The University of the State of New York

The State Education Department
State Review Officer
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No. 13-067

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Ha'or Beacon School (Beacon) and for the costs of related services for the 2012-13 school year. The parents cross-appeal from the IHO's determination which denied their request for reimbursement for their son's tuition costs at Camp Chaverim (Chaverim) for July and August 2012 and failed to address certain claims asserted in their due process complaint notice. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

With regard to the student's educational history, the hearing record shows that, during the 2011-12 school year, the student attended first grade in a general education setting in a nonpublic

school and received special education itinerant teacher (SEIT) services, as well as related services (Dist. Ex. 5; Parent Exs. K at p. 1; O at pp. 1-2).[1]

On June 7, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (see generally Dist. Ex. 4).[2] Finding the student eligible for special education as a student with autism, the June 2012 CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school (id. at pp. 1, 9-10, 13-14).[3, 4] In addition, the June 2012 CSE recommended the following 30-minute sessions of individual related services on a weekly basis: two sessions of speech-language therapy in the classroom; two sessions of speech-language therapy in a separate location; two sessions of physical therapy (PT) in a separate location; two sessions of occupational therapy (OT) in the classroom; and two session of OT in a separate location (id. at pp. 9-10). The June 2012 CSE also recommended support for the student's management needs, such as proximity to teacher for refocus and redirection and multisensory presentation of instructional material, as well as 19 annual goals (id. at pp. 3-8).

By final notice of recommendation (FNR), dated June 15, 2012, the district summarized the 6:1+1 special class and related services recommended in the June 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. G).

The parents visited the assigned public school site and, afterward, in a June 25, 2012 letter to the district, they rejected the public school as inappropriate for the student and, as a result, notified the district of their intent to unilaterally place the student in a summer program at Chaverim for July and August of 2012 and at Beacon for the remainder of the 2012-13 school year at public expense (Parent Ex. J at p. 1).[5, 6] The parents also informed the district that they intended to seek, by way of an award of compensatory additional services or reimbursement or direct funding, the following: a full-time 1:1 paraprofessional at Beacon, 20 hours per week of 1:1 SEIT services, one hour per week 1:1 stuttering (speech dysfluency) therapy, three 45-minute sessions

[1] Evidence in the hearing record shows that the student's general education classroom consisted of 10 students and that the student received 20 hours of SEIT per week and related services, as well as 10 hours of privately funded SEIT services (Parent Ex. O at pp. 1-2).

[2] There are two copies of the student's June 2012 IEP in evidence (see Dist. Ex. 4; Parent Ex. F). As the district's exhibit includes the attendance page for the CSE meeting, that copy of the IEP will be cited in this decision (see Dist. Ex. 4 at p. 16).

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

[4] The June 2012 IEP specified that the placement recommendation was a "specialized school co-located in a [district] [c]ommunity [s]chool" (Dist. Ex. 4 at pp. 13, 14).

[5] The Commissioner of Education has not approved Beacon as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[6] In previous letters dated June 15 and June 20, 2012, the parents informed the district that they had not yet received a copy of the June 2012 IEP or an FNR and intended to unilaterally place the student and, after receipt of the FNR, requested additional information about the assigned public school site (see Parent Exs. H at pp. 1-2; I at pp. 1-2).

per week of 1:1 OT, three 30-minute sessions per week of 1:1 PT, and transportation, as well as compensatory education for any pendency services to which the student was entitled but did not receive (id. at pp. 1-2).

On September 1, 2012, the parents signed an enrollment contract with Beacon for the student's attendance during the 2012-13 school year (see Parent Ex. KK).

A. Due Process Complaint Notice

By second amended due process complaint notice, dated September 6, 2012, the parents alleged: that the student was denied a free appropriate public education (FAPE) for the 2012-13 school year; that Beacon, in combination with additional services and supports, as well as the summer program at Chaverim, constituted an appropriate unilateral placement; and that equitable considerations justified an award of the costs of the student's tuition and services (see generally Parent Ex. E). For relief, the parents requested reimbursement or direct funding of the tuition and costs for the student's attendance at Chaverim for July and August 2012 and Beacon for September 2012 through June 2013, in addition to the costs of the following services on a 12-month school year basis: a full time 1:1 paraprofessional, 20 hours per week of 1:1 SEIT services, one hour per week of 1:1 therapy with a speech dysfluency therapist, four 30-minute sessions per week of 1:1 speech-language therapy, three 45-minute sessions per week of 1:1 OT, three 30-minute sessions per week of 1:1 PT, transportation to Chaverim and Beacon, and up to four hours per month of individualized parent training and counseling, as well as compensatory additional services, including at least one hour per week of parent counseling and training (id. at p. 12).

B. Impartial Hearing Officer Decision

An impartial hearing convened on July 9, 2012 and concluded on February 11, 2013, after eight days of proceedings (see Tr. pp. 1-617).[7] By decision dated March 21, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that Beacon was an appropriate unilateral placement for the student, and that equitable considerations supported the parents' requests for relief (IHO Decision at pp. 11-20).

The IHO found that the cumulative impact of several deficiencies relating to the student's proposed program for the 2012-13 school year had the effect of denying the student a FAPE (IHO Decision at pp. 12-15). Specifically, the IHO found that the lack of 1:1 instruction, the failure to address the student's behavioral issues, and the district's failure to provide therapy or annual goals related to the student's stuttering or speech-language needs all contributed to cumulatively deprive the student of a FAPE for the 2012-13 school year (id.). Next, the IHO found that Beacon was an appropriate unilateral placement based on the manner in which the school met the student's needs and based on the student's progress (id. at pp. 15-18). The IHO noted that the fact the student received related services outside of the school was permissible and did not affect the appropriateness of the parents' placement (id.). Regarding Chaverim, the IHO found that there was insufficient proof to establish the appropriateness of that placement (id. at p. 18). Specifically,

[7] The first four days of proceedings addressed preliminary matters, including pendency, identification of issues to be resolved, subpoenas, and identification and/or introduction of exhibits; no testimonial evidence was presented (see Tr. pp. 1-113).

the IHO noted that: Chaverim provided the student with an insufficient amount of special education support; there was no proof that the student was provided with interventions to address his stuttering; there was no evidence of a tailored behavioral plan; and finally, there was insufficient proof of the student's progress (id.).

With respect to equitable considerations, the IHO found that the parents visited the assigned public school site and provided sufficient notice to the district of their objections to the June 2012 IEP and the assigned public school site (IHO Decision at p. 19). Accordingly, the IHO ordered the district to pay for 75 percent of the costs of the student's tuition at Beacon, with the reduction relating to religious instruction, along with speech-language therapy and SEIT services for the 2012-13 school year (id. at pp. 19-20).

IV. Appeal for State-Level Review

The district appeals, seeking reversal of the IHO's decision to the extent that he found that the district failed to offer the student a FAPE for the 2012-13 school year, that the parent's unilateral placement at Beacon was appropriate to meet the student's special education needs, and that equitable considerations weighed in favor of the parents' requests for relief. The district argues that it offered a FAPE to the student for the 2012-13 school year and that, contrary to the IHO's findings, the June 2012 IEP recommended sufficient support for the student in a 6:1+1 special class with 1:1 related services. Further, the district argued that the June 2012 CSE recommended 1:1 speech-language therapy and annual goals that would address the student's stuttering. Lastly, the district argued that a behavioral intervention plan (BIP) was not required to address the student's attention issues and that the parents did not raise that issue prior to the impartial hearing process. Regarding the parents' unilateral placement of the student, the district argues that the IHO erred in finding Beacon appropriate to meet the student's needs because it failed to provide all the mandated services that the student required or offer a 12-month school year program. Regarding equitable considerations, the district asserts that the IHO erred because the parents never seriously considered sending the student to a district public school.

In an answer and cross-appeal, the parents respond to the district's petition by denying the district's allegations material to the dispute. The parents also interpose a cross-appeal asserting that the IHO erred to the extent that he: (1) failed to find the parents' unilateral placement of the student at Chaverim during summer 2012 to be appropriate to meet the student's special education needs; (2) failed to address OT and PT services in his decision; (3) failed to decide the issue of parent counseling and training; and (4) failed to decide the parent's claims relating to the assigned public school site. The parents also seek a finding of futility of the administrative appeal process.

The district answers the parents' cross-appeal, denying the parents' claims and arguing that the IHO properly limited the parents' award based on all of the circumstances. The district also replies to the parents' application for a finding of futility of the administrative appeal, asserting that the application, if granted, would constitute a violation of State law.

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

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

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

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

VI. Discussion

A. June 2012 IEP

1. 6:1+1 Special Class

The district asserts that the IHO erred in finding that the 6:1+1 special class recommended in the June 2012 IEP offered insufficient 1:1 instruction or support to address the student's needs. As to the sufficiency of the 1:1 support recommended in the June 2012 IEP, the IHO indicated that the IEP described the student's need for 1:1 instruction, including in mathematics, but failed to recommend "any 1:1 instruction in the services section, whether through a 1:1 teacher or through a dedicated aide" (IHO Decision at p. 12).

The June 2012 CSE considered the following evaluative information and reports in developing the student's IEP: May 2012 updated Woodcock-Johnson III Tests of Achievement (WJ-III ACH) scores; a February 2012 neuropsychological reevaluation; a classroom observation conducted in March and June 2012; a May 2012 updated educational progress report prepared by the student's SEIT; a May 2012 OT progress report; and a May 2012 PT progress report (Tr. pp. 141, 144; see generally Dist. Exs. 5; 10; Parent Exs. K; M-O).

The February 2012 neuropsychological reevaluation report noted that the student "continue[d] to need one-to-one assistance of the type he [was] currently receiving with his SEIT . . . ." (Parent Ex. K at p. 5). Significantly, the setting to which the neuropsychologist referred was the general education class in the nonpublic school with the 1:1 SEIT (id. at p. 1). However, the report went on to state that, while perhaps not the student's least restrictive environment, "a program specializing in children with similar needs that could provide ABA services and extremely small groups with a small pupil-to-teacher ratio may be a better alternative" (id. at p. 6).[8] The neuropsychologist elaborated upon his recommendations at the impartial hearing, explaining that the student would benefit from a small class of "certainly less than ten" students with "two or maybe three teachers for that size group" (Tr. p. 289). Were the student to attend such a small class setting, the neuropsychologist testified that the student would benefit on a temporary basis (hopefully less than one year) from 1:1 support "in order to help him make the transition" (Tr. pp. 289, 291-92).

The May 2012 educational progress report, prepared by the student's SEIT, described the varying degrees of support that the student required depending on the task presented (Parent Ex. O at pp. 4-7). For example, with respect to writing, the report stated that the student could "independently write all 26 letters," needed visual and verbal cues for spacing and appropriate letter placement, but exhibited "difficulty writing complete sentences without 1:1 support" (id. at pp. 4-5). In contrast, the SEIT also reported that the student "t[ook] spelling tests independently with modifications made to the paper he takes it on (id. at p. 5). In the context of describing the student's mathematics skills, the report stated that the student needed "visual as well as verbal cues and hand over hand assistance to complete tasks" (id.). The report indicated that the student knew

[8] The neuropsychologist also testified that he felt ABA was the appropriate methodology for the student but not necessarily to the exclusion of other methodologies, "depending on what [other] methodology" was considered (Tr. pp. 311-12).

"coin values for penny, nickel, dime and quarter with consistency" but "ha[d] difficultly and need[ed] one to one assistance when he need[ed] to show different ways to make a value" (id. at p. 6). As to reading, the SEIT reported that the student had "difficulty with tracking" and that "[p]ointing to written words in texts while reading or counting objects prove[d] problematic without 1:1 assistance" (id.). The report also noted the student's high distractibility and impulsivity, need for "[f]requent redirection," and difficulty following directions (id. at pp. 2, 6). The SEIT indicated that the student "require[d] 1 to 1 assistance with almost all tasks" (id. at p. 7). In contrast, the report also indicated that the student could complete many self-help skills independently (id.).

While the May 2012 educational progress report leaves the impression that the student required a great deal of 1:1 support (albeit, at times in manner that appears internally inconsistent), the classroom observation of the student conflicts with this description (see generally Dist. Ex. 5; Parent Ex. O). The classroom observation report, prepared by the district school psychologist who subsequently attended the June 2012 CSE meeting, included a description of the student on two different occasions in different settings (Dist. Ex. 5). In the first setting, the school psychologist observed the student in the general education classroom led by a substitute teacher, in which the student's SEIT was not present (id.). The lesson related to the calendar and the student "actively engaged in the lesson" (id.). Next, the school psychologist observed the student during a lunch period, during which the SEIT remained "at the back of the room" (id.). During an afternoon prayer, the school psychologist observed the SEIT join the student and aid him in finding the correct page of his book, which he independently retrieved from his desk (id.).

State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). As for the student's management needs, the June 2012 IEP identified the following supports: small class ratio, proximity to teacher to assist with refocus and redirection, and multisensory presentation of instructional material (Dist. Ex. 4 at p. 3). The IEP also indicated the student's need for visual and verbal cues with various tasks, as well as his need for refocusing, redirection, and assistance to address his impulsivity (id. at p. 2). The June 2012 IEP offered the student a 12-month school year program in a 6:1+1 special class for all subjects, and individual related services of speech-language therapy, PT, and OT, on a push-in and pull-out basis (id. at pp. 8-10, 13-14).

Notwithstanding conflicting descriptions of whether the student needed 1:1 support in the evaluative information available to the CSE, the CSE opted to emphasize many of the descriptions from the May 2012 educational progress report with respect to the particular tasks with which the student required 1:1 support when developing the present levels of performance in the June 2012 IEP (compare Dist. Ex. 4 at p. 2, with Parent Ex. O at pp. 4-7). Thus the CSE appeared to resolve these conflicting views from the evaluative information in favor of the need for 1:1 support, (as did the IHO), but the district did not offer evidence during the hearing to explain why the present levels of performance resolved the ambiguity in favor of the view that the student required 1:1 support yet offered services inconsistent with that view of the student's needs. Review of the IEP and the materials before the CSE certainly offers significant support for both parties' positions; however, while the hearing record does not indicate that the student required 1:1 instruction by a special education teacher (as opposed to 1:1 support by an assistant or paraprofessional), there is insufficient evidence in the hearing record to grant the district's request reverse the IHO's ultimate

determination that the 6:1+1 special class, without more, offered an inadequate amount support. Whether this deficiency alone resulted in a denial of a FAPE with this much conflicting evaluative information in evidence is questionable, but in considering it cumulatively with the deficiencies in the IEP with respect to the student's speech-language needs, discussed below, the hearing record supports the IHO's conclusion that the district failed to provide the student with a FAPE for the 2012-13 school year.

2. Speech-Language Therapy

The district appeals the IHO's finding that the June 2012 IEP did not contain speech-language annual goals and that the student's speech dysfluency was not addressed by the CSE (IHO Decision at pp. 14-15). The district notes that the evaluation performed by the parents' stuttering specialist was not received by the June 2012 CSE prior to the meeting and also that the IEP provided for four sessions per week of 1:1 speech-language therapy for the student. The district correctly argues that the June 2012 CSE did not have before it the August 2012 private speech evaluation, completed by the dysfluency specialist at the time the CSE met, and therefore, any determination regarding the efficacy of the CSE's recommended program cannot include information from that report, as the adequacy of the IEP is based upon information available to the CSE at the time the IEP was drafted (see R.E., 649 F.3d at 186).

Turning to information that was available to the June 2012 CSE, the February 2012 neuropsychological evaluation indicated that the student presented with "significant speech and language difficulty, including some degree of speech dyspraxia," as well as a "slight" and "variable" speech dysfluency (Parent Ex. K at pp. 1). The evaluation detailed the student's: difficulties with speech-language production, including difficulties with articulation, lexical skills, word retrieval, morphologic structure and syntactic production; "significant problems with language understanding," including an inability to complete "tasks that required inferential understanding"; and difficulty with phonologic awareness (id. at pp. 3-4). The evaluation recommended that the student received "intensive speech[-]language therapy, preferably on a daily basis" (id. at p. 6).

In addition, the March 2012 educational progress report, while noting the student's progress in receptive and expressive language skills was largely due to the student's work with the dysfluency specialist, also indicated that the student exhibited delayed response to questions, difficultly following directions, difficulty answering "wh" questions after reading a passage or listening to a read aloud, an inability to retell a story read aloud, difficulty expressing a rhyming word, and difficultly communicating due to his dyspraxia and dysfluency (Parent Ex. O at pp. 2-3). The SEIT who completed the March 2012 educational progress report indicated her implementation of techniques used by the stuttering specialist and the student's need for modeling and prompting in order to "correctly produce fluent speech" (id. at p. 3). The SEIT concluded that it was "crucial for [the student's] continued language development to have his language program implemented throughout his school day" (id. at pp. 8-9).

Review of the June 2012 IEP confirms that it did not include a description of the student's speech-language deficits, as reflected in the evaluative information before the CSE, or include annual goals targeted to address such needs (see Dist. Ex. 4 at pp. 1-8). The IEP included annual goals regarding decoding and reading and the district school psychologist testified that these could

also be goals used by the speech-language therapist (Tr. pp. 173-74; see Dist. Ex. 4 at pp. 5-6). However, the parents presented testimony from a neuropsychologist and a fluency disorder specialist who worked with the student for stuttering therapy who both testified that the annual goal regarding decoding was neither a goal for implementation by a speech-language therapist nor a goal related to stuttering (Tr. pp. 234-35, 300-01). Therefore, although the June 2012 IEP recommended four weekly sessions of speech-language therapy (two in the classroom and two in a separate location), given the level of deficit the student exhibited in this area, there is insufficient evidence to reverse the IHO's determination that the June 2012 IEP is deficient in this regard. Once more, this alone might not have resulted in a denial of a FAPE to the student, but when considered cumulatively with the discussion above regarding the insufficient provision of support for the student in the IEP, the hearing record supports the IHO's ultimate determination that the district failed to provide the student with a FAPE for the 2012-13 school year.

3. Special Factors-Interfering Behaviors

The district asserts that the IHO erred in his determination that the June 2012 CSE improperly failed to develop a BIP or otherwise address the student's behaviors in the IEP. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]).

In New York State, policy guidance explains that "[t]he IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP" and, if necessary, the "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). The Second Circuit has explained that when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

Here, it is undisputed that the June 2012 CSE did not develop a BIP for the student (see Dist. Ex. 4 at p. 14). While the information before the June 2012 CSE indicated that the student exhibited some attentional and behavioral concerns, it did not reflect that the student engaged in behaviors that impeded his learning or that of others (see Dist. Exs. 5; Parent Exs. K; M-O). The February 2012 neuropsychological reevaluation report reported information from the student's parents and first grade teacher from his then-current general education nonpublic school that the student exhibited an "'inability' to focus and stay on task," a "perseverative nature," "difficulty working independently," behavioral immaturity, and "difficulty with appropriate peer interaction and communication" (Parent Ex. K at pp. 1-2). In addition, the neuropsychologist reported information from the parents that they attempted a medication for the student's attention deficits and because the student "was having tantrums and being aggressive" but that the medication was discontinued upon acceleration of said behaviors (id. at p. 2). The report also included information based on the evaluator's findings that the student had "a remarkably short attention span" and could exhibit impulsivity in approaching tasks (id.).

In the school setting, the March 2012 classroom observation described that the student remained in his seat and actively engaged in the lesson in a general education class setting with a substitute teacher and no 1:1 SEIT present (Dist. Ex. 5). The June 2012 classroom observation also showed that the student was able to sit at his desk, eat lunch, raise his hand, and ask for permission to get a book, receive permission, retrieve the book, and return to his desk, all while the SEIT was at the back of the room (id.). Afterward, the students were instructed to take out the book they would be using next and, by the time the SEIT returned to the student's side, the student had done so, without assistance (id.).

Further, to the extent that the student exhibited interfering behaviors, the June 2012 identified them, such as his attention deficits, difficulty standing quietly in line, inappropriate laughter, and a tendency to perseverate (Dist. Ex. 4 at pp. 2-3). In addition to the strategies and supports for management needs, described above, the May 2012 IEP also included an annual goal that the student would "demonstrate improvement in attention and behavior by remaining on task for 5 minutes when completing various required activities with no more than 3 verbal cues in an environment with minimal to moderate extraneous stimuli" (id. at p. 7).

Based on the foregoing, the hearing record demonstrates that the student's behaviors did not impede his learning or that of others and that, in any event, the June 2012 IEP adequately described the behaviors and recommended appropriate supports to address them. Therefore, contrary to the IHO's determination, the hearing record does not support a finding that the June 2012 CSE's failure to conduct an FBA or develop a BIP contributed to a denial of a FAPE to the student in this instance. In view of the foregoing, the IHO's determination with regard to the FBA and BIP must be reversed.

4. Parent Counseling and Training

The parents assert in their cross-appeal that the IHO failed to address their claim regarding the lack of parent counseling and training in the June 2012 IEP. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform

appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M., 583 F. Supp. 2d at 509). The Second Circuit has explained that "because school districts are required by 8 NYCRR 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving the service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

While it is undisputed that the June 2012 CSE did not recommend parent counseling and training as a related service in the student's June 2012 IEP (see Dist. Ex. 4), the hearing record does not support the conclusion that this violation impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of the FAPE to the student, or caused a deprivation of educational benefits to the student, such that it would contribute to a finding of a denial of a FAPE in this instance (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). However, the district is cautioned that it must not continue to disregard its legal obligation to include the related service of parent counseling and training on the student's IEP. Thus, I will direct that, when the next CSE convenes, the district shall consider whether the related service of parent counseling and training is required and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (20 U.S.C. § 1415[b][3]; 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo]; 200.5[a]).

B. Challenges to the Assigned Public School Site

The parents assert as part of their cross-appeal that the IHO failed to address their implementation claims. Specifically, they assert that the district chose a particular public school placement for the student to attend without input from the parents and also that the assigned public school site would not have been able to implement the student's IEP.

1. Parental Participation in the Selection of the School Site

First, I will address the parents' claim that they were improperly denied participation in the selection of the student's proposed placement. Generally, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR 300.116, 300.327, 300.501[c]; 501[b][1][i]). The Second Circuit has established that "'educational placement' refers to the

general educational program-such as the classes, individualized attention and additional services a child will receive-rather than the 'bricks and mortar' of the specific school" (R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. Aug. 19, 2011]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). Further, there is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Thus, while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013] [noting that a parent "does not have a procedural right in the specific locational placement of his child, as opposed to the educational placement"], aff'd, 556 Fed. App'x 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013] [holding that the parents' rights to participation "extend only to meaningful participation in the child's 'educational placement'," not to selection of a particular school building]; see also R.E., 694 F.3d at 191–92 [district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. 2011]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12, *14 [S.D.N.Y. Nov. 9, 2011]; A.L., 812 F. Supp. 2d at 504; S.H. v. New York City Dep't of Educ., 2011 WL 666098, at *5 [S.D.N.Y. Feb. 15, 2011]).[9] Instead, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (K.L.A., 371 Fed. App'x at 154; T.Y., 584 F.3d at 419-20; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553, 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents, 629 F.2d at 756; Tarlowe, 2008 WL 2736027, at *6; see also Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

Therefore, based upon the foregoing, the parents could not prevail on a claim that the student was denied a FAPE because they were deprived of the opportunity to participate in the selection of the student's specific public school site/classroom because neither the IDEA nor its implementing regulations provides them this right. If a student requires particular environmental conditions in school or in transportation in order to receive a FAPE, such needs and requirements

[9] However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D], 1414[d][2]; 34 CFR 300.17[d], 300.323; 8 NYCRR 200.4[e]).

must be identified on the student IEP, and the parents have the right to participate in the development of that IEP.

2. Implementation

As to the parents claims relating to the ability of the assigned public school site to implement the student's June 2012 IEP, for the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I find the parents' challenges to be without merit. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. I; J), the parents cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice"]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F., 746 F.3d at 79; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

D. Unilateral Placement

Having determined that the hearing record supports the IHO's ultimate determination that the district failed to offer the student a FAPE for the 2012-13 school year, the next inquiry is whether the parents' unilateral placement was appropriate to address the student's needs. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 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 Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

1. Appropriateness of Chaverim

The IHO determined that there was insufficient evidence that Chaverim, which the student attended during summer 2012, addressed the student's individual needs (see IHO Decision at p. 18). The parents cross-appeal this determination, arguing that the summer program was appropriate for extended school year services and met the goal of preventing substantial regression for the student and that the IHO improperly held the summer program to a higher standard.

Contrary to IHO's determination, the hearing record sufficiently establishes that the summer program offered appropriate special education instruction and support for the student (see IHO Decision at p. 18). The evidence in the hearing record establishes that Chaverim was a State-approved summer school program for students receiving special education and provided an academic curriculum from 8:00 a.m. to 3:00 p.m. (Tr. pp. 446-48; Parent Exs. W; MM at p. 1). The student received the special education curriculum in the classroom with approximately eight to ten students, except for one hour of the day when he met with the SEIT and worked on reading,

reading comprehension, decoding, and mathematic skills (Tr. pp. 448-50; see Parent Ex. X).[10] Additionally, the student received speech-language therapy and OT at Chaverim (see Parent Exs. NN; OO). As described in an August 2012 speech-language progress report, the student exhibited improvement with his phonemic awareness and language skills (Parent Ex. NN). This progress report also described the student's attention and fluency deficits and indicated that the speech-language pathologist employed strategies such as redirection and use of a time, hour glass, or reinforcement to address the student's delays in focus (id.). The August 2012 OT progress report identified specific goals addressed in the summer program, described the students ability to transition to and from therapy and his need for cues to stay focused, and indicated that the student made progress at Chaverim (Parent Ex. OO at pp. 1-2).

2. Appropriateness of Beacon

The district appeals the IHO's determination that Beacon was an appropriate unilateral placement and argues that Beacon failed to provide required related services as the district provided such services pursuant to its pendency (stay-put) obligations. The district also argues that Beacon was not appropriate because it did not offer a 12-month school year.

With regard to the district's assertion that Beacon did not adequately provide related services to the student, in order to establish the appropriateness of a unilateral placement, parents need not show that the placement provided every special service necessary to maximize the student's potential, but rather, must demonstrate only that the placement provided educational instruction specially designed to meet the unique needs of a student (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014]; M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65; see also C.F., 746 F.3d at 82 [stating that a unilateral placement need not necessarily meet the specific standards of the IDEA or State law]). While the student received related services of speech therapy, OT, and PT from outside providers, the hearing record demonstrates that the student received instruction specially designed to meet his unique needs at Beacon, including his significant needs for teacher support and his needs relating to social and behavior issues (to the extent the student had behavior issues) (see Dist. Ex. 14; Parent Ex. QQ; see also Tr. pp. 362-90). Based on the circumstances in this case, where the student was receiving the necessary related services, the fact that the parents availed themselves of a right afforded by the IDEA itself by seeking funding for related services from the district pursuant to its obligation to provide the student with pendency services does not per se result in a finding that the parent's unilateral placement is therefore inappropriate. To hold otherwise would suggest that parents in these circumstances are required to forgo pendency services in order to assert a viable tuition reimbursement claim; however, the district points to no authority to support such an argument. Relatedly, consistent with the parents' arguments, the IHO's award will be modified to include the OT and PT services for the 2012-13 school year as requested by the parents; specifically individual PT two times per week for 30 minutes and individual OT four times per week for 30 minutes (Parent Ex. F at pp. 9-10).

[10] While there is evidence that the teachers at the summer program may have been in receipt of the student's IEP from the district, the proof relating to that was neither conclusive, nor clear as to how it may have been used to assist with the student's instruction (Tr. p. 449).

Finally, while Beacon did not offer a 12-month program, the parents nevertheless coordinated separate summer programming, which, as described above, was appropriate for the student and, under the circumstances of this case, I do not find that this factor precludes reimbursement.

E. Equitable Considerations

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]).

The district asserts that the IHO erred in finding that equitable considerations weighed in favor of the parents' requested relief, arguing that the parents never seriously considered sending the student to a district public school. However, contrary to the district's argument, parents' "pursuit of a private placement [i]s not a basis for denying the[m] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L., 744 F.3d at 840). Moreover, overall the evidence in the hearing record supports a finding that the parents would have accepted a district placement if it provided the sufficient support for the student (Tr. pp. 566-68). Thus, the IHO's determination that equitable considerations support an award of tuition reimbursement is affirmed.

VII. Conclusion

Having independently examined the hearing record, I concur with the IHO's ultimate determinations that the district did not offer the student a FAPE for the 2012-13 school year, that the parents' unilateral placement of the student at Beacon was appropriate, and that the equitable considerations supported an award of reimbursement of the foregoing (save 25 percent to account for the religious component). However in contrast to the conclusion of the IHO, I find that the hearing record supports a conclusion that Chaverim was appropriate for the student for July and August 2012 and that the IHO should have included OT and PT services in the awarded relief.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, the IHO's decision dated March 21, 2013 is modified by reversing that portion which determined that the student required an FBA or a BIP; and

IT IS FURTHER ORDERED that, consistent with the body of this decision, the IHO's award of relief to the parents is modified to provide that the district shall also reimburse the parents for the costs of the student's tuition at Chaverim and to provide the student with OT and PT services consistent with the body of this decision; and

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

Dated: **Albany, New York**
January 23, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER