



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-060

**Application of a STUDENT WITH A DISABILITY, by his 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:**

Mayerson and Associates, attorneys for petitioner, Maria C. McGinley, Esq., and Gary S. Mayerson, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 son's tuition costs at the Rebecca School (Rebecca) for the 2012-13 school year. The appeal must be sustained.

### **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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

For the 2011-12 school year, the student attended Rebecca and received instruction in an 6:1+2 special class that employed the Developmental Individual-difference Relationship-based (DIR) model, in addition up to ten hours per week of home-based special education teacher support services (SETTS) using applied behavior analysis (ABA), and transportation to and from school with limited travel time (see, e.g., Tr. pp. 591, 739-41; Dist. Ex. 5 at p. 8).

On March 14, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 2 at pp. 1-15). Finding the student eligible for special education as a student with autism, the March 2012 CSE recommended a 12-month school-year program consisting of a placement in a 6:1+1 special class in a specialized school and

related services of: five 40-minute sessions of individual occupational therapy (OT) per week; five 40-minute sessions of individual speech-language therapy per week; one 40-minute session of group (2:1) counseling per week; one 40-minute session of individual counseling for per week; and a full-time 1:1 crisis management paraprofessional (id. at pp. 1, 9-10; see also Dist. Ex. 10 at p. 1, 5).<sup>1</sup>

By final notice of recommendation (FNR) dated June 11, 2012, the district summarized the 6:1+1 special class and related services recommended in the March 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 6).

By letter dated June 15, 2012, the parent notified the district of her intention to unilaterally place the student at Rebecca for the 2012-13 school year at public expense and to seek the provision of 10 hours per week of home-based SETSS, two hours per week of a therapeutic art program during the summer months, and one hour per week of home-based counseling, in addition to the provision of transportation services for the student (see Parent Ex. K at p. 1). In her letter, the parent rejected as inappropriate the March 2012 IEP, noting several of her concerns, including the recommended level of services and behavioral interventions (id.).<sup>2</sup> After visiting the assigned public school site on June 20, 2012, the parent informed the district by letter, dated June 29, 2012, that she found the assigned public school to be inappropriate to meet the student's needs and reiterated her requests for tuition reimbursement and other services (Parent Ex. L at p. 1-2).

On July 2, 2012, the parent executed an enrollment contract with Rebecca for the student's attendance during the 2012-13 school year beginning in July 2012 (see Parent Ex. N at pp. 1-6).<sup>3</sup>

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

By due process complaint notice, dated July 9, 2012, the parent enumerated approximately 118 allegations in support of her claim that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at pp. 1-14). Among other things, the parent alleged that the May 2012 failed: to consider evaluative information provided to the CSE by Rebecca; to conduct a proper functional behavioral assessment (FBA) or develop an appropriate behavioral intervention plan (BIP); to conduct a triennial evaluation; and to develop an IEP with annual goals and short-term objectives that addressed the student's unique needs (id. at pp. 4-8). The parent also alleged that the public school site to which the student was assigned was inappropriate because it would not have been able to meet the student's educational and related service needs (id. at pp. 10-12). As relief, the parent requested: reimbursement for the cost of: the student's attendance at Rebecca for the 2012-13 school year; 10 hours per week of home-based

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

<sup>2</sup> By separate letter dated June 15, 2012, the parent informed the district that she did not have the opportunity to visit the assigned public school site listed in the FNR and provided the district with a list of her potential concerns and questions regarding the assigned school (see Parent Ex. J at pp. 1-2).

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

SETSS; up to two hours per week of a therapeutic art program during July and August 2012; up to four hours per month of individualized parent counseling and training; transportation to and from school; and compensatory additional services for all pendency services to which the student was entitled, but did not receive (id. at p. 13).

