The University of the State of New York

The State Education Department
State Review Officer
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No. 12-190

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:
Ben Kinzler, Esq., attorney for petitioner

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 nonpublic school (the NPS) for the 2010-11 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that year. The appeal must be sustained in part. The cross-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 student is described as being micro premature, having been born at 23 weeks gestation (Tr. p. 209; Dist. Ex. 2 at p. 7). She has received diagnoses of autism, mild cerebral palsy, and cortical vision impairment (Tr. pp. 80, 209-10; Dist. Ex. 2 at pp. 5, 7-8). She also presents with hydrocephaly requiring the use of a shunt (Dist. Ex. 2 at pp. 1, 7). The student has a history of seizures and developmental delays (id. at pp. 1, 7-8). In addition, the student exhibits fine and gross motor delays, delays in visual-perceptual-motor skills, feeding and saliva management difficulties, an awkward gait, poor balance and the need for toileting assistance (id.).

On June 14, 2010, the CSE convened to conduct the student's annual review and to develop an IEP for the 2010-11 school year (Dist. Ex. 2 at p. 1). The June 2010 CSE determined that the

student remained eligible for special education as a student with autism and recommended placement in a twelve-month school year program in a 6:1+1 special class in a specialized school with instruction in Yiddish and a full time Yiddish-speaking 1:1 health paraprofessional (id. at pp. 1, 6-7, 21, 23; see Tr. p. 211).[1] A notation on the summary of the January 2010 IEP recommendations also indicates provision for a "Yiddish Alternate Placement Para" (Dist. Ex. 2 at p. 1).[2] The June 2010 CSE recommended that the student receive related services consisting of: individual physical therapy (PT) for five 45-minute sessions per week in English; individual occupational therapy (OT) for five 30-minute sessions per week in English; individual speech-language therapy for four 60-minute sessions per week in Yiddish; and individual vision education services for two 30-minute sessions per week in English (id. at p. 23). The June 2010 IEP also indicated that the student had impaired physical mobility requiring her to wear leg braces and orthotics, which necessitated the provision of an accessible program (id. at pp. 1, 8).

Following the June 2010 CSE meeting, the district sent the parent a final notice of recommendation (FNR) on June 21, 2010 (Dist. Ex. 4). The FNR indicated that the student was recommended for a 6:1+1 Yiddish special class in a specialized school; however, the FNR noted that "due to the immediate needs of your child and the unavailability of a bilingual program at this time" the district was recommending that the student attend a 6:1+1 English special class in a specialized school as an interim placement pending the availability of a bilingual class (id.). The FNR also summarized the related services recommended in the June 2010 IEP, including individual OT, PT, speech-language therapy, vision education, and a 1:1 health paraprofessional (id.).

By letter dated July 13, 2010, the parent informed the district that she visited the assigned public school site on July 8, 2010 (Dist. Ex. 3). The parent explained that, although she found the staff to be friendly and was impressed with the assigned school, she found the program to be inappropriate for the student (id.). According to the parent, the student spoke Yiddish and would have had difficulty understanding an English-speaking teacher (id.). In addition, the parent indicated that translation by a paraprofessional would have confused the student due to her auditory processing "complexities" (id.). The parent also noted that the student would not have been able to work on socialization skills, as she would have been unable to relate to the other students in her language (id.). The parent informed the district that she declined the recommended placement but accepted the related services and would "appreciate an alternate placement offer" (id.).

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

[2] The district school psychologist who attended the June 2010 CSE meeting explained at the impartial hearing that, if the 6:1+1 special class was not available in Yiddish, the CSE intended to recommend an alternative placement wherein the student would attend a 6:1+1 special class in English and a Yiddish-speaking paraprofessional "would be available . . . to explain things" to the student (Tr. p. 17). Were such an alternate placement to become necessary, she was unsure whether the bilingual paraprofessional would be the same individual who served as the student's health paraprofessional or if two individuals would serve in the different roles (Tr. pp. 25-26).

On August 23, 2010, the parent sent another letter informing the district that she would place the student at the NPS for the 2010-11 school year and would seek reimbursement from the district for the cost of the student's tuition (Parent Ex. I).

A. Due Process Complaint Notice

In a due process complaint notice dated March 6, 2012, the parent alleged that the district failed to offer the student a FAPE for the 2010-11 school year (Dist. Ex. 1 at p. 1). The parent asserted that the June 2010 CSE did not follow proper procedures, was invalidly composed, did not review appropriate documentation, and did not develop goals and objectives to address the student's needs (id.). The parent also alleged that the recommendation for an interim placement in a 6:1+1 classroom with instruction in English was not appropriate, asserting that it would not address the student's language needs because the student required instruction in Yiddish for the entire day (id.). The parent asserted that the recommendation for a Yiddish paraprofessional at the alternate placement would have been inappropriate because the student already had a full-time health paraprofessional (id.). In addition, the parent asserted that the assigned public school site could not provide such a paraprofessional (id.). The parent contended that the student required a special education program "with bilingual instruction, small group support and individual attention" (id.). As relief, the parent requested reimbursement or prospective funding at the NPS (id. at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on June 6, 2012 and concluded on June 26, 2012 after two days of hearings (Tr. pp. 1-248). In a decision dated August 17, 2012, the IHO found that the district did not offer the student a FAPE for the 2010-11 school year and that the parent's unilateral placement was not appropriate (IHO Decision at pp. 10-12). The IHO determined that the district did not offer a FAPE because the related services recommended in the June 2010 IEP were too burdensome and would have impaired the student's ability to benefit from the recommended program (id. at p. 10). The IHO found that the June 2010 IEP did not properly balance the student's academic needs with her need for related services (id. at p. 11).

Regarding the unilateral placement, the IHO determined the NPS was inappropriate because it did not offer a 12-month school year (IHO Decision at pp. 11-12). The IHO reasoned that the student required a 12-month school year because the June 2010 IEP recommended a 12-month school year and the parent did not object to that portion of the IEP (id.). The IHO further noted that the "largely anecdotal" evidence of the student's progress at the NPS did not "rule out the possibility" that the student experienced "regression during the summer months" and it was "incumbent" on the parent to establish "that she took appropriate steps to prevent" the student from experiencing such regression (id. at p. 12). Consequently, the IHO declined to address equitable considerations and denied the parent's request for relief (id.).

IV. Appeal for State-Level Review

The parent appeals the IHO's August 17, 2012 decision to the extent that the IHO found the NPS was not an appropriate unilateral placement for the student for the 2010-11 school year. The parent asserts that the IHO erred in finding that the student required a 12-month school year, arguing that there was no evidence in the hearing record indicating that the student regressed over

the summer. The parent also contends that a finding of regression would be counter to evidence in the hearing record indicating that the student made progress at the NPS during the 2010-11 school year. The parent requests that the IHO's decision be reversed and that the district be ordered to pay directly or reimburse the parent for the costs of the student's tuition at the NPS.

The district answers, denying the substance of the allegations contained in the petition, and cross-appeals from the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year.[3] In its cross-appeal, the district asserts that the IHO erred in addressing the adequacy of the related services in the June 2010 IEP, arguing that the parent did not raise any such claim in the due process complaint notice. The district also asserts that the related services recommendations were appropriate to address the student's needs, arguing that the recommended frequency of the related services was almost the same as that received by the student at the NPS.

In addition, the district alleges that the parent should also be denied relief due to equitable considerations. The district asserts that the parent did not notify the district of any objections to the related services recommendations, thereby preventing the district from reconvening the CSE to address the parent's concerns. Moreover, the district alleges that the parent is not entitled to direct payment of the student's tuition to the NPS because the parent did not show an inability to pay the student's tuition at the NPS and because the parent is not liable for the cost of the student's tuition. Alternatively, the district asserts that the cost of the tuition and services at the NPS was unreasonable and should be reduced.

Although the parent answers the district's cross-appeal, she does not admit or deny any of the allegations contained in the cross-appeal. Instead, the parent argues that the IHO had sufficient information to find that the related services recommendations were inappropriate and asserts additional bases on which to find that the student was denied a FAPE for the 2010-11 school year, that the NPS was an appropriate placement, and that equitable considerations weigh in favor of the parent's requested relief. The parent's additional assertions include allegations that the student required instruction in Yiddish and that a translation paraprofessional would have prevented the student from learning first-hand and from socializing.

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

[3] The district originally served the answer and cross-appeal on December 20, 2012 on the attorney who served as the parent's counsel during the due process hearing, rather than on the attorney representing the parent on appeal, but later corrected the mistake by serving the same pleadings on the correct counsel on December 26, 2012 (compare Dec. 20, 2012 Answer, with Dec. 26, 2012 Answer).

(Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Scope of Review

As an initial matter, the district correctly argues that the IHO exceeded his jurisdiction by sua sponte addressing whether the frequency of related services recommended in the June 2010 IEP was appropriate, as the parent did not raise any issue regarding the related services in the due process complaint notice (see IHO Decision at pp. 10-11; Dist. Ex. 1 at pp. 1-2). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i]-[ii],

300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; see, e.g., B.M. v New York City Dep't of Educ., 569 Fed. App'x 57, 59, 2014 WL 2748756 [2d Cir. June 18, 2014]; R.E., 694 F.3d at 187-88 n.4; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

The parent did not raise any allegations in the due process complaint notice regarding the appropriateness of the related services recommended in the June 2010 IEP (Dist. Ex. 1). The parent also did not respond to the district's assertion that the IHO's findings regarding the recommended related services were outside the scope of the impartial hearing (compare Dec. 26, 2012 Ans. ¶ 45, with Ans. to Cross-Appeal). In addition, the parent indicated in her June 2010 letter to the district that she "accepted all related services" (Dist. Ex. 3). Under these circumstances, I find that the parent's due process complaint notice cannot reasonably be read to include a claim that the related services were inappropriate (see Dist. Ex. 1). Further, a review of the hearing record shows that the district did not agree to an expansion of the issues in this case, and the parent did not attempt to amend the due process complaint notice to include related services as an additional issue (Tr. pp. 13, 26-27, 62).[4] Therefore, the IHO exceeded his jurisdiction in addressing the appropriateness of the related services recommendations and the IHO's finding must be annulled (see B.M., 569 Fed. App'x at 59; N.K., 961 F. Supp. 2d at 584-86; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8).

B. June 2010 IEP

[4] At the impartial hearing, the only reference to related services during the district's direct examination was a question inquiring what evaluative data the CSE used to determine the related services recommendations included in the IEP (Tr. p. 13). The first reference to the frequency of the related services occurred during cross-examination (Tr. pp. 26-27) and the parent's attorney first alleged during her opening statement, after the district rested its case, that the frequency of the related services would have caused the student to miss class time (Tr. p. 62). Taken together, the testimony does not indicate that the district opened the door to the IHO's sua sponte determination that the frequency of the related services were too burdensome (see Tr. p. 13; see also B.M., 569 Fed. App'x at 59; M.H, 685 F.3d at 249-50).

While not addressed by the IHO, in the answer to the district's cross-appeal, the parent asserts an alternative ground for upholding the IHO's decision that the district failed to offer the student a FAPE. Specifically, as alleged in the parent's due process complaint notice, the parent argues that the student could not benefit from instruction in English in the alternative placement, notwithstanding the recommendation for a bilingual paraprofessional.

Initially, in order to determine the appropriateness of the disputed placement, a review of the student's needs is necessary.[5] However, in this case, the district did not submit any documentary evidence during the impartial hearing consisting of reports or evaluations considered by the June 2010 CSE (see Dist. Exs. 1-4). As neither party submitted any evaluative information regarding the student (see Dist. Exs. 1-4; Parent Exs. A-L), it is difficult to decipher the student's needs from the IEP alone (see Dist. Ex. 3). The parent did not raise an issue on appeal regarding the sufficiency or consideration of evaluative information before the CSE or the adequacy of the student's present levels of performance as set forth in the June 2010 IEP; accordingly, these claims are not in and of themselves a basis for finding a denial of a FAPE. Nonetheless, based on the hearing record before me, there is little probative evidence for assessing the particular placement recommendations challenged in this case. This is especially so with respect to the student's ability to receive educational benefit in a class with instruction in Yiddish versus instruction in English with a Yiddish-speaking paraprofessional. Based on this failure and, consequently, the undeveloped record with regard to the relevant issues, addressed further below, I find that the district failed to establish that it offered the student a FAPE for the 2010-11 school year.

While the June 2010 IEP describes the student's strengths and weaknesses in academic achievement, functional performance, and learning characteristics, as well as in social and physical development, there is insufficient information in the hearing record to determine the source of this information (Dist. Ex. 2 at pp. 3-8). The district school psychologist testified that the CSE received much of the information contained in the June 2010 IEP from the student's teacher and related service providers (Tr. pp. 18-21; Dist. Ex. 2 at pp. 3, 6-7, 9-18). The student's teacher confirmed that the goals included in the June 2010 IEP were provided by the private school and that she discussed the student's general functional level during the CSE meeting (Tr. pp. 105-06, 115). However, there is no other indication in the hearing record that the CSE reviewed any evaluative information about the student, such as evaluative reports or progress reports.[6]

What is particularly problematic for the district in this case is that the June 2010 IEP describes the student's abilities and weaknesses in academics and language, but the available evidence fails to indicate whether the description reflects the student's capabilities in Yiddish, English, or both languages (Dist. Ex. 2 at pp. 3-4). School districts must ensure that assessments

[5] Although the parent alleged in the due process complaint notice that the June 2010 CSE did not review sufficient documentation (Dist. Ex. 1 at p. 1), the IHO did not rule on this claim and the parent has not further argued it on appeal (see generally IHO Decision; Pet.; Ans. to Cross-Appeal).

[6] In response to a question regarding the June 2010 CSE's related services recommendations, the district psychologist testified that the CSE "generally" receives updates from the private school and classroom observations; however, the hearing record does not include any updates from the student's related service providers or reports from a classroom observation (Tr. pp. 13, 22). The psychologist testified that a classroom observation was performed during the 2009-10 school year and that she could provide a copy of the report; however, a copy was never offered into evidence (Tr. p. 22).

and other evaluative materials used to assess a student are "provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer" (34 CFR 300.304[c][1][ii]; 8 NYCRR 200.4[b][6][i][a]). A CSE must also consider special factors including a student's communications needs and, in the case of a student with limited English proficiency, how the student's language needs relate to the student's IEP (20 U.S.C. § 1414[d][3][B][ii], [iv]; 34 CFR 300.324[a][2][ii], [iv]; 8 NYCRR 200.4[d][3][ii], [iv]; see "Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/ English Language Learners (ELLs) who are Students with Disabilities," Office of Special Educ. Mem. [March 2011], available at http://www.p12.nysed.gov/specialed/publications/ bilingualservices-311.pdf).

As noted above, the June 2010 CSE recommended that the student receive instruction in Yiddish in a 12-month school year program in a 6:1+1 special class in a specialized school with the support of a 1:1 health paraprofessional (Tr. pp. 12, 17; Dist. Ex. 2 at pp. 1, 21, 23). The June 2010 IEP also indicated a recommendation for an alternate placement, in the event a 6:1+1 Yiddish special class was not available, consisting of instruction in in a 6:1+1 English special class and assignment of a 1:1 Yiddish-speaking paraprofessional (Dist. Ex. 2 at p. 1; see Tr. p. 17). The parent testified that, during the June 2010 CSE meeting, she disagreed with the district's recommendation for instruction in English with a bilingual paraprofessional because the student primarily spoke Yiddish (Tr. p. 214). She testified that the student would have had difficulty learning in English and would not have benefitted from the assistance of a bilingual paraprofessional (Tr. pp. 214-15).

While the June 2010 IEP indicates that the student's "preferred language/mode of communication" was Yiddish, there is no explanation within the IEP of the extent to which the student may have benefited from instruction in English or from an alternate placement with a bilingual paraprofessional (Dist. Ex. 2).[7] Additionally, there is also no indication in the June 2010 IEP or in the hearing record that the June 2010 CSE considered the student's communication needs or language needs in recommending an alternate bilingual paraprofessional. Further, as discussed above, the district did not submitted any evaluative information regarding the student and there is no evaluative information in the hearing record indicating the student's proficiency in English at the time of the June 2010 CSE meeting. As a result, there is insufficient information in the hearing record to determine the student's proficiency in English or the extent to which the student may

[7] As an example, the June 2010 IEP indicates that the student can "carry on a two sided conversation" and "can follow one-to-two step directions" but it does not indicate whether the student exhibits these skills in English (Dist. Ex. 2 at p. 3).

have required direct instruction in Yiddish and, consequently, the district did not establish that it offered the student a FAPE for the 2010-11 school year.[8]

C. Unilateral Placement

Having determined that the district did not offer the student a FAPE for the 2010-11 school year, I next address the appropriateness of the parent's unilateral placement of the student at the NPS for the 2010-11 school year. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; 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

[8] With respect to the parent's claims relating to the assigned public school site, which the IHO did not address in any detail and which the parties continue to argue on appeal, in this instance, for the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parent's assertions are without merit. The parent's claims regarding the assigned public school site (see Dist. Exs. 1 at p. 1; 3), turn on how the June 2010 IEP would or would not have been implemented and, as it is undisputed that the student did not attend the district's assigned public school site (see Dist. Ex. 1 at p. 1; Parent Ex. A), the parent cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice"]; K.L., 530 Fed. App'x at 87; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

1. Specially Designed Instruction

The hearing record shows that the NPS offered students with disabilities individualized instruction in a small group environment with therapeutic support (Tr. p. 67; Parent Ex. H). The NPS consisted of ungraded classes with a total enrollment of approximately 30 students ranging from five to sixteen years of age, all of whom have IEPs (Tr. pp. 67-68, 137-38). The school described its program as focusing on "multiple domains," which included regulation, routine, nutrition, activities of daily living (ADL) skills, physical development, a cognitive component, a communication system, and social/emotional development (Parent Ex. H). The student's program for the 2010-11 school year included five 30-minute sessions of OT per week, five 45-minute sessions of PT per week, four 60-minute sessions of speech-language therapy per week, the service of a full-time 1:1 paraprofessional, one 30-minute session of aquatic therapy per week, two 30-minute sessions of feeding therapy per week, 20 hours of behavioral academic instruction per week, and the service of an augmentative assistive technology consultant two times per month (Tr. pp. 144, 148-50, 168-72; Parent Ex. A at p. 6).

The student's teacher indicated the student attended a class with three other students, aged seven to ten, with a range of disabilities (Tr. pp. 69, 72, 77, 110-111, 147). She also described the general reading, math, and writing levels of the students in the class as ranging from kindergarten to first grade (Tr. p. 70). The teacher indicated that, in addition to herself, the student's class was staffed by two other certified teachers and four assistant teachers (Tr. pp. 70-73, 77). She explained that all of the staff had their "specialties" and were present in the classroom based on the schedule and needs of the students (Tr. pp. 71-72). The teacher further explained that each child had a paraprofessional and that the student's paraprofessional was responsible for health and safety as well as ADLs and behavior (Tr. pp. 121-22).

The student's teacher reported that the school provided academic instruction on a one-to-one basis (Tr. p. 77). To address the student's needs in mathematics, the teacher used manipulatives and incorporated mathematic skills into functional activities such as baking, shopping, and other ADL skills to develop functional mathematic understanding (Tr. pp. 77-78). For reading, the teacher provided high interest stories, exposed the student to "lots" of sight words, and worked on reading comprehension to ensure that the student understood what she read (Tr. p. 78). To address the student's self-stimulating behavior the teacher reported that staff used strategies such as ignoring and redirection with verbal prompts in a "very motivating" fashion (Tr. pp. 78-79). To prevent the student from starting to engage in self-stimulating behavior, the teacher reported that the staff taught the student different coping mechanisms and encouraged the student to express her emotions using words and pictures in order to avoid triggering the self-stimulating behaviors (Tr. p. 79).

According to the student's teacher, the NPS provided the student with instruction in her primary language because that is how "she learn[ed] best" (Tr. p. 104). The student's teachers and assistant teachers, except for the music teacher, were bilingual in Yiddish and English, and the student's classes were primarily taught in Yiddish (id.). The school principal indicated that the student's occupational therapist and speech-language pathologist were fluent in English and Yiddish (Tr. p. 155). The student's teacher indicated that she exposed the student to both languages to help the student learn English as well as Yiddish (Tr. pp. 104, 124-25, 136). The teacher also noted that the student learned basic "commands" in English, learned to follow simple directions in English, and understood simple English vocabulary (Tr. pp. 136-37).

To support the development of peer relationships, the teacher indicated that she paired the student with another student for a game to develop turn-taking skills and that the teachers modeled appropriate social interactions, promoted awareness of peers, and facilitated greetings with those in and outside of the classroom (Tr. pp. 79-80).

To address the student's needs related to her cortical vision impairment, the teacher testified that she reviewed an evaluation of the student's vision conducted by a "world renowned expert on [cortical vision impairment]" and participated in monthly conference calls in which the expert consulted with the parent and teacher (Tr. pp. 80-81). The teacher testified that classroom staff tried to create a non-distracting environment, since children with cortical vision impairment could be very distracted by auditory stimulation (Tr. p. 81). The teacher also used light to focus the student on the instructional materials, used clear cut pictures and prints, and provided materials on black or solid colored backgrounds (Tr. pp. 81-82).

Based on the foregoing, the hearing record demonstrates that the NPS appropriately addressed the student's academic, language, social/emotional, cortical vision impairment, and related services needs during the 2010-11 school year.

2. 12-Month School Year

The district argues, and the IHO found, that the NPS was not appropriate because it did not offer the student an educational program on a 12-month school year basis (see IHO Decision at pp. 11-12). While a CSE must consider a 12-month school year for students who need such services "to prevent substantial regression" (8 NYCRR 200.1[eee], 200.6[k][1]), it does not necessarily follow that in every instance where a CSE recommended a 12-month school year, such

services were necessary to prevent substantial regression. In this instance, there is no evidence in the hearing record indicating why the June 2010 CSE recommended 12-month services or whether the student needed such services to prevent substantial regression (Dist. Ex. 2 at p. 1). As the district failed to offer evidence of the student's need for 12-month services, the district cannot controvert the evidence submitted by the parent indicating the student's needs and the extent to which the parent's unilateral placement either addressed or failed to address those needs (see A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).

Additionally, the district and the IHO only focused on this one aspect of the parent's unilateral placement and failed to consider the totality of the circumstances (see Frank G., 459 F.3d at 364 ["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"]). Accordingly, for a student who required a 12-month school year, a unilateral placement's failure to provide a program over the summer months might result in a finding that such a placement was not appropriate (see, e.g., Application of a Student with a Disability, Appeal No. 12-094; Application of the Dep't of Educ., Appeal No.: 12-002). Here, however, the totality of the circumstances, including the lack of information in the hearing record about the student's need for such a program, supports a contrary conclusion (see Frank G., 459 F.3d at 364).

3. Progress

While evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate, it is a factor that may be considered (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *10 [S.D.N.Y. Feb. 4, 2013]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; Gagliardo, 489 F.3d at 115; see also Frank G., 459 F.3d at 364). In this instance, the evidence in the hearing record, while largely subjective, indicates that the student made progress at the NPS during the 2010-11 school year (e.g., Tr. pp. 87-91, 95-99, 103, 108-09).

The student's teacher testified that the student made progress "with everything across the board," including improvement with basic skills, comprehension, answering questions, and developing real life math skills (Tr. p. 108). The teacher also reported that the student showed progress with environmental awareness, interacting with peers, navigating the environment, and engaging in and enjoying games with peers (Tr. pp. 108-09). In addition to the teacher's description of progress, the parent also indicated that the student made progress in the areas of independence, awareness of others, communicating with peers, and commenting on what was going on in class (Tr. p. 220).

Regarding academics, the student's teacher testified that the student progressed in math and reading (Tr. pp. 87-91). The student increased her reading level, her sight words, and comprehension (Tr. p. 87). The student progressed from simple answers related to reading material to prompted insertion of answers, fill in the blank answers, and more answers to simple "wh" questions (Tr. pp. 87-88). The teacher indicated that, in math, the student had an "obsession with

numbers" and could count and add (Tr. p. 91). The teacher explained that staff worked on attaching meaning to numbers and indicated the student learned to associate meaning to the numbers, basic addition and subtraction, and how to solve simple problems (Tr. pp. 91-92). The teacher indicated that the student made progress in classifying objects and in the area of visual auditory comprehension (Tr. pp. 95-96). The teacher noted that the student moved from answering questions with "the first answer off the top of her head" to answering questions in a "different way," and she learned to attend to and show interest in books (Tr. p. 97). The teacher also reported that the student made progress in handwriting, moving from scribbling on walls and tables to focusing on the paper and the representations of letters and numbers (Tr. pp. 98-99).

Regarding social development and peer play, the teacher reported that, by the end of the year, the student was able to participate in games appropriately (Tr. p. 93). The teacher indicated that the student progressed from being in her "own world" at the beginning of the year, throwing game pieces on the floor or mouthing them, to taking turns and waiting for her turn (Tr. pp. 93-94). The teacher also indicated that the student made progress in relation to ADL skills (Tr. p. 103). She described that, while the student initially showed no interest in anything related to food, the student learned to read ingredients and measure, while interacting with the other students (id.).

Considering the special education instruction and related services provided by the NPS to address the student's needs during the 10-month school year and the student's progress during the 2010-11 school year, the hearing record supports a finding that the NPS was an appropriate unilateral placement.

D. Equitable Considerations

Having determined that the NPS was an appropriate placement to address the student's needs during the 2010-11 school year, I now consider whether equitable considerations warrant a reduction in tuition reimbursement. The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; T.M. v. Kingston City Sch. Dist., 891 F. Supp. 2d 289, 295 [N.D.N.Y. 2012]; 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. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363-64 [S.D.N.Y. 2009]; Thies

v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; see also Frank G., 459 F.3d at 363-64; Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty 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]).

1. Sufficiency of 10-Day Notice

The district contends that equitable considerations should preclude or diminish an award of relief because the parent did not provide the district with an appropriate notice of her intention to unilaterally place the student.

Review of the hearing record shows that the parent sent two letters informing the district of her objections to the recommended program and her intent to unilaterally place the student at the NPS for the 2010-11 school year (Dist. Ex. 3; Parent Ex. I). The first letter, dated July 13, indicated that the parent found the district's program inappropriate because of a "big language barrier" and because the student would not be able to understand instruction in English (Dist. Ex. 3). The letter also indicated that the parent accepted all related services and would "appreciate an alternate placement offer" (id.). The parent then sent another letter on August 23, 2010 informing the district that she would place the student at the NPS and seek reimbursement from the district for the cost of tuition (Parent Ex. I). The parent indicated that the student's needs were "best stimulated and supported by [the NPS]" (id.).

The August 23, 2010 letter was timely, as the parent enrolled the student at the NPS on September 5, 2010 (Parent Exs. A at p. 3; I). The district contends that the parent's July 2010 and August 2010 letters were insufficient because they did not indicate any objections to the related services recommended in the June 2010 IEP. While the district is correct in that the parent did not raise any objections regarding the related services recommendations in her letters (Dist. Ex. 3; Parent Ex. I), as discussed above, the parent did not raise any claims regarding related services in her due process complaint notice either and the IHO's determination regarding related services was outside of the scope of review (see IHO Decision at pp. 10-11; Dist. Ex. 1 at pp. 1-2). In addition, the district had an opportunity to remedy the concerns expressed by the parent in her July 2010

letter but chose not to respond (Dist. Ex. 3 at p. 1). Under these circumstances, the parent's 10-day notice was sufficient and is not a basis for a reduction in tuition reimbursement.

2. Cost of Unilateral Placement

Although the district does not contest the amount or frequency of related services provided at the NPS, the district, without further explanation, asserts that the cost of the tuition and related services at the NPS was unreasonable and should be reduced (Ans. ¶ 37). The reasonableness of the cost of tuition at the unilateral placement is relevant in determining whether equitable considerations support an award of tuition reimbursement (Carter, 510 U.S. at 16). However, in this instance, there is insufficient evidence in the hearing record to support a finding that the cost of tuition and related services was unreasonable. For example, during closing the district asserted that the rate for speech-language therapy and OT at the NPS was $60 per hour as opposed to the district's rate of $45 per hour (Tr. p. 242). However, while the parent entered her contract with the NPS into evidence indicating the cost of related services at the NPS, the district chose not to enter any evidence indicating what the district believed to be a reasonable cost for such services (Parent Ex. A at p. 6). Without any indication of what might constitute an unreasonable charge, and without any evidence of collusion or fraudulent conduct on the part of the parent or nonpublic school, the district's allegation is insufficient to warrant a reduction in tuition reimbursement (see E.M., 758 F.3d at 461; Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 429-30 [S.D.N.Y. 2011]).

On the other hand, review of the hearing record shows that a portion of the tuition sought by the parent was for evaluations of the student (Parent Ex. A at p. 6). The evaluations conducted or arranged for by the NPS included a feeding therapy evaluation, a behavioral evaluation, and an assistive technology evaluation (Tr. pp. 164, 170-71; Parent Ex. A at p. 6). The IDEA and State and federal regulations guarantee parents the right to obtain an independent educational evaluation (IEE) (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district unless the district requests a hearing and establishes the appropriateness of its evaluation (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]).

In this instance, although there is evidence that the parent obtained IEEs through the unilateral placement (Parent Ex. A at p. 6), there is no indication in the hearing record that the parent either requested an evaluation from the district or disagreed with an evaluation conducted by the district. Because the parent did not request an evaluation from the district or disagree with an evaluation conducted by the district, the parent is not entitled to reimbursement for the cost of the NPS evaluations at public expense (see 34 CFR 300.502[b][1]; 8 NYCRR 200.5[g][1]).

Accordingly, the parent will not be awarded the cost of the feeding therapy evaluation, behavioral evaluation, or assistive technology evaluation.[9]

E. Relief

The district argues that the parent's request for direct payment should be denied, asserting that the parent is not liable for the cost of the student's tuition and has not shown an inability to front the cost of the student's tuition at the NPS. Parents may be awarded retroactive direct tuition payment as relief where they have satisfied the factors under Burlington for tuition reimbursement, have not made tuition payments due to a lack of financial resources, and are legally obligated to do so (Mr. and Mrs. A., 769 F. Supp. 2d at 406).

The parent entered into a contract with the NPS on September 5, 2010 (Parent Ex. A at p. 3). Pursuant to the contract, the total tuition for the 2010-11 school year, including related services, was $169,450 (Parent Ex. A at p. 6). The hearing record indicates that the parent made payments toward the tuition in the amount of $51,000 leaving a balance of $118,450 as of April 2012 (Parent Ex. C).[10] The parent testified that she paid as much of the tuition as she was able and was responsible for payment of the remaining balance (Tr. pp. 216-17, 219). She also testified that there was a point where she became "delinquent" and could not "catch up" (Tr. p. 219). The parent submitted a copy of a portion of her joint income tax return indicating that the parents' annual salary was significantly below the annual cost of tuition at the NPS (Parent Ex. F at p. 1).

Based on the above, the parent has established a legal obligation to pay the student's tuition at the NPS for the 2010-11 school year (see E.M., 758 F.3d at 457-60). In addition, the parent's testimony and income tax return sufficiently establish that the parent was unable to front the cost of the student's tuition at the NPS for the 2010-11 school year (Tr. pp. 216-17, 219; Parent Ex. F). Under these circumstances, the appropriate equitable relief consists of direct funding of the student's tuition at the NPS for the 2010-11 school year (see Mr. and Mrs. A., 769 F Supp. 2d at 406; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the district denied the student a FAPE for the 2010-11 school year, that the NPS was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[9] The cost of the evaluation was $600 for the feeding therapy evaluation, $810 for the behavioral evaluation, and $540 for the assistive technology evaluation (Parent Ex. A at p. 6).

[10] Payments were made directly to the NPS by various lenders on behalf of the parent pursuant to loan agreements entered into the hearing record (Parent Exs. J-M).

IT IS ORDERED that the IHO's decision dated August 17, 2012, is modified, by reversing those portions of the decision regarding appropriateness of the related services recommended in the June 2010 IEP and the appropriateness of the parent's unilateral placement; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for amounts paid and directly fund the remaining costs of the student's tuition at the NPS for the 2010-11 school year, less the cost of the feeding therapy, behavioral, and assistive technology evaluations.

Dated: **Albany, New York**
December 15, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER