The University of the State of New York

The State Education Department
State Review Officer
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No. 13-124

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Susan Luger Associates, Inc., Special Education Advocates for petitioners, Lawrence D. Weinberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Francesca J. Perkins, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2012-13 school year. Respondent (the district) cross-appeals from so much of the IHO's decision as determined that the district bore the burden of proof with respect to equitable considerations. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and they will not be recited here. The CSE convened on May 18, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Dist. Ex. 1). The May 2012 CSE determined that the student was eligible for special education and related services as a student with autism and recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school with related services of occupational therapy (OT), speech-language therapy, and physical therapy (PT), as well as the

services of a full-time, 1:1 health paraprofessional (id. at pp. 12-13).[1] The parents disagreed with the recommendations contained in the May 2012 IEP, and notified the district of their intent to unilaterally place the student at the Rebecca School (see Parent Ex. J at p. 19).[2] In an amended due process complaint notice, dated August 3, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. C).

After a hearing on July 31, 2012 related to the student's pendency (stay put) placement, the IHO issued an interim decision dated August 13, 2012, determining that the student's pendency placement consisted of 5 hours per week of 1:1 special education itinerant teacher (SEIT) services, three sessions of individual OT per week, two sessions of individual PT per week, and two sessions of individual speech-language therapy per week per week, each to be provided at the student's home, as well as three sessions of individual speech-language therapy per week at school (Tr. pp. 1-21; Interim IHO Decision at pp. 5-6). After two prehearing conferences, the impartial hearing continued on the merits on December 10, 2012, which concluded on April 9, 2013, after five days of proceedings (Tr. pp. 22-801). In a decision dated May 30, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 10-23).

IV. Appeal for State-Level Review

The parents appeal from the IHO's decision and request that it be overturned in its entirety. The district answers, requesting that the IHO's decision be upheld, and cross-appeals from the IHO's allocation of the burden of proof to the district with respect to equitable considerations. The parties' familiarity with the particular issues for review contained within the parents' petition and the district's answer and cross-appeal is presumed and will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in determining that the May 2012 CSE appropriately addressed the student's interfering behaviors;

2. Whether the Rebecca School was an appropriate unilateral placement for the student; and

3. Whether equitable considerations favored the parents' claim for tuition reimbursement.[3]

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

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

[2] The Rebecca School has not been approved by the Commissioner of Education as a program with which districts may contract for the provision of special education programs and services to preschool students with disabilities (8 NYCRR 200.1[nn]; 200.7).

[3] Although referenced in their petition, the parents do not appeal from the IHO's decision or raise any arguments with respect to the IHO's denial of the claims in their due process complaint notice for compensatory education services or an independent educational evaluation at district expense.

designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d

at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Special Factors—Interfering Behaviors

Turning to the appropriateness of the May 2012 IEP, the parents argue on appeal that the FBA and BIP failed to address the student's behavioral needs relating to his tantrums and sensory regulation. The parents also argue that the May 2012 IEP failed to include appropriate annual goals to address the student's sensory needs. For the reasons set forth below, the IHO erred in finding that the May 2012 CSE appropriately addressed the student's behavioral needs.[4]

In New York State, policy guidance explains that "[t]he IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP" and, if necessary, the "student's need for a behavioral intervention plan [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having a functional behavioral assessment (FBA) conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]).

An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

The district school psychologist who participated during the May 2012 CSE meeting testified that the FBA and BIP were completed during the May 2012 CSE meeting (Tr. p. 161). The district school psychologist further testified that the FBA was "based on information that was in reports as well as information that came up during the meeting in our discussions with the school and the parent" (Tr. p. 160). With respect to the student's interfering behaviors, the district school

[4] Although I disagree with the IHO's finding that the CSE appropriately addressed the student's interfering behaviors and his overall determination that the district offered the student a FAPE for the 2012-13 school year, the remainder of the IHO's determinations are well supported by the hearing record and I adopt them as my own.

psychologist admitted that the student had tantrums which interfered with his learning but stated that the CSE did not include this behavior in the FBA because "there were many, many behaviors," the behavior was identified in the IEP, and he did not believe that "every single behavior" had to be identified on the FBA (Tr. pp. 209-10). The FBA identified the student's targeted interfering behaviors as putting non-edible items into his mouth and wandering (Dist. Ex. 2 at p. 1). Based on the manner in which the district school psychologist developed the FBA and the failure to identify the student's tantrums as an identified behavior, the FBA did not conform with State regulations (see 8 NYCRR 200.22[a][2], [3]). However, while the failure to conduct an adequate FBA is a serious procedural violation "because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all," the district's failure to conduct a proper FBA does not, by itself, automatically render an IEP deficient (R.E., 694 F3d at 190; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]). Instead, the May 2012 IEP and BIP must be closely examined to determine whether they otherwise addressed the student's interfering behaviors (C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 139-41).

A review of the May 2012 IEP indicates that the student's "dysregulated behavior is a major impediment to progress" and that the student "has frequent tantrums" (Dist. Ex. 1 at p. 2). The May 2012 IEP also notes that the student "has delays in sensory processing," "is unable to distinguish safe from dangerous behavior," and "will put non-edible items into his mouth" (id. at pp. 2-3). However, despite indicating these needs the IEP lacks sufficient supports and strategies to address the student's interfering behaviors. For example, the "management needs" section of the IEP addresses the student's behaviors through the provision of "redirection," "refocusing," and "visual, physical and verbal cues"; however, these strategies are not sufficient in light of the severity and nature of the student's behaviors and the safety concerns they raise (id. at p. 2). Similarly, the BIP did not include any intervention strategies to be used to alter antecedent events in order to prevent the occurrence of the target behavior, to teach alternative and adaptive behaviors to the student, or to provide consequences for the targeted inappropriate behaviors and alternative acceptable behaviors (Dist. Ex. 3). Finally, to the extent that the student's behaviors were related to his needs relating to sensory processing, the IEP did not address these needs in any fashion at all (Dist. Ex. 1 at p. 2).

Based on the foregoing, contrary to the IHO's determination, the CSE's failure to fully identify the student's interfering behaviors in the FBA or to include sufficient strategies in the May 2012 IEP and BIP to address the student's needs relating to sensory dysregulation, resulted in a denial of a FAPE to the student.[5]

B. Unilateral Placement

Having found that the district failed to offer the student a FAPE, the next issue is whether the Rebecca School was an appropriate unilateral placement for the student. A private school

[5] This is particularly so because the student's mouthing of inedible objects presented a health and safety concern that was not sufficiently addressed by the district in the IEP (see, e.g., N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12 [S.D.N.Y. June 16, 2014]).

placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 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 crux of the district's argument is that the Rebecca School was an inappropriate unilateral placement because it was unable to provide the student with sufficient support. A review of the hearing record supports a finding that the Rebecca School is an appropriate unilateral placement as it provided the student with sufficient support to address his unique needs.

The district argues that the Rebecca School would not provide the student with the support of a 1:1 health and toileting paraprofessional as recommended by the May 2012 CSE. The evidence in the hearing record indicates that, during the 2012-13 school year, the student was placed in a classroom with a 9:1+4 ratio (Parent Ex. O at p. 1). The student's special education teacher at the Rebecca School for the 2012-13 year testified that with respect to the student's toileting needs, either the Rebecca School staff or the student's service providers would assist the student (Tr. p. 311). The Rebecca School teacher further testified that because the student needed 1:1 support with respect to his academics, the student received 1:1 support from the teacher or teaching assistant "as much as possible" (Tr. pp. 467-68). She further testified that when necessary, the student received 1:1 support in English language arts (Tr. pp. 389-90). With respect to the student's tantrums and sensory dysregulation, the Rebecca School program director testified that "a weighted blanket" was used to help calm the student down (Tr. p. 346). Additionally, the Rebecca School classroom teacher testified that the classroom included sensory equipment such as a swing, trampoline, mats, and a bean bag chair (Tr. p. 380). Also, with respect to the student putting inedible objects in his mouth, the student's speech pathologist testified that the student was given a "chewy tube" to provide oral stimulation and prevent the behavior (Tr. pp. 683-84).

With respect to the district's argument that the Rebecca School was not appropriate because the classroom teacher and assistant teachers were not "certified in special education,," this argument fails because, as noted above, a private school in the context of a unilateral placement need not meet State standards by employing certified special education teachers (see Carter, 510 U.S. at 14).[6] Moreover, the cited testimony reflects that although the Rebecca School teacher testified that she was not State-certified to teach special education kindergarten, she was New York State-certified in childhood general and special education (first through sixth grades) and had both training and experience working with kindergarten students (Tr. pp. 374-75, 482-83).

Based on the foregoing, the hearing record indicates that the Rebecca School provided the student with a high degree of individualized attention, supports, and strategies to address his needs. Accordingly, the hearing record does not support the district's contention that the Rebecca School was not an appropriate unilateral placement for the student on the basis that it did not provide him with sufficient individualized attention and support.

C. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year and that the Rebecca School constituted an appropriate unilateral placement for the student, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the

[6] If anything, the assistance provided the student at the Rebecca School, indicating that the student required 1:1 support rather than instruction, supports the IHO's determination that the recommended 6:1+1 special class placement with a 1:1 paraprofessional was appropriate to meet the student's needs.

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 hearing record shows that the parents actively participated during the May 2012 CSE meeting (Dist. Exs. 1 at p. 19; 4 at p. 2). The hearing record further reveals that the parents provided the district with notice that the parent was placing the student in the Rebecca School Parent Ex. J at pp. 19, 22). Although the district argues that the parents did not intend to enroll the student in a public school placement, its argument is not persuasive as unless "the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA . . . their pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). Thus, a review of the hearing record reveals no equitable considerations that would diminish or preclude an award of tuition reimbursement to the parent.[7]

With respect to the parents' requested relief, the hearing record indicates that the parents executed a contract obligating them to pay a total of $81,417 for the student's tuition for the 2012-13 school year (Parent Ex. G). Based on the parents' income, as evidenced by their tax return and testimony (Tr. pp. 744-45, 769-70; Parent Ex. I), they have sufficiently established an inability to front the costs of the student's tuition at the Rebecca School to warrant the equitable relief of direct funding (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406, 420-28 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 452-454 & nn.14-15 [2d Cir. 2014]).

[7] Although the district contends in its cross-appeal that the IHO erred in assigning the burden of proof to the district with respect to equitable considerations, which party bears the burden of proof on an issue is only relevant when the evidence is in equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; M.H., 685 F.3d at 225 n.3). As the hearing record contains no evidence that the parents obstructed or were uncooperative with the district, and some evidence that they cooperated with the district, the evidence is not in equipoise and it is unnecessary to further address this contention.

VII. Conclusion

After a complete and careful review of the record, the IHO's finding that the district offered student a FAPE for the 2012-13 school year must be reversed as set forth above. A further review of the hearing record reveals that Rebecca School was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parents' request for relief. I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 6, 2013, is modified, by reversing those portions which found that the district appropriately addressed the student's behavioral needs and offered the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for amounts paid and fund the remaining costs of the student's tuition at the Rebecca School for the 2012-13 school year.

Dated: **Albany, New York**
December 30, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER