professional] to see if this [wa]s really working" (Tr. p. 148). The school psychologist testified that she informed the parent that "as far as [she] knew and as far as members of the [CSE] team were telling [her] . . . the para[professional] was making a difference" and that the parent should allow the district to implement the services for "at least four, five, or six months" (Tr. pp. 148-49; see Tr. pp. 214-15).<sup>10</sup> The school psychologist did not review or consider the May 2011 letter from the student's psychiatrist in making this determination (Tr. pp. 216-17).<sup>11</sup>

The district argues on appeal that the parent's request was not reasonable under the circumstances because only three months had passed since the district initiated 1:1 behavior paraprofessional services and more time was needed in order to assess whether such services were effective in meeting the student's needs. This argument is not substantiated by the evidence in the hearing record. The parent's request was made after observations of the student as well as a conversation with the student's special education classroom teacher and several meetings with the student's psychiatrist (Tr. pp. 376-78, 393, 395). All of this information indicated to the parent that the 1:1 behavior paraprofessional services were ineffective for the student. Further, the parent's request was made in May of 2011, which provided the district with ample time to schedule another CSE meeting to review the private psychiatrist's report and to consider modifying the student's February 2011 IEP before the start of the 2011-12 school year in September (see 20

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<sup>10</sup> Additionally, the hearing record contains contemporaneous notes taken by the school psychologist during this phone call (Dist. Ex. 15). These notes indicate that the parent told the school psychologist that she "contacted [an attorney] . . . to get what is appropriate for [the student]" and that she wanted "funding" for a "non-public school" (id.).

<sup>11</sup> At some point subsequent to this phone conversation, the school psychiatrist reviewed the May 26, 2011 letter from the student's psychiatrist (Tr. p. 151). She further indicated that the letter's recommendations would not have changed the February 2011 CSE's program recommendations (Tr. pp. 151-58).

U.S.C. § 1414[d][3][A][ii]; 34 CFR 300.324[a][1][ii]; 8 NYCRR 200.4[d][2]; Winkelman, 550 U.S. at 524, 530-32; see also Grim, 346 F.3d at 381).

Moreover, it appears from the hearing record that the district failed to convene a meeting to discuss the student's progress toward meeting his behavioral goals in May 2011 as mandated by the student's BIP. The student's BIP, developed on February 14, 2011, provided that the student's progress toward meeting the behavior goals in the IEP would be "assessed and communicated with [the] parent [ ] at least every ten (10) weeks" (Dist. Ex. 11 at p. 17). The BIP further directed that such a "review" should be scheduled (id.). In view of the fact that the hearing record indicates that the student first began working with the 1:1 behavior management paraprofessional at the beginning of March 2011, the meeting contemplated by the BIP should have been held two weeks prior to the parent's May 26, 2011 letter (id.; see Tr. pp. 135-36; Dist. Ex. 12 at p. 1). Therefore, irrespective of the parent's written request, the district was obligated to meet and discuss the student's progress toward his behavior goals, a discussion that would have necessarily included an assessment of the student's 1:1 behavior paraprofessional services.

Additionally, the parent testified at the impartial hearing that one of her concerns with the student's 1:1 behavioral paraprofessional services was the negative effect that the paraprofessional had on the student's self-esteem. Specifically, the student reported to the parent that he "hated" having an assigned 1:1 paraprofessional in his regular education classroom and that it was "a big embarrassment" (Tr. p. 373). The student's self-esteem challenges were discussed in both the November 2010 psychiatric evaluation and January 2011 neuropsychological/educational evaluation considered by the February 2011 CSE (Dist. Exs. 4 at p. 7; 5 at p. 2). The neuropsychological/educational evaluation explicitly noted that the student's "recurrent learning challenges in the classroom" had a deleterious effect on his self-esteem (id.; see also Dist. Ex. 4 at p. 7). Although the hearing record is unclear as to whether the parent shared this particular concern with the district psychologist in the May 2011 telephone call, it is apparent that this was a legitimate area of concern which the parent sought to address when the CSE reconvened.

