



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-072

### **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, Jessica C. Darpino, Esq., of counsel

Susan Luger Associates, Inc., Special Education Advocates, attorneys for respondents, Lawrence D. Weinberg, 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 a 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 the costs of the student's tuition at The Studio School ("Studio") for the 2012-13 school year. The 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]-[B], [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 279.4[b], 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

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

The student had been attending Studio since fall of September 2010 (see Parent Ex. G at p. 2). Most recently, the CSE developed an IEP for the student dated June 23, 2011 (see Parent Ex. P at p. 1). At that time, the student was deemed eligible for special education as a student with a speech or language impairment (id.).

On January 19, 2012, the parents signed an enrollment contract with Studio for the student's attendance during the 2012-13 school year (Dist. Ex. 1; see Tr. pp. 568-69).

The parents wrote to the district on February 21, 2012 requesting that a CSE convene "as soon as possible" to develop the student's program for the 2012-13 school year (Parent Ex. F at p. 1). The parents informed the district that, because Studio required that they enter into a contract in order to reserve a seat for the student, they did so "in case the [district] d[id] not offer an appropriate program/placement" (id.). Receiving no response, the parents wrote to the district again on June 11, 2012, repeating their request that the CSE convene (Parent Ex. E at p. 1).

On July 19, 2012, the parent signed and returned a district form indicating that the parents consented to "additional assessments" of the student in anticipation of a CSE meeting (Parent Ex. C at pp. 1, 3). In the accompanying letter to the district, the parents again requested that a CSE convene "as soon as possible" (id. at p. 1). The parents further stated that they intended to enroll the student at Studio for the 2012-13 school year at public expense if they did not receive an appropriate and timely "program/placement" offer (id.). This letter also indicated that the parents enclosed three privately-obtained evaluations for consideration by the CSE (id.).

The parents wrote to the district again on August 16, 2012, enclosing copies of the three prior letters identified above requesting a CSE meeting (Parent Ex. B at p. 1). Based upon the district's "failure to offer an appropriate program/placement" for the student, the parents indicated that they had "no alternative" but to enroll the student at Studio for the 2012-13 school year (id.).

On September 20, 2012, the parents executed a new enrollment contract with Studio for the student's attendance during the 2012-13 school year (Parent Ex. M). The new contract set forth additional costs related to the student's attendance, as well as a provision by which the parents would be released from their financial obligations under the contract in the event that they accepted a public school placement from the district (id.).

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

In a due process complaint notice dated September 27, 2012, the parents alleged 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. 2-4). The parents alleged that, despite numerous written requests, a CSE failed to convene and develop an appropriate program for the student for the 2012-13 school year (id. at p. 2). The parents also contended that they received no response from the district after providing written consent permitting the district to conduct evaluations and providing copies of three private evaluations (id.). The parents also asserted "[u]pon information and belief," several contingent challenges to an assigned public school site in the event a CSE developed an IEP and the district assigned to the student to attend a particular public school site (see id. at p. 3).<sup>1</sup>

Regarding the appropriateness of the unilateral placement, the parents argued that Studio offered instruction geared toward the student's individual needs and, further, that the student made progress in this setting (Parent Ex. A at p. 3). The parents additionally alleged that equitable considerations weighed in favor of their request for relief because they cooperated with the district and provided timely notice of their unilateral placement of the student at Studio (id.). For relief,

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<sup>1</sup> These allegations are not relevant to this appeal because the district did not convene to develop an IEP in accordance with the parents' requests and, in any event, conceded that it did not offer the student a FAPE for the 2012-13 school year (Tr. p. 8).

the parents sought tuition reimbursement, "[d]oor-to-door special education transportation/suitable transportation," reimbursement for transportation costs paid by the parents between September 1, 2012 and June 30, 2013, reimbursement for a neuropsychological evaluation obtained by the parents, and reimbursement "and/or" an award of compensatory education for speech-language therapy and occupational therapy (OT) received by the student during the 2012-13 school year (id. at pp. 3-4).

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

On January 9, 2013, the parties proceeded to an impartial hearing, which concluded on January 31, 2013, after three days of proceedings (Tr. pp. 1-587). In a decision dated March 27, 2013, the IHO found that, based on the district's concession and the uncontested evidence in the hearing record, the district failed to offer the student a FAPE for the 2012-13 school year (IHO Decision at pp. 11-12). The IHO also found that Studio was an appropriate unilateral placement for the student and that no equitable considerations militated against an award of tuition reimbursement (IHO Decision at pp. 12-16).

With respect to the unilateral placement, the IHO determined that Studio provided a "mainstream learning program," as well as "small class size with . . . individualized attention," where the student received specially designed instruction in the LRE (IHO Decision at p. 15). The IHO found that Studio personnel who testified at the impartial hearing "observed the [student] and kn[e]w of his educational issues and difficulties" (id.). The IHO found "convincing" the testimony of the Studio personnel and the parents that the student made progress, academically and behaviorally (id.). Addressing the district's specific objections to Studio, the IHO disagreed with the district that the student did not make "significant improvement" during the 2012-13 school year and noted that the clinical psychologist who evaluated the student testified that the student made "some improvement" and enjoyed an "upward trend" in testing performance between 2010 and March/April of 2012 (id. at p. 13). The IHO also rejected the district's argument that the parent did not introduce "objective measures" of the student's progress, citing neuropsychological evaluations, as well as testimony from Studio staff, the parents, and a clinical psychologist (id.). These witnesses, according to the IHO, spoke to "gains . . . in [the student's] academic skills," as well as his "speech[-]language, OT, and writing," daily living, and social skills, and a decrease in the student's anxiety levels (id.). The IHO also rejected the district's argument that Studio was an inappropriate educational setting because it relied on independent providers to deliver necessary related services to the student (id. at pp. 13-14).

With regard to equitable considerations, the IHO found that there was no evidence in the hearing record warranting a reduction or denial of an award tuition reimbursement (IHO Decision at pp. 15-16). The IHO found that the parents "cooperated in good faith at all times" with the district (id. at p. 16). Specifically, the IHO noted that the parents gave "proper and timely notice" to the district that they intended to enroll the student at Studio for the 2012-13 school year by sending "several letters" (id. at p. 15). The parents' execution of a contract with Studio in January 2012 for the upcoming 2012-13 school year was, according to the IHO, "very reasonable" and did not weigh against an award of tuition reimbursement (id. at p. 16). Further, the IHO noted that the parents enrolled the student at Studio in August 2012 "with time running out for obtaining a program and placement" due to the district's failure to develop an IEP (id.). The IHO rejected the district's

argument that the tuition was excessive because the district failed to introduce comparative evidence of rates charged by similar schools (id. at p. 14).

Accordingly, the IHO awarded the parent the costs of the student's education at Studio for the 2012-13 school year (IHO Decision at p. 16). The IHO also ordered the district to reimburse the parents for the costs of the student's transportation to and from Studio (id. at p. 17). The IHO further ordered the district to reimburse the parents for the portion of the neuropsychological evaluation not already paid by the parents' insurance carrier (id. at p. 16).

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

The district appeals, seeking to overturn the IHO's determinations that Studio was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parent's request for relief. At the outset, the district argues that the IHO's decision was impermissibly "vague" and failed to cite to the hearing record in contravention of State regulations.

Regarding Studio, the district argues that it was an inappropriate placement for the student because it did not offer a program uniquely tailored to the student's needs. Furthermore, the district argues that, to the extent it may be determined since Studio does not offer grades or administer testing, the student made little progress. In addition, the district asserts that the student's language-based needs were add odds with the approach at Studio, which focused on the students' achievement of self-awareness through language. The district further alleges that the student needed more support than he received in the general education classroom at Studio. Specifically, the district alleges that, in accordance with the recommendations of a private psychologist, the student required reading intervention services. The district also objects to Studio's lack of a sensory gym and staff psychologist. Finally, the district alleges that the amount of OT and speech-language therapy services the student received at Studio was insufficient to meet his needs. Further, with respect to the manner in which Studio contracted with providers, the district alleges that it is not a special education school but "a conduit for the hiring of independent contractors to provide related services."

The district also argues that equitable considerations do not support an award of tuition reimbursement because the parents never considered placing the student in a public school. In support of this allegation, the district argues that the parents signed an enrollment contract with Studio in January 2012, several months before the start of the 2012-13 school year. The district further contends that the parent's intent in this regard is discernible from the fact that the student never attended a public school and received related services from providers affiliated with Studio since he attended preschool.

Regarding the relief ordered by the IHO, the district argues that the parents abandoned their claim for transportation at the impartial hearing and failed to introduce proof that the student required such transportation. Also, if the IHO's tuition award is upheld, the district argues that the \$15,000 "administrative fee" included in the total tuition amount charged by Studio was excessive and not supported by the evidence in the hearing record. The district further argues that the rates

charged by the student's related service providers were excessive compared to the district's own rates.<sup>2</sup>

The parents answer, denying the district's material assertions and requesting that the IHO's decision be upheld. The parents argue that Studio offered a program uniquely designed to meet the student's needs. Further, the parents contend that equitable considerations weigh in favor of an award of tuition reimbursement because, among other reasons, the district failed to convene a CSE and develop an IEP for the school year in question. The parents also contest the district's assertion that Studio must provide related services in the same duration and amount as recommended on an IEP generated by the district for a prior school year. The parents further argue that Studio's tuition was reasonable, including the above-mentioned administrative fee. Regarding the related service providers' rate, the parents argue that these rates are reasonable and, further, that the district's reimbursement rate is irrelevant. With regard to transportation, the parents argue that it was the district's burden under State law to prove at the impartial hearing that the student did not require special transportation and that it failed to do so. Finally, the parents argue that the petition makes "frivolous" arguments, including its argument that the IHO did not appropriately reference the hearing record in his decision.

## 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, 180-83, 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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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.

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<sup>2</sup> The district does not appeal the portion of the IHO's decision ordering reimbursement for the costs of the neuropsychological evaluation; accordingly, this determination by the IHO is final and binding on the parties and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

2007]; 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).

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. 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 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).

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. Impartial Hearing Officer Decision**

On appeal, the district contends that the IHO's decision was "vague" and otherwise deficient for failing to include specific citations to the record. While the district correctly cites the language of 8 NYCRR 200.5[j][5][v] which requires that an IHO's decision "reference the hearing record to support the findings of fact," the district's protestations are not borne out by the text of the IHO's decision. The IHO's decision, on the contrary, contains numerous (over 70) citations to the hearing record (IHO Decision at pp. 1-19). The IHO undoubtedly satisfied his regulatory obligation and the district's argument must be rejected (see 8 NYCRR 200.5[j][5][v]).

### **B. Unilateral Placement**

In this case, the district conceded that it did not offer the student a FAPE for the 2012-13 school year; consequently, the next issue is whether the parent's unilateral placement of the student at Studio during the 2012-13 school year was appropriate (see Tr. p. 8). For the reasons described below, the hearing record supports the IHO's finding that Studio was an appropriate unilateral placement for the student.

#### **1. The Student's Needs**

In this instance, although the accuracy of the student's needs—as identified in certain evaluations and assessments in the hearing record—are not directly in dispute, a discussion thereof provides further illumination of the remaining issue; namely, whether the student's unilateral placement at Studio was appropriate. Under the circumstances of this case—where the district conceded that it failed to offer the student a FAPE for the school year in question and elected to not submit any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs into the hearing record—the district has effectively abandoned any opportunity to assert at either the impartial hearing or on appeal its position regarding the student's special education needs and the extent to which the parent's unilateral placement either addressed or failed to address those needs (see Tr. p. 8). Accordingly, to the extent that Studio staff relied upon evaluation reports or assessments of the student to identify the student's needs and develop the student's educational program, and those evaluation reports or assessments were not sufficiently accurate or complete for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and not the parent (see

34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]; A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district].<sup>3</sup>

Thus, the question of whether Studio was an appropriate unilateral placement is principally determined by whether the program provided "educational instruction specially designed to meet the unique needs of the [student]" (Rowley, 458 U.S. at 188-89; see Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 365). As discussed below, the evidence in the hearing record submitted by the parent in this case was sufficient to identify the student's unique individual needs and to satisfy the parent's burden to establish the appropriateness of the student's unilateral placement at Studio for the 2012-13 school year.

In this case, the parent submitted two privately-obtained neuropsychological evaluation reports conducted by the same psychologist in May 2010 and March/April 2012 as evidence of the student's needs (see Parent Exs. G, H).<sup>4</sup> The parent also introduced two OT evaluation summary and progress reports from July and December 2012, as well as two speech-language therapy progress reports from July 2012 and January 2013 (see Parent Exs. I; J; R; S). Additionally, the parent introduced a December 2012 Studio academic report (Parent Ex. Q). The educational facilitator for the Studio School testified that Studio personnel relied on "the information that we had at the end of last year" to develop the student's educational plan for the 2012-13 school year (Tr. pp. 118-19; see Exhibits G, I, J). The evaluative information provided by the parents constitutes objective evidence sufficient to identify the student's unique individual needs, and the services provided at Studio detailed below were consistent with these needs (Gagliardo, 489 F.3d at 113; Frank G., 459 F.3d at 364).

The March/April 2012 neuropsychological evaluation, conducted by a clinical psychologist, was designed to assess the student's cognitive functioning, as well as update and measure the student's "current functioning and ongoing progress" (Parent Ex. G at p. 2; see id. at pp. 1, 11). Based on his evaluation, the psychologist concluded that a previous diagnosis of mixed, receptive-expressive language disorder continued to be appropriate for the student (id. at p. 11). The evaluator also noted the student's language deficits, emerging academic skills, and struggles with both fine motor skills and motor planning (id.).

During formal testing, the evaluator described the student as "friendly, cooperative, . . . motivated," and a "pleasure to evaluate" (Parent Ex. G at p. 4). The evaluator also described the student as tentative but persistent in his attempts to complete difficult tasks (id. at p. 4).<sup>5</sup> The evaluator reported that Administration of the Wechsler Intelligence Scale for Children—Fourth

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<sup>3</sup> Moreover, because a "private placement need not provide . . . an IEP for the disabled student," Studio had no duty to conduct the tests or evaluations typically relied upon by a district to develop an IEP (Frank G., 459 F.3d at 364).

<sup>4</sup> Only the March/April 2012 neuropsychological evaluation will be discussed below as it pertains to the student's then-current development, strengths, and needs.

<sup>5</sup> The psychologist noted that the more a task was based on verbal skills, the more the student struggled (Parent Ex. G at p. 4). He also noted that the student was less comfortable with "new and unfamiliar tasks" (id.).

Edition (WISC-IV) yielded a full scale IQ of 91, with variability noted within the test scores (id. at pp. 4-6). According to the evaluator, the student exhibited "impressive strength in his verbal and nonverbal reasoning skills," while tasks involving "more extensive expressive language" were an area of weakness (id. at pp. 5, 6). The evaluator noted that the student demonstrated a "strong score" when asked to explain how two words were alike (id. at p. 5). The student achieved scores in the average range when matching pictures sharing a conceptual basis and locating previously viewed symbols in a larger group of symbols but exhibited vocabulary skills within the "[l]ow [a]verage" range (id. at pp. 5-6). According to the evaluator, the student exhibited the most difficulty with the comprehension subtest, as it required more open-ended responses and employed progressively difficult language (id. at p. 5).

The evaluator reported that, with respect to academic achievement, the student performed approximately a year below his grade level on academic tasks evaluated on the Woodcock-Johnson III Tests of Achievement (W-J III ACH) (Parent Ex. G at pp. 6-7). The evaluator reported that the student's academic skills, especially those relating to encoding and decoding, were just emerging (id. at p. 7). Therefore, the evaluator administered a limited portion of the W-J III ACH subtests (id.). The evaluator reported that the student could identify and sound out letters and demonstrated a relative strength in understanding simple directions but "encountered difficulty" as the directions increased in complexity (id.). The evaluator noted that the student was beginning to learn math facts, which was reflected in his score on the applied problems subtest (id.).

The psychologist also reported the results of the student's performance on the Comprehensive Test of Phonological Processing (CTOPP) (Parent Ex. G at pp. 7-8). The student's ability to blend words and demonstrate elision (a verbal task of saying what is left of a word when part of it is removed) were in the "low [a]verage" range, and his ability to repeat words and rapidly name objects and colors were in the "[a]verage range" (id. at p. 8). The evaluator also incorporated testing results from the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-IV) (id. at pp. 8-10). The evaluator reported that the student's scores on the CELF-IV were weaker than his verbal performances on the WISC-IV, which was characteristic of a student with "expressive and receptive language challenges" (id. at p. 9). According to the evaluator, the student achieved his strongest score on the expressive vocabulary subtest, which offered both visual cues and structure (id.). The student's lowest reported score was on the formulated sentences subtest, a subtest that required the student to make up a sentence about a specific picture using a given word (id.). The evaluator reported that, while the student's scores on the CELF-IV indicated a continued need for support, they also reflected the student's potential to make gains with adequate support (id. at p. 10).

In order to assess the student's neuropsychological functioning, the evaluator administered subtests of the Developmental Neuropsychological Assessment Test (NEPSY) (Parent Ex. G at pp. 10-11). The evaluator reported that the student demonstrated strengths in the areas of attention, as he was able to stand still with his eyes closed while auditory distractors were provided, and visuospatial skills, as demonstrated by his ability to find shapes when they were presented in a larger group of shapes (id. at p. 10). According to the evaluator, the student performed in the "[l]ow [a]verage" range on a task measuring his ability to comprehend instructions and a task requiring him to reproduce detailed shapes and designs (id. at p. 11).

For the 2012 neuropsychological evaluation, the evaluator also spent several hours observing the student in class and during an unstructured recess time (Parent Ex. G at pp. 2-3). The evaluator described the student as "quiet and relatively by himself," as well as appearing "comfortable with the other kids" as he lined up to transition to the workroom from a classroom (id. at p. 3). The evaluator observed the student choosing a project, working on the self-generated project with "steadiness and diligence," and seeking assistance from his teacher when attempts to accomplish a task independently failed (id. at p. 3). During recess, the examiner observed the student during a game of tag with same age peers and noted that the student, although quiet and "stay[ing] a bit on the periphery," also played along with a "very broad smile on his face" (id.).

According to the psychologist, the results of his evaluation indicated growth in areas of the student's cognition, specifically his ability to utilize verbal and non-verbal reasoning skills (Parent Ex. G at p. 11). The evaluator reported that the student was able to understand what was happening in his classroom, to follow work that he was assigned, make use of support, and express his needs when necessary (id.). However, the evaluator also found that the student continued to struggle with both receptive and expressive language, particularly when language was used in a more complex and open-ended context (id.). Additionally, the evaluator noted that the student struggled with fine motor skills and motor planning (id.). With respect to academics the evaluator reported that the student's reading and writing skills were emerging and recommended that the student receive reading intervention to assist with his emerging decoding skills (id. at pp. 11-12). The evaluator also recommended that the student continue to receive OT and speech-language therapy (id. at p. 11). Finally, the evaluator opined that it was "clear" the student "must remain in a small classroom environment" that would allow the student "the opportunity to develop his academic and social skills" (id.).

According to the June 2012 OT evaluation summary and progress report, as well as the OT provider's testimony at the impartial hearing, the student demonstrated delays in fine and gross motor skills, motor planning, sensory development, graphomotor and ADL skills (Parent Ex. I at pp. 1-2; see Tr. 174-78). The occupational therapist described the student as having low muscle tone, which compromised his endurance and made it somewhat harder for him to keep up with students his age (Tr. pp. 176-77; Parent Ex. I at p. 2). She indicated that this low muscle tone also contributed to the student running with a wide base (Tr. p. 177; Parent Ex. I at p. 2). With respect to the student's upper body, the occupational therapist noted that the student exhibited weakness in his shoulder girdle, elbow, joints, and hands, which affected the quality of his gross and fine motor skills (Tr. p. 176-77). According to the occupational therapist, the student was extremely sensitive to touch and texture (Tr. pp. 177-78; see Parent Ex. I at p. 1). She reported that the student's lack of experiential play with his hands impacted the way he held utensils and tools (Tr. p. 178; see Parent Ex. I at p. 2). The occupational therapist further explained that the student had difficulty with activities of daily living (ADL) from spatial and fine motor tactile points of view (Tr. p. 178).

According to the July 2012 speech-language progress report, as well as the testimony of the student's speech-language pathologist, the student demonstrated "significant receptive, expressive[,] and pragmatic language delays" (Parent Ex. J at p. 1; see Tr. p. 376). The speech-language pathologist further indicated that the student's expressive language challenges included "a disorder with his syntax so that his message [wa]s misleading" (Tr. pp. 378-79). Further, the July 2012 speech-language progress report described the student's struggles when "independently

engaging with peers in verbal exchanges in novel and abstract scenarios" (Parent Ex. J at p. 1). Specifically, the student used simple and concrete sentences when challenged by novel/complex scenarios or social engagement (*id.* at p. 2). The speech-language pathologist reported that the student exhibited difficulty comprehending a "novel story without visual support or repetition" (*id.*). Further, the speech-language pathologist testified at the impartial hearing that the student's difficulty with pragmatic, receptive, and expressive language interfered with his involvement with his environment (Tr. p. 376). She additionally noted the student's difficulties with "new directions[,] new concepts," and understanding complex questions (Tr. p. 378). Further, she noted the student's pragmatic language difficulties, including an inability to stay engaged with peers, read social cues, and to ask questions during conversations (Tr. p. 379).

## **2. Specially Designed Instruction**

The district argues that, contrary to the IHO's findings, the hearing record contains insufficient evidence describing how the educational program at Studio effectively addressed the student's specific disabilities and needs. State regulation defines specially designed instruction as "adapting, as appropriate, to the needs of an eligible student . . . the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In this instance, the evidence in the hearing record reveals that Studio designed a program specially designed to meet the student's individual needs for the 2012-13 school year.

According to the head of school at Studio, the school's mission was to "educate the hearts and minds of children" and it valued intellectual and creative ideas, as well as academic excellence (Tr. p. 501; Parent Ex. K at p. 1). The educational facilitator at Studio testified that there were between 90 and 100 students in "the ongoing school," which offered classes ranging from preschool to middle school (Tr. p. 73). The educational facilitator further testified that the school grouped its students into mixed aged groups and that the student was in a group with six and seven year old students (Tr. pp. 73; see also Tr. p. 240). The head of the elementary school program testified that there were fifteen children in the student's classroom, one teacher, and one teacher assistant (Tr. pp. 240-42).

The educational facilitator, who testified at the impartial hearing, headed the comprehensive education program (CEP) at Studio during the 2012-13 school year, overseeing what she described as a "small program for a small number of children in the school who need[ed] . . . multiple special education intervention[s]," along with "a whole program designed to support th[ose] child[ren] throughout the day at school with services" (Tr. p. 74; Parent Ex. K at p. 5). The student was one of six children at Studio who participated in the CEP program, while the remainder of the student body consisted of regular education students (Tr. pp. 75, 78). Studio's CEP program, according to the educational facilitator, provided any service that a student needed; for example, speech-language therapy, OT, reading services, or vision therapy (Tr. pp. 74-75). The student's CEP team was composed of the educational facilitator, an occupational therapist, a speech-

language pathologist, the student's head and assistant classroom teachers, and the head of the elementary school program (Tr. pp. 111-12).<sup>6</sup>

To address the student's academic needs, including reading, mathematics, and writing, the CEP team at Studio made multiple curriculum modifications (see Tr. pp. 88-89, 138-39, 155-56, 244-48; Parent Ex. Q at pp. 1-2). The head of the elementary school program, consistent with the classroom teacher's report, described the student's academic skills as "at least a grade behind" (Tr. p. 245; see Parent Ex. Q at p. 2). According to the December 2012 classroom teacher's academic report and testimony from the head of elementary school program, the CEP team addressed the student's academic needs using methods that included: a teacher standing or sitting near the student when individual and group instructions were given; repeating oral instructions one at a time; modifying assignments into smaller increments or providing additional time; holding materials until the student needed them; modeling questioning techniques; and modeling/prompting how to engage with peers (Tr. pp. 249-50, 278; Parent Ex. Q at p. 1). Other modifications specifically designed to address the student's academic needs included reading to the student in order to improve reading comprehension, dictating to the teachers to improve his writing composition skills, and using manipulatives to improve math skills (Tr. pp. 245-47, 256-57). Other services that the CEP team provided to the student included ongoing collaboration meetings of the team members, modifications of the student's day to day plan, staff orientations and trainings, an annual classroom teacher academic report, three OT and speech-language assessments and/or progress reports per school year, and team meetings prior to parent meetings each trimester (Tr. pp. 83-86, 88-89, 114, 134-36, 197-200, 290-93, 300-01, 497-98).

According to the testimony of the head of the elementary school program, as well as the speech-language pathologist's July 2012 report, the student's social/emotional needs were addressed in the small class setting with typical peers at Studio, which allowed the student to work on social interaction skills, while peers, teachers, and therapists provided models for language and appropriate social interactions (Tr. pp. 299-300; Parent Ex. J at p. 1). Further, the head of the elementary school program described how the CEP team addressed the student's social language needs during lunch time by facilitating interactions with peers (Tr. pp. 287-89).

To address the student's fine and gross motor, motor planning, sensory, and ADL needs, Studio provided the student with two 45-minute sessions per week of OT; one session in the classroom and one 1:1 session in the therapist's off-site sensory gym (Tr. pp. 170-71, 174-76, 213-14).<sup>7</sup> The December 2012 OT evaluation summary and progress report detailed strategies and tools used, such as individual attention, use of a pencil grip, sensory gym time, extra time to complete fine and gross motor activities, theraputty and clay exercises to strengthen his hand and wrist muscles, scissor practice, and obstacle course work that were effective in meeting the student's individual fine and gross motor, sensory, motor-planning, and graphomotor needs (Parent Ex. R). The occupational therapist also provided comprehensive testimony at the impartial hearing

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<sup>6</sup> While the educational facilitator at Studio oversaw the CEP, the head of the elementary school program was in charge of its curriculum (Tr. pp. 75, 77-78, 237-38).

<sup>7</sup> While the district' correctly points out that Studio did not have a sensory gym, the hearing record reveals that the student's OT provider had access to a sensory gym, which the student attended and utilized (see Tr. pp. 174-75, 213-14).

describing the manner in which she addressed the student's fine motor, gross motor, sensory and daily living needs. Specifically, with respect to the student's fine motor weaknesses, the occupational therapist reported that she used therapy to work on hand strengthening exercises with the student and also worked on the student's writing skills (Tr. p. 181). To address the student's gross motor needs, the occupational therapist described how she worked with the student in the yard next to his classroom on "little drills" such as running, skipping, jumping, and wall push-ups (Tr. p. 183). In addition, in her office she set up obstacle courses for the student to maneuver and worked on balance activities (Tr. pp. 183-84). The occupational therapist further testified that the student's sensory needs were addressed during lunch using a variety of foods, as well as during classroom projects, exposing the student to a variety of tactile experiences such as clay, sand, and wet tissue paper (Tr. pp. 186-87, 201-03). The sensory gym was used to address the student's sensory integration needs and allowed the student to work on skills that may be outside of his comfort level, initially, away from his peers (Tr. pp. 186-87). With respect to the student's ADL needs, the OT reported that she practiced skills, such as putting socks on and off and lacing shoes, climbing up and down stairs, and manipulating fasteners (Tr. p. 179-81).

To address the student's significant needs in expressive, receptive, and pragmatic language skills, Studio provided speech-language therapy three times per week (one push-in and two pull-out), and the speech-language therapist engaged in weekly collaboration and consultation between and among the members of the CEP team (Tr. pp. 83-84, 146, 374-77). According to the January 2013 speech-language progress report, the student benefitted from his small class size at Studio, as it provided the best opportunity to "process and comprehend language directions and comments, use his language to the best of his ability, . . . [and] enhance peer interactions" (Parent Ex. S at p. 1). According to the testimony of the student's speech-language therapist, the student's needs were specifically addressed by breaking down "wh" questions into smaller parts and explaining to the student which type of "wh" question was asked both in classroom and in 1:1 speech sessions (Tr. pp. 379-81). She further described "rewording" as an important strategy used to improve the student's expressive language skills by better organizing his sentence structure (Tr. pp. 382-83). The speech-language therapist testified that she demonstrated for the student's classroom teachers how to work on and model the same skills on which the student focused in the 1:1 speech-language therapy sessions so that the student could benefit from practical experience with these skills within the classroom setting (Tr. pp. 380-82).

Turning to some of the district's specific challenges to the appropriateness of Studio, the district argues that Studio did not fully assess or meet the student's reading needs. The district correctly points out that the 2012 neuropsychological evaluation recommended "reading intervention" to assist the student's "emerging decoding skills" (Parent Ex. G at p. 12). Further, it appears that Studio employed a reading specialist who could have provided the student with specialized reading services but who was not incorporated into the student's program (Tr. pp. 75, 90). Nevertheless, as detailed above, the student received speech-language therapy and classroom instruction designed to meet his significant language needs. The district also argues that the student did not receive a necessary amount of related services as compared to the levels prescribed in the student's June 2011 IEP (see Parent Ex. P at p. 1). Even assuming that the June 2011 IEP represented an accurate assessment of the student's related service needs for the 2012-13 school year, the difference between the amount of services on the June 2011 IEP and the amount the student received at Studio is not significant in this instance (compare Parent Ex. P. at p 17 [three 30-minute sessions per week of OT and five 30-minute sessions per week of speech-language

therapy], with Parent Ex. R at p. 1 [two 45-minute sessions per week of OT] and Tr. p. 376 [three 45-minute sessions per week of speech-language therapy]). Moreover, as to both of these arguments, it is well-established that a unilateral placement need not provide every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). Further, as set forth above, in light of the district's concession that it failed to offer the student a FAPE and its election not to submit any evidence about the student's special education needs at the impartial hearing, the district's position regarding the extent to which Studio failed to address the student's needs carries less weight (see A.D., 690 F. Supp. 2d at 208).<sup>8</sup> Therefore, the district's arguments that Studio failed to provide the student with specialized reading instruction or sufficient related services must fail.

### 3. Progress

The district argues that, to the extent it may be determined, since Studio does not offer grades or administer testing, that the student made little progress at the unilateral placement. In contrast to the district's argument, the hearing record reflects that the student made progress in several areas. Initially, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D. D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 491-92 [S.D.N.Y. 2013]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).<sup>9</sup> However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Contrary to the district's argument and notwithstanding that Studio did not formally evaluate the student, utilize standardized tests, or develop IEPs for the students (see Tr. pp. 131, 146), the hearing record contains sufficient evidence regarding the student's progress at Studio, including the testimony of Studio personnel and progress reports. In the December 2012 Studio School academic report, the student's classroom teacher described the student as "working

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<sup>8</sup> Similarly, the district's argument that the parents abandoned or failed to meet their burden regarding the student's transportation needs fails. Because the parties do not dispute that the IHO's order provided for special transportation and the district offered no information as to the student's needs, there is no reason to disturb the IHO's finding on this point (IHO Decision at pp. 16-17; see A.D., 690 F. Supp. 2d at 208).

<sup>9</sup> The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

diligently in all areas of the curriculum" and noted that he was "motivated and committed to making progress" (Parent Ex. Q at p. 1). The head of elementary school program at Studio testified that the student made progress by demonstrating reduced anxiety, sitting for longer periods of time, self-starting, and participating in classroom activities with an increased degree of awareness (Tr. pp. 259-60, 273-5, 298-99). She further testified, and the December 2012 classroom teacher's academic report described, that the student progressed in reading comprehension, attention, reading, writing, as well as addition, money, and time skills (Tr. pp. 250-51, 253, 259-60; Parent Ex. Q at pp. 1-2). With regard to writing, the student demonstrated an ability to write a greater number of words and sentences (Parent Ex. Q at p. 2).

The December 2012 OT evaluation summary and progress report further noted the student's progress with, among other things, writing endurance, shape copying skills, catching and hopping skills, reduced distractibility, increased focus, and reduced need for teacher/therapist support for transitions (Parent Ex. R at pp. 1-2; see also Tr. pp. 180-81, 192-3, 205-06). At the impartial hearing, the occupational therapist cited additional examples of the student's progress during the 2012-13 school year, including his improved ability to put on a coat and socks and manipulate fasteners (Tr. p. 180). The occupational therapist additionally noted "remarkable improvement in [the student's] ability to organize himself [whe]n illustrating stories and things that he d[id] during reading and writing" (Tr. p. 182). Further, the occupational therapist reported improvement in the student's muscle tone and upper body strength since the beginning of the school year, noting that the student was "doing so many more things that he never did before," like climbing monkey bars, swinging rhythmically, and completing wall push-ups (Tr. pp. 184-85).

The January 2013 speech-language progress report also noted that the student made progress since the beginning of the 2012-13 school year (Parent Ex. S at p. 1). Specifically, within the classroom, the student frequently initiated interactions with peers, and the speech-language therapist noted "increased instances of integrating and implementing verbal models" that, in turn, increased the student's ability to remain engaged for longer in verbal exchanges (id.). Within the pull-out speech-language therapy sessions, according to the January 2013 report, the student "demonstrated the ability to comprehend and retain a wider variety of concepts," and an increased ability to answer questions presenting abstract concepts (id.). Further, the student's speech-language therapist testified that the student made progress generalizing language practice from smaller to larger groups, hearing and processing rewording prompts, and using pragmatic language skills (Tr. pp. 380, 383-85).

Based on the foregoing, the evidence in the hearing record demonstrates that Studio and, specifically, Studio's CEP program, met the student's unique educational needs and, further, that the student made progress in this environment.

### **C. Equitable Considerations/Remedy**

Having determined that Studio was an appropriate unilateral placement for the student for the 2012-13 school year, the next issue to consider is whether equitable considerations support the parents' request for reimbursement of the student's tuition costs. The district argues that equitable considerations militate against an award of tuition reimbursement because the parents had no intention of considering a public school site. The district also argues that the tuition at Studio was excessive.

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 IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

In the present case, there is no evidence in the hearing record that provides sufficient reason to reduce or deny an award of tuition reimbursement. The parents fully cooperated with the district, requesting in writing that a CSE convene to develop an IEP for the student on three occasions between February and July 2012 (see Parent Exs. C at p. 1; E at p. 1; F at p. 1). In addition, the parents procured a private neuropsychological evaluation of the student and provided it, along with progress reports from the student's related service providers to the district to use in the development of the student's IEP (see Parent Ex. C at p. 1; see generally Parent Exs. G; I; J). Furthermore, the parents provided sufficient and timely notice to the district regarding their intent to unilaterally place the student at Studio (see Parent Ex. B at p. 1).

Although the evidence in the hearing record shows that the parents signed an enrollment contract with Studio in January 2012 for the student's attendance during the 2012-13 school year

and provided a deposit in order to reserve a spot for the student (Dist. Ex. 1; Parent Ex. O at pp. 4-5; see Tr. pp. 568-69), it appears that the parents acted reasonably under the circumstances of this case (see, e.g., C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 [2d Cir. 2014]; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at \*9-\*10 [S.D.N.Y. Sept. 23, 2013]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at \*28-\*30 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd sub nom, R.E., 694 F.3d 167; C.L. v. New York City Dep't of Educ., 2013 WL 93361, at \*9 [S.D.N.Y. Jan. 3, 2013], aff'd, 2014 WL 278405 [2d Cir. Jan. 27, 2014], as amended [Feb. 3, 2014]). The parents informed the district that Studio required that they sign the contract and provide the deposit in order to reserve a seat for the student and, therefore, requested that the CSE convene "as soon as possible" (Parent Ex. F at p. 1). Furthermore, a new contract with Studio was signed by the parents in September 2012, which included a provision by which the parents would be released from their financial obligations under the contract in the event that they accepted a public school placement from the district (Parent Ex. M).

Moreover, the district did very little, on balance, to better its position with regard to equitable considerations. Based on all of the foregoing, the evidence in the hearing records supports the determination of the IHO that the district cannot prevail with regard to equitable considerations when it failed to conduct necessary evaluations, convene a CSE, and respond to any of the parents' numerous written requests regarding the student (IHO Decision at pp. 15-16; see id. at p. 12).

The district also specifically objects to a charge Studio identified as an "administrative fee," which was determined at the impartial hearing by taking the cost of the CEP program and subtracting the cost of the related services providers (see Tr. pp. 531-33; Parent Ex. M). Ordinarily this "fee," which accounts for approximately 20 percent of the student's annual tuition cost, might appear excessive (see Tr. p. 505; Parent Ex. M). However, the district is hardly in a position to object to any aspect of the parents' conduct given its concession that it denied the student a FAPE and its inexcusable failure to evaluate the student and design an IEP for the 2012-13 school year. Under these facts, the equities tip substantially in favor of the parents (see N.R. v. Dep't of Educ., 2009 WL 874061, at \*7 [S.D.N.Y. Mar. 31, 2009] [finding that the district's "abdication of its responsibility" was so clear that equitable considerations weighed in the parents' favor]).<sup>10</sup>

## VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's determination that Studio was an appropriate unilateral placement and that equitable considerations weighed in favor

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<sup>10</sup> There is also no reason to disturb the IHO's determination that the district failed to introduce any evidence in support of its claim that the student's related service providers' charged excessive rates. On appeal, the district's attempt to cure this evidentiary shortcoming at the appellate stage by merely citing its own website identifying the district's rate of reimbursement is insufficient to overcome the district's failure to satisfy its burden at the impartial hearing in the first instance. It would not be appropriate to simply take judicial notice of such rates. Instead, the district should have disclosed this evidence to the parents and presented it at the hearing so that it could be subjected to cross examination or rebuttal evidence. Moreover, the presumption underlying the district's argument—that individual families are both capable of and required to leverage such services at the same rates as a large public agency like the district—is questionable on its face and would need to be appropriately established through the hearing process, which the district failed to do.

of the parents' requested relief (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Accordingly, there is no reason to disturb the IHO's award of tuition reimbursement to the student for the 2012-13 school year. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated:**            **Albany, New York**  
                         **April 17, 2014**

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