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

An impartial hearing convened on August 13, 2012 and concluded on November 28, 2012, after six days of proceedings (Tr. pp. 1-936). By decision dated March 11, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year (see IHO Decision at p. 16). Specifically, the IHO found that the student required 1:1 instruction to learn new skills, and, therefore, the district's proposed placement of the student in a 6:1+1 special class was not reasonably calculated to enable the student to receive educational benefit (id. at p. 9). The IHO also found that the district's failure to include a home-based after-school program in the March 2012 IEP denied the student a FAPE because such a program was necessary for the student to avoid regression (id. at p. 10). The IHO further found that the district's FBA and BIP violated the student's right to a FAPE because the FBA failed to identify the setting in which the student's behaviors took place, the triggers for those behaviors, or appropriate interventions to manage those behaviors (see id. at pp. 10-14).

With regard to the parent's unilateral placement of the student at Rebecca, the IHO found that the placement was inappropriate and not reasonably calculated to enable the student to receive educational benefit (IHO Decision at pp. 16-18). The IHO reasoned that Rebecca's school-wide 2:1 ratio as the key component of the DIR method was not designed to address the student's unique need for 1:1 instruction and, further, that there was insufficient objective evidence in the hearing record of whether the student made progress at Rebecca given the subjective nature of the school's progress reports (id. at p. 18). Specifically, the IHO found that Rebecca's progress reports did not meet an objective standard because the school "d[id] not employ objective or standard measures of progress," and the parent did not produce evidence of progress based on objective reports and measureable data (id.). The IHO described Rebecca's progress reports as "vague, subjective and overflowing with jargon" and cited, for example, one particular report as suggesting that "any progress toward cessation of the student's self-biting disappears when he is very upset, thus negating any conclusory description of 'progress made'" (id. at pp. 16, 17). Additionally, the IHO found that, because the student required a BIP to address his "interfering behaviors," the "lack of [any] formal behavior plan whatsoever at Rebecca further render[ed] dubious the placement's ability to benefit him educationally" (id. at p. 18). The IHO found that the evidence showed that the day program at Rebecca, by itself, would not provide the student a FAPE because the "undisputed" evidence in the hearing record demonstrated that the student regressed substantially when he did not receive the home-based services over school breaks (id.).

Finally, the IHO found that, had the parent been entitled to reimbursement for the cost of tuition costs at Rebecca, there would have been no equitable considerations that would have prohibited an award of tuition reimbursement because the parent cooperated with the CSE, visited the assigned public school, and informed the district of her concerns about the placement (IHO Decision at p. 19). Based on the foregoing findings, the IHO denied the parent's request for tuition reimbursement (id.). The IHO awarded the parent, however, the costs of 10 hours per week of the student's home-based ABA/SETTS services because those services were appropriate for the

student (*id.* at pp. 19-20).<sup>4</sup> The IHO denied the remaining relief requested by the parent but ordered the CSE to reconvene "as soon as practicable" to develop an appropriate IEP for the student to include 10 hours per week of home based ABA/SETTS services and to "reflect an appropriate student-to-teacher ratio that ensures an intense level of 1:1 teaching support" (*id.* at p. 20). The IHO also ordered the district to provide or fund the student's related services on a 12-month basis and to fund an independent educational evaluation (IEE) in the form of an FBA to appropriately analyze the student's interfering behaviors at school (*id.*).

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

The parent appeals, seeking to overturn the IHO's denial of her request for tuition reimbursement for the 2012-13 school year. Relevant here, the parent argues that the IHO applied "unduly high and overly restrictive standards" in finding that Rebecca was not an appropriate unilateral placement for the student. The parent argues that evidence of actual progress was not required to establish that Rebecca was appropriate for the student. Moreover, contrary to the finding of the IHO, the parent contends that the evidence in the hearing record demonstrates that the student made meaningful progress at Rebecca. The parent also argues that Rebecca's educational program and related services were sufficiently individualized to meet the student's unique needs and were, therefore, appropriate for the student. Although the parent is in agreement with the IHO's determination that the home-based ABA/SETTS program was appropriate for the student, the parent argues that Rebecca and the home-based services were collectively appropriate and constituted an appropriate educational program that addressed the student's unique needs. The parent also argues that the student's unique needs did not necessarily require a 1:1 learning setting. Finally, the parent argues that equitable considerations favor tuition reimbursement and/or prospective funding.<sup>5</sup>

In an answer the district responds by admitting and denying the allegations raised by the parent in her petition. As an initial matter, although the parent was granted leave to amend her petition to submit additional evidence that was not available at the time of the impartial hearing, the district objects to the parent's additional evidence because that evidence is either not relevant

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<sup>4</sup> To the extent that the IHO found that the home-based ABA/SETTS services were appropriate for the student and ordered the district to fund the costs of 10 hours of ABA/SETTS services per week, the district neither cross-appeals from that finding nor argues on appeal why those home-based services were or were not appropriate for the student. Accordingly, this determination of the IHO is final and binding on the parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

<sup>5</sup> Because the parent did not specifically appeal the IHO's denial of her requests for compensatory additional services and special transportation in the form of limited travel time, the findings of the IHO as to these matters are deemed final and binding and will not be further addressed (see 24 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

or not necessary to the issues presented in this appeal.<sup>6</sup> With regard to the merits of the IHO's findings, the district neither challenges nor appeals from the IHO's determination that it failed to offer the student a FAPE for the 2012-13 school year or that equitable considerations supported the parent's request for relief. Rather, the district avers that the IHO correctly determined that the parent failed to establish the appropriateness of the unilateral placement of the student at Rebecca.

## 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 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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch.

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<sup>6</sup> Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Applying this standard, exhibits J, K, and L, each of which were not available at the time of the impartial hearing, will be considered for the limited purpose of determining whether the student made meaningful progress during the 2012-13 school year (see Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006] [emphasizing the importance of examining evidence of the student's meaningful progress "in determining the appropriateness of an alternative educational placement"]). The remaining exhibits to the petition are unnecessary, irrelevant, or duplicative and will not be considered. In addition, to the extent that the parent has included additional arguments in her amended petition beyond those relevant to the purpose for which the leave to amend was granted (submission of additional evidence), those arguments will not be considered (see 8 NYCRR 279.6).

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]). 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 provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dept 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).

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—Unilateral Placement**

In this case, because the district does not challenge the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year that finding has become final and binding upon the parties and I now turn to the issue of whether the parent's unilateral placement of the student at Rebecca was appropriate.

### **A. Specially Designed Instruction**

Consistent with the evidence in the hearing record describing the student's needs, an independent review of the evidence in the hearing record demonstrates that the student's educational program and services at Rebecca during the 2012-13 school year were appropriate and specially designed to address the student's unique needs. By way of background, the student's educational needs were identified in testimony presented during the impartial hearing and in evaluative documents including a January 2011 psychoeducational evaluation; a December 2011 Rebecca interdisciplinary report of progress update; and several quarterly educational progress reports from the student's SETTS provider (see Tr. pp. 587-88; see generally Dist. Exs. 5; 11; 12; Parent Exs. C; D; E). The student, who is partially verbal, demonstrated deficits in cognitive, adaptive, and social/emotional skills and delays in the areas of receptive, expressive, and pragmatic language, as well as academics, self-regulation, and attention (Dist. Ex. 11 at pp. 2-3).<sup>7</sup>

Rebecca is described in the hearing record as a school for students ages four through twenty-one who have neurodevelopmental delays in relating and communicating, including students diagnosed on the autism spectrum (Tr. p. 581). The school uses a DIR/Floortime model of instruction that focuses on a child's development, sensory profile, and relationships and develops an individualized program to meet each student's needs (Tr. pp. 581, 584-86).<sup>8</sup> According to the director, Rebecca's intake process included administering a functional emotional assessment scale to applicants prior to admission to determine if Rebecca was an appropriate school for the applicant (see Tr. pp. 584-86). The director testified that the school attempted to individualize each child's educational program to meet that child's individual needs (Tr. p. 586).

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<sup>7</sup> According to the parent, the student has received diagnoses of autism, asthma, and apraxia (see Tr. pp. 242, 280; Dist. Ex. 2 at p. 2). When the student was dysregulated, he would engage in self-injurious or aggressive behavior, which could include pinching, hitting, kicking, biting, or crying (Tr. pp. 752, 587-88; Dist. Ex. 5 at pp. 8-9).