Finally, the district is not on firm footing to evaluate the parent's actions here where it inexcusably failed to respond to the parent's May 2011 letter and failed to provide prior written notice to the parent explaining why it determined that it was unnecessary to reconvene the CSE to ensure the provision of a FAPE to the student (34 CFR 300.503; 8 NYCRR 200.5[a]; see also Letter to Chandler, 112 LRP 27623 [OSEP 2012]); Letter to Anonymous, 112 LRP 52263 [OSEP 2012]). By failing to even acknowledge the parent's concerns—supported, she believed, by new evaluative information not previously available to the CSE—the district undermined the "cooperative process" between parents and districts that the Supreme Court has held constitutes the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5] [stating Congress' finding that the education of students with disabilities can be improved by "strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home"] and Winkelman, 550 U.S. 516). Therefore, I concur with the IHO and find that the district's failure to respond to the parent's request to reconvene and consider updated information significantly impeded the parent's ability to participate in the decision-making process regarding the student's placement and thereby denied the student a FAPE (20 U.S.C. § 1415[f][3][E][ii][II]; 34 CFR 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]).

## B. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2011-12 school year, I turn to the appropriateness of the parent's unilateral placement of the student at Aaron. 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 must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at p. 14). 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, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "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]; 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, at \*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; quoting Frank G., 459 F.3d at 364-65).

A complete review of the evidence in the hearing record reveals that Aaron provided specially-designed instruction to the student, thereby addressing the student's demonstrated delays in the areas of cognition, academics, attention, language processing, fine motor skills, behavior, and social/emotional functioning (Tr. pp. 24-56, 120-126, 238-41, 245-48, 270, 335, 364-65; Dist. Exs. 3-7; Parent Exs. I-K).

The student's classroom teacher at Aaron testified that the school serves students with special needs in the areas of language processing, sensory processing and regulation, social/emotional functioning, and cognition from kindergarten through sixth grade, with a maximum of twelve students and two teachers per class, and a maximum of six students in literacy and math groups (Tr. pp. 238-39). The school also provided the student with the related services of counseling, speech-language therapy, and OT in both individual and group settings (Parent Ex. K at pp. 1-4; see Tr. p. 239). The school employed numerous techniques to promote student self-awareness and social interactions among peers, including consistent implementation of teacher modeling and language-based programs, biweekly meetings between teachers, therapists, and an educational supervisor to discuss students' individual needs, and the provision of a weekly "social skills" group to students (Tr. pp. 240-41).

The student's classroom teacher at Aaron testified that the student's third grade class consisted of eleven students ranging in age from eight to nine years old as well as two teachers (Tr. pp. 241-42). Nine of the students in the classroom had IEPs (Tr. p. 242). The teacher further testified that the student "fit in" with the functional levels of the other students in her class, which ranged from first grade to fourth grade for reading, second grade to fourth grade for math, and from beginning/middle second grade to beginning/middle third grade for writing (Tr. pp. 241-42, 244, 347-48; Parent Ex. J at p. 1).<sup>12</sup>

To address the student's academic needs, the classroom teacher provided the student with individualized attention and prompts; a behavioral chart; visual prompts; manipulatives; graphic organizers, and a "phonic ear" to amplify her voice in order to assist the student to process oral language (Tr. pp. 247-48, 249, 252-53, 256, 351-52; see Parent Ex. J at p. 7).<sup>13</sup> Additionally, the teacher presented material to the student at a slower pace and used smaller phrases to facilitate learning and would "check in with [the student] frequently throughout the day to make sure he

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<sup>12</sup> Although the transcript indicates that a question was posed to the teacher regarding the "rating levels" of the students in her class, it is apparent from the context of the teacher's testimony that this is a typographical error and the question related to the students' "writing" levels (Tr. p. 348).

<sup>13</sup> The classroom teacher testified that the "phonic ear" was "almost like a microphone, but it's attached to a string that you wear around your neck . . . and it kind of takes the place of a microphone" (Tr. p. 353). The teacher further explained that "[t]here [we]re speakers installed around the classroom" which allowed the device to "amplify[] certain aspects of [the classroom teacher's] speech" (Tr. p. 352). She further indicated that the phonic ear device addressed the student's distractibility "because it drown[ed] out the background noise of things that may [have] be[en] happening in the classroom or outside of the classroom" (Tr. p. 353).



