



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-132

### **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, Cynthia Sheps, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Neal H. Rosenberg, Esq., of counsel

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Jewish Community Center (the JCC) for the 2012-13 school year. The appeal must be dismissed.<sup>1</sup>

#### **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 appeal to a State Review Officer

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<sup>1</sup> Although the appeal is dismissed with respect to the salient issues of FAPE, appropriateness of the unilateral placement and equitable considerations weighing in favor of the parents, I note that, as discussed further herein, the IHO did err in making certain findings that do not affect the outcome of the present appeal. As a result, although the appeal can be construed as technically sustained as to those limited issues, the ultimate relief sought on appeal – reversal of the IHO's determinations as to FAPE, the unilateral placement and equitable considerations – is not awarded in this decision and, therefore, the appeal of the district shall be deemed dismissed.

(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 detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The Committee on Preschool Special Education (CPSE) convened on August 16, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Dist. Ex. 1). The parents disagreed with the recommendations contained in the August 2012 IEP, as well as with the particular nonpublic preschool program to which the district assigned the student to attend for the 2012-13 school year and, as a result, notified the district of their intent to unilaterally place the student at the JCC, an out-of-State nonpublic program (see Dist. Ex. 12).<sup>2</sup> In an amended due process complaint notice, dated January 3, 2013, 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. A).

An impartial hearing convened on March 19, 2013 and concluded on May 13, 2013 after three days of proceedings (Tr. pp. 1-300). In a decision dated June 14, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that the JCC was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 1-18). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at the JCC for the 2012-13 school year (id. at p. 18).

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

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer thereto is also presumed and will not be recited here. The essence of the parties' dispute on appeal focuses on whether the August 2012 CPSE was properly composed, whether the parents were afforded the opportunity to participate in the development of the student's IEP, whether the CPSE adequately considered available evaluative information, whether the CPSE was required to develop a behavioral intervention plan (BIP) for the student, whether the student's IEP was required to include parent counseling and training, whether the assigned preschool program was appropriate to meet the student's needs, the

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<sup>2</sup> The JCC 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).

appropriateness of the JCC as a unilateral placement and whether equitable considerations favored the parents' claim for tuition reimbursement.<sup>3</sup>

## 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 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

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<sup>3</sup> Although the IHO found the district failed to recommend sufficient speech-language therapy, the parents did not raise this allegation in their due process complaint notice and therefore I will not address this claim here.

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 the team developing a student's IEP 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**

Upon careful review, the evidence in the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district failed to offer the student a FAPE for the 2012-13 school year, that the JCC was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (see IHO Decision at pp. 16-18).

### **A. August 2012 IEP**

#### **1. August 2012 CPSE Composition**

Turning first to the issue of whether the CPSE was properly composed, the IHO conducted a well-reasoned analysis of the relevant evidence and I agree with the conclusion reached by the IHO, and adopt her findings of fact and conclusions of law as my own, with respect to this issue.

The IDEA requires a CPSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][2][iii]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). The IDEA also requires a CPSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][2][ii]; see also E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at \*6 [S.D.N.Y. Sept. 29, 2012]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

In this case, a review of the hearing record demonstrates that attendees at the August 2012 CPSE meeting included: the parents, an additional parent member, a special education teacher who was the student's then-current special education itinerant teacher (SEIT), a regular education teacher who was the supervisor of the student's SEIT, and the district representative who also participated as the CPSE administrator and is a certified special education teacher (Tr. pp. 14, 23; Dist. Ex. 1 at p. 2). I agree with the IHO's conclusion that a regular education teacher was not a required member of the CPSE as a general education program was not being considered by the CPSE (see IHO Decision at p. 15). The IHO also concluded that the district representative was qualified to serve as a special education teacher as she was a certified special education teacher

(IHO Decision at p. 15). Although the district representative was not a special education teacher of the student, the student's then-current SEIT participated in the CPSE meeting (see Dist. Ex. 1 at p. 2). Additionally, the CPSE administrator testified that all CPSE members participated in the meeting (Tr. p. 26).

Thus, while the August 2012 CPSE lacked a special education teacher who would be responsible for implementing the student's April 2011 IEP had the student attended the district's program, assuming without deciding that this constituted a procedural violation, the hearing record lacks sufficient evidence to conclude that such procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]; see also A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]).

## **2. Parent Participation**

The IHO concluded that the district significantly impeded the parents' opportunity to participate by ignoring their request regarding the student's special education program (IHO Decision at p. 16). With regard to the issue of parent participation, I find that the IHO erred for the reasons described below. Accordingly, the IHO's conclusion on this issue must be reversed.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b] [1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]).

Contrary to the IHO's finding, the evidence in the hearing record shows that the district afforded the parents a meaningful opportunity to participate in the development of the student's IEP. Moreover, the evidence in the hearing record, and in particular, the testimony of the student's mother, reflects a pattern of active and meaningful parent participation and further suggests that the parents provided input in the development of the August 2012 IEP (Tr. pp. 23, 26, 155, 190-95; Dist. Ex. 1 at p. 2). According to the student's mother, both she and the student's father stated their belief during the August 2012 CPSE meeting that the student required a special education setting and expressed their concerns to the CPSE regarding the lack of behavioral and social supports at the assigned preschool program (Tr. pp. 190-95). The student's mother testified the district explained to the parents during the August 2012 CPSE meeting that a 12:1+2 special class was recommended to address the student's academic and social needs and that a smaller class desired by the parents, such as a 6:1+1 special class, would contain students at a much lower functioning level and would not address the student's needs (Tr. pp. 191-92). Although, the parents

disagreed with the recommended program, the hearing record shows active participation on the part of the parents.

### **3. Consideration of Evaluative Information**

The IHO concluded that the August 2012 CPSE did not consider the information contained in the evaluative reports regarding the student's needs related to behavior, regulation, and emotional functioning. Contrary to the IHO's finding, testimonial evidence indicates the August 2012 CPSE considered the evaluative data related to the student's behavioral and emotional regulation. However, based on the evidence in the hearing record, I find the August 2012 CPSE failed to address the student's needs related to emotional functioning and regulation which resulted in a denial of a FAPE.

The evidence in the hearing record reflects that the August 2012 CPSE considered the evaluative reports before the CPSE related to the student's behavioral and emotional regulation needs. Specifically, the CPSE administrator testified that based on the evaluative information the CPSE was aware of the student's behavioral and emotional regulation needs but the student's behavioral and emotional needs were not significant (see Tr. pp. 25, 28, 32). Although the August 2012 CPSE considered the evaluative reports, for reasons discussed below the CPSE's failure to address the student's behavioral and emotional needs resulted in a denial of a FAPE.

### **4. Special Factors—Interfering Behaviors**

Turning to the issue of whether the August 2012 CPSE was required to develop a BIP, the IHO conducted a well-reasoned analysis of the relevant evidence. After careful review of all of the evidence in this case, I agree with the conclusion reached by the IHO and adopt her findings of fact and conclusions of law as my own with respect to this issue.

Under the IDEA, a CPSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CPSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; 200.16[e][3]; 200.22[b]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]. To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]).

In New York State, policy guidance explains that "the 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 one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation, " at pp. 25-26, 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, "[a] student's need for a [BIP] must be documented in the IEP" (*id.* at p. 25). 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 CPSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i]; 200.22[a]-[b]).

The special factor procedures set forth in State regulations require that the CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CPSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [Apr. 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Here, it is undisputed that the August 2012 CPSE did not develop a BIP for the student. The hearing record shows that the August 2012 IEP did not identify the student's interfering behaviors even though the information before the August 2012 CPSE indicated that the student engaged in behaviors that interfered with her learning or that of others (Tr. p. 107; *see* Dist. Exs. 1; 4; 6; Parent Ex. B).<sup>4</sup> The evaluative reports before the August 2012 CPSE contained information that the student exhibited difficulties with behavioral and emotional functioning, which the CPSE did not reflect in the August 2012 IEP (Dist. Exs. 1; 4; 6; 14; Parent Ex. B). With respect to the evaluative information used in developing the August 2012 IEP, the hearing record demonstrates that the August 2012 CPSE relied upon a July 2011 psychological evaluation, a June 2012 SEIT progress report, a June 2012 preschool progress report, a June 2012 JCC progress report, a July

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<sup>4</sup> The director of the JCC testified that the student's primary deficits were behavioral and emotional regulation as well as social skills (Tr. p. 107).



2012 psychiatrist letter, and a July 2012 annual educational progress report (see Tr. pp. 24-25, Dist. Exs. 4-7; 14; Parent Ex. B).<sup>5</sup> According to the JCC progress report, the student's difficulties with self-regulation, behavior, and anxiety interfered with her functioning in school (Dist. Ex. 4 at p. 2). The June 2012 JCC progress report indicated the student's pediatrician was concerned that the student consistently exhibited "meltdowns" (id. at p. 1). The JCC progress report also indicated the student did not progress in her then-current program and engaged in "severe management issues" in the home setting (id.). The progress report reflected that the student appeared "highly anxious and constricted" and cried easily during her JCC socialization group (id.). In addition, while at the JCC, the student refused to enter the bathroom because she was afraid, appeared withdrawn, and used toys in a restricted and repetitive manner (id.). The July 2012 letter from the student's evaluating psychiatrist indicated the student exhibited "extreme tantrums" and poor socialization, as well as difficulties with communication (Dist. Ex. 6 at p. 1). The letter also indicated the student demonstrated difficulties with transitions, changes in routine, and that she becomes agitated and has meltdowns (id.). The psychiatrist indicated the student "easily experiences sensory overload" and was withdrawn within group settings (id.). The psychiatrist also noted that even with special education supports, the student's behaviors worsened over time, including more tantrums with no improvement in social skills and interacting with peers, until she entered the JCC where the student had shown gradual improvement (id. at p. 2).<sup>6</sup> The July 2011 psychological evaluation noted that the school psychologist and teacher reported the student was overwhelmed by new and exciting activities and that she would become upset and not participate (Parent Ex. B at p. 2).

A careful review of the August 2012 IEP reveals that the IEP did not reflect the student's difficulties with behavior, regulation, and emotional functioning as identified in the evaluative data available to the August 2012 CPSE (compare Dist. Ex. 1 at pp. 3-4, with Dist. Exs. 4; 6; Parent Ex. B). Moreover, the August 2012 CPSE did not document the student's delays regarding behavior, regulation, and emotional functioning in the IEP even though these deficits were identified in the evaluative reports before the August 2012 CPSE (Dist. Exs. 1; 4; 6; Parent Ex. B). Not only did the district fail to develop a BIP, the August 2012 IEP neither identified the student's interfering behaviors nor addressed her maladaptive behaviors and difficulties with regulation and emotion even though the evaluative reports before the August 2012 CPSE identified the student's interfering behaviors (see Dist. Ex. 1 at pp. 3-4). Indeed, the portion of the IEP that would include resources, accommodations, and strategies designed to address the student's management needs related to behavior provided the student with no accommodations or supports (id. at p. 4). Additionally, the August 2012 IEP did not include counseling as a related service despite the student's documented difficulties with emotional regulation and behavior (see id. at p. 12). The August 2012 IEP only included one annual goal to assist the student to cope with frustration and notably the evaluative documents did not identify frustration as an antecedent to the student's maladaptive behaviors (see id. at pp. 6-7). I agree with the IHO that the August 2012

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<sup>5</sup> Although the hearing record is unclear as to whether the July 2011 psychological report was considered by the August 2012 CPSE, the IHO concluded it was considered and the district does not dispute this conclusion (see IHO Decision at p. 14).

<sup>6</sup> The report noted the student had received a diagnosis of autism (Dist. Ex. 6 at p. 3).

CPSE was required to develop a BIP for the student or otherwise address her interfering behaviors (IHO Decision at p. 14; see R.E., 694 F.3d at 190-91).

### **5. Parent Counseling and Training**

It is undisputed that the August 2012 CPSE did not recommend parent counseling and training as a related service in the student's August 2012 IEP, and the hearing record provides no basis to depart from the IHO's determination that, in conjunction with the failure of the August 2012 CPSE to develop a BIP or otherwise address the student's interfering behaviors, this failure supports a finding of a denial of a FAPE (IHO Decision at p. 15).

### **6. Assigned Preschool Program**

With respect to the parents' claims regarding the assigned preschool program, contrary to the IHO I find that such claims were speculative because the student did not attend the recommended program for the 2012-13 school year, and thus, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see IHO Decision at p. 16).

Challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended school. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]).

In view of the forgoing, the parents cannot prevail on claims that the district would have failed to implement the August 2012 IEP at the assigned preschool program because a retrospective analysis of how the district would have executed the student's IEP at the assigned preschool program is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187). In this case, these issues are speculative insofar as the parents did not accept the IEP containing the recommendations of the August 2012 CPSE or the program offered by the district and instead chose to enroll the student in a nonpublic school of their choosing (see Dist. Ex. 12). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CPSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K., 2013 WL 6818376, at \*13 [stating that "[t]he converse is also true; a substantively appropriate IEP

may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

## **B. Unilateral Placement**

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. at 13-14). 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, \*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).

With regard to the parties' dispute over whether the parent's unilateral placement of the student at the JCC for the 2012-13 school year was appropriate, I affirm the IHO's finding that the JCC was appropriately designed to address the specific special education needs of the student (IHO Decision at p. 17). The evidence in the hearing record reflects that the student demonstrated needs in academics, language processing, and social/emotional/behavioral functioning (Dist. Ex. 1; 4-7; 14; Parent Ex. B). To meet the student's academic and social needs, the JCC provided the student with instruction in a 9:2+1 class five days a week, two and one half hours per day (Tr. pp. 100, 117).<sup>7</sup> In addition, the JCC provided speech-language therapy and occupational therapy (OT) to address the student's deficits in language as well as her fine motor needs (see Tr. pp. 113-14, 130-32). To address the student's behavioral and emotional regulation, the JCC provided the student with a cognitive-behavioral approach to learning, a social skills curriculum, and parent training (Tr. pp. 94-99). Testimony of the director of the JCC indicated the student demonstrated progress in academics, language and social/emotional/behavioral functioning (Tr. pp. 104-08, 117).

As the JCC provided the student with specialized instruction and related services to meet the student's unique special educational needs and the student demonstrated progress while at the JCC, I find the hearing record supports the IHO's finding that the student's unilateral placement was appropriate. Based on the foregoing, the evidence in the hearing record supports the IHO's finding that the parents established that the JCC provided the student with instruction and services specially designed to meet her unique needs.

### **C. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

Turning to the parties' disagreement over equitable considerations, in this case, the IHO properly found that the evidence in the hearing record supports a finding that the parents

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<sup>7</sup> With respect to the 2012-13 school year, the student attended a JCC mainstream preschool class in addition to the JCC special education component (see Tr. p. 150).

cooperated with the district (IHO Decision at pp. 17-18). The parents attended the CPSE meeting, visited the proposed preschool program, and gave the district notice of their intent to seek tuition reimbursement (see Tr. pp. 155-56, 158-64; Dist. Ex. 12). Therefore, equitable considerations favor the parents' request for relief.

## **VII. Conclusion**

The hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, the JCC addressed the student's special education needs, and equitable considerations weighed in favor of the parents' request for relief. Accordingly, although I disagree with certain of the IHO's underlying findings, which have been identified and reversed by this decision as discussed herein, I agree with her ultimate conclusions.

**THE APPEAL IS DISMISSED.**

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

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**