



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-135

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:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, Stephen L. Goldstein, 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 respondents' (the parents') daughter for the 2010-11 and 2011-12 school years and ordered it to provide compensatory additional special education services and fund the student's tuition costs at the Rebecca School for the 2011-12 school year. The appeal must be sustained in part.

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 school 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student received services through the Early Intervention Program and the Committee on Preschool Special Education due to significant global developmental delays (Tr. pp. 425-26, 428-29; Parent Ex. K at pp. 1-2).¹ She has received diagnoses of an autistic disorder and a

¹ I note that the district included an exhibit with the hearing record that was removed from evidence on the second hearing date (Dist. Ex. 17; see Tr. pp. 480-81). As the district expressly withdrew this exhibit from evidence during the impartial hearing (Tr. p. 480) and I find it to be unnecessary to my decision, I have not considered it.

moderate intellectual disability, including deficient adaptive functioning and limited interpersonal skills (Parent Ex. K at p. 6).²

For the 2009-10 and 2010-11 school years, the student attended a district 6:1+1 special class and received speech-language therapy and occupational therapy (OT) (Tr. pp. 432-33; Dist. Ex. 3 at pp. 1, 18; Parent Ex. R at pp. 1, 16).³

On March 15, 2011, the CSE convened for the student's annual review and to develop the IEP for the 2011-12 school year (Dist. Ex. 2). The CSE recommended that the student continue in the same 12-month, 6:1+1 special class she had attended for the past two school years, and receive counseling, speech-language therapy, and OT services (Tr. p. 143; Dist. Ex. 2 at pp. 1, 16; Parent Ex. N).

In a letter to the CSE chairperson dated September 1, 2011, the parents provided the district with "10 day notice" that they were unilaterally placing the student at the Rebecca School for the upcoming school year and would seek direct payment or tuition reimbursement for that placement (Parent Ex. H at p. 1). According to the parents, the district had failed to address their daughter's needs for several years, she had not progressed while in the district's elementary school for the past several years, and they believed that the recommended program and placement was not designed to meaningfully address her needs (id.).

The student began attending the Rebecca School on September 20, 2011, and continued there through the 2011-12 school year (Parent Exs. B; C; D).⁴

A. Due Process Complaint Notice

By due process complaint notice dated February 1, 2012, the parents requested an impartial hearing (Dist. Ex. 1). The parents asserted that the student had not made progress while attending a district program for the 2009-10 and 2010-11 school years, but that the district offered the same inappropriate program for the 2011-12 school year (id. at pp. 1-2).⁵ Specifically, the parents alleged that the student was not appropriately grouped in her district elementary school classroom, her sensory needs were not addressed, she regressed with regard to independent toileting, and she received insufficient specialized instruction (id.).⁶

² The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Tr. p. 106; see 34 CFR 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

³ During the 2010-11 school year, the student also received one session of counseling per week (Dist. Ex. 3 at p. 18).

⁴ The Rebecca School is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁵ The dispute related to the 2009-10 school year was withdrawn after a prehearing conference was conducted (Tr. p. 33; IHO Ex. I).

⁶ Although raising no further specific challenges to the IEPs developed for the 2009-10 and 2010-11 school years, the parents asserted that they were "deficient in the same ways the 2011-12 [IEP] is deficient. Additionally, upon information and belief, the CSEs that developed these IEPs were improperly comprised" (Dist. Ex. 1 at p. 2 n.1).

The parents also alleged that the March 2011 IEP was not appropriate because it failed to accurately reflect the student's needs and did not contain achievable, measurable goals designed to address those needs (Dist. Ex. 1 at p. 2). The parents asserted that the CSE's recommendation of the same program that it had recommended for the prior two years "strongly suggest[ed]" the district predetermined the recommendation, depriving the parents of an opportunity to meaningfully participate in the development of the student's IEP (*id.*). Furthermore, the parents contended that the March 2011 IEP failed to include parent counseling and training, in derogation of State regulation (*id.*). The parents also asserted that the March 2011 CSE was improperly comprised (*id.*).⁷

The parents asserted that since being placed at the Rebecca School, the student had made significant progress in multiple areas and that the Rebecca School was meeting each of her needs (Dist. Ex. 1 at p. 3). For relief, the parents requested direct payment or reimbursement for the student's Rebecca School tuition and additional services sufficient to remedy the district's failure to offer the student a free appropriate public education (FAPE) (*id.* at p. 4).⁸

B. Impartial Hearing Officer Decision

An impartial hearing was convened on April 24, 2012, and continued on two additional consecutive hearing dates, concluding on April 26, 2012 (Tr. pp. 45-505).⁹ In a decision dated May 30, 2012, the IHO found that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years and awarded the parents additional services as well as direct funding and reimbursement for the student's tuition costs at the Rebecca School (IHO Decision).¹⁰

For the 2011-12 school year, the IHO found that the district impeded the parents' opportunity to participate in the development of the March 2011 IEP because she found credible the father's testimony that the March 2011 CSE meeting lasted no more than 15 minutes, which the IHO found to be an insufficient length of time for the CSE to adequately discuss each of the student's needs and consider the parents' concerns regarding the recommended program (IHO Decision at pp. 24-26). The IHO found that this failure also led to the omission from the IEP of "goals and services" aimed at addressing the student's deficits in the areas of toileting and sensory processing (*id.* at p. 26). Additionally, the IHO found that the CSE was not properly composed,

⁷ This allegation was clarified at a prehearing conference as challenging whether the CSE members were those providing services to the student, whether all necessary personnel working with the student were present, and whether all those who signed the March 2011 IEP's attendance sheet were actually present (Tr. pp. 5-7).

⁸ After being directed by the IHO to clarify the type and amount of additional services they were requesting, the parents specified that they were seeking 210 hours of direct special education teacher services (special education services), provided at the student's home in a 1:1 ratio (Tr. pp. 21-23, 33; IHO Ex. I).

⁹ The IHO also conducted two prehearing conferences, at which the parents clarified the claims raised in their due process complaint notice (Tr. pp. 1-44). The hearing process was both efficient and fair insofar as IHO made use of the prehearing conference procedures set forth in State regulation, arranged for consecutive days of hearings, documented all requested extensions that she granted to the timeline, and issued her thorough decision in a timely fashion (*see* 8 NYCRR 200.5[j][3][iii], [xi], [xii]; [j][5]).