[was] grasping the concepts and [that] he d[id] understand" (Tr. pp. 247-48). To address the student's social/emotional needs, including his needs related to frustration tolerance and social skills, the teacher utilized strategies such as visual cues, modeling, role-playing, social skills lessons, positive reinforcement, and an individualized behavioral plan (Tr. pp. 248-49; see Parent Ex. J at p. 7). The school's speech-language coordinator testified that the annual goals contained in the student's February 2011 IEP were "reference[d] . . . at the beginning of the school year," but that Aaron also "generate[d] additional goals based on [their] observations and . . . curriculum assessments" (Tr. pp. 334-35).

According to the student's 2011-12 Aaron School mid-year report, dated February 2012, the student received instruction in reading, language arts, writing, math, social studies, science/health, social skills, computer, art, movement, music, and library (Parent Ex. J at p. 1; see Parent Ex. D). The mid-year report noted that "[d]ue to [the student's] difficulties with self regulation, attention, expressive language and social/emotional cognition, he require[d] a variety of individualized supports and strategies to ensure his continued academic and social progress" (Parent Ex. J at p. 1).

The mid-year report indicated that the student received a 45-minute session of literacy instruction per day in a group of three (Parent Ex. J at p. 2). Within this literacy group, a special education teacher instructed the student using the "Wilson Foundations" reading program (Wilson) (id.). The Wilson program "focuses" on improving decoding, phonological awareness, fluency, and spelling skills (id.). Supplemental instruction materials, including trade books and teacher-created materials, were used to improve the student's reading comprehension skills and his abilities to draw conclusions as well as link cause and effect (id.).<sup>14</sup> The mid-year report also indicated that the student's spelling and comprehension skills were addressed daily within the literacy group through warm-up exercises, group activities, independent practice, and homework (id.). The student received further supported in his literacy class during the 2011-12 school year through a "balanced literacy approach, interactive activities, visual supports, graphic organizers, and the use of Thinking Maps" (id. at p. 2). Testimony from the student's classroom teacher reinforced the conclusions of the mid-year report (Tr. pp. 256-58, 326). The teacher testified that the small group setting of the literacy group provided the student with consistent, individualized instruction which addressed his low frustration tolerance, insofar as he was better able to understand the material through the use of individualized prompts and reminders (Tr. p. 256).

The mid-year report indicates that the student's math group consisted of four students and utilized, among other resources, the Saxon Mathematics Program (Saxon) (Parent Ex. J at p. 3). The Saxon program targeted the student's development of computation skills, word problems, money concepts, and measurement through the use of a multisensory approach that provided the student with additional opportunities to practice and reinforce math concepts through, among other things, "various educational websites and teacher[-]made worksheets" (id.).<sup>15</sup> The mid-year report

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<sup>14</sup> According to the hearing record, Wilson is "an Orton-Gillingham based program" which the teacher utilized to "focus[ ] on improving [the student's] decoding and encoding skills through multisensory instruction" (Parent Ex. J at p. 2).

<sup>15</sup> According to the hearing record, Saxon "focuse[d] on developing computation skills as well as identifying angles, solving word problems, solving addition and subtraction facts, counting coins, [and] identifying and

further indicated that the student received instruction delivered in a sequential manner using hands-on activities; that he received "one to one teacher support to provide step by step instruction," which increased his confidence level; and that he benefited from teacher reminders and "individualized body breaks and sensory tools to help him sustain his attention and work successfully" (*id.*). These supports, according to the report, enabled the student to "meet the demands and expectations of the class" (*id.*). The classroom teacher testified that all of the students in the math group were functioning at a second grade level and that the small class size allowed for individualized attention which assisted the student in learning new material and managing his frustration (Tr. p. 325). She further testified that the student was provided specific math goals that targeted skills such as word problems, fractions, measurement, time and money concepts (Tr. pp. 325-26).

Regarding the student's writing skills, the mid-year report indicated that the school utilized a "sequential and systematic" writing curriculum, which was incorporated into all of the student's academic areas (Parent Ex. J at pp. 3-4). According to the hearing record, the student's writing skill level fell within approximately a second grade level, a comparable level to the other 10 students in his writing group (Tr. pp. 326, 328). To address the student's difficulties with written expression, as well as the formulation and organization of ideas, the school employed a multisensory approach which included strategies such as chunking, graphic organizers, a sequential and systematic approach, and visual supports (Tr. pp. 327-28). Additionally, the student received individualized attention and support during writing activities, including teacher prompts to initiate and complete tasks, modeling, and checklists (Tr. pp. 327-28; Parent Ex. J at p. 4).

Aaron utilized the Handwriting Without Tears curriculum as well as direct instruction from the classroom occupational therapist to address the student's handwriting/fine motor needs (Parent Ex. J at p. 4). According to the hearing record, Handwriting Without Tears is a multisensory instructional approach used to teach the student directionality, vocabulary, imitation, positioning, and "sequencing of the letter formations in both manuscript and cursive writing" (*id.*).<sup>16</sup> The mid-year report noted that the student "struggle[d] with self-regulation and impulsivity and, as a result, d[id] not always form his letters correctly" (*id.*). To address these concerns, the student was provided with clear lined paper to write within, as well as modeling, repetition, review, redirection, visual supports, verbal cues, and reminders to improve his handwriting (*id.*).

Relative to language arts, the February 2011 Aaron mid-year report indicated that the student occasionally became "overwhelmed" with writing tasks, "struggle[d] with brainstorming and organizing his thoughts in a clear manner," and experienced difficulties with "expressing his thoughts and transferring his ideas onto paper" (Parent Ex. J at p. 5). The student also had difficulty "controlling his impulses" which occasionally prompted him to interrupt his teachers, call out answers, share his thoughts before others had a chance to finish theirs, and become hung up on one idea (*id.*). To address these needs, the teacher provided the student with multisensory and interactive activities as well as scaffolding strategies to "break complex tasks into smaller and more manageable steps" (*id.*). The teacher further "facilitate[d] interactions during large and small

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forming lines of symmetry and line measurement" (Parent Ex. J at p. 3).

<sup>16</sup> According to the hearing record, the Handwriting Without Tears curriculum "employs wooden pieces, slate boards and chalk, and visually structured handwriting paper" (Parent Ex. J at p. 4).

group activities"; modeled expectations; offered "individualized support and encouragement during independent writing tasks"; and provided access to organizational tools such as thinking maps and narrative chains (id.).

In social studies and science/health, the student exhibited "difficult[ies] with impulsivity and attention" and often required teacher assistance to remain engaged and on-task (Parent Ex. J. at pp. 5-7). To address these needs, the mid-year report indicated that the student received "verbal prompts and reminders to show 'whole body listening' and [to] be a 'thinking about others' kid" in social studies class (id. at p. 7). In science class, the student benefitted from "[r]epeating and cueing" as well as "'wh-' questions", clear explanations of classroom activities, and multisensory instruction (id. at p. 6).

Regarding the student's social/emotional and behavioral needs including anxiety, low frustration tolerance, and disruptive behaviors, the hearing record reflects that student was provided with positive reinforcement, role playing activities, and both a classroom and individual behavioral plan (Tr. pp. 340-41; Parent Ex. J at p. 2). The student's classroom teacher testified that the student required an individual behavior plan because the student "wasn't really responding to the class-wide program" (Tr. p. 341). The student's teacher identified the student's three primary interfering behaviors in the classroom as "raising quiet hands, following directions on the first try, and using kind words to teachers and friends" (Tr. p. 249). The teacher further testified that the student "ha[d] those three prompts on top of [a] chart," and that "there's usually 12 periods throughout the day, so after every period, if [he] was successful at those three prompts, he earns a check . . ." (Tr. p. 249). If the student earned 9 out of 12 checks in a day, he "earn[ed] a big check for the day" (Tr. p. 249). And if the student earned four out of five big checks for the week, he "g[ot] to choose a privilege of his choice" (Tr. p. 249).

Further social/emotional and behavioral support was provided through "a visual cue" on the student's desk, which "help[ed] him remain calm and walk[ed] him through problem solving with a peer" (Tr. p. 248). Additionally, the student received social skills training, which was, according to the classroom teacher, "carr[ied] over into the classroom" and "constantly referr[ed] back to" (Tr. pp. 248-49). The classroom teacher also testified that during less structured nonacademic periods such as lunch, assemblies, recess, and school trips to a local park, the student continued to "struggle[] with attention, language processing, and . . . social interactions" (Tr. p. 329). However, the teacher indicated that she and an assistant teacher provided the student with individual support in the forms of teacher facilitation, modeling appropriate interactions, providing the student with language, or helping him walk through problem solving sessions (Tr. pp. 329-31).

In order to further address the student's needs in the areas of receptive, expressive and pragmatic language, self-awareness, emotional regulation, social skills, fine motor skills, graphomotor skills, and sensory processing/regulation, the student received counseling once per week for 30 minutes per session, alternating between a 1:1 setting and a dyad; OT once per week for 30 minutes per session in a group of two; speech-language therapy twice per week for 30 minutes per session, once in a 1:1 setting and once in a dyad; and a classroom social skills group once per week for 30 minutes per session (Tr. pp. 266-70, 331-32; Parent Exs. J at p. 1; K at pp. 1, 3-4).

The district contends that the Aaron program was inappropriate to address the student's special education needs because it did not provide sufficient frequency and duration of related services in the student's areas of need. The hearing record reflects that the student received the same related services recommended by the February 2011 CSE while at Aaron; namely, speech-language therapy, OT, and counseling (see Parent Ex. K).<sup>17</sup> Therefore, it is not disputed that the student received related services in all of his areas of need during the 2011-12 school year (id.).<sup>18</sup> Additionally, the student received one 30-minute session per week of social skills training in his classroom at Aaron (Parent Ex. K at pp. 1, 3). The hearing record reveals that frequency and level of related services at Aaron were substantially similar to the levels prescribed by the February 2011 IEP (compare Dist. Ex. 11 at pp. 12, 15, with Parent Ex. K). The only significant differences are that the February 2011 IEP offered one additional 30-minute session per week of speech-language therapy, OT, and counseling, while Aaron offered an additional 30-minute session per week of social skills training (id.). As discussed above, in order to establish the appropriateness of a unilateral placement to address a student's needs, the parent need not show that the placement provides every special service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; M.H. v. Dep't of Educ., 712 F. Supp. 2d 125, 166 [S.D.N.Y. May 10, 2010], aff'd, 685 F.3d 217 [2d Cir. 2012]; Stevens, 2010 WL 1005165, at \*9; see R.K. v. Dep't of Educ., 2011 WL 1131522, at \*3-\*4 [E.D.N.Y. Mar. 28, 2011]). Therefore, the hearing record reveals that the student received speech-language therapy, OT, social skills, and counseling services to meet his areas of need.<sup>19</sup>

The hearing record also reflects that the student made progress in several areas at Aaron. Although a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 F. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D. D-S. v. Southold Union Free Sch. Dist., 506 F. App'x 80, 82, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364), it is,

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<sup>17</sup> The district does not allege that the related services provided to the student at Aaron were inappropriate or ineffective.

<sup>18</sup> Because the student received related services to address all of his areas of need, the district's challenge to Aaron's "cap" on the amount of related services a student may receive is irrelevant.

<sup>19</sup> Given the substantial evidence in the hearing record demonstrating the appropriateness of Aaron and the fact that, while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 (2d Cir. 2014); Frank G., 459 F.3d at 364; Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]), the district's argument that Aaron did not represent the LRE for the student must fail. Although Aaron is a private school that exclusively educates students with disabilities, the evidence in the hearing record illustrates that the school offered specially designed instruction to address the student's needs (see generally Parent Ex. I at pp. 1-3).

nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522, and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).<sup>20</sup>

The student's 2011-12 Aaron mid-year report indicated that, from fall 2011 to February 2012, the student demonstrated progress toward the achievement of several of his annual goals at Aaron.<sup>21</sup> Of the goals introduced to the student at the time of the report,<sup>22</sup> the student made progress toward achieving two skills out of five in homeroom functioning; two skills out of five in social functioning; two skills out of two in language arts; two skills out of two in health; two skills out of three in both writing and music; one skill out of three in computer skills; and one skill out of two in study skills (Dist. Ex. J at p. 8). Relative to reading, the mid-year report indicated that the student demonstrated progress in one of fourteen skills and maintained his previous ability levels in the other thirteen skills (id. at p. 9). In math, the student progressed in one out of six listed skills while maintaining his previous ability levels in the five other listed skills (id. at pp. 9-10). A review of the student's mid-year progress report as a whole reveals that the student made progress at Aaron toward a substantial amount of his academic and social/emotional goals.<sup>23</sup>

Therefore, a review of the evidence in the hearing record supports the IHO's determination that the Aaron program was specially designed to address the student's unique educational needs during the 2011-12 school year.

