



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-172

### **Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

#### **Appearances:**

DLA Piper LLP, attorneys for petitioner, Joshua Kane, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

### **DECISION**

#### **I. Introduction**

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

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

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

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

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [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 CSE convened on March 31, 2011 to conduct an annual review and develop an IEP for the student (Dist. Ex. 13). At the time, the student was six years old and had received diagnoses of mental retardation and cerebral palsy (Dist. Ex. 3 at p. 2; Parent Ex. C at pp. 8-9). The March 2011 CSE found the student was eligible for special education and related services as a student with an intellectual disability, and recommended a 12-month program consisting of a 12:1+1 special class placement in a specialized school and related services of speech-language therapy and occupational therapy (OT) (Dist. Ex. 13 at pp. 11-12).<sup>1</sup>

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<sup>1</sup> While the IEP uses the term mental retardation, State regulations were amended in October 2011 to replace the term mental retardation with the term intellectual disability while retaining the same definition (compare 8 NYCRR 200.1[zz][7], with 34 CFR 300.8[c][6]). The student's eligibility for special education and related services as a student with an intellectual disability is not in dispute in this proceeding (34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][7]).

In a final notice of recommendation (FNR) dated August 3, 2011, the district summarized the special education programs and related services recommended by the March 2011 CSE and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Parent Ex. E).<sup>2</sup>

By letter dated September 13, 2011, the parent notified the district that she was "withdrawing" the student after visiting the assigned school site in August (Parent Ex. F). The parent stated that the assigned school site did not have the proper services or environment for the student (*id.*). She also indicated that she was willing to consider any alternate school placement offered by the district, but had enrolled the student at Cooke and would seek an order directing the district to pay for the student's tuition for the 2011-12 school year (*id.*). In closing, the parent requested bus transportation for the 2011-12 school year (*id.*). Also on September 13, 2011, the parent executed an enrollment contract for the student's attendance at Cooke for the 2011-12 school year (Parent Ex. G).<sup>3</sup>

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

In a due process complaint notice dated December 22, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. I at p. 1). Additionally, the parent alleged that the assigned public school site was not appropriate for the student because the recommended classroom ratio of 12:1+1 was too large (*id.* at p. 2). The parent also raised concerns regarding information she received during a visit to the assigned school in August 2011 (Parent Ex. I at pp. 2-3).

With regard to the student's enrollment at Cooke, the parent stated that the student was in classes with small class ratios, which enabled her to remain focused (*id.* at p. 3). The parent opined that in general, Cooke provided a program and environment that would facilitate the student's educational progress (*id.*). As relief, the parent requested direct funding of the cost of the student's tuition at Cooke and provision of roundtrip transportation (*id.*).

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

On March 9, 2012, the parties proceeded to an impartial hearing, which concluded on May 11, 2012, after five days of proceedings (*see* Tr. pp. 1-369). In a decision dated July 25, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year and denied the parent's request for tuition reimbursement (*see* IHO Decision at pp. 8-9, 11).

The IHO found that the IEP developed at the March 2011 CSE meeting "thoroughly described" the student's present levels of performance by including results of a psychoeducational evaluation administered in October 2009 and scores from an administration of the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) in March 2011 (*id.* at pp. 4-5). Because the parent did not challenge the appropriateness of the annual goals contained in the March 2011 IEP, nor raise any procedural violations with regard to the development of the IEP, the IHO found the goals to be appropriate for the student and further found that no procedural violations had

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<sup>2</sup> Several pieces of documentary evidence were entered into the hearing record by both parties. In such instances, citation is provided only to the exhibit introduced into evidence by the parent (*see* 8 NYCRR 200.5[j][3][xii][c]).

<sup>3</sup> The Commissioner of Education has not approved Cooke as a school with which school districts may contract for the instruction of students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

occurred during the development of the March 2011 IEP (*id.* at pp. 5, 8). The IHO also found that the March 2011 CSE discussed the student's academic and social-emotional performance, the annual goals were developed at the meeting, and the CSE discussed the benefit of a 12-month program in a 12:1+1 special classroom in a specialized school, which it determined would address the student's academic deficits, impaired speech, focusing problems, and need for redirection (*id.* at pp. 5-6). The IHO found that a 12-month program was necessary to address the student's needs and that the recommended program offered the student a FAPE in the least restrictive environment (LRE) (*id.* at p. 8).

Although evidence was presented as to the appropriateness of Cooke, the IHO made no findings thereon as she had found that the district offered the student a FAPE (IHO Decision at p. 9). Nevertheless, the IHO determined that even if the district had failed to offer the student a FAPE, equitable considerations favored the district and precluded the parent's claim for tuition reimbursement (*id.* at pp. 9-11). The IHO noted that the parent did not reject the recommendations of the CSE at the time of the March 2011 CSE meeting and did not provide the required 10-day notice to the district prior to enrolling the student at Cooke (*id.* at p. 10). The IHO also stated that tuition reimbursement was not appropriate because the parent had not clearly stated whether she was seeking tuition reimbursement or direct funding, nor had the parent offered any evidence of payment or inability to pay the student's tuition (*id.* at pp. 10-11).

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

The parent appeals, requesting that the IHO's decision be overturned with respect to the appropriateness of the recommended assigned public school site and equitable considerations. The parent also requests that an SRO find Cooke to be an appropriate placement for the student and order the district to pay the costs of the student's tuition at Cooke for the 2011-12 academic school year. In an accompanying memorandum of law, the parent argues that the district failed to offer the student a FAPE, specifying that a 12:1+1 special class placement in a specialized school would not provide sufficient support and supervision to enable the student to make educational progress and that the district did not establish that the student would have been appropriately functionally grouped at the assigned public school site. The parent also submitted four exhibits that she requests an SRO consider as additional evidence (Pet. Exs. A-D).

In an answer, the district responds to the parent's allegations with admissions and denials, and argues to uphold the IHO's decision in its entirety. In addition, the district asserts that the March 2011 IEP and the proposed placement in a specialized school were appropriate, Cooke was not appropriate and that the equitable considerations favor the district. The district contends that Cooke did not meet the student's needs, nor was the student appropriately functionally grouped. The district also objects to the consideration of the additional evidence submitted by the parent.

#### **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 [2009]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]).

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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Sufficiency of Petition**

As an initial matter, the parent's appeal must be dismissed for non-compliance with the practice regulations. As described above, a party aggrieved by the decision of an IHO may appeal to an SRO and their petition must set forth 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 parent's petition contains factual allegations and a "wherefore" clause that requests that the SRO overturn the IHO's decision "with respect to the appropriateness of [the assigned school] and the equities of the case" (Pet. p. 17). However, the petition does not actually identify any error challenging the IHO's determination that the March 2011 IEP offered the student an appropriate educational program. While the accompanying memorandum of law contains legal argument regarding the appropriateness of the March 2011 IEP, a memorandum of law is not a substitute for a petition indicating the basis for challenging an IHO's order by identifying the findings, conclusions, and orders to which the parent objects (8 NYCRR 279.4[a], 279.6; see Application of a Student with a Disability, Appeal No. 14-024). Accordingly, the IHO's determination that the recommendation that the student attend a 12:1+1 special class in a specialized school offered the student a FAPE in the LRE has become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

Out of an abundance of caution and notwithstanding the parent's failure to appeal the IHO's determination that the district offered the student a FAPE, I have reviewed the entire hearing record and provide alternative findings on the merits of the parent's appeal.

#### **2. Additional Evidence**

The district asserts that the additional documentary evidence submitted with the petition by the parent should be rejected because the documents were available at the time of the impartial

hearing and are not necessary for the SRO to render a decision. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

In this case, I decline to accept the additional documentary evidence, as it was available at the time of the impartial hearing and not timely offered into evidence for the IHO's review, and consideration of the additional documentary evidence is not necessary in order to render a decision in this case.

### **B. March 2011 IEP**

Although the parent has not properly challenged the IHO's determinations regarding the program recommended by the March 2011 IEP, the recommended 12-month, 12:1+1 special class in a specialized school appears to be the basis of the original complaint before the IHO, and I have taken the unusual step of offering alternative findings below for the sake of judicial economy were the matter further reviewed and to provide the parties guidance for future educational planning for the student. A discussion of the development of the IEP and resulting recommendation will provide a context for the resolution of this issue, but to be clear once again, the petition in this matter recited facts but asserted no challenges of error in the IHO's determination regarding the provision of FAPE to the student, and therefore it stands as the final determination in this case.

The hearing record indicates that the March 2011 IEP reflects information contained in an October 2009 psychoeducational evaluation, an October 2009 social history, an undated social history update,<sup>4</sup> a March 2010 speech-language evaluation, February 2011 and March 2011 progress reports from the student's district school, a March 2011 psychoeducational evaluation, the March 2011 Vineland-II, and March 2011 classroom observations (Dist. Exs. 3; 5-11; Parent Exs. A-C; see Tr. pp. 120-24, 148-49, 174-75; Dist. Ex. 13).

The evaluative information available to the CSE indicated that the student required refocusing, cueing, and redirection to address her attentional needs and difficulties with rules and routines; individual support and attention for written and cognitive tasks; repetition to address her memory deficits; was seriously delayed in her receptive and expressive language skills; and had a tendency to wander (Tr. pp. 171-72; Dist. Exs. 5; 8 at p. 2; 10; 11 at pp. 2-3; Parent Exs. A at pp. 2, 5; B at p. 4). In progress reports, the student's teacher estimated that the student was functioning at a pre-kindergarten to early kindergarten level in both reading and mathematics and noted fair academic progress in the areas of classwork and neatness and good progress in homework (Dist. Exs. 5; 9). With regard to the student's social and emotional development, the teacher described the student as loving attention and thriving on praise (Dist. Ex. 5 at p. 2). The teacher noted that the student would cling to others who were nice to her, was prone to crying if left alone, and had a tendency to withdraw from the group and wander off (id.).

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<sup>4</sup> The social history update references a physical examination that occurred in either October or November 2010 and the name of the student's teacher for the 2010-11 school year (Dist. Ex. 6 at p. 2).

The present levels of performance reported on the March 2011 IEP, which are not in dispute, indicated the student required support, a number of prompts, and verbal encouragement to follow classroom routines and to remain on task for more than five minutes (Dist. Ex. 13 at p. 1). The IEP also indicated the student had difficulty responding to requests made by teachers (*id.* at p. 2). To make progress and acquire new skills, the March 2011 IEP noted the student required many trials to master cognitive information; worked "best in very small groups" with individual attention and support due to distractibility; and required frequent redirection, reminders to remain on task, and individual prompting in order to change from one activity to another (*id.*). The IEP also noted the student required a calm, structured, small special education class in a specialized school in order to make progress (*id.* at p. 3).

At the impartial hearing, a district social worker testified that the March 2011 CSE recommended placement in a specialized school because—based on the student's social/emotional issues, difficulties with focus and attention, and her needs for 1:1 attention, reminders, and redirection—the student needed "a more comprehensive program" with "more intense services" (Tr. pp. 116, 149-50, 172-74). The social worker also testified that the parent requested a program in a specialized school (Tr. p. 116). Additionally, in a February 2011 letter request by the district to reevaluate the student, the social worker indicated that the student required "more intensive support in a smaller classroom" (Parent Ex. M; *but see* Tr. p. 184).

However, despite the acknowledgment by district staff and the March 2011 IEP that the student required intensive levels of attention and support, the hearing record is unclear how the student's needs—which the district conceded were not being met in a 10-month program in a 12:1+1 classroom in a community school (*see* Dist. Ex. 13 at pp. 16-17)—would have been met in a 12-month program in a 12:1+1 special class in a specialized school.<sup>5</sup> At the hearing, the district social worker opined that a 12:1+1 classroom ratio was the least restrictive environment appropriate for the student and she testified that a specialized school provided a "more restrictive program" than a community school by virtue of the fact that it provided a 12-month program (Tr. pp. 116-17, 187). The social worker further indicated that a 12:1+1 special class in a specialized school would include additional classroom staff and provide "far more support" than a 12:1+1 special class in a community school (Tr. pp. 177-79). She also testified that the CSE could reconvene to consider a more supportive setting if the 12:1+1 setting did not adequately address the student's needs (Tr. p. 187).

While the social worker's testimony may or may not have been an accurate description of both the differences between a community school and a specialized school and the ease with which the CSE could reconvene to consider other classroom settings, none of this information regarding additional resources purportedly available in a specialized school was identified in the March 2011

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<sup>5</sup> The district's concession regarding 10-month versus 12-month services makes no sense when viewed through the lens of the available information in the hearing record because the hearing record does not support the district's recommendation for a 12-month program. A student's eligibility for 12-month special services and/or programs is determined by the need to prevent substantial regression, defined by State regulation as severe loss of skills or knowledge over the summer months so as to require "an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; 200.6[k]). There is nothing in the hearing record that indicates the student experienced substantial regression and, accordingly, the CSE did not have a basis on which to conclude that the student required a 12-month program. The hearing record does not reflect that there was any discussion of substantial regression during the March 2011 CSE meeting, none of the evaluative data mention substantial regression, and there is no explanation for this recommendation on the IEP.

IEP. Testimony by district personnel during the impartial hearing regarding the supports and services available in a 12:1+1 special class in a specialized school cannot cure the deficiency in an IEP by establishing that the student would have received supports and services beyond those listed in her IEP (see R.E., 694 F.3d at 185-88 [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., 933 F. Supp. 2d 554, 574-75 [S.D.N.Y. 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., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 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], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]). Thus, the district social worker's testimony that the recommended specialized school program would address the student's need for individualized small group instruction and additional support neither explains nor justifies their omission from the IEP; rather, it materially alters the written terms of the March 2011 IEP (see P.K. v. New York City Dep't of Educ., 2013 WL 2158587, at \*4 [2d Cir. May 21, 2013]; Application of a Student with a Disability, Appeal No. 14-020; Application of the Dep't of Educ., Appeal No. 13-193). There is no indication in the hearing record that the parent was informed at the time of the March 2011 CSE meeting of the manner in which a 12:1+1 special class in a specialized school would address the student's need for small group instruction as well as provide supports to address the student's distractibility, wandering behaviors and constant need for focusing and redirection (see R.E., 694 F.3d at 186). Although the March 2011 IEP indicates that the student required individual attention, frequent redirection, individual prompts for attention and focus, the IEP does not reflect how a 12+1:1 special class in a special school would provide the student with more individual attention and adult support than a 12:1+1 special class in a community school (Dist. Ex. 13 at pp. 1-3, 16-17).<sup>6</sup> According to the district social worker, the parent's request for a recommendation for placement in a special class offering a smaller student-to-teacher ratio was dismissed as not being in the student's LRE (Tr. pp. 187, 232). While the CSE is tasked with offering the student a FAPE in the LRE, dismissing a request as "too restrictive," when such a placement would not provide the student with any more or less access to nondisabled peers than that recommended by the CSE, does not have any bearing on LRE principles under the IDEA and thus the district's stated rationale for rejecting the parent's suggestion of a smaller, more supportive student-to-teacher ratio was flawed (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). The CSE should have considered the available options along the district's continuum of services, particularly since the district apparently agreed with the parent that the student required additional support beyond that provided in her current 12:1+1 classroom

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<sup>6</sup> The regulations implementing the IDEA provide that "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled" (34 CFR 300.116[c]), which in this case would be a "community school" with nondisabled peers rather than a specialized school that does not have nondisabled peers. Simply providing a placement in an IEP that removes the student from her nondisabled peers, with no other distinction, does little to explain the "other arrangements" that are attendant to participating in a 12:1+1 special class in a special school versus a 12:1+1 special class in a community school. Such "other arrangements"—only alluded to in after-the-fact testimony in this case—should be clearly identified on the student's IEP or, if such supports are not necessary, the student's need for attending a school completely separated from nondisabled peers should be readily apparent on the IEP (e.g., because a student's behaviors so impede the learning of others as to require separate schooling). Neither is present in the IEP in this case.

(Tr. pp. 116, 149-50, 172-74).<sup>7</sup> Based upon the foregoing, I find that the district failed to establish that it offered the student a FAPE for the 2011-12 school year.

### **C. Appropriateness of the Unilateral Placement**

The district argues on appeal that Cooke did not meet the student's needs and that the student's functional grouping at Cooke was not appropriate. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (*id.* at 13-14). 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], abrogated on other grounds by Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]). "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 at 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*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

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<sup>7</sup> In the "Other Programs Considered" section of the IEP, the CSE indicated that it considered a special class in a community school and a special class in a specialized school for the deaf and hard of hearing. The reason for rejecting the community school was that the student "needs a more restricted class setting in a specialized school where she can be in a 12 month program with more individual attention and support" (Dist. Ex. 13 at pp. 16-17). The reason for rejecting the special class in a specialized school for the deaf and hard of hearing was "that's not [the student's] disability" (*id.* at p. 17).

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 student attended Cooke during the 2011-12 school year and received instruction in reading in a classroom ratio of 4:1+1, mathematics in a ratio of 6:1+2, and writing, science, and social studies in a ratio of 8:1+2 (Tr. p. 248; Parent Ex. H at pp. 3-8). The student also received related services provided by Cooke, which included individual speech-language therapy three times per week, individual OT two times per week, physical therapy (PT), and counseling in a group of four (Tr. pp. 296-97, 305; Parent Ex. H at pp. 1, 11-13).<sup>8</sup> According to a March 2012 Cooke progress report, in addition to academic instruction and related services, the student also participated in library, story art, yoga, and physical education classes (Parent Ex. H at pp. 1, 14-16). For art, library, and physical education, the student participated with regular education students from a general education class (Tr. pp. 302-06, 310).<sup>9</sup> Cooke provided the student dividers and breaks when she was in larger groups to address her distractibility, and used manipulative and visuals to support the student's learning (Tr. 356-58).

With regard to reading, the Cooke progress report indicated that the student worked on encoding, decoding, and comprehension skills using a guided reading program (Parent Ex. H at p. 3). The student reportedly increased her sight word vocabulary and demonstrated growth in her ability to use a combination of letter/sound, syntactic, and semantic clues to figure out new words (id.). The student also was able to identify new words in guided reading lessons with minimal teacher support (id.). While the student exhibited strong growth in reading, the progress report noted the student required teacher support to monitor comprehension and accuracy when working with a grade level text (id. at p. 4). The student's reading teacher testified that the student's speech-language therapy provider delivered services on a push-in basis during the student's reading class every one to two weeks to implement strategies to improve the student's intelligibility (Tr. p. 336). The reading teacher also testified that the student was at the same reading level as the other students in the class (Tr. p. 329).

In writing, the progress report indicated that the student focused on labeling and adding words to pictures, writing her name, writing recognizable letters, telling about pictures and using picture cues to convey meaning (Parent Ex. H at p. 5). The student made steady progress with

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<sup>8</sup> The student's special education teacher from Cooke testified that the student's physical therapy (PT) and counseling were "not individualized to her" but were provided to all students, and that the PT was "part of our gym program" led by the physical therapist (Tr. pp. 304-05).

<sup>9</sup> The hearing record reflects that Cooke was collocated with a nonpublic general education school (Tr. p. 346). Although the district asserts that the hearing record did not indicate that the student could appropriately be placed in such an environment, the district points to no evidence in the hearing record that the student was prevented from receiving educational benefits by participating in nonacademic classes with regular education students.

drawing and was described as "at the pre-conventional stage of writing" (id.). The March 2012 progress report also included goals to increase the number of details included in the student's work and expand the number of sentences she used to describe her drawings (id.).

The progress report noted that in mathematics, the student worked on number sense operations, statistics and probability, and measurement at a mid-kindergarten level, showing the ability to complete several math skills independently on a regular basis (Parent Ex. H at p. 6-7). In social studies, the Cooke progress report indicated a focus on the skills of comparing and contrasting (Parent Ex. H at pp. 8). The student reportedly improved in her ability to sustain attention during class, but continued to have difficulty reading aloud and required "frequent verbal and visual prompts" to compare and contrast (id. at pp. 8-9). The student was able to organize information and contribute to a class activity creating a chart with visual prompts (id. at p. 9). When provided verbal and physical prompts, as well as a visual schedule and calendar, the student was able to sequence events (id.). In science, Cooke provided the student with picture cues and verbal prompting to enable her to answer questions, make observations, and report on objects and events (Parent Ex. H at p.10). The student demonstrated progress in sustaining attention and was most attentive during lessons using multisensory materials (id.). The student continued to require support to provide analysis and had difficulty with descriptive vocabulary (id.).

To address the student's OT needs the occupational therapist worked with the student on fine motor skills, handwriting, and activities of daily living (ADL) skills (Parent Ex. H at p. 12). The student's individual OT sessions included sensorimotor activities, hand strengthening, bilateral integration, manual dexterity, dressing skills, and handwriting (id. at p. 13). In addition to the student's individual OT services, the occupational therapist provided push-in services along with a physical therapist to the student's entire writing class (id. at p. 12).

The district's only challenge to the substance of the student's instruction at Cooke is to allege that Cooke did not adequately address the student's expressive language deficits. To address the student's needs relating to expressive language, the Cooke progress report noted that the student's speech-language therapy focused on intelligibility and articulation skills (Parent Ex. H at p. 11). The student's classroom teacher testified that when the student first began attending Cooke, she could not understand the student's speech and the student would point and use an alphabet chart to try to communicate (Tr. pp. 287-88, 292-93). Due to the student's limited spelling skills, the teacher indicated that Cooke staff did not immediately understand that the student was attempting to communicate, but thereafter consulted with the speech-language therapy pathologist to discuss ways to support the student's communication attempts (Tr. 293). The staff provided the student with an alphabet chart and the computer while the speech-language pathologist worked with the student inside and outside the classroom to improve speech intelligibility (Tr. p. 294). The student's speech-language therapy provider instructed the student's teachers on prompting the student to use initial and final sounds to improve speech intelligibility (Tr. p. 294). The classroom teacher further testified that with the use of prompts, the student's teachers and service providers were able to understand 60-70 percent of the student's speech and were better able to assess the student's abilities and skills (Tr. pp. 294-95). Once the student's intelligibility and articulation improved, Cooke staff determined that the student had a greater knowledge base than previously realized and she was placed in higher level classes for science and social studies (Tr. pp. 288-92). Based on the foregoing, I find the district's argument to be without merit.

After reviewing the hearing record, I find that Cooke was an appropriate placement for the student. The record demonstrates that the student received specially designed instruction that met

her needs. When the student demonstrated that her abilities were greater than previously believed, she was moved to a more challenging curriculum in two academic subjects (Tr. pp. 288-92). The student's teachers addressed the student's distractibility with frequent breaks, visual supports, manipulatives, and verbal and physical prompts as needed (Parent Ex. H). The student was also provided access to nondisabled peers and participated in nonacademic classes with regular education students (Tr. pp. 304-05, 310). I therefore find that the student's placement at Cooke, by providing her with instruction designed to meet her unique needs, was reasonably calculated to provide her with educational benefits.<sup>10</sup>

#### **D. Equitable Considerations**

Having determined that Cooke was an appropriate placement for the student for the 2011-12 school year, the final issue for consideration is whether equitable considerations support the parent's claim for the costs of the student's tuition. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]).

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. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

As stated above, the IHO made no finding as to the appropriateness of Cooke, but determined that equitable considerations did not favor the parent's requested relief. The parent testified that she informed the March 2011 CSE that she believed the student required a smaller classroom placement than a 12:1+1 (Tr. p. 232), but did not indicate that she informed the CSE of

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<sup>10</sup> To the extent the district argues that the student was inappropriately grouped with students whose ages ranged beyond that permitted by State regulation, the district has provided no authority for the proposition that the age range restriction imposed on school districts by State regulation applies to private placements (8 NYCRR 200.6[h][5]).

her intention to enroll the student in a nonpublic school at public expense. The hearing record shows that the parent did not provide the district with notice of her intention to unilaterally place the student and seek public funding for the costs of that placement until she had enrolled the student at Cooke (Tr. pp. 263-65; Parent Exs. F, G). Accordingly, I find that the parent failed to provide the district with notification of the unilateral placement as required by the IDEA (20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]).<sup>11</sup> However, since the parent's appeal is dismissed due to her failure to properly appeal from the IHO's determination that the March 2011 IEP offered the student a FAPE, it is unnecessary for me to determine the extent to which an award for the costs of the student's tuition should be reduced or denied altogether based on the parent's failure to fully comply with the notification requirements of the IDEA.<sup>12</sup>

## **VII. Conclusion**

Because the parent did not appeal from the IHO's determination that the district offered the student a FAPE, there is no basis appearing in the hearing record to disturb that determination. Were the parent's challenges to the IHO's determination properly raised on appeal, I would find that the district failed to offer the student a FAPE for the 2011-12 school year and that the parent's unilateral placement of the student at Cooke was appropriate. Because the parent failed to properly do so, I make no finding regarding the extent to which equitable considerations support the parent's request for public funding of the costs of the student's tuition at Cooke.

### **THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 20, 2014**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>11</sup> Even if I were to consider Petition Exhibit A, which consists of handwritten notations made by the parent on the FNR, the exhibit indicated the parent's concerns regarding the particular assigned public school site and requested a different public school site placement that could provide "proper services + environment," it did not notify the district of the parent's intention to enroll the student in a nonpublic school at public expense (Pet. Ex. A at p. 3).

<sup>12</sup> To the extent the district argues that the parent's actions evinced her intention to enroll the student in a nonpublic school regardless of the program offered by the district, the Second Circuit has recently held that if parents cooperate with the district "in its efforts to meet its obligations under the IDEA . . . their pursuit of a private placement [is] not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (*C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 840 [2d Cir. 2014]; see, e.g., *A.R. v. New York City Dep't of Educ.*, 2013 WL 5312537, at \*9-\*10 [S.D.N.Y. Sept. 23, 2013]).