¹⁰ The IHO structured her decision by first discussing the 2011-12 school year. As she relied on many of her findings with respect to the 2011-12 school year in discussing the adequacy of the program offered for the 2010-11 school year, I present her findings here in the order she made them.

as no district representative was present at the meeting (id.). Because the district did not provide a representative who was knowledgeable about the district's resources at the March 2011 CSE meeting, the IHO found that the student's "ability to access needed services was impeded" because of the absence of anyone who could "describe the range of services that were available to address [the student's] identified special education needs," a conclusion she considered to be supported "by the total lack of toileting and sensory processing goals, and services to address such goals, in the IEP" (id.).

Addressing the student's program in the March 2011 IEP, the IHO found that the IEP did not accurately reflect the student's present levels of performance by failing to sufficiently indicate "the extent and nature" of the student's deficits and by failing to note other areas of need (IHO Decision at pp. 27-28). These deficiencies, the IHO found, "carr[ie]d over to deficiencies in the goals" contained in the March 2011 IEP, as the IEP contained no goals addressing the student's needs in the areas of visual motor, self-care, and sensory processing (id. at p. 28).¹¹ For these reasons, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year.

With respect to the 2010-11 school year, the IHO found "that the [district] did not provide [the student] with a [FAPE] during the 2010-2011 school year for many of the same reasons that it failed her with respect to the 2011-2012 school year" (IHO Decision at p. 35). Specifically, the IHO found that the CSE meeting held in April 2010 to develop the student's IEP for the 2010-11 school year was of insufficient duration for the CSE to adequately consider the student's needs and that the CSE was not properly composed, which deficiencies impeded the parents' participation and the student's ability to access necessary services as described above (id. at pp. 35-37). Furthermore, the IHO found that the April 2010 IEP was not reasonably calculated to confer educational benefits on the student because it lacked "goals and services to address her visual motor, self-care . . . and sensory processing deficits" (id. at p. 37). The IHO also found that the hearing record indicated that the student made insufficient progress during the 2010-11 school year in toileting independence and communication, and that the student's service providers did not address her sensory processing needs (id. at pp. 37-38). Accordingly, the IHO found that the district did not provide the student with a FAPE for the 2010-11 school year (id. at p. 38).

Turning to the appropriateness of the parents' unilateral placement of the student at the Rebecca School for the 2011-12 school year, the IHO found that the Rebecca School met the student's needs "by providing her with a small class, significant adult support (including individualized attention) and an environment in which her social, sensory, communication and academic deficits are addressed" (IHO Decision at p. 31). The IHO noted gains made by the student in the areas of communication, sensory processing, academic skills, and social skills, and found that the related services provided by the Rebecca School were appropriate to meet the student's needs (id. at pp. 31-32).

¹¹ The IHO also found that the CSE's failure to recommend parent counseling and training on the March 2011 IEP did not constitute a denial of FAPE because the district school the student attended offered parent training workshops (IHO Decision at p. 29). However, she went on to find that because the parents required parent training to assist the student in developing self-care skills, the failure to offer it on the IEP was "part of the complex of significant inadequacies depriving [the student] of a [FAPE]" (id. at pp. 29-30).

To remedy the denial of FAPE for the 2010-11 school year, the IHO noted that the student had made gains in some areas which the April 2010 IEP had failed to sufficiently address (IHO Decision at p. 38). Finding the hearing record deficient as to the manner in which the parents' requested additional services of "SETSS"¹² would remedy the denial of a FAPE, the IHO determined that it would be appropriate to provide the student with 210 hours of services aimed at the student's continued needs in the areas of communication, social, self-care, and pre-academic skills (*id.* at pp. 38-39). To address each of these areas, the IHO awarded 105 hours of speech-language therapy and 105 hours of home-based special education services, each to be provided outside of the student's Rebecca School school day so as not to interfere with her instruction (*id.* at p. 39). In determining an appropriate remedy for the denial of FAPE for the 2011-12 school year, the IHO found that equitable considerations supported the parents' claim for tuition reimbursement, as the hearing record established that the parents cooperated with the district and provided the district with timely notice of their intention to withdraw the student from the district and enroll her in the Rebecca School at district expense (*id.* at pp. 32-34). Because she found that the student's father had established his inability to pay the student's Rebecca School tuition costs, the IHO ordered the district to pay the student's tuition for the 2011-12 school year directly to the Rebecca School (*id.* at pp. 33, 39).

IV. Appeal for State-Level Review

The district appeals, contending that the IHO erred in finding that it failed to offer the student a FAPE for the 2010-11 and 2011-12 school years. The district asserts that the IHO erred in finding that the parents were unable to meaningfully participate in the April 2010 and March 2011 CSE meetings, and argues that it was reasonable for the meetings to be shorter than might otherwise have been the case based on the district staff CSE members' familiarity with the student's needs. Furthermore, the district argues that the hearing record indicates that the IEPs were fully discussed at the CSE meetings, such that the parents were able to meaningfully participate in their development, and the hearing record does not indicate that the CSEs would not have made changes to the IEPs. With regard to the absence of a district representative, the district asserts that the student's special education teacher was qualified to act as such because she was certified as both a special education and regular education teacher, knew about the general education curriculum, and was knowledgeable of the district's continuum of services. In any event, the district argues that the absence of a district representative did not constitute the denial of a FAPE because the other members of the CSE "were collectively qualified to provide information to the [p]arents about the [district's] resources."

The district also asserts that the IHO erred in finding that the IEPs did not address the student's sensory needs, as both "recommend[ed] OT and counseling." Furthermore, the district contends that both IEPs accurately provided the student's present levels of performance based on

¹² I note that throughout the hearing record, both the parties and the IHO referred to the requested special education services as special education teacher support services (SETSS) (IHO Decision at pp. 4, 35, 38-39; Tr. p. 33; IHO Exs. I, VI at pp. 1, 23; VII at p. 30). It should be noted that neither federal nor State statutes or regulations contain a definition of SETSS and neither party described SETSS in the hearing record. Other sources indicate that this service has been provided as a pull-out service from a regular education classroom in groups of up to eight students (see *B.W. v. New York City Dep't of Educ.*, 716 F. Supp. 2d 336, 340 [S.D.N.Y. 2010]) and in this case, in which the parent sought 1:1 services in the home, it is unclear from the hearing record what the parties contemplated "SETSS" to consist of in this instance, except that the IHO indicated that the SETSS was awarded to address the student's self-care and pre-academic skills deficits (IHO Decision at p. 39).

the student's portfolio and assessments, and clearly detailed her skill levels and functional levels. With respect to the goals created for the student, the district asserts that the IHO erred in focusing on the lack of self-care and sensory goals, as the IEPs contained "detailed academic, counseling, [speech-language therapy] and OT goals" that were reasonably calculated to confer educational benefits on the student.

With regard to the award of additional services to remedy the denial of FAPE for the 2010-11 school year, the district asserts that it provided the student with all of the services recommended in the April 2010 IEP; that she made meaningful progress in the areas of self-care, attending, and communication; and that any regression was due to the parents' removal of the student from the district's program before the summer of 2011 and placing her in a summer camp. In any event, the district asserts that the awarded services were not calculated to remedy the alleged deprivation of a FAPE. With respect to the student's placement at the Rebecca School, the district argues that the student was not appropriately grouped, as the age range of the students were from 6 to 10 years old and the student functioned at the lower level of the class in which she was placed; the Rebecca School only provided the student with a 9-month program when the hearing record indicates her need for a 12-month program to avoid regression; and that the student's progress at the Rebecca School was properly attributable to the progress she made while in the district's elementary school. The district also contends that equitable considerations weigh against granting funding of the student's Rebecca School tuition because the parents did not cooperate with the district, as they did not attend parent-teacher conferences and failed to assist in developing the student's toileting skills. Finally, the district asserts that the parents gave insufficient notice of their dissatisfaction with the services provided to the student by not expressing any disagreement with the district's program until they provided notice that they were removing the student from the public school to enroll her in the Rebecca School and seeking public funding seven days prior to the start of the school year.

The parents answer, denying the district's assertions and requesting that the IHO's determinations be affirmed. The parents also allege that certain matters were decided by the IHO but were not appealed by the district, and assert that these decisions are now final and not subject to review by an SRO.

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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v.

Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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; 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. Dep't 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]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 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 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. 2010-11 School Year

On April 19, 2010, the CSE convened for the student's annual review and to develop the student's IEP for the 2010-11 school year (Dist. Ex. 3).¹³ Attendees included the parents, the student's special education teacher and her related service providers including a district school psychologist, speech therapist, and occupational therapist (Dist. Ex. 3 at p. 2; see Tr. pp. 77-78, 80-81, 176; Dist. Ex. 12 at p. 2). According to the special education teacher, during the meeting the CSE reviewed "portfolios and assessments" and related services reports to prepare the student's IEP (Tr. pp. 81-82). At the impartial hearing, the district did not definitively identify any specific documents and reports the April 2010 CSE relied upon at the meeting.¹⁴ Assuming for the sake of argument that the documents entered into the hearing record by the district dated prior to April 2010 were those considered at the meeting, the April 2010 CSE had available to it a September 2009 OT School Function Evaluation Checklist, results from an October 2009 partial administration of the Brigance Diagnostic Inventory of Early Development-II (Brigance-II), and a November 2009 Literacy-Work Attitude and Behavior report (Dist. Exs. 12-14).

¹³ The IEP indicated that it was to be implemented from April 2010 through April 2011 (Dist. Ex. 3 at p. 2).

¹⁴ Under the circumstances of this case, I need not reach the question of whether the district's failure to identify at the impartial hearing the evaluative data and other materials relied upon in developing a student's IEP constituted a failure to offer the student an appropriate educational placement because this issue has not been raised by the parties. However, I remind the district of its obligation to provide the parents with prior written notice on prescribed forms mandated by the Commissioner of Education (available at <http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>), which required the district to provide a description of each evaluation procedure, assessment, record, or report that was used as a basis for the proposed action (see 34 CFR 300.503; 8 NYCRR 200.5[a]) within a "reasonable time" (8 NYCRR 200.1[oo]) which, under the circumstances of this case, would have been at some point before the date of initiation of the April 2010 IEP.

According to this information, the student was ambulatory and did not exhibit mobility difficulties (Dist. Ex. 12 at pp. 4, 9-10). She was nonverbal and either pointed to or took desired items to communicate her wants (Dist. Exs. 12 at p. 9; 14 at p. 16). The student pointed to a limited number of pictures, body parts, and colors upon request (Dist. Ex. 14 at pp. 17-19). The student exhibited poor attention to tasks, a low frustration tolerance, a variable ability to complete one step directions, and had difficulty staying in her seat (Dist. Exs. 12 at pp. 9, 11; 14 at p. 16). She did not demonstrate age appropriate fine motor skills for the purposes of using pencils or scissors, or the motor planning skills to sequence actions to complete tasks or use visual/verbal/tactile information (Dist. Ex. 12 at pp. 7, 10). Pre-writing skills included making marks/scribbles, tracing a circle, and copying a horizontal line (*id.* at p. 5). She did not draw objects or people, letters or numbers, or color within the lines (*id.*). The student was dependent on others to complete activities of daily living (ADLs) including caring for her personal hygiene, toileting, functioning in the community, and some aspects of eating and dressing (*id.* at pp. 6, 9-10). While the student exhibited the ability to tolerate tactile and vestibular sensory input, she demonstrated difficulty with various aspects of proprioceptive, auditory, visual, and perceptual input (*id.* at p. 5). Specifically, the student had difficulty adjusting her posture/seat position, walking with a heel/toe pattern, alerting/orienting to auditory stimuli, adapting to unfamiliar sounds, responding and attending to verbal instructions, making eye contact, attending to relevant visual information, and showing understanding of positional concepts (e.g. up, over, top) (*id.* at p. 7). In the area of sensory modulation, the student did not stay alert in class or regulate her reactions to stimuli (*id.*).

The special education teacher testified that when the student entered her classroom in fall 2009, the student exhibited "a lot" of sensory "issues," including not staying in her seat, mouthing items, rubbing her eyes, throwing herself on the floor, and screaming (Tr. pp. 77-78, 84, 96-98, 100). She stated that at the time of the April 2010 CSE meeting, the student required adult support in all aspects of self-care including feeding, dressing, and toileting (Tr. pp. 84, 86-87, 102-04). According to the special education teacher, as of April 2010, the student was nonverbal, did not display an awareness of others, required physical and verbal adult support to complete tasks, and participated in classroom activities for approximately five to ten minutes (Tr. pp. 88-90, 98, 101).

1. CSE Process

Initially, the district asserts that the IHO erred in finding: (1) that the CSE impeded the parents' participation in the development of the April 2010 IEP by conducting a 10-15 minute long CSE meeting; and (2) that the student's ability to receive an appropriate education was impeded by the fact that there was no district representative present at the April 2010 CSE meeting. I agree with the district that these deficiencies did not rise to the level of a denial of a FAPE.

a. Parent Participation

With regard to the length of the April 2010 CSE meeting, the only indication in the hearing record of the meeting's length is the testimony of the student's father that the meeting lasted "between 10 to 15 minutes" (Tr. p. 433). The IHO found that it was not possible, given the complexity of the student's needs, to adequately discuss the student's needs in such a time frame, thereby depriving the parents of an opportunity to participate in the development of the student's IEP (IHO Decision at pp. 35-36). I note that the due process complaint notice contains no challenges to the length of the CSE meeting. Moreover, I find no legal authority to hold that the length of a CSE meeting alone is sufficient to support a finding that the parents were precluded

from participating in developing the student's IEP.¹⁵ In any event, I note that while the IHO found the student's father's testimony regarding the length of the meeting to be "credible," she did not make a finding that the student's special education teacher lacked credibility and there is no reason not to balance the father's testimony with the special education teacher's testimony that each aspect of the IEP was discussed and that the parents offered no objections to any aspect of the IEP (Tr. pp. 85, 92-93, 96, 99, 105-07), even if there is no dispute that the length of the overall CSE meeting was brief.

b. CSE Composition—District Representative

Turning to the IHO's finding that the absence of a district representative from the April 2010 CSE meeting caused the student to be deprived of a FAPE, counsel for the parents clarified at the prehearing conference that the allegation in the due process complaint notice that the CSE was "improperly comprised" challenged whether the CSE members who were present were actually persons working with the student, whether all persons with relevant information were present, and whether those persons who signed the attendance sheet of the IEP were actually present (Tr. pp. 5-7). In response to this clarification, the IHO indicated that she would "hold [counsel for the parents] to [his] definition of improperly comprised" (Tr. p. 7).¹⁶ Nonetheless, the IHO found that the lack of a district representative impeded the student's ability to access necessary services, as evidenced by a lack of toileting and sensory processing goals (IHO Decision at pp. 36-37).

The district asserts that the student's special education teacher was qualified to serve as the district representative or, in the alternative, that the student suffered no harm as a result of a lack of a district representative at the April 2010 CSE meeting. I agree with the district that, although no one signed into the CSE meeting as a district representative, the hearing record does not support the conclusion that this resulted in the student experiencing a loss of educational opportunity or that the parents' participation in the process was significantly impeded. A district representative member of the CSE is described as a representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency" (20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist provided that such individual meets the above statutory qualifications (8 NYCRR 200.3[a][1][v]). While the district asserts that the student's special education teacher was qualified to serve as the district representative because she was certified as both a special education and regular education teacher and had worked in multiple district schools over her five year career, I am unconvinced that the evidence in the hearing record

¹⁵ Neither the IDEA nor State regulations prescribe a minimum length for conducting a CSE meeting. Moreover, there is no evidence in the hearing record showing that, for example, the parents attempted to discuss topics and were cut off or that the district refused to listen to their concerns due to time constraints imposed by the district.

¹⁶ Counsel for the parents later indicated that he was "looking to develop that further on the record as to who was there, was everyone there that was supposed to be there, and were the folks that signed in actually physically there?" (Tr. pp. 8-9). I note that both IEPs clearly indicated that a district representative was not present, such that the district's failure to comply with the IDEA was apparent at the time the due process complaint notice was drafted (Dist. Exs. 2 at p. 2; 3 at p. 2).

established her qualifications with regard to being knowledgeable about the district's available resources. However, I disagree with the IHO's conclusion that this failure led to other deficiencies in the IEP. The special education teacher's testimony clearly indicates her awareness of the student's needs and present levels of performance (Tr. pp. 85-99, 101-03). Furthermore, the parents, the special education teacher, and all of the student's related service providers were present at the April 2010 CSE meeting (Tr. pp. 80-81, 85; Dist. Ex. 3 at p. 2), and there is no indication in the hearing record that the student required services available in the district of which these providers were not aware. The failure to adequately address the student's needs in the April 2010 IEP—discussed further below—is a result not of the CSE's composition, but of the manner in which the IEP was drafted. While I remind the district of its obligation to ensure the presence of a district representative at every CSE meeting held for a student with a disability, in this instance I do not find that this particular procedural violation deprived the student of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

2. April 2010 IEP—Present Levels of Performance and Goals

The IHO found that the April 2010 IEP was deficient because it did not contain goals or services to address the student's visual motor, self-care (including toileting), and sensory processing deficits, despite the IEP present levels of performance indicating that the student exhibited "significant delays in the areas of visual motor, self-care and sensory processing skills" (Dist. Ex. 3 at p. 8; IHO Decision at p. 37). I agree, noting that a review of the present levels of performance does not provide further descriptions or information about the specific needs the student exhibited in these areas (Dist. Ex. 3 at pp. 3-9).

The April 2010 IEP annual goals and short-term objectives related to the student's need to improve her ability to display an awareness of others, make eye contact, interact with peers, engage in parallel play, express preferences, actively participate in an activity, sort items into two categories, point to the picture of a given object, participate in a group activity, identify five body parts, stay in her seat, walk in a line, exchange a sentence strip with a communication partner, follow simple one step familiar directions, use simple social phrases via picture exchange, display "simple gross motor interactive play" skills, and improve attention and focusing skills to complete activities (Dist. Ex. 3 at pp. 10-15). While some of these annual goals and short-term objectives could be broadly construed to relate to sensory processing (e.g. improving attention and focusing, staying in her seat), without additional information in the present levels of performance regarding what her specific needs were in that area it is difficult to determine whether these annual goals and short-term objectives addressed the student's specific sensory processing needs (*id.* at pp. 12, 15). The IEP does not otherwise include strategies related to her management needs that provide the student with support for her sensory processing deficits (*see id.* at pp. 3-9). Although aspects of the annual goals and short-term objectives relating to the student's use of the Picture Exchange Communication System (PECS) included visual motor skills (visually selecting a picture from a field, removing it from the book and handing it to a communication partner), the focus of those goals and objectives was to improve communication (*id.* at pp. 13-14). Additionally, I agree with the IHO that none of the annual goals or short-term objectives could be read so broadly as to suggest their purpose was to address the student's self-care deficits. As stated above, the student continued to exhibit significant needs in this area, and although the student's 2009-10 IEP provided present levels of performance information regarding the student's eating, dressing, and toileting skills, and corresponding short-term objectives to address toileting and dressing needs, the 2010-11 IEP failed to do so (*compare* Dist. Ex. 3, *with* Parent Ex. R at pp. 5, 7, 11). Accordingly, I find

that the April 2010 IEP failed to offer the student a FAPE because it failed to sufficiently identify the student's present levels of functional performance and include corresponding goals required to address the student's identified needs (20 U.S.C. § 1414[d][1][A]; 34 CFR 300.320[a]; 8 NYCRR 200.4[d][2]).

B. 2011-12 School Year

On March 15, 2011, the CSE convened for the student's annual review and to develop the IEP for the 2011-12 school year (Dist. Ex. 2).¹⁷ Attendees were the parents and the same district staff (special education teacher, speech therapist, occupational therapist, school psychologist) who had attended the April 2010 CSE meeting and provided services to the student during the 2010-11 school year (Tr. pp. 136-37; compare Dist. Ex. 2 at p. 2, with Dist. Ex. 3 at p. 2). The hearing record does not identify the specific documents the March 2011 CSE relied upon at the CSE meeting to develop the student's IEP (see Tr. p. 137).¹⁸ Assuming again for the sake of argument that the documents entered into the hearing record by the district dated prior to March 2011 were those considered at the meeting, the March 2011 CSE had those documents discussed above that were available to the April 2010 CSE as well as a June 2010 speech-language student outcomes summary report, a September 2010 Student Strengths-Based Profile and Interest Inventory, a September/October 2010 speech-language report, and the results of an October 5, 2010 administration of the Nonspeech Test (Dist. Exs. 6-7; 9-11; see Dist. Exs. 12-14).¹⁹

The information new to the March 2011 CSE primarily related to the student's communication skills, and indicated emerging abilities in the areas of requesting, making choices, rejecting/protesting, seeking attention to self, and attending to a partner and objects presented by a partner (Dist. Exs. 6 at p. 1; 7 at p. 2). The student was nonverbal, communicated by using PECS, and was motivated by stickers, toys, sensory items, balls and puzzles (Tr. pp. 178, 219; Dist. Exs. 9; 10). According to the speech therapist, the student's attention span was limited and she required numerous verbal and physical redirection prompts (Tr. p. 219; Dist. Ex. 9). The student was dependent for toileting and required physical prompts for dressing; however, she exhibited the ability to eat independently (Dist. Ex. 10). The special education teacher testified that during the 2010-11 school year the student exhibited progress in her ability to trace lines and shapes, sit in her chair, feed herself, pack and unpack her bag, hold a pencil/crayon properly, take off/put on her jacket, sit on the toilet, use a visual schedule, and decrease mouthing her clothing and tantrum behavior (Tr. pp. 103-04, 111, 113, 116, 118-19, 126-28, 137-38, 169).

The IHO found that the March 2011 IEP was deficient because the present levels of performance did not adequately describe the student, and it did not contain goals or services to address the student's visual motor, self-care (including toileting), and sensory processing deficits despite the IEP present levels of performance indicating that the student exhibited "significant delays in the areas of visual motor, self-care and sensory processing skills" (Dist. Ex. 2 at p. 7;

¹⁷ The IEP indicates that it was to be implemented from March 2011 through March 2012 (Dist. Ex. 2 at p. 2).

¹⁸ Again, this issue was not raised by the parties and need not be addressed on appeal.

¹⁹ The hearing record also contained notes from the speech therapist to the parents from the fall and winter of the 2010-2011 school year (Dist. Ex. 16 at pp. 1-5).

IHO Decision at p. 28).²⁰ While I disagree with certain aspects of the IHO's findings, an overall read of the hearing record and the IEP supports the conclusion that the district failed to describe and offer services to sufficiently address the student's identified areas of need and thus failed to offer the student a FAPE.²¹

The IHO is correct that in this case, the March 2011 IEP designation of "Alternate Grade Level Indicators" (AGLI) without additional information describing the student's readiness or academic skills is insufficient (Dist. Ex. 2 at p. 3; IHO Decision at p. 28). The IEP academic present levels of performance offered general statements about the student including that she benefitted from various types of prompting throughout activities, she required a structured environment, small group instruction and repetition of work, and that she was making progress in all developmental areas (Dist. Ex. 2 at p. 3). While the present levels of performance sufficiently described the student's communication skills, the only specific readiness or academic skill identified in the IEP is the student's ability to match pictures and sort colors with prompts (*id.* at pp. 3-5). The IEP indicated that the student's sensory processing skills were significantly delayed; however, the present levels of performance did not provide any additional information regarding this area of need (*id.* at pp. 3-8). As was problematic with the April 2010 IEP, while some of the annual goals and short-term objectives in the March 2011 IEP could be broadly construed to relate to sensory processing needs (e.g., participating in an activity for an increased length of time, maintaining eye contact), it is difficult to determine whether these annual goals and short-term objectives addressed the student's specific sensory processing needs without additional information in the present levels of performance regarding what her specific needs were (*id.* at p. 13). The IEP does not otherwise include management needs that provided the student with support for her sensory processing deficits (*id.* at pp. 3-8).

Regarding the student's self-care skills, the IEP indicated that the student was "dependent in [caring for her] personal hygiene, buttoning, shoelacing and zipper[ing]," and that she independently ate finger foods and drank from a sip cup without spillage (Dist. Ex. 2 at p. 8). The IEP provided one annual goal and corresponding short-term objectives related to self-care skills,

²⁰ The IHO also found that by holding a 10-15 minute long meeting without a district representative present, the district impeded the parents' ability to participate in the March 2011 CSE meeting and the student's receipt of a FAPE (IHO Decision at pp. 24-26). I find these determinations to be erroneous for essentially the reasons stated above with respect to the April 2010 CSE meeting. Finally, while the district also asserts that the IHO erred in finding that the CSE's failure to offer parent counseling and training was "part of the complex of significant inadequacies" with the March 2011 IEP that denied the student a FAPE (IHO Decision at pp. 29-30), I find that it is unnecessary to address this contention because the IHO explicitly found that the "failure to specify parent training and counseling on [the March 2011 IEP] did not result in a deprivation" of FAPE by itself (*id.* at p. 29), and for the reasons discussed herein, I agree with her ultimate conclusion that the district did not offer the student a FAPE.

²¹ The IHO found that the March 2011 IEP did not accurately describe the student's social/emotional skills and failed to provide goals in the area of visual motor skills (IHO Decision at p. 28). I disagree with the IHO on both counts, as the IEP described the student's relatedness, improvement in eye contact, the circumstances under which she joined activities, and her need to improve her ability to initiate communication with peers and adults (*see* Dist. Ex. 2 at pp. 5-6, 8); and the IEP contained short-term objectives addressing the student's need to improve her ability to color within the lines, trace lines and shapes, trace letters, and copy curved and straight lines (*see id.* at p. 10). The IHO also determined that the IEP lacked goals to address the student's crying and tantrum behaviors (IHO Decision at p. 28); however, the special education teacher testified that by the 2010-11 school year, those behaviors had decreased (Tr. pp. 97-98, 169).

designed to help the student improve her ability to put on and remove outerwear (*id.* at p. 9). I agree with the IHO that the IEP did not provide adequate descriptions of the student's self-care needs, including indicating that she was still dependent for toileting, and failed to provide annual goals and short-term objectives to address those needs (Tr. p. 133; IHO Decision at p. 28; *see* Dist. Ex. 2 at pp. 3-13). Accordingly, the district did not offer the student a FAPE because the March 2011 IEP failed to sufficiently identify the student's present levels of functional performance and include corresponding goals required to address the student's identified needs (20 U.S.C. § 1414[d][1][A]; 34 CFR 300.320[a]; 8 NYCRR 200.4[d][2]).

C. Unilateral Parental Placement

Turning now to the appropriateness of the parents' unilateral placement of the student at the Rebecca School for the 2011-12 school year, the district challenges the placement on three grounds: (1) that the student was not functionally grouped appropriately in her Rebecca School classroom; (2) that the student required a 12-month program and the Rebecca School offered the student only a 9-month program; and (3) that any progress made by the student at the Rebecca School is attributable to the progress she made while attending the district's school placement in prior years. I find each assertion to be without merit for the reasons stated below and uphold the IHO's determination that the Rebecca School constituted an appropriate placement for the student for the 2011-12 school year.

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 provide 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 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). 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, *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]).

The program director of the Rebecca School (the program director) testified that it is a school for students with neurodevelopmental delays in relating and communicating, with the majority of students having received diagnoses of autism spectrum disorders (Tr. pp. 246, 258). The school provides instruction for approximately 115 students from 4 to 21 years old, using primarily a developmental individual difference relationship-based (DIR) model (Tr. pp. 251, 258-59). The student attended the Rebecca School during the 2011-12 school year, in a classroom composed of one teacher, six other students, and three teacher assistants (Tr. pp. 279-82). The student received two individual and one group session of OT per week; two individual, one group, and one session of speech-language therapy in a dyad per week; and one session of individual counseling per week (Parent Ex. C at pp. 4, 6, 8).

To address the student's sensory needs, the Rebecca School provided her with OT services including accessing a sensory gym with swings, jumping on a trampoline, "getting smooshed on a Foof chair," riding a scooter, crawling through a tunnel, allowing her to stand on her head, and playing with sensory materials (Tr. pp. 297, 303-04, 388-90; Parent Ex. C at pp. 1, 4-6). The Rebecca School prepared a written sensory diet that provided the student with choices of sensory input (Tr. p. 390). To prevent the student from becoming dysregulated, staff at the Rebecca School provided her with sensory input prior to transitions, and used a picture schedule so she could anticipate the change (Tr. pp. 313-15). The student's OT and counseling sessions worked on improving her ability to remain regulated during activities, in part by using sensory input (Parent Ex. C at pp. 4-5, 7-8).

In the area of communication, the Rebecca School provided the student with instruction to improve her motor speech and receptive, expressive, and pragmatic language skills (Tr. pp. 319-20; Parent Ex. C at pp. 6-7). To improve the student's motor-speech skills, the speech-language pathologist provided the student with oral stimulation and instruction using the "PROMPT" technique to improve her ability to produce sounds and word approximations (Tr. pp. 319-20; Parent Ex. C at p. 7). At the Rebecca School, staff worked with the student to improve her understanding the meaning of pictures, and by pairing verbal language with pictures to improve her ability to communicate (Tr. pp. 316-17, 383-84, 391). The student worked on following one step directions with cues and responding to questions by pointing to a picture given a choice of

two (Parent Ex. C at p. 7). The student engaged in turn-taking activities and tasks that promoted eye contact to address pragmatic language skill needs (id. at pp. 6-7).

To address the student's academic needs, the program director testified that the teacher implemented the curricula the Rebecca School used and adapted it for the student (Tr. p. 316). In reading, the teacher worked with the student to gain an understanding of picture symbols, and provided her with exposure to letter recognition (Tr. pp. 316-17; Parent Ex. C at p. 3). Math instruction consisted of number concepts, one-to-one correspondence, measurement/spatial, and visual schedule activities (Tr. pp. 317-18; Parent Ex. C at p. 3). To improve self-care skills, the student worked on packing and unpacking her backpack, setting up her workspace for the day, preparing her lunch, and improving her awareness of when she needed to use the bathroom (Tr. pp. 320-22; Parent Ex. C at p. 4).²²

1. Grouping

Addressing first the district's argument that the student was not appropriately functionally grouped at the Rebecca School, unilateral parental placements generally "need not meet state education standards or requirements" to be considered appropriate to address the student's needs (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14). In particular, the district points to no legal authority for the proposition that functional grouping requirements in State regulations apply to unilateral parental placements (see Application of a Student with a Disability, Appeal No. 12-004). In any event, although State regulations require that students in special classes be grouped accordingly to similarity of needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][2]), the district does not argue that the student's needs were not being met because she was "functioning at the lower level of the class" (Pet. ¶ 48) or that she was not receiving instruction individualized to her abilities.²³ Furthermore, the hearing record indicates that the student was grouped appropriately for instruction at the Rebecca School. The program director testified that the English language arts and math skills of the students in the classroom were between a pre-k to kindergarten level, with the student's skills in the "middle to low" end of that range (Tr. p. 295). The hearing record shows that the student sought sensory input throughout the day, and primarily communicated via nonverbal means, as did the other students in her class (Tr. pp. 296-97, 300, 379-82; Parent Ex. C at pp. 1, 6). Socially, students in the class initiated interactions with adults, but showed a limited awareness of peers; skills similar to those the student exhibited in December 2011 (Tr. pp. 298, 302; Parent Ex. C at pp. 2, 6, 8). The hearing record also indicates that the student, similarly to the other students in her class, exhibited difficulties with auditory processing and showed increased processing skills for gestures and pictures rather than verbal language (Tr. pp. 118-19, 298-99; Dist. Ex. 10; Parent Ex. C at pp. 1, 3). For these reasons, I find that the student was grouped with sufficiently similar peers at the Rebecca School so as not to compel reversal of the IHO's

²² According to the program director, the student toileted independently with prompting to wash and dry her hands, and fed herself independently (Tr. p. 321).

²³ Even if the district raised such arguments and they were applicable to unilateral placements, the failure to comply with the State procedures for grouping students with disabilities does not necessarily rise to the level of a denial of a FAPE. If a classroom contains a range of achievement greater than three years in reading or mathematics, a district must "provide the committee on special education and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, and the general levels of social development, physical development and management needs in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]).

determination that the Rebecca School constituted an appropriate placement for the student for the 2011-12 school year.

Additionally, although the district asserts that the age grouping in the student's Rebecca School classroom was inappropriate because the students ranged from 6 to 10 years of age (Tr. p. 281), even assuming for purposes of this case that the State regulation prohibiting age ranges of greater than 36 months in special classes applies to nonpublic schools (see 8 NYCRR 200.6[h][5]), the district has provided no argument that the student's instruction was negatively affected as a result. In any event, an age range greater than 36 months does not rise to the level of a denial of a FAPE where, as here, the circumstances show that the students are appropriately grouped within the class for instructional purposes (M.P.G., 2010 WL 3398256, at *10-11; Application of the Dep't of Educ., Appeal No. 12-034).²⁴

2. 12-month Program

The district asserts that because the student required a 12-month school year but only attended the Rebecca School for nine months of the 2011-12 school year, the Rebecca School did not constitute an appropriate placement for the student (see 8 NYCRR 200.1[eee]). Having conducted an independent review of the hearing record, I find the district's assertion to be without merit. While the district correctly notes that SROs have previously found unilateral parental placements to be inappropriate if they offered only a 10-month program to a student who required extended school year (ESY) services to receive an appropriate education (see Application of the Dep't of Educ., Appeal No. 12-002; Application of the Dep't of Educ., Appeal No. 11-075), I find the reasoning in those cases to be inapplicable to the situation before me. In particular, I note that in this case, the evidence shows that parents had not made the decision to enroll the student in the Rebecca School until sometime during summer 2011 (Tr. pp. 452-53) and she was not removed from the district until the beginning of the 2011-12 10-month school year (Parent Ex. H). Based on the evidence, I do not attach a high degree of significance under the circumstances of this case to the fact that the parents determined not to avail themselves of the ESY services offered to the student in the March 2011 IEP, but instead chose to send the student to an overnight summer camp for students with disabilities (Tr. pp. 441-42, 450-56).²⁵

3. Progress at the Rebecca School

I turn next to the district's argument that the student's progress at the Rebecca School during the 2011-12 school year was properly attributed to gains she made in the district's school during the 2009-10 and 2010-11 school years. Although not dispositive, the program director provided a description of the student's skills when she entered the Rebecca School in September 2011 and the hearing record shows that the student demonstrated progress since that time in the areas of communication, academic, self-care, and social skills (Tr. pp. 307-12, 317-24; Parent Ex. C), and

²⁴ I also note that, despite the program director's testimony in April 2012 that the student was "just over 6" (Tr. p. 279) the hearing record indicates that the student had recently turned eight years old (Tr. p. 68; Dist. Exs. 1 at p. 1; 2 at p. 1; see Parent Ex. C at p. 1) and was thus within 36 months of age of the other students in the classroom (see, e.g., M.P.G., 2010 WL 3398256, at *10).

²⁵ If the student had been removed from enrollment at the district prior to the 2011-12 ESY, its possible that the parents may have been required to establish that the summer camp was appropriate (see Application of the Dep't of Educ., Appeal No. 12-002; Application of the Dep't of Educ., Appeal No. 11-075).

the district has provided no reason to discount this progress or attribute it solely to instruction provided by the district.²⁶ Furthermore, a finding of progress is not required for a determination that a student's private placement is adequate (G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; see also Frank G., 459 F.3d at 364),²⁷ and I find that the foregoing provides ample support for the IHO's determination that the Rebecca School was an appropriate placement for the student for the 2011-12 school year.

D. Equitable Considerations and Remedy

Having found that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years, it is necessary to determine the appropriate remedy to cure the harm suffered by the student.

1. 2010-11 School Year—Compensatory Additional Services

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case and may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]; see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078).

²⁶ It is unclear how the district could attribute the progress the student exhibited while attending the Rebecca School to the time she spent in the district's program. Given the district's failure to expand on this argument in its petition (or to cite to the hearing record to support its argument) except to note that the student still exhibited tantrum behavior, I do not find the district's argument to be compelling. Even if the district were correct, and a large portion of the student's academic success is a result of instruction she received while attending a district school, that alone would not establish that the student did not make progress while attending the Rebecca School such that the school would be found to be inappropriate.

²⁷ I note, however, that the Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private 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 at 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"]).

Compensatory relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that the "IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a" FAPE]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 108 LRP 49659, [S.D.N.Y. March 6, 2008], adopted at 50 IDELR 225 [July 7, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible under the IDEA and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for services under the IDEA by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address (the student's) educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

The IHO noted "the difficulty in fashioning an award" with respect to the district's denial of FAPE to the student for the 2010-11 school year, as the primary deficiencies in the April 2010 IEP—the failure of the IEP to address the student's sensory and toileting needs—were largely

remediated by her subsequent attendance at the Rebecca School (IHO Decision at p. 38).²⁸ I concur with this assessment, but find that in this case, a more appropriate balance in developing a remedy of additional services is necessary.²⁹

The IHO's award of additional services was aimed at addressing the domains of communication, socialization, ADLs, and pre-academic skills, because she determined those domains continued to be areas of considerable deficit for the student (IHO Decision at pp. 38-39). Although an IHO is imbued with the authority to fashion an appropriate remedy to cure a denial of a FAPE, in this case, the hearing record contains no indication that the failure of the district to properly state the student's present levels of performance or to include toileting, visual motor, or sensory goals on the April 2010 IEP impacted on these particular domains. The equitable award of additional services should be more closely tailored to remediating the deficits in the April 2010 IEP that led to the student being denied a FAPE for the 2010-11 school year. Therefore, I will modify the award of compensatory additional services by reversing that portion of the IHO's decision that awarded the student 105 hours of speech-language therapy, as the hearing record indicates that the student made language gains while she attended the district's elementary school (Tr. pp. 178-88, 190-91, 195-99, 219, 222-26), and the parents raised no challenge to the April 2010 IEP pertaining to speech-language skills, or to the level or quality of the speech-language services provided to the student during the 2010-11 school year in their due process complaint notice (see Dist. Ex. 1). Nonetheless, I concur with the IHO that under the circumstances presented, some award of additional services is warranted to remedy the district's failure to provide the student with a FAPE for the 2010-11 school year.

Although the hearing record indicates that the student continued at the time of the appeal to exhibit difficulties in several areas with respect to which the April 2010 IEP failed to address her needs sufficiently (her self-care, sensory processing, and visual motor deficits), it contains a paucity of evidence or argument regarding the parties' views of the progress the student would have made if the district had offered her a FAPE for the 2010-11 school year and her corresponding need for additional services. At most, the hearing record indicates that the student continued to require instruction in the areas in which the April 2010 IEP was deficient, rather than providing specific guidance as to the amount of services required to alleviate the harm to the student caused thereby. I find that the IHO's award of 105 hours of special education services reasonably attempts

²⁸ The IHO also noted her concern that awarding services designed to address the student's sensory processing difficulties "might interfere with the carefully crafted sensory schedule and sensory diet in place at Rebecca" (IHO Decision at p. 38).

²⁹ The IHO stated that the parents had "not explicitly explained . . . how any alleged FAPE deprivation could be remedied through 210 hours of" special education services (IHO Decision at p. 38). Although not dispositive of my determination in this instance, State law places the burden of proof in an impartial hearing on the district, "except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement" (Educ. Law § 4404[1][c]). To the extent that the IHO's decision could be read as placing on the parents the burden of establishing the student's entitlement to additional services—an issue not involving tuition reimbursement for a unilateral parental placement—it does not comport with State law. However, the IHO's decision may be equally plausibly read as intending to convey her belief that, had the parents explained how their requested remedy could alleviate the affects of the denial of FAPE to the student for the 2010-11 school year, it would be helpful to a decision-maker in fashioning an appropriate remedy, a conclusion with which I am in complete concurrence. I further note that the district, when given an opportunity to request further clarification regarding the parents' request for additional services, expressly declined to do so (Tr. p. 33).

to place the student in the position she would have been in had the district designed an IEP that offered her a FAPE. I believe the parties are in the best position to specify the specific additional services that the student requires and should be afforded an opportunity to do so and, therefore, I encourage the parties to attempt to reach an agreement regarding what types of services would best remedy the shortcomings of the April 2010 IEP;³⁰ however, in the absence of such an agreement between the parties, I affirm the portion of the IHO's award fixing the amount of services at 105 hours.³¹

2. 2011-12 School Year—Tuition Reimbursement Remedy

With regard to a remedy for the district's failure to offer the student a FAPE for the 2011-12 school year, the district argues that equitable considerations weigh against the IHO's award of the cost of the student's tuition at the Rebecca School because the parents did not cooperate with the district in implementing the student's special education toileting program and failed to provide the district with sufficient notice of their intent to enroll the student in the Rebecca School and seek public funding.

Initially, I strongly caution the district that it may not condition its provision of a FAPE to a student with a disability on the parents' participation in or assistance with the services it provides to the student (Application of the Bd. of Educ., Appeal No. 12-082; see Maple Heights City Sch. Dist., 45 IDELR 201 [SEA OH 2006] [a district "cannot relieve itself of its obligations to provide [a] FAPE by denying services which the [p]arent later provides"]; Montgomery County Pub. Schs., 504 IDELR 228 [SEA MD 1982] [the district "may not make the provision of special education services to the child conditional upon the parents' participation in a related service"]). As described above, the evidence shows that the April 2010 IEP contained no acknowledgment of the student's difficulties in the area of toileting and provided no goals aimed at remedying them. Accordingly, there is no evidence in the hearing record that the parents engaged in conduct that impeded the district's provision of services to the student under the April 2010 IEP and because of this, the district's argument that the parents are not entitled to an award of tuition reimbursement is rejected as without merit.³²

Secondly, the parents provided the district with notice of their intention to enroll the student at the Rebecca School and seek tuition reimbursement at public expense by their letter of September 1, 2011 (Parent Ex. H). As the parents did not enroll the student at the Rebecca School until—and do not seek tuition reimbursement for any time prior to—September 20, 2011 (Parent Ex. D), more than 10 business days after the date they gave the district notice of their intention to do so, I agree with the IHO that this constituted sufficient notice to the district prior to the

³⁰ I note that services tailored to the student's current needs relating to the denial of a FAPE during the 2010-11 school year might include OT, given her acknowledged deficits in self-care, sensory processing, and visual motor skills.

³¹ As the parents' request makes clear that they sought the special education services to be delivered in a 1:1 ratio (IHO Ex. I) and the hearing record does not indicate that such a ratio would be inappropriate, I award the services in a 1:1 ratio unless the parties otherwise agree. I note again that the IHO provided the district an opportunity to request clarification of the parents' request, which it refused (Tr. p. 33).

³² I remind the district that it is not actual progress, but the development of an IEP that is reasonably calculated to lead to progress, that determines whether a student has been offered a FAPE (see Rowley, 458 U.S. at 192; Mrs. B., 103 F.3d at 1120).

withdrawal of the student from the district's elementary school (see 20 U.S.C. § 1412[a][10][C][iii][I]).³³

VII. Conclusion

Although the student made some degree of progress while attending the district's elementary school, the hearing record does not establish that the district addressed each of the student's areas of acknowledged need. I reiterate the importance of sufficiently describing a student's present levels of functional performance on the IEP. Having examined the hearing record, I find that the IHO's determinations that the Rebecca School was an appropriate placement for the student for the 2011-12 school year and that equitable considerations support the parents' claim for tuition reimbursement are well-supported. As described above, the tuition reimbursement relief is supported by the evidence in the hearing record and I partially modify the IHO's award of additional services, mindful of the dictate that such an award should be designed to remediate the deficiencies identified in the district's program on an equitable basis and attempt to place the student in the position she would have occupied but for the district's failure to provide her with a FAPE.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 30, 2012 is modified, by reversing that portion which awarded and 105 hours of speech-language therapy; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree within 45 days from the date of this decision, the district shall within one year from the date of this decision provide the student with 105 hours of special education services in accordance with the body of this decision.

Dated: **Albany, New York**
 September 12, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

³³ I also agree with the IHO's observation that the district's argument that notice must be given more than 10 days prior to the beginning of the school year "would bar any parent from transferring a child to a non-public school during the school year" (IHO Decision at pp. 33-34), a result clearly at odds with the IDEA's purpose of ensuring that students with disabilities receive an appropriate education. I note in particular that the hearing record contains no indication that the parents sought to rehabilitate an otherwise inappropriate private program by selectively seeking reimbursement for only a portion thereof, and I express no opinion with regard to the balancing of the equities in such a situation.