### **C. 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; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary

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<sup>20</sup> The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d 356, 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

<sup>21</sup> The Aaron mid-year progress report constitutes objective evidence of the student's progress at Aaron during the 2011-12 school year (Gagliardo, 489 F.3d at 113; Frank G., 459 F.3d at 364).

<sup>22</sup> It appears that, by the time of the mid-year report, several of the student's goals had "not yet been introduced" (see Parent Ex. J at pp. 8-10). These goals have not been considered in the above analysis. Additionally, other goals were marked "not yet . . . introduced" as of fall 2011 but marked "executes with guidance and frequent support," the earliest level under Aaron's scoring rubric, at the time of the report (see Parent Ex. J at pp. 8-10). Because it is unclear whether the student made progress toward these goals or whether they were merely introduced, they cannot be considered objective evidence of the student's progress and have not been factored into the above analysis (id.).

<sup>23</sup> The mid-year report additionally indicated that the student did not demonstrate progress toward one social studies goal, two handwriting goals, three physical education goals, and one library skill goal (Parent Ex. J at p. 8).

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"). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 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, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at \*13 [E.D. Pa. Oct. 22, 2007]).

On appeal, the district argues that equitable considerations militate against an award of tuition reimbursement because the parent never seriously considered enrolling the student in a public school and, further, that the parent did not visit the assigned public school site before she enrolled the student at Aaron for the 2011-12 school year. Although the district alleges that the parent's May 2011 letter was a deliberately calculated attempt to "manufacture" a claim for tuition reimbursement at Aaron, the evidence in the hearing record does not support this contention. The parent participated in the February 2011 CSE meeting and fully cooperated with the CSE during the review process (see Tr. pp. 24-25, 371; Dist. Ex. 11 at p. 20). Further, in her May 26, 2011 telephone call with the school psychologist and letter, the parent expressed concerns with the February 2011 IEP and requested that the CSE reconvene to consider the private psychiatrist's report (Tr. pp. 213-14, 375-77, 381, 397-98; see Parent Exs. F; G at p. 3). The parent received no response whatsoever from the district. It was not until more than three weeks after contacting the district—and failing to receive a response—that the parent executed an enrollment contract with Aaron and remitted an \$8,000 deposit (Tr. pp. 378, 386; Parent Exs. A-B; H at p. 1). Further, the parent offered timely notice that she was removing the student from the public school system and intended to seek tuition reimbursement (Parent Ex. G at p. 3).

Similarly, the fact that the parent did not visit the assigned school site is of no consequence. Just as the IDEA does not bestow parents with a right to visit an assigned public school site (see 34 CFR 300.116, 300.327, 300.501[c]; see also Letter to Mamas, 42 IDELR 10 [OSEP 2004] [IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement]; but see C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014] [holding that the IDEA provides parents with a right to acquire "relevant information" about an assigned public school classroom]), it does not impose an affirmative obligation upon parents to do so. Further, the assigned school classroom was located within the public school the student attended during the 2010-11 school year (compare Parent Exs. 4 at p. 2; 5 at p. 2, with Dist. Exs. 13-14). The parent testified at the impartial hearing that she visited the student's classroom during the 2010-11 school year and, therefore, was already familiar with the assigned public school (Tr. pp. 382-83).

Based upon the parent's active participation in the development of the student's IEP and the district's inexcusable failure to respond to the parent's concerns, I agree with the IHO and find that equitable factors support the parent's claim for reimbursement (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at \*8-\*9 [S.D.N.Y. Jan. 3, 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 679-80 [S.D.N.Y. 2012]).

## **VII. Conclusion**

Based on the foregoing, I concur with the IHO's determinations that the district failed to offer the student a FAPE during the 2011-12 school year by failing to respond to the parent's reasonable request to reconvene the CSE; that Aaron provided the student with specially-designed instruction to address his areas of need; and that equitable considerations support an award of reimbursement to the parent for the cost of the student's tuition at Aaron for the 2011-12 school year.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
June 13, 2014

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