The University of the State of New York

The State Education Department
State Review Officer
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No. 12-137

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, Lisa R. Khandhar, Esq., of counsel

Susan Luger Associates, Inc., Special Education Advocates for respondents, Lawrence D. Weinberg, 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') son and ordered it to reimburse the parents for their son'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 district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The hearing record reveals that the student began receiving speech-language therapy, occupational therapy (OT), and instruction using an applied behavior analysis (ABA) method in a home-based program at 18 months of age (Parent Ex. C at p. 2). At three years of age, the student began attending an approved nonpublic preschool program in a 12-month, 12:1+2 "ABA oriented" special class, where he also received speech-language therapy and OT services (id.). During the 2010-11 school year, the student attended the approved nonpublic school in a 6:1+2 special class and continued to receive speech-language therapy and OT services (Dist. Ex. 6 at p. 1). The

student has received a diagnosis of a pervasive developmental disorder-not otherwise specified (PDD-NOS) and exhibits limited receptive and expressive language skills (Parent Ex. C at pp. 2, 8-9). His difficulty with socialization and remaining engaged in activities interferes with his ability to function effectively (Dist. Ex. 6 at p. 3; Parent Ex. C at pp. 2, 4, 9).

In anticipation of the student's transition to school-age programming, the CSE convened on May 11, 2011 to develop an IEP for the 2011-12 school year (Tr. p. 81; Dist. Ex. 3 at p. 12). The CSE determined that the student was eligible for special education and related services as a student with autism and recommended that for the 2011-12 school year, beginning in September 2011, the student be placed in a 6:1+1 special class in a specialized school and receive speech-language therapy and OT services (Dist. Ex. 3 at pp. 1, 8).[1, 2] In a final notice of recommendation (FNR) dated June 15, 2011, the district summarized the special education and related services recommended for the student for the 2011-12 school year, and identified the particular public school site to which the district assigned the student to attend (Dist. Ex. 4). The student's mother reported that she visited the assigned public school "one or two days after" June 15, 2011 and subsequently notified the district in writing that she was rejecting its recommended program (see Tr. pp. 360-61, 365, 393-94; Parent Ex. A at p. 3).

In a letter dated September 15, 2011, the parents notified the district that they were rejecting the district's program because they did not believe it was appropriate for the student (Parent Ex. A). The parents further advised the district that they would be enrolling the student in the Rebecca School in September 2011 and seeking tuition reimbursement at public expense (id.). On September 26, 2011, the parents signed a contract with the Rebecca School for the period starting October 4, 2011 and ending June 22, 2012 (Parent Ex. H). The student began attending the Rebecca School in fall 2011 (Tr. p. 367; Parent Exs. B at p. 1; H at p. 6).

A. Due Process Complaint Notice

In a due process complaint notice dated December 7, 2011, the parents requested an impartial hearing asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year on both procedural and substantive grounds (Dist. Ex. 1 at pp. 1, 2). Among other things, the parents asserted that: (1) the May 2011 CSE was not duly constituted; (2) the annual goals and short-term objectives failed to address the student's unique educational, social, and emotional needs because there were no socialization or activities of daily living (ADL) goals; (3) the IEP goals were not prepared at the CSE meeting; (4) the CSE failed to include the provision of parent counseling and training on the IEP; and (5) the program recommendation made by the May 2011 CSE was inappropriate for the student because it did not offer "adequate or appropriate supports, instruction, supervision, or services" to allow the student to make educational progress (id. at pp. 2-3). The parents also alleged that the class size and student-to-teacher ratio was too large, and that the physical setting was "confusing and

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[1] Although the May 2011 CSE recommended a 12-month program for the student, the school psychologist/district representative who participated at the May 2011 CSE meeting stated that the student would receive summer 2011 special education programs and services through his then-current preschool program (Tr. pp. 80-82, 90; Dist. Ex. 3 at p. 8).

[2] The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]; see Tr. pp. 8-9).

overwhelming" (id. at p. 3). Regarding the unilateral placement of the student at the Rebecca School, the parents asserted that the Rebecca School provided instruction, supports and services designed to meet the student's unique needs (id.). The parents further asserted that they cooperated with the CSE and in no way impeded it from offering the student a FAPE (id.).

As relief, the parents sought the costs of the student's tuition at the Rebecca School for the period of October 11, 2011 to June 30, 2012, transportation services, and "[r]eimbursement and/or compensatory education for and/or [Related Service Authorizations (RSA)]" for speech-language therapy and OT from July 1, 2011 to June 30, 2012 (Parent Ex. A at p. 4).[3]

B. Impartial Hearing Officer Decision

On March 19, 2012, the parties proceeded to an impartial hearing, which after four days of proceedings, concluded on May 17, 2012 (Tr. pp. 1, 76, 228, 348). In a decision dated May 31, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year, the Rebecca School was an appropriate placement for the student, and equitable considerations favored an award for tuition reimbursement (IHO Decision at pp. 17, 19, 20). The IHO ordered the district, upon proof of payment, to reimburse the parents for the costs of the student's tuition at the Rebecca School for the period of October 11, 2011 to June 30, 2012 (id. at p. 20).

The IHO found that the student was not pursuing a general education curriculum and therefore, the legal standard articulated in Bd. of Educ. v. Rowley, 458 U.S. 176 (1982) did not apply (IHO Decision at pp. 12-14). The IHO elected to apply a "self-sufficiency standard" which she described as a "higher standard" of "a meaningful educational benefit towards the goal of self-sufficiency and an independent adult life" (id. at p. 15). Applying the self-sufficiency standard, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year because the May 2011 IEP did not offer the student meaningful educational benefits toward the goal of self-sufficiency and an independent adult life, which she opined was a reasonable goal for the student (id. at p. 16).

The IHO also found that even if she were to apply "the lower Rowley legal standard of 'appropriateness' for students who pursue the general education curriculum," the student was denied a FAPE for the 2011-12 school year (IHO Decision at p. 16). According to the IHO, the May 2011 IEP was not reasonably calculated to produce progress (id.). The IHO determined that almost all of the annual goals and short-term objectives in the May 2011 IEP were skills that the student already possessed when he started school in September 2011, and therefore the IEP was "calculated to produce stagnancy or regression" (id.). The IHO also found that the goals were "generic" and designed for any student with autism, rather than specifically for this student (id. at pp. 6, 16).

In addition, the IHO determined that the district committed procedural violations that resulted in a denial of a FAPE (IHO Decision at p. 17). The IHO found that the May 2011 CSE significantly impeded the parents' ability to participate in the development of their son's IEP

[3] The due process complaint notice contains a typographical error as it sets forth that the parents sought relief for related services for the period of "July 1, 2011 through June 30, 2011" (Parent Ex. A at p. 4).

because the CSE held a "pre-conference" without the parents where it reviewed documents and discussed a placement for the student, and then held a "post-conference" where two CSE members who did not know the student drafted "inappropriate goals and objectives" after all other CSE members, including the parents, had left (id.). She found that these procedural violations also caused a deprivation of educational benefits to the student because his "IEP and placement were inappropriate" (id.).

In determining that the Rebecca School was an appropriate placement for the student, the IHO found that although the "small amount" of time devoted to the acquisition of academic and pre-academic skills was "personally troubling," the Rebecca School provided the student with a comprehensive methodology, a coordinated program with on-site related services, trained staff, and parent training (IHO Decision at p. 18). The IHO further found that equitable considerations favored the parents' request for tuition reimbursement because they cooperated with the CSE process and did not execute a contract with the Rebecca School until after the start of the school year (id. at p. 19).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in determining that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate unilateral placement, that equitable considerations weighed in favor of the parents' requested relief, and in granting the parents' request for tuition reimbursement.

The district contends that the hearing record establishes that it offered the student a FAPE for the 2011-12 school year and that it could have appropriately implemented the IEP at the assigned public school. The district argues that the IHO erred in determining that the legal standard set forth in Rowley does not apply. The district also challenges the IHO's finding that the district committed procedural violations of the IDEA, arguing that the IHO erred in finding that the district held an impermissible "pre-conference" without the parents, that the CSE did not include members who personally knew the student, and that the annual goals and short-term objectives in the IEP were impermissibly drafted after the CSE meeting. In addition, the district asserts that the IHO erred in finding that the annual goals and short-term objectives in the IEP were "generic." The district contends that the CSE appropriately developed goals designed to address skills toward which the student was working and that at the time the IEP was drafted, the student had not yet possessed all of the skills contemplated by the IEP goals. Furthermore, while the IHO found that the proposed IEP was calculated to produce stagnancy or regression, the district asserted that the opposite was true, and that the CSE's recommendation, including its recommendation for a 12-month program, was reasonably calculated to prevent regression.

In its petition, the district also asserts allegations regarding issues raised in the parents' due process complaint notice that were not decided by the IHO. In response to the parents' allegation that the May 2011 IEP failed to include the provision of parent counseling and training, the district asserts that parent counseling and training is integrated into the district's recommended program and the assigned public school could have provided a "'comprehensive parent training program.'" With respect to the parents' allegation that the IEP lacked goals related to socialization and ADL skills, the district asserts that socialization and ADL skills are an inherent part of the recommended program and that the CSE addressed the student's socialization needs in the IEP. The district

further argues that the parents' claims about the assigned public school should be dismissed without discussion on the ground that the student never attended the assigned public school and in the event that they are addressed they should be found to be without merit.

With respect to the unilateral placement, the district contends that the IHO erred in her determination that the Rebecca School was an appropriate placement for the student, alleging that the Rebecca School failed to provide appropriate instruction in light of the student's "capacity." The district asserts that the Rebecca School did not address the student's emerging academic skills, noting that the teacher scheduled only six hours of academic or pre-academic instruction per week. In addition, the district asserts that the student has a strong need for socialization and that the percentage of nonverbal students in the student's class limited opportunities for socialization. With respect to equitable considerations, the district asserts that the IHO erred in her determination that the equities favored the parents' request for reimbursement because the parents did not provide appropriate notice of their rejection of the IEP and unilateral withdrawal of the student from the district program.

In their answer, the parents respond to the district's allegations and assert additional arguments in support of their request to uphold the IHO's decision. In support of the IHO's determination that the district failed to offer the student a FAPE, the parents assert that the district's failure to comply with the procedural requirements "guaranteeing parental participation and due process" denied the student a FAPE, that any failure to cooperate by the parents was due solely to the district's procedural failures, and that the IHO correctly determined that the parents were denied an opportunity to meaningfully participate in the development of the student's IEP at the CSE meeting. While the parents acknowledge that IEP team members may meet and consider documents before a CSE meeting, the parents assert that the IHO correctly determined based on the evidence before her that "critical decisions" were made without the parents' input as IEP team members met before the CSE meeting to discuss documents and after the CSE meeting to develop the goals. According to the parents, they did not have any input into the development of the student's goals.

The parents further assert that the evaluative information considered by the May 2011 CSE failed to include any updated cognitive testing and was not sufficient to develop appropriate goals. In addition, the parents assert that the annual goals and short-term objectives in the May 2011 IEP were not appropriate because they did not fully address the student's needs and that the district failed to demonstrate that the goals were appropriate at the time the IEP was to be implemented. The parents identified specific goals that they alleged lacked a "baseline," were vague, or lacked measurable criteria. In their answer, the parents also elaborate on allegations made in the due process complaint notice, which were not discussed in the IHO's decision, including that none of the IEP goals addressed the student's socialization and ADL needs.

In their answer, the parents also assert that the CSE failed to "consider a less restrictive class in a specialized school" and failed to recommend a sufficient amount of related services. The parents assert that any issue regarding the assigned public school would not be speculative to address. Lastly, the parents include additional arguments in their answer to support upholding the IHO's determinations that the Rebecca School was appropriate to meet the student's needs and that equitable considerations weighed in their favor.

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., 557 U.S. 230, 239 [2009]; Rowley, 458 U.S. at 206-07).

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; H.C. ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869 [2d Cir. June 24, 2013]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; 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., 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], aff'd, 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, 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, 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. 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]; 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. Legal Standard

I will first address the IHO's resolution of the legal standard that applies in determining whether the student was offered a FAPE. I concur with the district's contention that the IHO erred in the application of the legal standard when she found that the Supreme Court's standard for whether a student was offered a FAPE as set forth in the Rowley decision does not apply to the instant case because the student was not attending a general education class or pursuing the general education curriculum (IHO Decision at pp. 13-14; see also Application of the Dep't of Educ., Appeal No. 08-056 [holding that the same IHO erred by failing to apply the Rowley standard]). The IHO instead improperly relied on language from Deal v. Hamilton Bd. of Educ. (392 F.3d 840 [6th Cir. 2004]) as a substitute for the Rowley FAPE standard (IHO Decision at pp. 14-15). Neither the 1997 nor 2004 amendments to the IDEA changed the by then well-settled Rowley standard (see J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 941, 947-51 [9th Cir. 2009]; Lessard v. Wilton Lyndeborough. Coop. Sch. Dist., 518 F.3d 18, 28-29 [1st Cir. 2008]; Mr. C. v. Maine Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 300 [D. Me. 2008]). Nor did Deal itself purport to entirely supplant this standard, citing to Rowley for the proposition that "the court must assess whether the IEP developed through those procedures [mandated by the IDEA] was reasonably calculated to enable the child to receive educational benefits" (Deal, 392 F.2d at 853-54, citing Rowley, 458 U.S. at 206-07). The Second Circuit has consistently applied the Rowley standard to students not in the general educational environment (see R.E., 694 F.3d at 175, 187, 190; M.H., 685 F.3d at 245; T.P., 554 F.3d at 254; Cerra, 427 F.3d at 194-95; Walczak, 142 F.3d at 129-30; Mrs. B., 103 F.3d at 1120-21; see also H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869 at *3 [2d Cir. June 24, 2013]; Bryant v. New York State Educ. Dep't, 692 F.3d 202, 207-08 [2d Cir. 2012]; E.S. v. Katonah-Lewisboro Sch. Dist., 2012 WL 2615366, at *1-*2 [2d Cir. July 6, 2012]; French v. New York State Dep't of Educ., 2011 WL 5222856, at *2 [2d Cir. Nov. 3, 2011]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *3 [2d Cir. Aug. 16, 2010] [noting Rowley's holding that courts "may not impose demands on district[s] greater than those required by Act"]) Finally, the Sixth Circuit has continued to apply the Rowley standard of whether a student's "IEPs were reasonably calculated to enable [the student] to receive educational benefits" (Nack, 454 F.3d at 613-14). As such, I am not persuaded that the Rowley standard should not be the applicable standard for determining if the district offered the student a FAPE in this instance.

B. Predetermination / Parent Participation

I will next address the IHO's determination that the district committed procedural violations that rose to the level of denying the student a FAPE (IHO Decision at p. 17). An independent review of the entire hearing record supports the district's argument that the IHO erred in concluding that the district failed to offer the student a FAPE based upon a finding that the parents were denied the opportunity to meaningfully participate in the development of the IEP because IEP team members held a "pre-conference" before the May 2011 CSE meeting and developed the goals after the CSE meeting.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D. D-S, 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

In this case, the hearing record indicates that the school psychologist, who also participated at the May 2011 CSE meeting as the district representative, a district teacher certified in both special and general education, and an additional parent member met immediately before the scheduled CSE meeting to familiarize themselves with the student and review documents (Tr. pp. 133-37). The school psychologist testified that during the "pre-conference," the IEP team members "pass along the documents to each other, and we comment on them" (Tr. p. 137). She further testified that "[she] would never go into a meeting without having reviewed and read the documents. It's very difficult to read the documents while parents are sitting there" (id.). According to the school psychologist, she discusses the findings of the documents she reviews with the parents (id.). The school psychologist also testified that during the pre-conference, the IEP team members discuss different placement options for the student, but that no decision was made until the time of the May 2011 CSE meeting (Tr. pp. 158-61).

Both the student's mother and school psychologist testified that the May 2011 CSE meeting lasted approximately one hour (Tr. pp. 163, 376). Participants at the CSE meeting included the

school psychologist/district representative, the district teacher certified in both special and general education, the parents, an additional parent member, and the student's previous ABA service provider (Tr. pp. 82-83, 375; Dist. Ex. 3 at p. 16). The student's special education teacher from the preschool program participated in the meeting by telephone (Tr. pp. 376-77; Dist. Ex. 3 at p. 16). The hearing record indicates that all the participants attended the entire meeting (Tr. p. 84). The school psychologist testified that the CSE reviewed and discussed the December 2010 progress report prepared by the student's special education teacher from the preschool program, and the February 2011 psychoeducational evaluation report prepared by a district school psychologist (Tr. pp. 80-81, 91-93; Dist. Exs. 6; 12).[4]

According to the student's mother, the May 2011 CSE discussed with the preschool teacher the student's behavior, learning ability, and skills (Tr. pp. 376-77; Dist. Ex. 5). The student's mother further testified that during the meeting, she contributed her impressions about how the student behaved and functioned at home (Tr. pp. 377-78). During the May 2011 CSE meeting, the student's mother voiced her disagreement with the frequency of recommended speech-language therapy (Tr. p. 381). The student's mother also testified that the May 2011 IEP annual goals and short-term objectives were not discussed with the parents during the May 2011 CSE meeting (Tr. p. 358).

The hearing record indicates that the school psychologist and the district's special/regular education teacher drafted the goals on the student's IEP after the May 2011 CSE meeting (Tr. pp. 102-03, 127). According to the school psychologist, the goals were drafted based upon a review of the psychoeducational evaluation, OT and speech-language progress reports, reports of the student's educational progress provided by his preschool, and knowledge of the general skills the district wanted kindergarten students to develop (Tr. pp. 103, 148-49). She further testified that the IEP goals identified "gaps" in the student's performance and reflected the discussion held at the May 2011 CSE meeting about the student's skills and needs (Tr. p. 103).

Based on the foregoing, I find that the district's pre-conference meeting did not amount to predetermination in this case. The hearing record shows that the district was merely preparing for the CSE meeting, familiarizing themselves with the student, and reviewing documents at the pre-conference meeting; all of which are permissible preparatory activities prior to a CSE meeting (see T.P., 554 F.3d at 253; Nack, 454 F.3d at; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W., 869 F. Supp. 2d at 333-34; D. D-S, 2011 WL 3919040, at *10-11; B.O., 807 F. Supp. 2d at 136; A.G., 2009 WL 806832, at *7; P.K., 569 F. Supp. 2d at 382-83; Danielle G., 2008 WL 3286579, at *6-*7; M.M., 583 F. Supp. 2d at 507 [; W.S., 454 F. Supp. 2d at 147-48; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). Moreover, as discussed above, the hearing record reflects that the CSE did not reach any placement decisions regarding the student until the May 2011 CSE meeting and that the parents were afforded an opportunity to participate during the CSE meeting.

I also decline to find that the development of the goals after the May 2011 CSE meeting constituted a procedural violation that led to a loss of educational opportunity to the student or

[4] The May 2011 CSE also had available to it both a 2010 OT progress report and speech-language progress report, as well as a February 2011 social history update report (Tr. pp. 94-95, 147-48; Dist. Exs. 9-11; 13).

seriously infringed on the parents' opportunity to participate in the CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847 [S.D.N.Y. Nov. 9, 2011]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010] [explaining that parental presence is not required during actual goal drafting]; E.G., 606 F. Supp. 2d at 388-89; see also Mahoney v. Carlsbad Unified Sch. Dist., 2011 WL 1594547, at *2 [9th Cir. Apr. 28, 2011] [declining to find a denial of a FAPE where the goals and objectives were pre-drafted, but not provided to the parents]). Accordingly, the IHO's determination that the district denied the student a FAPE based on a finding that the parents were denied the opportunity to meaningfully participate in the development of the student's IEP must be reversed.

C. Annual Goals

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

The parents alleged in their due process complaint notice that the May 2011 IEP goals and objectives did not meet all of the student's unique educational, social, and emotional needs in that it lacked goals addressing socialization and ADL skills (Dist. Ex. 1 at p. 2). The IHO determined that the May 2011 IEP was not reasonably calculated to produce progress, but rather "stagnancy or regression," as "almost all of the goals and objectives on this IEP were skills that [the student] already possessed when school started in September 2011" (IHO Decision at p. 16).

The May 2011 IEP present levels of performance reflects information commensurate with the information reviewed and discussed by the CSE, including that the student exhibited below average vocabulary skills and emerging academic skills; such as his ability to identify "most letters and some single digit numbers" and colors with prompts, respond to his name, follow one-step directions, pull an adult's hand to gain a desired item, demonstrate understanding of 1:1 correspondence, match identical items, and point to some items independently (compare Dist. Ex. 3 at p. 1, with Dist. Exs. 5; 6 at p. 1; 12 at pp. 2-3). The May 2011 IEP indicated that the student did not exhibit significant behavioral difficulties in school and that he verbalized using one-word utterances, exhibited toileting and feeding skills with prompts, and although not a preferred activity, had begun to hang up his coat; skills described in the information before the CSE which was reviewed and discussed (compare Dist. Ex. 3 at p. 1, with Tr. pp. 377-78 and Dist. Exs. 5; 6 at pp. 2-3). According to the information the May 2011 CSE reviewed and the resultant IEP, the student showed signs of beginning socialization skills, worked on taking turns and transitioning, had begun to develop peer awareness although preferred solitary play, enjoyed playing with

musical toys, puzzles and books, and exhibited diminished sharing skills (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 6 at p. 3).

The school psychologist who attended the May 2011 CSE meeting testified that she understood the student's academic performance at the time of the meeting to be at an "early preschool level" (Tr. p. 100). The May 2011 IEP contained annual goals and short-term objectives designed to improve the student's ability to receptively and expressively identify letters, numbers, colors and shapes; label common objects in the classroom, school, and community; sort and match common objects, colors, and shapes with and without prompts; and point to 5 body parts with and without prompts (Dist. Ex. 3 at pp. 3-6). The school psychologist described these goals as addressing the student's pre-readiness reading, math and language skills (Tr. pp. 101-02). According to the school psychologist, the goals to improve the student's letter and number identification skills were developed in response to the student's performance during the February 2011 psychoeducational evaluation (Tr. pp. 127-30).

The May 2011 IEP also contained annual goals and short-term objectives that included varying prompt levels to increase the student's ability to point to express his needs; shake his head to answer yes/no questions; follow one and two-step requests; and maintain eye contact for 10 seconds (Dist. Ex. 3 at p. 7). To improve the student's fine motor skills, the IEP provided short-term objectives involving his ability to string beads, write a specific uppercase letter, and copy a line (id.).

The IHO appears to have based her finding that by September 2011 the student had already acquired some of the skills the IEP goals addressed on the testimony of the student's Rebecca School teacher, who began working with the student at that time (Tr. pp. 236, 240, 277-81). According to the Rebecca School teacher, in September 2011 the student exhibited "emerging academic skills" and the ability to receptively and expressively identify letters, numbers 1-10, colors, and 2-3 basic shapes; sort and match colors, shapes and common objects; label common objects in the classroom and school; point to 5 body parts; point to express his needs; and shake his head to respond to yes/no questions (Tr. pp. 277-81). As stated above, information reviewed and discussed by the May 2011 CSE indicated that many of the student's academic abilities were qualified, e.g. that he identified "most" letters, "some" single digit numbers," body parts and colors "with prompts," and that he pointed to "some" items independently (compare Dist. Ex. 3 at p. 1, with Dist. Exs. 5; 6 at p. 1; 12 at pp. 2-3). The October 2010 speech-language progress report indicated that the student required cues to comprehend yes/no questions and request preferred items (Dist. Ex. 11). The May 2011 IEP contained annual goals and short-term objectives that continued to address skills the student had been working on in his preschool environment, but had not yet mastered (compare Dist. Ex. 3 at pp. 3-7 with Dist. Exs. 5; 6; 11; 12).. Additionally, the Rebecca School teacher testified that the student had not achieved goals related to pointing to items independently, responding to his name, following one-step directions, stringing beads, writing a specific uppercase letter of the alphabet, or copying a line as of September 2011 (Tr. pp. 276, 281; see Dist. Exs. 3 at p. 7; 6 at pp. 1-2). Thus, based on the foregoing, I decline to find that the Rebecca School teacher's after-the-fact testimony supports a conclusion that the goals were inappropriate for the student at the time the May 2011 IEP was created (see R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]; T.B. v.

Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, *17-*18 [S.D.N.Y. March 21, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 n.19 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012].

I now turn to the parents' allegation in the December 2011 due process complaint notice that the May 2011 IEP was flawed because it did not offer socialization or ADL goals (Dist. Ex. 1 at p. 2). The parents are correct that the May 2011 IEP did not include ADL goals; however, the information available at the time of the May 2011 CSE meeting indicated that the student was independent at home with feeding and toileting and with prompts, used the bathroom, and fed himself at school (Dist. Exs. 6 at p. 3; 13 at p. 1). The May 2011 IEP indicated that the student used the toilet and fed himself with prompts, and noted that he was beginning to hang up his coat, which was not a preferred activity (Dist. Ex. 3 at p. 1; see Dist. Exs. 5; 6 at p. 2). A review of the information available to the May 2011 CSE did not reveal discussion about other ADL skills with which the student needed assistance with, and the parents' due process complaint did not specify which ADL goals the student required in order to receive a FAPE (see Dist. Exs. 1 at p. 2; 5; 6 at pp. 2-3; 9-13).

Regarding the student's socialization skills, information the May 2011 CSE reviewed indicated that the student's social skills were at the "beginning stages" and that his preschool program had been working toward improving his social skills both in and outside of the classroom (Tr. pp. 91-93; Dist. Ex. 6 at p. 3). The student continued to work on taking turns and according to the preschool progress report, his awareness of peers was "developing gradually" (Dist. Ex. 6 at p. 3). The preschool program reported that the student was aware of peers and at times allowed one specific peer to interact with him, but "for the most part" the student chose to move away from his peers (id.). Although the student's refusal to share toys with peers had diminished, the preschool program reported that if a peer took a toy from him, he would cry, scream and try to retrieve it (id.). The district's psychoeducational evaluation report indicated that during testing the student exhibited "fleeting eye contact, inconsistent relatedness, and some self-directed behaviors" (Dist. Ex. 12 at p. 3). The report further indicated that the student engaged mostly in solitary or parallel play with peers (id.).

The May 2011 IEP indicated that the student communicated using single-word utterances and although he was showing "signs of beginning socialization skills," and was "developing peer awareness," he often moved away from peers and exhibited diminished sharing skills (Dist. Ex. 3 at pp. 1-2). According to the IEP, the student was also working on taking turns (id. at p. 2). The IEP indicated that the student's socialization skills were of concern to the parents and the school psychologist testified that socialization was an area that the student needed to work on (Tr. p. 121; Dist. Ex. 3 at p. 2). I agree with the school psychologist's statement that none of the IEP annual goals specifically addressed socialization (Tr. p. 119). The IEP does contain short-term objectives developed to improve the student's ability to express his needs, respond to yes/no questions, follow directions, and maintain eye contact (Dist. Ex. 3 at p. 7). While these short-term objectives could be construed as skills related to the student's ability to interact socially with others, I find that without other provisions in the IEP designed to address the student's socialization deficits, the May 2011 CSE's recommendations were not reasonably calculated to address this special education

need. A review of the IEP does not show that it provided supports and services (e.g., counseling, social skills training) to improve the student's social skills (see Dist. Ex. 3). At the impartial hearing, the school psychologist testified that 6:1+1 special class placements "inherent[ly]" addressed students' social/emotional needs, and that the May 2011 CSE recommendation that the student receive one thirty-minute session of group speech-language therapy per week was to improve his socialization skills (Tr. pp. 87, 106, 108, 110, 119-20).

However, as noted above, retrospective testimony may not be used to materially alter a deficiently written IEP by establishing that the student would have received services beyond those listed in his IEP (R.E. 694 F.3d at 185-88). Furthermore, it is insufficient for the school psychologist to assert that a 6:1+1 special classroom "would incorporate social skills training" (Tr. p. 87) and that such services were "inherent" in such a classroom (Tr. pp. 106, 108, 120) without any further elaboration. The school psychologist's broad statement that social skills training was an inherent component of a 6:1+1 special classroom neither explains nor justifies the services listed on the IEP in this instance; rather, it materially alters the written terms of the May 2011 IEP (see P.K. v. New York City Dep't of Educ., 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]). I note that there is no indication that the parents were informed at the time of the May 2011 CSE meeting of the manner in which a 6:1+1 special classroom would address the student's socialization deficits (see R.E., 694 F.3d at 186). As the student's socialization needs were known to the CSE at the time of the May 2011 CSE meeting, it was improper for the district to fail to address them within the body of the IEP. Although the failure to address every one of a student's needs by way of an annual goal will not ordinarily constitute a denial of a FAPE (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]), under the circumstances of this case, I find that the May 2011 IEP also failed to otherwise provide appropriate special education supports and services to meet the student's needs in the area of socialization and therefore denied him a FAPE (20 U.S.C. § 1414[d][1][A]; 34 CFR 300.320[a]; 8 NYCRR 200.4[d][2]; see Application of the Dep't of Educ., Appeal No. 12-135).

D. Parent Counseling and Training

State regulation requires that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). Recently, the Second Circuit explained that "because school districts are required by [State regulation][5] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191). The Court further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when

[5] 8 NYCRR 200.13(d).

aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (id.).

A review of the May 2011 IEP reveals that parent counseling and training was not included in the CSE's recommendations and consequently the district failed to satisfy the requirement that such services be identified on the IEP (Dist. Ex. 3). At the impartial hearing, the school psychologist testified that she did not recommend the provision of parent counseling and training to the parents during the May 2011 CSE meeting because it was "inherent" in the program offered to students enrolled in district specialized schools (Tr. pp. 109-10). While the classroom teacher of the proposed 6:1+1 classroom explained that the assigned public school site offered parent counseling and training to all parents of students enrolled in the assigned public school on a monthly basis and that staff addressed topics such as building social skills and increasing independence among students (Tr. pp. 37-38), in this instance, a review of the hearing record does not suggest that the parents were advised at the time of the May 2011 CSE meeting that parent counseling and training was incorporated into the proposed program.

I find under the circumstances of this case that the district's failure to incorporate parent counseling and training into the May 2011 IEP was a violation of State regulation that in this instance, combined with the IEP's failure to address the student's socialization needs noted above, rose to the level of a denial of a FAPE to the student (see R.E., 694 F.3d at 191, 194; F.B., 2013 WL 592664, at *12). Additionally, I note that, as stated by the Second Circuit, the district "remain[s] accountable for its failure to [provide parent counseling and training] no matter the contents of the IEP," due to the requirements in State regulation (R.E., 694 F.3d at 191). In light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I order that when the CSE next reconvenes to develop a program for the student, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).

E. Unilateral 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 argues that the Rebecca School was not an appropriate placement because it was not specifically designed to address the student's academic or socialization needs. As discussed in greater detail below, I find that the district's assertion is not supported by the hearing record and I agree with 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 offered an educational program which met 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). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Student with a Disability, Appeal No. 12-036; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49 (2005); L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 (S.D.N.Y. March 19, 2013); see also Educ. Law § 4404[1][c]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]; see L.K., 2013 WL 1149065, at *15). 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 M.B., 2013 WL 1277308, at *2; D. D-S v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]; L.K., 2013 WL 1149065, at *15). 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; M.B., 2013 WL 1277308, at *2; 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; L.K., 2013 WL 1149065, at *15; 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; see M.B., 2013 WL 1277308, at *2; Frank G., 459 F.3d at 364-65).

The program director of the Rebecca School (program director) testified that the school serves students ages 4 to 21 years of age who exhibit neurodevelopmental delays in relating and communicating, with the majority of students having received a diagnosis on the autism spectrum (Tr. pp. 165-66, 168-69). The Rebecca School uses primarily a developmental individual difference relationship-based (DIR) methodology incorporating sessions of instruction using the Floortime approach (Tr. pp. 172, 252-53; Parent Ex. B at p. 1). The student began attending the Rebecca School in fall 2011 in a classroom composed of one teacher, nine students, three assistant teachers, and one paraprofessional (Tr. pp. 205-06; Parent Ex. B at p. 1). He also received three OT and three speech-language therapy sessions per week (Tr. p. 207; Parent Ex. B at pp. 4, 6).

To address his academic needs, the hearing record shows that the student received instruction in math concepts such as 1:1 correspondence, identifying written numbers 10-20, and counting (Tr. pp. 247-48, 283; Parent Exs. B at pp. 3-4; F; see Tr. p. 243). The English language arts (ELA) curriculum at the Rebecca School used fairy tales and manipulatives to increase the student's understanding of and ability to answer simple questions about the stories (Tr. pp. 248-49, 251-52; Parent Ex. B at p. 3). The student used his own book to improve his ability to track the text as it was read (Tr. pp. 270-71, 283). Sight word lists were selected for each student based upon his or her particular interests (Tr. pp. 273-74). The December 2011 progress report described the student's skills regarding his interest in reading, word recognition and comprehension (Parent Ex. B at p. 3). Math skills described in the report included 1:1 correspondence, rote counting ability, expressive number identification, and the student's ability to identify the larger of two items (id. at pp. 3-4). The social studies curriculum at the Rebecca School focused on improving the student's ability to participate in a group and remain engaged and related in community settings (id. at p. 4). Science instruction included multisensory activities (id.). The report provided the student with five literacy goals, five math goals, two social studies goals, and one science goal (id. at pp. 8-9).

To meet the student's socialization needs, the program director testified that the school used a 2:1 student to teacher ratio to provide opportunity for students throughout the day to be paired with a peer and an adult facilitator (Tr. pp. 182-83). The special education teacher stated that she provided individual sessions using Floortime methods to improve the student's ability to take turns and interact one-on-one with an adult (Tr. pp. 236, 240, 252-53). The student's daily schedule contained a "morning meeting" session that according to the special education teacher, entailed "building a classroom community, raising awareness of peers, [and] interest [in] peers" (Tr. p. 245). Additional opportunities for socialization with peers occurred during movement activities and lunch (Tr. pp. 249-51; Parent Ex. F). The hearing record shows that one of the student's speech-language therapy sessions was in a dyad with a peer and one session was in a group of four students, to provide him with opportunities to use language effectively with other students (Tr. pp. 183, 260). The December 2011 Rebecca School progress report indicated that the student was working on skills such as entering into a state of shared attention with another person, engaging in

purposeful interactions with adults and peers, initiating and responding during two-way, purposeful, communicative interactions, and engaging with others in two-way problem-solving interactions (Parent Ex. B at pp. 1-2). The progress report included short-term objectives to improve the student's ability to initiate a preferred activity with a preferred peer, remain in continuous interactions with adults, and increase his ability to share attention with peers and adults in the classroom (id. at p. 8). The special education teacher testified that the student had exhibited progress in his social skills since he began attending the Rebecca School (Tr. pp. 245-46, 249-51, 276).

To the extent that the district asserts that the classroom at the Rebecca School limited the student's opportunities for socialization because "one-third of the students in his classroom" were nonverbal (Pet. ¶ 51), I note that 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).[6] In particular, although 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), the hearing record indicates that the student was grouped with peers exhibiting similar communication needs at the Rebecca School. Information in the hearing record shows that the student communicated by using single-word utterances, gestures, vocalizations, and word approximations (Dist. Ex. 12 at p. 2; Parent Ex. B at p. 7). According to the Rebecca School speech-language pathologist, the student primarily used verbal and nonverbal language to request/reject items and activities and respond to questions (Parent Ex. B at p. 7). Although the student demonstrated some spontaneous language, the speech-language pathologist reported that his verbal productions were primarily composed of immediate or delayed repetition of the therapist's utterances (id.). According to the Rebecca School special education teacher, within the student's class four peers were verbal, two peers exhibited emerging verbal skills, and three peers were nonverbal (Tr. p. 262). The hearing record also shows that some of the students in the class, including the student in this appeal, used pictures to expand their utterances (Tr. pp. 274-75; Parent Ex. B at p. 7).

Based upon the foregoing, I find no reason to disturb the IHO's determination that the Rebecca School constituted an appropriate unilateral placement for the student for the 2011-12 school year.

F. Equitable Considerations

Having determined that the Rebecca School was an appropriate placement for the student for the 2011-12 school year, I will now consider whether equitable considerations support the parents' reimbursement claim for tuition costs.

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 equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement

[6] The district fails to provide a rationale for its position that students must possess verbal language to engage in socialization activities.

that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see J.P. v. New York City Dep't of Educ., 2012 WL 359977, at *13-*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at *10; S.W., 2009 WL 857549, at *13-14; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also M.C., 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]; Application of a Student with a Disability, Appeal No. 12-036; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 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 v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 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]).

The district contends that the equitable considerations should preclude or diminish an award of relief in this instance due to the parents' failure to afford it timely written notice of their rejection of the proposed program. Here, the student's mother testified that she received the June 2011 FNR notifying her of the particular assigned public school site in late June 2011, and that she visited the assigned public school site immediately following receipt of the June 2011 FNR (Tr. pp. 360-63, 389). While the student's mother's letter to the district in which she rejected the May 2011 IEP, is dated September 15, 2011, the student's mother testified that she sent a copy of the rejection letter to the district as soon as she visited the assigned public school site in June 2011—well before the parents executed a contract with the Rebecca School in September 2011 for the

student's October 4, 2011 admission (Tr. pp. 365-68, 393-94, 398-99, 410; Parent Ex. H).[7] According to the student's mother, the district did not respond to the letter she sent after visiting the assigned school, and as a result, in September 2011, the student's mother sent a second letter notifying the district of the parents' rejection of the proposed program (Tr. pp. 366, 399-400). The student's mother also testified that she met with the district CSE chairperson to express her concerns with the district-recommended program on the same day that she visited the assigned public school site (Tr. pp. 394-96).[8] Thus, under these circumstances, I decline to find that the parents failed to provide timely notice of their rejection of the proposed program.

Moreover, the hearing record establishes that the parents cooperated with the district and remained willing to enroll the student in a district public school. For example, the parents participated in the May 2011 CSE meeting and the student's mother immediately availed herself of the opportunity to visit the assigned public school site upon receipt of the June 2011 FNR (Tr. pp. 356-57, 360-64). With respect to the parents' willingness to enroll the student in a district school, the student's mother testified that she was "open-minded" at the time of her visit to assigned public school (Tr. pp. 364-65). According to the student's mother, following her visit to the assigned public school, she immediately advised the district CSE chairperson that she wished to visit another district school; however, the parent's request was denied at that time (Tr. pp. 394-95). Furthermore, the student's mother testified that she did not learn about the Rebecca School until summer 2011, and that she did not visit there until early July 2011 (Tr. pp. 383-84).[9] At the time of the student's mother's July 2011 visit to the Rebecca School, Rebecca School personnel offered the student an opportunity to attend there at that time; however, the student's mother did not accept their offer, because she wanted to see if the district would offer her what she deemed to be a more appropriate program for the student (Tr. pp. 385-87). The student's mother testified that in late July 2011, she submitted an application to the Rebecca School for the student's admission for the 2011-12 school year (Tr. p. 387). On September 26, 2011, the parents effectuated an enrollment contract with the Rebecca School for the student's admission for the 2011-12 school year (Tr. p. 368; Parent Ex. H at p. 6). On October 4, 2011, the student began attending the Rebecca School (Tr. pp. 367-68, 410-11). The district did not respond to the student's mother's September 2011 correspondence until November 2011, at which time the district identified an alternative assigned public school site for the student (Tr. pp. 397, 400). Although the student's mother could not recall the name of the second assigned public school site recommended in November 2011, she testified that she visited the second assigned public school site (Tr. p. 400).

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[7] The student's mother testified that she did not retain a copy of the rejection letter that she sent to the district after visiting the assigned public school (Tr. p. 394).

[8] While the hearing record does not clearly articulate whether the student's mother advised the CSE chairperson of her concerns surrounding the 6:1+1 special class placement, the hearing record reflects that the CSE chairperson advised the student's mother that the CSE chairperson could not "give [the parents] any other program" and that the parents "would have to wait" (Tr. pp. 394-96).

[9] The hearing record reveals that the student's mother's first visit to the Rebecca School took place prior to her visit to the assigned public school site; however, both visits were within close proximity to each other and that at the time of the student's mother's visit to the assigned public school site, she was "just doing [her] own research and learning of different things, different programs and different school[s]" (Tr. pp. 384-85).

Based on the foregoing, I find that the parents acted reasonably under the circumstances of this case and cooperated with the district, and I therefore see no reason to disturb the IHO's finding that equitable considerations favor the parent's request for reimbursement for the student's 2011-12 school year tuition at the Rebecca School. (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., 2012 WL 6691046, at *8-*9 [S.D.N.Y. Dec. 26, 2012]; R.K., 2011 WL 1131522, at *4).

VII. Conclusion

In summary, I find that the IHO erred by relying on language from Deal v. Hamilton Bd. of Educ. (392 F.3d 840 [6th Cir. 2004]) as a substitute for the Rowley FAPE standard in determining that the district failed to offer the student a FAPE for the 2011-12 school year. I also find that the IHO's determination that the district denied the student a FAPE based on findings that the parents were denied the opportunity to meaningfully participate and that the annual goals and short-term objectives in the May 2011 IEP were inappropriate, must be reversed as these findings are not supported by the hearing record. However, I find that the district's failure to address the student's socialization needs in the May 2011 IEP, and to provide parent counseling and training, collectively comprise a denial of a FAPE for the 2011-12 school year. I also concur with the IHO that the parents' unilateral placement at the Rebecca School was appropriate, and that equitable considerations favor an award of reimbursement to the parents of the student's tuition at the Rebecca School for the 2011-12 school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 31, 2012 is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year based upon (1) the IHO's improper reliance upon the legal standard articulated in Deal v. Hamilton Bd. of Educ. (392 F.3d 840 [6th Cir. 2004]) as a substitute for the Rowley FAPE standard, (2) the IHO's finding that the district deprived the parents of an opportunity to meaningfully participate in the development of the student's May 2011 IEP, and (3) the IHO's finding that the annual goals and short-term objectives in the student's May 2011 IEP were not appropriate; and

IT IS FURTHER ORDERED that at the next CSE meeting regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parent with prior written notice consistent with the body of this decision.

Dated: **Albany, New York**
July 5, 2013

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STEPHANIE DEYOE
STATE REVIEW OFFICER