<sup>8</sup> The director described DIR as an instructional method for children with neurodevelopmental delays in relating and communicating, including children with autism (Tr. p. 581). She explained that Floortime was an intervention used in the DIR program to target a student's developmental needs using a construct called circles of communication, which was essentially a question/answer technique whereby a question "opens the circle" and an answer "closes the circle" (Tr. pp. 601, 603). The director also indicated that there were several Floortime levels, with level 4 being the level at which children could "open" and "close" a communication circle continuously (Tr. pp. 603-04). Three levels are described in the student's progress reports as "Regulation and Shared Interest" (level one), "Engagement" (level two), and "Two-Way Purposeful Emotional Interaction" (level three) (Pet. Exs. J at p.1; K. at p.1).

With regard to whether Rebecca provided an appropriate level of support in the classroom, the parent argued that the IHO erred in finding that it was "undisputed that [the student] need[ed] 1:1 teaching support to learn new concepts and that the Rebecca School employ[ed] a 2:1 ratio as a key component of the DIR method" and, therefore, that the parent's unilateral placement was not appropriate for the student (IHO Decision at p. 18). A review of the evidence in the hearing record supports the parent's view that the student did not require constant 1:1 instruction or support to receive educational benefit at Rebecca. The student's classroom at Rebecca had an 8:1+3 ratio (Pet. Exs. J at p. 1; K at p.1). The class had a head teacher, "two teacher assistants," and one student had a dedicated 1:1 paraprofessional (Tr. pp. 595, 739). Although the student had a full-time 1:1 paraprofessional in the past, Rebecca staff testified that he had been "very successful" in school since then without one and that the 1:1 support made the learning environment too restrictive for the student, which would have impeded the student's ability to generalize (Tr. pp. 592-94, 690, 754, 793). None of the staff suggested that the student required 1:1 support since then (Tr. p. 594). Further, the provision of 1:1 support was not recommended for the student because the student had "made a lot of progress and didn't need that support anymore"—to wit, the student was joining groups and interacting more with peers (Tr. p. 690). Additionally, the student was provided with 1:1 support in his speech-language therapy, OT, and music therapy (Tr. p. 746). Thus, Rebecca had the student practice very specific social and academic skills in his individual and supportive therapies with the goal of having the student attempt to generalize those skills in the classroom with other students and without 1:1 support (Tr. p. 747; see Tr. p. 511). In view of the foregoing, the IHO erred in determining that the level of support provided by Rebecca was inappropriate for the student.

Turning next to the student's related services needs, the student received OT, speech-language therapy, and music therapy at Rebecca (Tr. pp. 589-90; see Pet. Exs. J at p.1; K at p.1). With regard to OT, the student received two 35-minute sessions per week of individual OT and two 35-minute sessions of OT per week in a group (see, e.g., Pet. Ex. J at p. 6.). The evidence reflects that the OT was designed to meet the student's needs in sensory processing, motor planning, and visual/spatial needs (Tr. p. 688). The small group sessions provided him with role models and also gave him the chance to be a role model for others (Tr. p. 686). The student worked on a motor planning skill, such as using a scooter board and practiced socialization within a small group at the same time (Tr. p. 692). At the time of the hearing, jumping was particularly difficult for the student, so his OT focused on that skill as well (id.). By June 2013, he was able to jump forward using both feet three times, with moderate physical and verbal support (Pet. Ex. K at p. 7). The evidence also indicates that visual and spatial work was an important part of his OT because the student needed to learn how to search his environment for things that he wanted and needed before he became dysregulated (Tr. p. 692). This skill was needed in the school environment, where items were in different places at different times, and the student needed to learn how to "use his eyes to kind of guide his way and find things that he want[ed] and need[ed] to stay regulated" (Tr. pp. 692-93). Between June 2012 and December 2012, the evidence reflects that the student also worked on letter formation in his therapy sessions, which was difficult for him because he needed a visual model of the alphabet to successfully form letters and to decrease frustration (Pet. Ex. J at p. 7).

To address the student's speech-language needs, Rebecca provide the student with three 30-minute sessions of individual speech-language therapy per week and one group session (2:1) per week to target the student's expressive and receptive language skills, oral motor skills, and

pragmatic language skills (Tr. p. 504; e.g., Tr. p. 510). The speech-language pathologist conducted one of the individual sessions each week in the classroom to help the student generalize his skills and sustain the same level of ability in the classroom that he displayed in his private therapy sessions (Tr. pp. 513, 551). The group session, which addressed pragmatic language, was designed to "push him to interact" with his peers (Tr. p. 514). The speech-language pathologist testified that the student was able to sit at a table, follow directions, and interact with his peers, all of which she reported "was huge for him" and constituted progress (Tr. p. 519). Moreover, she reported that, in the prior year, the student gave mostly one-word answers to questions but that, at the time of the impartial hearing, he was using three-to-four words (*id.*). She also worked with the student on articulation (Tr. p. 526). To address the student's sensory regulation needs, the speech-language pathologist explained that, if the student became dysregulated during his speech-language therapy sessions, she used a sensory diet to help him re-regulate (Tr. pp. 505-06). She also used a technique to provide tactile input to the student's mouth to help with his oral motor skill development (Tr. pp. 507-09).

To address the student's counseling and social/emotional needs, Rebecca also provided the student with music therapy. The evidence in the hearing record reflects that the music therapist at Rebecca was a licensed "creative arts therapist" and a board certified music therapist (Tr. p. 649).<sup>9</sup> Rebecca selected music therapy as the modality for counseling because of the student's limited ability to express himself and to communicate through words (Tr. p. 655). The music therapist worked with the student on sustaining interactions through music and through vocalizations (Tr. pp. 655-56). The music therapist reported that the student was more able to sustain interactions and to verbally communicate when he was in distress (*id.*). The student's mother also testified that she used some of the musical interventions at home that the music therapist recommended to her and that those interventions helped the student calm down when dysregulated (Tr. p. 928). To the extent that Rebecca provided the student with music therapy rather than formal counseling, the evidence supports a finding that music therapy was appropriately designed to address the individualized needs of this student for the reasons discussed above. Indeed, because Rebecca was sensitive to the student's very limited communication skills and the need to foster development of relationship skills, creative arts therapy and, specifically, music therapy provided a non-verbal way to address both of those needs.

With regard to the student's interfering behaviors, the IHO found that the student required a BIP to benefit from his special education and that the "lack of [any] formal behavior plan . . . at Rebecca further render[ed] dubious the placement's ability to benefit [the student] educationally" (IHO Decision at p. 18). Initially, when a student is unilaterally placed at a nonpublic school, the parents do not have to establish that the nonpublic school satisfied all of the requirements under

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<sup>9</sup> Under State law, creative arts therapists, who are often trained in music therapy, are licensed as mental health practitioners (see Educ. Law § 8404[1][a], [b] [defining the practice of creative arts therapy as the "assessment, evaluation, and the therapeutic intervention and treatment . . . of mental, emotional, developmental and behavioral disorders through the use of the arts as approved by the [Education D]epartment" and involving the "use of assessment instruments and mental health counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate creative arts therapy services"]; Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 386 [2004] [noting that for purposes of State licensing "music therapists" are now referred to as "creative arts therapists"]; People v. R.R., 12 Misc. 3d 161, 168 [Sup. Ct. New York Cnty. 2005]; see generally Educ. Law § 8412; 8 NYCRR 79-11.3, 79-11.7, 200.1[qq]).

the IDEA and State regulations (see Carter, 510 U.S. at 14). Thus, the necessary inquiry is whether Rebecca appropriately addressed the student's behavioral needs, not necessarily whether Rebecca utilized the mechanisms mandated by State regulation for use by school districts (see 8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). As described below, review of the evidence in the hearing record demonstrates that Rebecca addressed the student's behavioral needs.

For example, Rebecca was aware of the student's significant sensory-processing problems that impacted his behavior and daily functioning, particularly when he became dysregulated (Tr. p. 588).<sup>10</sup> As noted above, the student had a "very complicated" sensory system that it was both over-reactive and under-reactive, and, when he became dysregulated, he could not focus or attend (id.). When dysregulated, the student became "uncomfortable in his skin" and would bite his hand or pinch himself (id.). The staff viewed this as the student communicating "I need help," and the Rebecca staff responded by providing sensory input on a regular basis all day so that he received "the input before he bec[a]me dysregulated" (id.). The evidence in the hearing record shows that the student received a sensory diet every two hours, which both calmed down his sensory system and provided input to other areas of his sensory system (Tr. pp. 677, 692). The student's sensory diet consisted of rubbing him with a surgical brush, providing joint compression, providing vestibular input through swinging, and providing proprioceptive input through jumping on a trampoline (Tr. p. 781). To further address the student's sensory needs, Rebecca had the student wear a weighted vest for 30 minutes on and 30 minutes off throughout the day (id.). The student's teacher confirmed use of the sensory diet and testified that the student was "more receptive" to social and academic work after receiving it (Tr. p. 747).<sup>11</sup> Additionally, the evidence reflects that the student's teachers and other staff at Rebecca were trained to recognize the student's individual signs of dysregulation and to take him to the school's sensory gym to address his sensory needs when he was dysregulated (Tr. p. 677). His classroom also had sensory equipment that he could access (with support) as needed (Tr. p. 748).

When the student was dysregulated, he often bit his hand "to give himself proprioceptive input" (Tr. p. 504). The speech-language pathologist described this as the student's way of getting himself "back on track" by providing the input he needed to be regulated (Tr. p. 505). To address the student's dysregulation, the speech-language pathologist redirected the student's behavior by giving him things that provided input through non-hurtful means, including chewy tubes, twisted licorice candy, or a lip vibrator (Tr. p. 506). She explained that these interventions "provide[d] him [with] the same feedback that he would get from biting himself . . . [b]ut limit[ed] the self-harm and the [interfering] behavior" (Tr. p. 508). These behavioral interventions helped him become more regulated and were part of an overall educational plan designed by Rebecca particularly for this student and his behavioral needs (see id.). The classroom used the same techniques to address the student's dysregulation (id.). Indeed, the December 2012 Rebecca

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<sup>10</sup> Rebecca's program director explained that children with sensory processing deficits were unable to use sensory information in an integrated and functional way, which resulted in over-regulation or under-regulation of the sensory system (Tr. p. 585).

<sup>11</sup> Indeed, the student's teacher testified that he demonstrated progress in basic academic skills and that his behavior improved; for example, he was more socially appropriate and his aggression had decreased (Tr. pp. 751, 752). Moreover, his aggression was not directed toward people; for example, when he kicked out, he kicked in the air (Tr. p. 752).

progress update report reflected that the behavioral interventions were effective because the student was able to accept sensory strategies "rather than biting his hand" when dysregulated (Pet. Ex. J at pp. 1-2). Additionally, Rebecca provided the student with the opportunity for him to initiate a break for himself by moving to the floor or a chair and playing with "self-regulating" toys such as a popular modeling compound or markers (id. at p. 2). The progress report also indicated that the student's recovery time from dysregulation decreased from 20 minutes to 15 minutes, a twenty-five percent improvement (id.).

Another "trigger" for the student's behavioral problems was transition, both from one activity to another and from a familiar staff person to a new face. The student has difficulty remaining regulated during transitions throughout the school day, and he sometimes drops to the floor or kicks out his legs (Tr. p. 776). The evidence reflects that the Rebecca staff developed proactive techniques to address these problematic behaviors. For example, his teacher prepared him for transitions by providing verbal and visual reminders (id.). Related service providers also managed the student's transitions on a regular basis when taking the student to and from his various therapies. The speech-language pathologist used a five-minute warning and a countdown to prepare the student for transitions (Tr. p. 502). She also has a visual system that alerted the student of what he needed to do during the transition process (Tr. p. 503). These reminders helped the student predict what was going to happen next, thereby assisting the student with transition (id.). In the June 2012 progress update report, the speech-language pathologist reported that the student was making all transitions easily (Parent Ex. AA at p. 3). The creative arts therapist testified and his June 2012 progress notes reflect that the student did have difficulty transitioning to music therapy when they first started working together and sometimes became aggressive but that, as their relationship became "more solid," the student's aggression lessened and he had an easier time transitioning (Tr. p. 652; see Parent AA at pp. 3-4). Similarly, when the student transitioned from one occupational therapist to another, the OT supervisor acted as a liaison between staff by going with the student to the new therapist to show the therapist what the student had worked on and accomplished with the prior therapist and to give the student added support in transitioning and getting to know his new therapist (Tr. pp. 684-85). The supervisor testified that the student had "a hard time with change" and that "having somebody that he did know helped him in that transition" (Tr. p. 684).

An independent review of the foregoing evidence demonstrates that the Rebecca staff assessed the student's behaviors that interfered with his functioning and learning throughout the school day and appropriately targeted and addressed the student's behaviors that were most frequently related to his internal dysregulation and/or difficulty transitioning, either between activities or between familiar and unfamiliar staff. The evidence further demonstrates that the Rebecca staff developed intervention strategies, plans, and techniques to address the student's behaviors in a systematic way, including providing the student with a sensory diet on a regular basis to help him maintain regulation, providing him with appropriate sensory interventions to replace behaviors such as biting himself, and providing him with visual and verbal supports at transition times to assist with successful transition. The evidence adequately demonstrates that the Rebecca staff are trained in these interventions and used them in their daily work with the student. Based on the foregoing evidence, Rebecca has appropriately addressed the student's behavioral needs.

Accordingly, in view of the foregoing evidence in the hearing record, the parents have established that Rebecca provided the student with specially designed instruction designed to meet his unique academic needs and provided individualized accommodations, strategies, and related services to support the student's functioning that helped him benefit from his education at Rebecca (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365).

## **B. Progress**

In this case, the parent appeals the IHO's determination that Rebecca's progress reports were "vague, subjective and overflowing with jargon" and that the parent had produced no objective evidence showing that the student made educational progress at Rebecca (IHO Decision at p. 16). Contrary to the IHO's determination, the evidence in the hearing record, while at times subjective, indicates that the student made progress while at Rebecca during the 2012-13 school year. While evidence of 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 \*9-\*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, at \*2 [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]; see also Frank G., 459 F.3d at 364).

Consideration of more qualitative-natured evidence, for example, of progress is especially important in this case given the nature of the student's deficits and functioning levels and evidence tending to show that objective evidence of progress, such as grades and standardized assessments, were more difficult to acquire (see, e.g., Dist. Ex. 11 at pp. 2-4). Indeed, the student's teacher at Rebecca testified that many of the students at Rebecca were not capable of being formally assessed (Tr. p. 780). For example, the student's teacher administered the Peabody Developmental Motor Scales test (PDMS-2) at the beginning of the school year but had to adapt it by giving the student sensory breaks (Tr. p. 781). Because of the student's severe delays, Rebecca appropriately relied on progress reports to report skill mastery (see Tr. p. 780).<sup>12</sup> An independent review of such a report of progress demonstrates that it provided detailed descriptions of the student's progress towards short and long-term goals in all academic and related service domains (see Dist. Ex. 5 at pp. 1-12).<sup>13</sup> As to the IHO's concern that the December 2011 progress report indicated that the student "still bites his hand initially when he becomes 'extremely dysregulated,'" an independent review of the progress report also indicates otherwise (IHO Decision at p. 17; Dist. Ex. 5 at p. 1).

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<sup>12</sup> Each Rebecca progress report covers a six-month period, and progress reports are provided in June and December of each year (Tr. p. 598).

<sup>13</sup> Although the appropriateness of the parent's unilateral placement at Rebecca for the 2012-13 school year is the issue in this case, evidence of the student's progress during the previous school year (2011-12) at Rebecca is relevant to the inquiry of the appropriateness of the educational program and services provided to the student by Rebecca for the 2012-13 school year because of the similarity of programming and services provided to the student between both school years (compare Dist. Ex. 5, and Parent Ex. AA, with Pet. Exs. J-K; cf. H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013] [finding a student's progress under a prior IEP a relevant area of inquiry for purposes of determining whether a subsequent similar IEP has been appropriately developed]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]).

For example, the progress report states that when the student "gets extremely dysregulated" or is experiencing physical discomfort he "will still initially go to bite his own hand" but if provided with "a verbal reminder or another co-regulating strategy, he will typically stop biting his hand and engage in the other regulating activity" (Dist. Ex. 5 at p. 1). Thus, there is evidence that the co-regulating strategies being implemented by Rebecca staff were helping the student learn to self-regulate and that he was making progress as a result (id.). The progress report also indicated that the student was "increasingly able to verbalize his needs, wants, and emotions as a tool of regulation" and that the student came to initiate self-regulation strategies such as "climbing in a body sock, sitting on a foof chair, or pulling on a weighted blanket 3 out of 5 times" (id.). Progress was also evidenced by the fact that the student was able to re-regulate more quickly after accepting co-regulation strategies, although it still took him more than five minutes to do so (id.).

The December 2012 progress update report also indicated that the student continued to make progress at Rebecca during the 2012-13 school year in the area of functional emotional development (see generally Pet. Ex. J). For example, the student had increased "his ability to remain regulated/regain regulation in challenging situations" when he had "ample transition time/preparation and adequate sensory supports" (id. at p. 1). His ability to engage in 10 repetitive Floortime circles or 10 minutes of communication using songs and one to four word sentences had increased since the prior report, when he had communicated "mostly through gestures and limited single words" (id.). The student's functioning did decrease when he was upset or staff set a limit on him, and he needed additional adult support at such times (id.). When extremely dysregulated, it was reported that sometimes bit his hand or scratched others (id.). Those behaviors could last up to 15 minutes before he was able to re-regulate himself with staff assistance (id.). He was increasingly able to verbalize when he needed to use the bathroom or wanted to eat or play with certain toys (id. at p. 2). He also could ask for the sensory devices he used to regulate himself (id.). And, although he still needed adult support to help he re-regulate, the time it took him to re-regulate had decreased from 20 minutes to 15 minutes (id.). The June 2013 progress update report also reflected that the student's progress continued through the end of the 2012-13 school year at Rebecca (see generally Pet. Ex. K). For example, the student's ability to engage in the circles of communication increased to 15 circles in 10 minutes (id. at p. 1). And, although the student continued to have difficulty when staff set limits or when he was upset by something and needed additional adult support to help him at such times, the length of his periods of extreme dysregulation decreased to 10 minutes (id.).

Furthermore, a comparison of the June 2012, December 2012, and June 2013 progress update reports demonstrates that the student slowly made progress in many areas (see generally Parent Ex. AA; Pet. Exs. K; J). For example, in June 2012, he could listen to a group read aloud for 15 minutes without needing a sensory break and, by December 2012 he could attend for up to 20 minutes with adult support if he had a sensory break before the read aloud (compare Parent Ex. AA at p. 5, with Pet. Ex. J at p. 3). By June 2013, the student could attend to a read aloud for up to 25 minutes "inconsistently" (Pet. Ex. K at p. 3). The student also increased his sight word vocabulary from six words per month in December 2012 to seven words per month in June 2013 (Pet. Ex. J at p. 3; K at p. 3). His ability to write the alphabet in capital letters increased from 20 letters in December 2012 to all the letters, with visual cues and minimal adult support, by June 2013 (Pet. Exs. J at p. 4; K at p. 4). In December 2012, he also met his goal of making an estimate of the number of items in a group (Pet. Ex. J at p. 4).

## VII. Conclusion

In sum, the evidence in the hearing record reveals that the student benefitted from instructional strategies and supports provided by Rebecca. Because Rebecca provided the student with an educational program specially designed to meet 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) and because the district has not interposed a cross-appeal challenging the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year and equitable considerations weighed in favor of the parents' request for relief, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated March 11, 2013, is modified by reversing those portions which found that the parent's unilateral placement of the student at Rebecca for the 2012-13 school year was not appropriate and which denied the parent's request for the costs of the student's tuition; and

**IT IS FURTHER ORDERED** that, to the extent that the parent has paid any portion of the student's tuition costs at the Rebecca School for the 2012-13 school year, the district shall reimburse the parent for such costs upon the submission of proof of payment to the district and shall pay directly to Rebecca the balance of the student's tuition for the 2012-13 school year.

**Dated:** Albany, New York  
January 30, 2015

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**