The University of the State of New York

The State Education Department
State Review Officer
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No. 13-020

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Commack Union Free School District

Appearances:
Pamela Anne Tucker, PC, attorneys for petitioners, Pamela Anne Tucker, Esq., of counsel

Lamb & Barnosky, LLP, attorneys for respondent, Robert H. Cohen, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Sappo School (Sappo) for a portion of the 2011-12 school year and all of the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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 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]).

III. Facts and Procedural History

The student has a history of attention deficit hyperactivity disorder (ADHD), obsessive compulsive disorder (OCD), anxiety disorder, and Tourette's Syndrome, as well as academic difficulties in reading, writing, and math (Parent Exs. B; C; G at pp. 1, 4; J; Y). In May 2011, the CSE convened for the student's annual review and to develop an IEP for the 2011-12 school year (seventh grade) (Dist. Ex. 3). Finding that the student remained eligible for special education and related services as a student with an other health-impairment the CSE recommended the student continue to receive a placement that included integrated co-teaching (ICT) services and a 12:1 skills class (a special class) for one period per day (Dist. Ex. 3 at p. 1). The CSE also recommended that the student receive math instruction in a small, self-contained class; however, the parents rejected this option due to social concerns (Dist. Ex. 3 at p. 1).[1]

During the 2011-12 school year the student continued to experience educational difficulties, as his OCD interfered with his ability to get to school and attend classes, as well as his ability to learn (Dist. Ex. 5; see Dist. Exs. 18, 19). In September 2011 the school social worker, along with the student's mother, expressed concern that the student was becoming depressed (Dist. Ex. 5). In response the CSE added weekly counseling sessions to the student's IEP (see Dist. Ex. 6 at p. 1).

By late October 2011 the student was unable to attend school and his skills were "weakening" (Dist. Ex. 6 at p. 1). The CSE reconvened on October 24, 2011 and recommended the student for a truncated school day based on his tardiness and difficulty getting to school (id.). The CSE also recommended that the student receive math instruction after school through home instruction, as the truncated day would cause him to miss his math class (id.; see Dist. Ex. 27; Parent Ex. V).[2]

In November 2011, at the recommendation of the student's private psychiatrist and therapist, the parents placed the student in an out-of-state residential placement that specialized in the treatment of anxiety disorders (Dist. Ex.16; Parent Exs. L at p. 1; S at p. 3; U).

The CSE met on February 2, 2012 in anticipation of the student's impending discharge and return home from the out-of-state residential placement (Dist. Ex. 8 at p. 1).[3] According to the February 2012 IEP, the CSE recommended that the student be screened by the board of cooperative educational services (BOCES) for placement at one of its middle school programs (the BOCES

[1] The student's mother testified that "[t]he self-contained class would consist of more children with more issues and [the student] already had [an] issue with being in the integrated class" (Tr. p. 963). She noted that the student had difficulty with being identified as "different" and reported that the parents did not believe that placing the student in a more isolated setting where he may feel different would be good for him (Tr. p. 963; see Tr. pp. 943-44).

[2] The CSE recommended that the home instruction take place at its middle school based on recommendations from the student's outside therapists and district social worker that the student should remain in the school building as much as possible (Tr. p. 62; Dist. Ex. 6 at p. 1).

[3] The parties determined prior to the February 2012 CSE meeting that the student would be unable to return to the district's middle school as it was too large and the student required a transitional placement (Tr. pp. 64-67, 155, 405, 984).

program);[4] a recommendation with which the parents agreed (Dist. Ex. 8 at p. 1). The student was discharged from the residential placement and returned home on or about February 13, 2012 (Parent Ex. R).[5]

On March 2, 2012 the student and his mother attended the BOCES screening to assess placement in the BOCES program (Tr. pp. 501, 1071). The student was accepted into the BOCES program and attended the school for one day on March 14, 2012 (Dist. Ex. 9 at p. 1). On March 16, 2012 the CSE met and recommended that the student be placed in an 8:1+1 special class in the BOCES program and receive related services of individual counseling for one 30-minute session per week, small group counseling for one 30-minute session per week, and small group family counseling for one 60-minute session per month (id. at pp. 1, 6). However, the parents rejected the recommended placement, citing the student's refusal to return to the school as the reason (id. at p. 1). Furthermore, the parents advised the CSE that they were pursuing a private school placement for the student (id.).

In a letter dated April 12, 2012 the parents advised the district that they had enrolled the student in Sappo the week of March 12, 2012 and requested that the district provide the school with tuition payment on behalf of the student (Dist. Ex. 24 at p. 1). The parents indicated that they intended to continue the student at Sappo "for the foreseeable future," until the student's skill and comfort level would possibly allow him to return to a larger school (id.). The parents alleged that the atmosphere at the BOCES program was anxiety provoking for the student and that "his condition continues to restrict daily situations that preclude him from attending a school not meeting the criteria of his needs" (id.).

In a due process complaint notice dated August 3, 2012, the parents alleged that the district failed to offer the student a free appropriate public education for a portion of the 2011-12 school year and all of the 2012-13 school year and requested tuition reimbursement for Sappo (see Parent Ex. A). In a response dated April 23, 2012 the district denied the parents request for tuition reimbursement asserting that it had made an offer of FAPE to the student (Dist. Ex. 25).

An impartial hearing convened on October 15, 2012 and concluded on November 27, 2012 after five days of proceedings (Tr. pp. 1-1112). In a decision dated January 11, 2013 the IHO determined that the district offered the student a free appropriate public education (FAPE) for the contested portion of the 2011-12 school year, as well as for the 2012-13 school year, and denied the parents' request for tuition reimbursement (IHO Decision at pp. 12-13).

[4] The BOCES program is a small, therapeutic middle school composed of 8:1+1 special classes, in which all of the students are provided with individual, group, and family counseling (Tr. pp. 466-67).

[5] The district offered to provide the student with home instruction while he was awaiting the BOCES screening (Tr. pp. 72-73). The parents confirmed that teachers from the district contacted them in an effort to arrange instruction, but indicated that the dates suggested by the teachers did not align with the family's schedule (Tr. pp. 1073-74). The parents agreed that this may have been due, in part, to the fact that they were visiting private schools during this time (Tr. p. 1074).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is presumed and will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in holding that the district offered the student a FAPE by recommending that he be placed in the BOCES program for the remainder of the 2011-12 school year.

2. Whether the IHO erred in not addressing the issue of least restrictive environment (LRE).

3. Whether the IHO erred in concluding that there was no denial of FAPE for the 2013-13 school year due to the parents' claim that the CSE failed to convene a meeting to prepare an IEP for the student for the 2012-13 school year.

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]). "'[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 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. 2011-12 School Year

Turning first to the issue of whether the district offered the student a FAPE for that portion of the 2011-12 school year contested by the parents, I find that the hearing record supports the IHO's determination that the educational services recommended by the district were reasonably calculated to confer meaningful educational benefit upon the student in the LRE (see IHO Decision at p. 13).

As an initial matter the parents did not raise any claims with respect to the adequacy of the supports in the March 2012 IEP in either their due process complaint notice or in their petition on appeal (see Parent Ex. A).[6] In addition, as noted by the IHO, neither the parents' due process complaint notice nor their testimony identified any dispute regarding the academic or therapeutic services available in the district's proposed 8:1+1 special class placement at the BOCES program (IHO Decision at p. 11; see Tr. pages 1-1112; Parent Ex. A). Rather the IHO found, and I concur, that the parents' objections to the district's recommended program stemmed primarily from their concern regarding environmental factors not on the IEP and the "intuited anxiety-provoking impact the environment would have on [their] son" (IHO Decision at p. 10; see Tr. pp. 997-99).

Based on their visitation of the proposed BOCES placement and the student's attendance at the school for one day, the parents allege that the environment at the BOCES middle school was not conducive to the student's success because school personnel walked around with walkie-talkies, there were signs posted in the office regarding lockdown procedures, no one talked during lunch, the students at the school consisted mainly of "street smart kids" and cursing was accepted in the classrooms (Parent Ex. A at pp. 3-4; see Tr. p. 998). Here, the hearing record shows that the parents preferred the "soothing" atmosphere of Sappo—which according to the student's mother

[6] In their due process complaint notice the parents indicated that the student was enrolled in the special education program at Sappo and that the school was utilizing the district's IEP (Dist. Ex. 24 at p. 1).

included artwork in the hallways, flowers on a table, and classical music playing in the hallways—to that of the BOCES program, which had blank walls, a bustling cafeteria, and "didn't look comforting" (Tr. pp. 994-98, 1000-01; see Tr. p. 951).[7]

While the student did not verbally express any anxiety over his initial visit to the BOCES program, in which he viewed staff use of walkie-talkies and an agitated student being calmed by an adult, the student's mother testified that the student had a "certain discomfort to his look" (Tr. pp. 998-99, 1069-70). She acknowledged, however, that the student's discomfort could have been a reaction to her own (Tr. pp. 1070-71).

With respect to the student's enrollment at the BOCES program, the student's mother testified that when the student returned home from his first day of school he stated that he was "not going back" and that the school was not for him (Tr. p. 1004).[8] According to the parent, the student reported that he was "ashamed" of the school because no one talked at lunch (Tr. p. 1004). Based on his reaction, the student's mother determined that the BOCES program would not be able to meet the student's social/emotional needs and therefore she "was not going to bring him back one more day" (Tr. p. 1006). Although I can greatly sympathize with the parents' concerns, I find that their perception of the atmosphere at the BOCES program as less than comforting to the student does not afford me a basis for finding a denial of FAPE. This is especially true here, where the student was recommended for a therapeutic placement to address his severe anxiety and where a significant goal for the student was to identify and build effective methods for coping with emotionally stressful situations rather than withdrawing from them (Tr. pp. 146-47; Dist. Ex. 9 at pp. 1, 3, 5).

Although in their due process complaint the parents challenged the BOCES environment and the other pupils with whom the student would be placed, it is questionable whether the issue of LRE was sufficiently raised in the due process complaint notice so as to place the district on fair notice of that issue for the impartial hearing. The parents' concern that the district's recommended program was more restrictive than the program chosen by the parents was more clearly identified after the impartial hearing was already in progress. Even assuming for the sake of argument that the parents' had clearly and properly identified LRE in their complaint, such claims with respect to LRE would nevertheless fail. The evidence shows that the information before the CSE in March 2012 supported that the student could not be satisfactorily educated in a general education class with supplemental aids and services due to his need for a smaller, more therapeutic, transitional placement. The district initially considered returning the student to its middle school following his discharge from the out-of-state residential treatment program (Tr. pp. 65-66, 320-21). However, staff from residential treatment program expressed concerned about the

[7] The teacher coordinator of the BOCES program testified that the school does not accept students with conduct disorders (Tr. pp. 480, 482). He confirmed that administrative staff at the BOCES program use walkie-talkies as a means of communication (Tr. pp. 516-17).

[8] The student's mother reported that when the student returned home from the out-of-state residential treatment program he was "very, very excited to find a new school" (Tr. pp. 990-91). She indicated that prior to the BOCES screening the family visited several private schools, including Sappo (Tr. pp. 990-96). In their due process complaint notice the parents reported that after visiting and participating in "trial enrollments" at several private schools and BOCES, due to the student's unique diagnoses they decided to enroll him in Sappo (Dist. Ex. 24; see Tr. pp. 947-50).

size of the district's school and the level of support it could provide (Tr. pp. 65-66, 112-13, 143-44, 155, 326). Based on the concerns of the residential treatment staff, and with the parents' awareness, the district determined that the student required a transitional program prior to returning to the public school (Tr. pp. 143-44). I note that the parents established that the out-of-state residential treatment program had tried to get the student to attend a "small" public school as part of his treatment program without success (Tr. pp. 80, 113, 155-56; see Tr. pp. 424-25).

With respect to the district's attempts to include the student in school programs with nondisabled students to the maximum extent appropriate and to locate a placement as close as possible to the student's home, the hearing record shows that while the CSE referred the student to BOCES for a screening, district personnel also investigated other placement options, but found them to be inappropriate for the student (Tr. pp. 328-31).[9] Moreover, the assistant superintendent for pupil personnel services testified that there were not "a plethora" of "transitional" placements available in the surrounding geographical area (Tr. 66). Based on the evidence, I find the district balanced the student's particular needs with the objective of educating him with nondisabled peers to the extent possible under these circumstances and the district's recommended placement constituted the LRE that addressed the student's unique needs at the time it was offered (Newington 546 F.3d at 119). Here, where the student was being discharged from a residential treatment program where he was physically unable to go beyond the front corridor in a smaller traditional school setting with nondisabled peers (Tr. pp. 113, 155-56, 424-25), I find the district's recommendation was not unreasonable under such circumstances. That the student may have further improved after the CSE meeting was conducted and his toleration of other environments grew does not alter the outcome as of the time that the CSE was required to make a decision.

B. 2012-13 School Year

Turning next to the issue of whether the district offered the student a FAPE for the 2012-13 school year, the IHO found the district's failure to conduct an annual review in anticipation of the 2012-13 school year to be a procedural violation that did not impair the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making progress, or cause a deprivation of educational benefit (IHO Decision at p. 12).

The March 2012 CSE meeting minutes show that the parents rejected the BOCES placement, recommended for the student from March 19, 2012 through June 22, 2012, at the March CSE meeting and indicated that they were pursuing a private school placement for the student (Dist. Ex. 10 at p. 6; see Tr. pp. 1008-09).[10] The parents did not advise the CSE at that time that they would be seeking tuition reimbursement for their private school placement (Tr. pp. 1008-09).

The district social worker testified that in a March 28, 2012 telephone conversation the student's father sought, and she provided, information regarding how to seek tuition reimbursement

[9] The district was aware that the student's parents' were also exploring private school placements during this time (Tr. p. 330-31, 985-87).

[10] The minutes also show that the CSE advised the parents that it could not recommend a private school setting for the student that did not have a special education program or that was not "NYS approved" (Dist. Ex. 10 at p. 6).

and transportation from the district (Tr. pp. 189-91). The district social worker informed the parents of the need to notify the district in writing of their intent to place the student in a private school and seek tuition reimbursement and also of the need to request transportation to the private school by April 1, which the parents did (Tr. pp. 189-92, 1064-65). The student's mother testified that at the time she requested transportation, prior to April 1, 2012, the parents intended to have the student continue at Sappo for the 2012-13 school year (Tr. p. 1065).

As noted above, the parents advised the district in a letter dated April 12, 2012 that they had enrolled the student in Sappo the week of March 12, 2012 and requested that the district provide the school with tuition payment on behalf of the student (Dist. Ex. 24 at p. 1). The parents did not specify the time period for which they were seeking tuition reimbursement, rather they requested that the district pay the Sappo tuition on behalf of the student and stated that they intended to continue the student at Sappo "for the foreseeable future," until the student's skill and comfort level would possibly allow him to return to a larger school (id.).[11]

The March 16, 2012 IEP indicated that the recommended services were to be provided from March 19, 2012 through June 22, 2012 and included a "projected" annual review date of June 22, 2012 (Dist. Ex. 9 at pp. 1, 2).

In their August 2012 due process complaint notice the parents alleged that the district's recommended program was not appropriate for the student and requested tuition reimbursement for the 2011-12 and 2012-13 school years (Parent Ex. A). The district confirms that the CSE did not reconvene following its March 16, 2012 meeting to develop an IEP for the student for the 2012-13 school year (Tr. pp. 126-27). The assistant superintendent for pupil personnel services testified that once the parents withdrew the student from the district (at the March 16, 2012 CSE meeting) and parentally placed him in a private school "he was no longer our student" (Tr. p. 127). I find that, under the circumstances presented herein, the parents had clearly put FAPE at issue and the district may not simply cease IEP planning for the student simply because the parent effectuated a unilateral placement (see Letter to Watson, 48 IDELR 284 [OSEP 2007]; see also Town of Burlington v. Dep't of Educ., 736 F.2d 773, 794 [1st Cir. 1984], aff'd 471 U.S. 359 [1985] ["pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law"]). Accordingly, district's failure to develop an IEP for the student for the 2012-13 school year constituted a denial of a FAPE.

C. Unilateral Placement

It is now necessary to determine whether the unilateral placement of the student at Sappo for the 2012-13 school year was 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 offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The

[11] The parents further asked for the district's support in sending the student to "the best possible program so that he may experience the best possible outcome" (Dist. Ex. 24 at p. 2).

private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *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).

With regard to the parties' dispute over whether Sappo was appropriate to address the student's needs during the 2012-13 school year, the evidence in the hearing record shows that Sappo constituted an appropriate unilateral placement for the student. As described in the hearing record, Sappo is a small, private school that employs a holistic approach to education (Tr. p. 864; Parent Ex. AA at pp. 1, 5). The mission of the school includes providing students with a "social

emotional learning environment" that allows them to develop a sense of self-awareness and self-management skills in order to achieve school and life success (Parent Ex. AA at pp. 3, 9; see Tr. pp. 733, 801, 855). The school employs the Sappo Holistic Approach & Procedures in Education (SHAPE) methodology that was developed by the school's founder (Tr. p. 800). The methodology includes strategies such as the "10/5" program, which is used to increase attention span; the 4:1 commendation/criticism ratio, used to raise self-esteem; and self-evaluation charts, used to stimulate motivation (Parent Ex. AA at p. 7). The school features a college preparatory curriculum based on New York State standards and instruction is differentiated (id. at pp. 10, 12). The special education department at Sappo provides both resource room and counseling services and includes certified special education teachers, regular education teachers and counselors, supported by trained paraprofessionals (id. at p. 27).

The hearing record shows that for the 2012-13 school year there were approximately 37 students enrolled in Sappo (Tr. pp. 731, 742). The student was placed in a class of six students at the seventh to eighth grade level (Tr. p. 752; see Dist. Ex. 29). He received weekly individual and group counseling sessions from a certified school counselor (Tr. pp. 707-09, 719, 749-50). According to the school counselor, the individual counseling sessions focused on helping the student to identify environmental triggers for his anxiety and assisting the student with calming himself prior to entering fearful situations (see Tr. p. 719). The group counseling sessions, referred to as a "peer circle," focused on helping students build their interpersonal, communication and conflict resolution skills, as well as how to express themselves and their viewpoints in a socially acceptable manner (Tr. p. 712, 722). In addition to counseling, the student participated in a daily study skills class that addressed his weakness (Tr. pp. 882-83). Sappo personnel testified that during the 2012-13 school year they implemented the goals and accommodations from the February 2012 IEP (Tr. pp. 715-21, 773, 877-81; see Dist. Ex. 8).[12] In addition they described how they implemented the recommendations from the out-of-state residential treatment program (Tr. pp. 773-74; 794-800, 881-89; see Dist. Ex. 14). Although not a dispositive factor, Sappo personnel testified that the student demonstrated social/emotional and academic progress during the 2012-13 school year (Tr. pp. 717-22, 871).

While the district asserts that Sappo did not provide special education services to the student because the school counselor was not a licensed psychologist, social worker, or mental health counselor, the district's assertion is factually incorrect. The hearing record shows that the Sappo school counselor was certified both as a school counselor and licensed as a mental health counselor, and that she was qualified to provide therapy in a school setting (Tr. pp. 708, 748). Moreover, the school counselor provided the student with individual counseling to address his anxiety and group counseling that more broadly focused on improving the student's interpersonal skills (Tr. p. 712, 716, 722). Based on the above, the district's challenges that the parents have met their burden to show that Sappo was an appropriate unilateral placement for the student for the 2012-13 school year must fail.

[12] The goals and accommodations in the student's February 2012 IEP are the same as those in the student's March 2012 IEP (compare Dist. Ex. 8 at pp. 4-7 with Dist. Ex. 9 at pp. 4-7).

D. Equitable Considerations

Having found that the district failed to offer the student a FAPE for the 2012-13 school year and that Sappo constituted an appropriate unilateral placement for the student, 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 S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

To the extent the district argues that equitable considerations do not favor the parents, it does so only with respect to his placement at Sappo for the latter half of the 2011-12 school year. For the 2012-13 school year I find that the parents gave the district adequate notice of their intent to seek reimbursement, there was no evidence that they were uncooperative, and equitable considerations favor their request for relief.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for that portion of the 2011-12 school contested by the parents, the necessary inquiry for the 2011-12 school year is at an end and there is no need to reach the issues of whether Sappo was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief. With respect to the 2012-13 school year, I find that the district failed to offer the student a FAPE, Sappo was an appropriate unilateral placement for the student, and equitable considerations favor the parents' claim for tuition reimbursement.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the IHO dated January 11, 2013 is modified, by reversing that portion which found that the district offered the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that the district shall, upon receipt of proof of payment, reimburse the parents for the costs of the student's tuition at Sappo for the 2012-13 school year.

Dated: **Albany, New York**
October 28, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER