



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-075

**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, Gail M. Eckstein, Esq., of counsel

Law Office of Anton Papakhin, P.C., attorneys for respondent, Anton Papakhin, 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 respondent's (the parent's) daughter and ordered it to provide direct payment for the student's tuition costs at the IVDU Upper School (IVDU) for the 2011-12 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO 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]).

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

The parties' familiarity with the facts and procedural history of the case, and the IHO's decision is presumed and will not be recited here.<sup>1</sup> The Committee on Special Education (CSE) convened on May 3, 2011, to formulate the student's individualized education program (IEP) for the 2011-12 school year (see generally Dist. Ex. 1). The parent disagreed with the recommendations contained in the May 2011 IEP, as well as with the class size and staffing ratio of the particular public school site to which the district assigned the student to attend for the 2011-12 school year and, as a result, notified the district of her intent to unilaterally place the student at IVDU (see District Ex. 1; Parent Exs. C;D). In a due process complaint notice dated February 22, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A).

An impartial hearing convened on May 21, 2012 and concluded on February 12, 2013 after two days of proceedings (Tr. pp. 1-132). In a decision dated March 28, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, that IVDU was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 5-18). As relief, the IHO ordered the district to provide direct payment of the student's tuition at IVDU Upper School for the 2011-12 school year (IHO Decision at p. 16). However, the IHO denied the parent's request for reimbursement for related services and/or compensatory additional services and dismissed the parent's claim for transportation costs in the absence of any evidence of such expenditures (IHO Decision at pp. 16-17).

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

The parties' familiarity with particular issues for review on appeal in the district's petition for review and the parent's answer thereto is also presumed and will not be recited here. The essence of the parties' dispute on appeal is whether the May 2011 CSE's recommendation for a 12:1+1 special class in a specialized school was sufficient to address the student's needs. In addition the district appeals the IHO findings regarding the appropriateness of the parent's unilateral placement and equitable considerations.

The parent does not cross appeal the IHO's determinations regarding the adequacy of evaluations, annual goals, or transition planning, nor his dismissal of her transportation and related services claims. Therefore, these determinations have become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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<sup>1</sup> Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

## 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]).

While the district has the burden of proof to demonstrate at an impartial hearing that it offered the student a FAPE, its burden generally ends when challenges to the assigned public school site are made but the student was unilaterally withdrawn from the public school prior to the district having to implement the student's IEP (R.E., 694 F.3d at 186-88; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3; see also Grim, 346 F.3d at 381-82).

## **VI. Discussion**

### **A. FAPE**

Upon careful review, the hearing record reflects that the IHO correctly reached the conclusion that the district failed to offer the student a FAPE for the 2011-12 school year and that equitable considerations weighed in favor of the parent's request for relief (see IHO Decision at pp. 8-17).<sup>2</sup> The IHO accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parent's due process compliant notice, referenced appropriate legal standards to determine whether the district offered the student a FAPE for the 2011-12 school year, and applied those standards to the facts at hand (see IHO Decision at pp. 4-17).<sup>3</sup> The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (see IHO Decision at pp. 4-17).

In particular, a review of the hearing record shows that the IHO correctly determined that the May 2011 CSE's recommendation for a 12:1+1 specialized class in a specialized school was not supported by the evidence (IHO Decision at p. 13). The district did not establish that the student would have received sufficient individualized instruction in a 12:1+1 special class to meet her significant academic and social/emotional needs and improve her deficits in receptive, expressive and pragmatic language skills and gross and fine motor skills (see Dist. Exs. 1 at pp. 3-5; 5 at p. 2; 6). The district's own observation of the student showed that she had difficulty following classroom instruction and required a "great deal of individual help" in a class of eight students (Dist. Ex. 5 at p. 2). In addition, the district special education teacher who conducted the observation confirmed that there was discussion at the May 3, 2011 CSE meeting regarding the size of the class the student required in order to learn; however, the testimony did little to support

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<sup>2</sup> While the IHO may have erred in treating the parent's claims related to the 12:1+1 classroom as an implementation claim, it appears that he did so based on the parent's assertion that the class size and staffing ratio of the assigned school were inappropriate (Parent Ex. A at p. 2). The IHO continued his analysis and also found that a 12:1+1 special class was substantively insufficient to address the student's needs (IHO Decision at pp. 12-13)

<sup>3</sup> To some extent the IHO appeared to treat the claims in the due process complaint regarding the 12:1+1 special class as procedural in nature, but to be clear I find that the due process complaint shows that the parent was concerned with the level of special education support called for by the IEP (i.e. student-to-staff ratios), which was a claim that goes to the substantive adequacy of the IEP. As further described below, this has had little effect upon the outcome in this instance.

the district's case because in all candor she did not have a recollection of the substance of the discussion at the CSE (Tr. p. 36).<sup>4</sup> This left the district in need of some other evidence to prove its case. Although not required to be created by federal or State regulation, the May 3, 2011 CSE minutes were placed in evidence; however, the minutes were brief and provided little insight into the discussion that took place at the CSE meeting or the reasons for the conclusion reached by the CSE (see Dist. Ex. 6). Another factor that is unhelpful in the district's presentation of its case is that there was no prior written notice offered into evidence, which, if appropriately developed may have assisted in explaining which information the district relied on to concluded that a special class of 12:1+1 in a specialized school was an appropriate recommendation for the student and why such information was persuasive to the CSE (see 34 CFR 300.503; 8 NYCRR 200.5[a]; Letter to Chandler, 112 LRP 27623 [OSEP 2012]). Whether or not a prior written notice was created in this case is unclear; however, one was required by federal and State regulation. The district's argument that the IHO erred in concluding that a 12:1+1 special class called for by the IEP was appropriate is without merit and the district has not established that the IEP was reasonably calculated to enable the student to receive educational benefits.

### **B. Unilateral Placement**

Turning to the issue of IVDU and whether it was appropriate for the student, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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 [citing 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

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<sup>4</sup> The district special education teacher who conducted the observation served as both the district representative and special education teacher at the May 3, 2011 CSE meeting (Tr. pp. 36-37; Dist. Ex. 1 at p.2).

only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

With respect to the district's claim that IVDU is not an appropriate placement for the student, the IHO based his findings on the testimony offered by the principal of IVDU, the parent, and documented reports of the student's academic progress in the private setting in determining that IVDU was an appropriate placement for the student because it provided her with specially designed, individualized instruction to meet her unique educational needs, supported by such services as were necessary to permit her to benefit from instruction (IHO Decision at pp. 14-15; Tr. pp 54-83, 108, 116; Parent Exs. B; G; I). The only challenge of error alleged by the district regarding the IHO's decision is that IVDU was not a 12-month program. In making this argument, the district appears to fault the parents for failing to disprove that the student experiences substantial regression in the absence of 12-month services. However, this approach by school districts to challenging parental unilateral placements has not been met with favor by examining courts when the evidence in a hearing record regarding a student's needs is already weak—if it is a disputed issue, establishing a student's needs through appropriate evaluation is a task chargeable to the district under the IDEA, not the parent. As in this case, when a district failed to offer evidence of the student's needs when defending its own program such as substantial regression and 12-month services to address it, the district cannot then use that absence of evaluative documentation to controvert evidence submitted by the parent indicating the student's needs and the extent to which the parent's unilateral placement either addressed or failed to address those needs (see A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be

incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district)). The district's challenge to the IHO's determination that IVDU is appropriate is without merit.

### **C. Equitable Considerations**

After reviewing the hearing record, I concur with the IHO that equitable considerations favor an award of tuition reimbursement. The hearing record shows that the parents: (1) cooperated with the CSE; (2) provided timely notice of their disagreement with the IEP; (3) provided timely notice of their intent to unilaterally place the student and seek reimbursement; (4) did not block or otherwise prevent the district from being able to evaluate the student; and (5) did not act unreasonably (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, 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]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

### **D. Relief – Direct Funding**

Finally, the district argues that the parent is not entitled to the direct funding of the student's tuition at IVDU.

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). Here, I agree with the IHO that the record in this matter establishes that the parents – whose adjusted gross income for 2011 was \$39,819 (Parent Ex. K) – lacked the resources to pay the \$48,000 annual tuition at IVDU (Parent Exs. E, F). In fact, the district itself even argues in its petition that IVDU could not have realistically expected payment from the parent precisely because its tuition was "more than the [p]arents' yearly income" (Petition at ¶ 37).

In addition, the district argues that the parent's contract with IVDU is a "sham" and the parent has failed to show a legal obligation to pay IVDU. In this regard the district contends, among other things, that the parent has not made any payments to the school, and that according to the parent, the school itself has done little to enforce the contract. However such facts do not warrant a determination that the parent was not obligated under the contract (see E.M., 758 F.3d

at 457-58 [examining parental standing in light of contractual obligations to pay, as well as implied obligations to pursue remedies under the IDEA]). This is especially true where, as here, the IVDU administrator responsible for finances testified that the parents were in debt to the school in accordance with the contract and the contract had not been amended (Tr. pp. 98-99, 100; Parent Ex. F). Accordingly, under the circumstances of this case, I find that the parent is entitled to direct funding of the student's tuition at IVDU for the 2012-13 school year, as ordered by the IHO, under the factors described in Mr. and Mrs. A. (see 769 F. Supp. 2d at 406).

## **VII. Conclusion**

In summary, I find that for the reasons discussed above the district denied the student a FAPE for the 2011-12 school year, that IVDU is an appropriate placement for the student, and that the IHO properly ordered the district to directly fund the student's tuition at IVDU for the 2011-12 school year.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                          **November 10, 2014**

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