The University of the State of New York

The State Education Department
State Review Officer
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No. 13-159

Application of a STUDENT WITH A DISABILITY, by his parent, 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:
Kule-Korgood, Roff & Associates, PLLC, attorneys for petitioner, Tuneria Taylor, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Yaldeinu School (Yaldeinu) for the February through June portion of the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's determination with respect to the issue of equitable considerations. The appeal must be sustained. 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

After moving to New York in August 2011, the student attended a private school in a classroom with 14 students and three adults for the beginning of 2011-12 school year, but was withdrawn by his parents because the school was unable to manage the student's behaviors (Tr. p. 98). The parent referred the student to the CSE for evaluation by way of an October 2011 letter, specifically indicating that the student could not return to his educational program until he was assigned a crisis management paraprofessional and provided counseling services (Parent Ex. I).

The CSE convened on November 18, 2011 to develop the student's IEP for the remainder of the 2011-12 school year (see Dist. Ex. 3). The November 2011 CSE determined that the student was eligible for special education programs and services as a student with autism and recommended that the student attend a 12:1+1 special class in a community school and receive individual and group counseling (Dist. Ex. 3 at pp. 1, 5, 8).[1]

By final notice of recommendation (FNR) dated November 23, 2011, the district summarized the recommendations made by the November 2011 CSE and notified the parent of the particular public school site to which it had assigned the student (Dist. Ex. 4). By letter to the district dated December 6, 2011, the parent expressed her reservations about the recommended placement, indicating that the 12:1+1 special class would not provide sufficient "individualized instruction and attention" for the student (Parent Ex. B). Although the letter indicated that the parent received the FNR, it also stated that she did not receive an "actual offer of placement" with a "specific school recommendation" (id.). It appears that the district subsequently sent the FNR on January 9, 2012 (Dist. Ex. 4). Thereafter, the parent visited the assigned public school site (Parent Ex. C at p. 1). By letter to the district dated January 10, 2012, the parent requested additional information about the assigned school and reiterated her concerns about the CSE's recommendations for the student (id. at p. 1). Subsequently, by letter to the district dated January 19, 2012, the parent rejected the recommendations made by the November 2011 CSE and the assigned public school as not appropriate for the student and stated the reasons for her objections (Parent Ex. D at pp. 1-2). She also informed the district of her intention to enroll the student at Yaldeinu for the 2011-12 school year at public expense (id. at p. 2).

On February 1, 2012, the parent signed an enrollment contract with Yaldeinu for the 2011-12 school year (Parent Ex. F at pp. 1-3). Commencing in February 2012, the student began attending Yaldeinu for the remainder of the 2011-12 school year (Tr. pp. 24, 106).

A. Due Process Complaint Notice

The parent filed a due process complaint notice, dated May 31, 2012, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year on both substantive and procedural grounds (Parent Ex. A). The parent alleged, among other things, that (1) the district engaged in impermissible "predetermination" and deprived the parent the opportunity to meaningfully participate in developing the student's IEP; (2) the district failed to adequately assess and evaluate the student and, therefore, the November 2011 IEP did not accurately describe the student's present levels of performance; (3) the annual goals, academic management needs, and testing accommodations listed in the November 2011 IEP were not sufficient to meet the student's needs; (4) the CSE's recommendation for a 12:1+1 special class was not appropriate for the student; (5) the November 2011 CSE recommended inadequate levels and frequencies of related services; (6) the November 2011 IEP did not promote generalization of the student's skills; (7) the November 2011 IEP did not provide for parent counseling and training services; (8) the district failed to conduct an appropriate functional behavioral assessment (FBA) or develop an appropriate behavioral intervention plan (BIP); and (9) the district failed to provide

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

prior written notice (id. at pp. 1-3). The parent also alleged that the assigned public school site was not appropriate for the student (id. at p. 3). As relief, the parent requested that an IHO award her the costs of the student's tuition at Yaldeinu for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

On June 5, 2013, an impartial hearing was convened in this matter and concluded after one day of proceedings (Tr. pp. 1-122). At the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2011-12 school year (Tr. pp. 12-13; see IHO Decision at p. 6). By decision dated July 18, 2013, the IHO found that Yaldeinu was not an appropriate placement for the student because: (1) the student's behaviors were not appropriately addressed; (2) the instruction at the private school was not designed to address the student's unique needs; (3) the private school did not provide counseling services until the student had attended for almost two months, at which point the school recommended that the counseling be doubled; (4) despite the individual attention provided at the school, the student's academics, in which he was not deficient, did not improve; (5) despite the individual attention provided at the school and implementation of a BIP, the student's behaviors remained uncontrollable, such that he was unable to join a group of peers during the entire school year; (6) the student was the oldest and highest functioning student in the class; and (7) academically, the student did not require such a restrictive placement (IHO Decision at pp. 9-12). Having found that Yaldeinu was not appropriate, the IHO declined to address equitable considerations and determined that the parent was not eligible for tuition costs for the 2011-12 school year (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that Yaldeinu was not an appropriate placement for the student for the 2011-12 school year, and, although not addressed by the IHO, further asserts that equitable considerations favored the parent's request for relief. With regard to the unilateral placement, the parent asserts that (1) the school provided appropriate instruction at the student's academic level, utilizing methods tailored to the student's unique needs; (2) the school properly addressed the student's behaviors and social deficits; (3) despite the delay in provision of counseling services, the private school took steps to learn the student's needs; (4) the student made academic progress; (5) the student was better able to function in groups with his peers by the end of the 2011-12 school year and during the 2012-13 school year, evidencing progress in that area; (6) the functional disparity in the classroom was minimal and the other students in the class were appropriate peers for the student; and (7) although the student did not exhibit academic deficits, his behavioral needs mandated a self-contained environment with 1:1 instruction. Turning to the equities, the parent asserts that she fully cooperated with the district and alleges that the district failed to respond to correspondence from the parent requesting an alternative program for the student. The parent seeks an order reversing the IHO's decision denying her request for relief.

The district answers the parent's petition, asserting that the IHO's denial of the parent's claim for the costs of the student's tuition at Yaldeinu for the 2011-12 school year should be upheld and asserting that the IHO correctly determined that Yaldeinu was not an appropriate placement for the student. In addition, the district alleges that equitable considerations do not favor the parent's request for relief and that the parent is not eligible for an award of direct payment of the

student's tuition to Yaldeinu. The district also interposes a cross-appeal alleging that the IHO incorrectly stated the burden of proof applicable to equitable considerations.

V. Applicable Standards—Unilateral Placement

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 v. T.A., 129 S. Ct. 2484, 2491 [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]). In this case, because the district conceded it failed to offer the student a FAPE, I will move on to the issue of whether the private school placement selected by the parent is appropriate.

A private school placement must be "proper under the Act" (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 15 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 [1985]), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112, 115 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 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, quoting Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006], see Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982]). 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, quoting Rowley, 458 U.S. at 176; 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).

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. Scope of Review

Before reaching the merits in this case, I must determine which claims are properly before me on appeal. Specifically, I will examine the district's cross-appeal, alleging that the IHO articulated an improper burden of proof for the analysis of equitable considerations (see IHO Decision at p. 6).

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall indicate what relief should be granted by the State Review Officer to the petitioner" (8

NYCRR 279.4[a]). State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]).

After determining that Yaldeinu was not an appropriate placement for the student, the IHO did not go on to consider equitable considerations (see IHO Decision at p. 12). Therefore, even if the district was correct that the IHO's articulation of the burden of proof was erroneous, the IHO made no finding applicable to the present case based upon that recitation. As such, there was no harm to the district in this instance as there was no finding adverse to the district (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915 [S.D.N.Y. Nov. 27, 2012], reconsideration denied, 2013 WL 1803983, at *9-*10 [S.D.N.Y. Apr. 24, 2013] [noting that parties are entitled to appeal only to the extent that they are aggrieved]). Most importantly this is not one of the "very few cases" in which the evidence was equipoise (Schaffer, 546 U.S. at 58; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479 at *9 n.6 [S.D.N.Y. Mar. 21, 2013]; A.D. v. New York City Dept. of Educ., 2013 WL 1155570 at *5 [S.D.N.Y. Mar. 19, 2013]), because, as further described below, I have determined that the evidence weighs in favor of the parent regardless of which party that bore the burden at the impartial hearing.

B. Appropriateness of the Yaldeinu School

Contrary to the IHO's decision, I find that the evidence in the hearing record supports the conclusion that Yaldeinu provided the student with instruction and services specifically designed to meet the student's unique needs and was otherwise an appropriate placement for the student for the 2011-12 school year. The hearing record reflects that Yaldeinu offered an applied behavioral analysis (ABA) program that provided 1:1 teaching, group instruction, and related services (Tr. p. 22). According to the Yaldeinu curriculum coordinator, the student's class consisted of seven students, one "master lead teacher," and seven 1:1 instructors (Tr. p. 25).

By way of background, the hearing record shows that the student exhibited severe behavioral deficits, including aggressive behaviors, which affected him socially and academically and had a negative effect on his peers (Tr. pp. 27, 36-41, 53, 70). According to an October 2010 psychological assessment report, the student exhibited high average to superior cognitive potential, with visual and auditory perceptual skills judged to be areas of relative strength (Dist. Ex. 1 at p. 11).[2] He achieved standard scores in the superior range in reading and spelling and in the average range for arithmetic (id.). He displayed below age appropriate social and study skills, as well as "poor academic engagement" (id.). The evaluation report indicated that the student exhibited "characteristics consistent with Asperger's disorder," such as displaying "better than average" academic skills and a well-developed vocabulary but with deficiencies in social interactions and "constrained interest" (id.). Behaviorally, the evaluation report indicated that the student exhibited "autistic like behaviors," including a history of extreme withdrawal and of relating to people inappropriately and continued impairment in social interaction; along with "an obsession to maintain sameness" and "extreme resistance to controls" (id.). The October 2010 psychological assessment report also indicated that the student exhibited some characteristics of depression and

[2] The evaluations underlying the psychological assessment report were administered in June 2010 and October 2010 (Dist. Ex. 1 at p. 1). For purposes of this decision, I will refer to the report as the October 2010 psychological assessment report.

attention deficit hyperactivity disorder (ADHD) (id.). Additionally, the report stated that the student exhibited heightened alertness to environmental stimuli that might be attributable to ADHD (id.). The report further indicated that one of the student's former teachers described him as "hyperactive, restless, erratic, flighty, or scattered," easily distracted, and lacking "continuity of effort and perseverance," and his quality of work as variable from day to day (id. at p. 5). Furthermore, the report indicated that the student displayed explosive and unpredictable behaviors and that he seemed unable to control himself (id.).

According to the November 2011 IEP, the student's behavior at school could be "quite disruptive and oppositional;" however he had good intellectual resources and strong academic skill levels (Dist. Ex. 3 at p. 1).[3] Socially, the November 2011 IEP reported that both the student's kindergarten and second grade teachers described the student's behavior as "explosive" (id.). Furthermore, the IEP indicated that the student had difficulties coping with frustration, as well as in playing appropriately with other children (id.). The November 2011 IEP also indicated that the student would lash out physically at teachers and that the student required "very intense levels of management" (id. at pp. 1-2). Additionally, the IEP included information, provided by the parent, describing the student's educational history, including his expulsion from three schools and his elopement from one of these schools during the 2011-12 school year (id. at p. 2). The parent's concerns, reported in the November 2011 IEP, included the student's difficulties following teacher directives, showing appropriate behaviors, and using appropriate coping skills when frustrated (id.). The parent also reported to the CSE that the student appeared to have some sensory issues (id.).

Additionally, the Yaldeinu curriculum coordinator testified that the student had significant social and behavioral deficits (Tr. p. 53). The coordinator also indicated that, during the duration of the student's attendance at Yaldeinu, the student was unsuccessful in a group setting and that it was easier for him to manage his behaviors in a 1:1 setting (Tr. p. 27). She testified that, when in a group setting, the student would engage in verbal aggression such as cursing, name calling, put downs, and threatening statements, as well as physical aggression towards teachers and peers, and that such behaviors occurred multiple times each day (Tr. p. 27, 29, 40-41). Moreover, the coordinator indicated that the student's behavior during these times could be so extreme that the other students were afraid of him and did not want to interact with him (Tr. p. 41).

According to the Yaldeinu social worker the student presented with "severe emotional disregulation" and exhibited oppositional behavior, along with difficulty tolerating stress, aggressive behavior, hyperactivity, impulsivity, and general difficulty regulating and modulating his affect (Tr. p. 70). She also reported that the student could not function in a group setting, that he could become verbally aggressive toward teachers and peers, and that she observed him destroy property (Tr. pp. 71-72).

According to the parent, the student had a history of behavioral difficulties, which resulted in his removal from more than one program, and that, at one point, the parent had obtained private counseling, as well as a paraprofessional for the student (Tr. p. 89-95). She further testified that

[3] Although it is unclear what specific information the CSE used to develop the November 2011 IEP, a review of the hearing record shows that the information from the October 2010 psychological assessment report was directly reflected in the November 2011 IEP (compare Dist. Exs. 1 at pp. 5, 11-12 with Dist. Ex. 3 at pp. 1-2).

when the student was six years old, even with the support of a paraprofessional, he was asked to leave one program (Tr. p. 93-95). The student attended a private school for the beginning of 2011-12 school year, but that school also asked him to leave because they were not able to manage the student's behaviors and he was considered a flight risk (Tr. p. 98).

1. Social/Emotional and Behavioral Needs

The IHO found that Yaldeinu was not appropriate for the student, in part, because the private school did not provide a program specifically designed to appropriately address his behavioral deficits (IHO Decision at pp. 11-12). However, a review of the hearing record indicates that Yaldeinu designed a BIP that was individualized to the student's needs and provided appropriate support to address the student's behavioral management needs.

According to the Yaldeinu progress report, due to the severity of the student's behaviors, the private school conducted a functional behavioral assessment (FBA) (Parent Ex. H at p. 1). The Yaldeinu curriculum coordinator testified that the private school collected data on the frequency and duration of the student's problem behaviors and that staff would review the data at collaborative team meetings (Tr. pp. 30-31). She further explained that a board certified behavior analyst (BCBA), who was also the clinical director for the 2011-12 school year, developed the BIP for the student (Tr. pp. 23-24). The coordinator further testified that the BIP included many different strategies to help the student control his behaviors (Tr. p. 27). Specifically, the BIP recommended using a high rate of reinforcement for compliance with demands and for "exhibiting positive social interactions" (Tr. p. 27-28). In addition, it included consequences for other types of behavior (Tr. p. 28). The coordinator testified that additional strategies were also included in the BIP, such as "pairing," which she described as the assignment of a teacher who was highly motivating to the student, with the intent that the student would respond with an increased desire to comply with a demand in order to gain the teacher's "positive attention" (id.). The coordinator also indicated that, as part of the student's program, the staff taught him social skills and replacement behaviors, such as requesting a break or a modification when he became frustrated (id.). The coordinator explained that, when the student exhibited aggressive behaviors, a strategy would be utilized, which was specific to the severity and the context of the behavior (Tr. pp. 28-29). For example, the coordinator explained that, if a demand was placed on the student, the demand continued even when the student responded with a problematic behavior, in order to teach him that the behavior would not "result in the removal of the demand" (Tr. p. 29). Furthermore, the coordinator indicated that the staff limited the attention paid to the student's problem behaviors in order to prevent attention from becoming a motivating factor in the occurrence of the behaviors (id.). She indicated that, if safety of the student's peers became a concern, then the group was removed from the classroom and the student remained, so that the staff could maintain the demand placed on the student and limit the amount of attention paid to the negative behavior (id.). Finally, there is no evidence in the hearing record that the student ever attempted to elope from Yaldeinu, as he had from his previous private school (see Tr. p. 98).

To further address the student's problem behaviors, the hearing record shows that Yaldeinu also provided speech-language therapy and counseling (Tr. pp. 28, 36). The coordinator testified that counseling was provided as an "antecedent modification," intended to help the student develop new skills and abilities and lead to a decrease in inappropriate behaviors (Tr. p. 28). According to the coordinator, Yaldeinu provided speech therapy in order to help the student improve his social

skills, as well his ability to problem solve, to infer meaning, and to identify and label his emotions (Tr. p. 36).

2. Academic Needs

The hearing record also demonstrates that Yaldeinu provided appropriate academic instruction and support to the student during the 2011-12 school year. The Yaldeinu curriculum coordinator testified that the student's curriculum consisted of academic programs in the areas of reading, writing and math, individualized to his needs and modified, as needed, to address the student's frustration (Tr. p. 34-42). Specifically, in reading, the student could "read and decode on a very high level, far beyond his age and grade," especially when utilizing materials that were factual or that were very highly motivating to him (Tr. p. 36-37). In addition to a standard textbook, the student was also provided with National Geographic materials for "higher graded" vocabulary and for material that was "more specific and factual," as well as with material that was of higher interest to the student (Tr. pp. 37-39, 63). According to the coordinator, the focus of the student's reading program was reading comprehension; however it also included improving the student's ability to deal with frustration (Tr. p. 38). The coordinator reported that even though the student was "on grade" with writing, he considered it challenging and would engage in "a lot of problem behavior" (Tr. p. 37). The student was provided with a five step writing process to help him generate ideas, brainstorm, write complete sentences, and to formulate his thoughts into a paragraph with a beginning and a conclusion (Tr. p. 39). With regard to the student's math program, the coordinator testified that the private school utilized a standard second grade curriculum for the student but that the staff "specialized" his instruction by modifying a task or increasing motivation (Tr. p. 40). She indicated that the student initially had difficulty with addition facts for numbers up to ten because "it was taking him too long to compute, and he was encountering too much frustration" and that, in response, the private school gave the student a program to increase his responding speed and fluency (Tr. p. 39). The coordinator also indicated that the staff was prepared when something was difficult for the student so they could modify a demand or follow through on the behavior protocol (Tr. p. 40).

3. Counseling Services

The IHO held that the private school offered insufficient counseling to the student, in that the student did not receive his counseling services until late March, almost two months after he enrolled at Yaldeinu (IHO Decision at pp. 11).

However, as discussed above, in order to establish the appropriateness of a unilateral placement to address a student's needs, the parents need not show that the placement provides every special service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H. v. Dep't of Educ., 685 F.3d 217, 252 [2d Cir. 2012]; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9.

It appears that the student's counseling services began in late March 2012 when the private school employed the social worker, as opposed to immediately upon the student's enrollment in February (see Tr. p. 75). However, the hearing record demonstrates that, once initiated, the student received counseling that was individualized and modified to his needs. Specifically, the student's

social worker testified that she began to work with the student in late March 2012 once per week for 45 minutes, which was then increased to twice per week for 45 minutes (Tr. pp. 69-70). She testified that she used cognitive behavioral play therapy and focused on helping the student to connect his feelings to his behaviors, to appropriately express his feelings of anger and sadness, and to generalize these skills to school and home environments (Tr. pp. 70-71). She indicated that she collaborated with the student's teacher and therapists, specifically indicating that the teacher would attempt to implement the strategies targeted in counseling in the classroom (Tr. pp. 72-73). She also testified that she would consult with the student's instructor, prior to a counseling session, to learn if the student engaged in any aggressive or oppositional behaviors during that week, which she would then focus on during the session (Tr. p. 86). Based on the foregoing evidence, I decline, after reviewing the totality of the circumstances, to conclude that Yaldeinu was not an appropriate placement for the student based on the delay in the provision of counseling services upon the student's enrollment, when the student did in fact receive the necessary services soon thereafter (Frank G., 459 F.3d at 365 [explaining that parents need not show that a private placement furnishes every special service necessary to maximize their child's potential] [emphasis added]).

4. Progress at Yaldeinu

The IHO found that the student did not make progress academically and remained at the second grade level even with the "provision of an individual instructor" (IHO Decision at p. 10). The IHO also held that the student did not make progress behaviorally, despite the individual attention provided at the school and implementation of a BIP, citing the student's inability to join a group of peers during the entire school year, as well as the testimony of the student's Yaldeinu social worker that the student made "minimal progress" during the remainder of the 2011-12 school year (IHO Decision at pp. 11-12). However, a review of the hearing record indicates that the student made progress both academically and behaviorally during the 2011-12 school year.

A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; D. D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 [S.D.N.Y. Mar. 19, 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F.Supp.2d 26, 34 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).[4] However, a finding of progress is nevertheless a

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

relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002].

With respect to academics, a June 2012 progress report from Yaldeinu indicated that the student made consistent academic progress in mathematics and reading (Parent Ex. Hat p. 1). In mathematics, the student made significant progress in his fluency of addition facts up to 20 and was generalizing these skills "in the natural environment" (id.). The progress report also indicated that the student mastered: the concept of place values for ones, tens and hundreds; telling analogue and digital time; and identifying all coins (id.). Furthermore, the student had been working on adding multiples of coins and had begun double digit addition with "anticipated quick progress" (id.). Additionally, the progress report indicated that reading was the student's strongest area and that he was able to read and answer abstract questions, as well as to compare and contrast concepts based on information he read (id.). The June 2012 progress report indicated that writing continued to be a challenging area for the student, which often resulted in problematic behavior; however, with a high rate of reinforcement, the student was able to formulate a paragraph with minimal prompts (id.).

The curriculum coordinator testified that the student progressed academically during the 2011-12 school year and gave examples, such as the student's improvement in adding math facts up to 20 and completing column addition (Tr. p. 41). She also indicated that the student learned to subtract facts up to 10, learned to tell time on an analogue clock and to "count up" sets of coins (id.). She further reported that, by the end of the 2011-12 school year, the student learned to compare and contrast pieces of information in reading comprehension, without prompts from the teacher, and learned "many, many spelling words," as well as how to complete a paragraph (Tr. pp. 41-42).

The IHO determined that the student did not make academic progress at Yaldeinu, because the coordinator testified that the student performed at a second grade level in reading and math, which was the same level reported in the October 2010 psychological assessment of the student (IHO Decision at p. 10). The coordinator testified that the student was at a second grade level in reading and math during the 2011-12 school year (Tr. p. 52). However, the October 2010 psychological assessment, utilizing the Wide Range Achievement Test-3 (WRAT-3), indicated that the student was performing at a second grade level in spelling and reading, but at a kindergarten level in arithmetic (Dist. Ex. 1 at pp. 5, 18). Moreover, I agree with the parent that this tentative comparison carries little weight, given the abbreviated length of the school year at Yaldeinu, the student's tumultuous educational history, the different sources of measuring the student's grade level (standardized testing versus estimations by the teacher), and the effect the student's behaviors on his academics (see Tr. pp. 52, 88-89; Parent Ex. I at p. 18).

Likewise, with respect to the student's progress behaviorally, the hearing record indicated that the student made strides at Yaldeinu. The coordinator testified that, as the school year progressed, the student functioned for longer periods of time without a behavioral outburst and more effectively in a 1:1 setting (Tr. p. 34). Contrary to the IHO's conclusion, a review of the hearing record indicates that the social worker testified that the student made "minimal progress" based on the fact that she worked with the student on his counseling goals for only three months, as opposed to a full school year (Tr. p. 72, 84). The social worker testified that, although the student's was unable to function within a group setting, he made progress verbalizing his wants

and needs more appropriately, instead of aggressing, and that was able to express his frustration more appropriately (Tr. pp. 71-72). The social worker also testified that by the end of the school year she observed one occasion where the student was able to "function within a group setting more appropriately" (Tr. p. 72).

The May 2012 social work progress report from Yaldeinu also indicated that, during the 1:1 counseling sessions, the student made progress staying on task and transitioning more easily (Parent Ex. H at p. 4). Furthermore, the report indicated that the student demonstrated increased abilities to express his feelings of anger and loss, as well as to more effectively identify and verbalize the connection between his feeling and behaviors (id.). The report also stated that the student's teachers felt he was displaying reduced aggression and impulsivity as well as an increase in cooperative play (id.).

5. Functional Grouping

I will now address the IHO's finding that the student was not appropriately functionally grouped at Yaldeinu (IHO Decision at p. 10). Although State regulations require that students in special classes be grouped according to similarity of needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][2]), unilateral parental placements generally "need not meet state education standards or requirements" to be considered appropriate to address the student's needs (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14). With respect to grouping, the district points to no legal authority for the proposition that functional grouping requirements in State regulations apply to unilateral parental placements (see Application of a Student with a Disability, Appeal No. 12-004). Moreover the district points to no instance in which a violation of functional grouping standards has, in and of itself, resulted in a denial of a FAPE to a student and similar standard are applied to district and parent placements in this Circuit, namely, that "[s]ubject 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., 459 F.3d at 364 [quoting Rowley, 458 U.S. at 207 and identifying exceptions]), thus, in circumstances such as these, I would be reluctant to conclude that parents failed to achieve the substantive purpose of the IDEA because of a failure functionally group the student in the way in the same manner as a public school placement. In any event, the hearing record does not indicate that the student's needs were not being met because he was functioning at a higher academic level than the other students in the classroom. Furthermore, the hearing record indicates that the student was grouped appropriately for instruction at Yaldeinu. The curriculum coordinator testified that the students in the class were ages five to eight with a range of disabilities and that all of the students required 1:1 instruction for cognitive deficits, academic concerns, and/or behavior and social issues (Tr. pp. 25-26). With respect to reading and math levels, the coordinator testified that the students in the classroom functioned between a kindergarten and second grade level, and that the student, academically speaking, was the highest functioning student in the classroom (Tr. pp. 51-53). Furthermore, as discussed above, the instruction in the classroom was modified and differentiated to meet the student's individual needs and abilities. Thus, the student was grouped with sufficiently similar peers at Yaldeinu, such that the IHO's finding to the contrary must be reversed due to a lack of sufficient evidentiary support.

6. Restrictiveness of Unilateral Placement

Finally, the IHO also found that the student did not require such a restrictive setting as Yaldeinu for his academic needs (IHO Decision at p. 11). While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F.Supp.2d 529, 552 [S.D.N.Y. 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007].

The coordinator testified that the student did not have an opportunity to interact with nondisabled peers at Yaldeinu (Tr. p. 54-55). However, the hearing record does not reflect the extent to which, if any, it would be appropriate to educate the student alongside nondisabled peers due to his significant deficits in the areas of social/emotional skills and behavior management, as discussed above (Tr. pp. 53, 70; Dist. Ex. 3 at pp. 1-2). While Yaldeinu may not have maximized the student's interaction with nondisabled peers, in this instance, it does not weigh so heavily as to preclude the determination that the parent's unilateral placement of the student at Yaldeinu for the 2011-12 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

C. Equitable Considerations

Having determined that Yaldeinu was an appropriate placement for the student for the 2011-12 school year, I will now consider whether equitable considerations supported the parent's reimbursement claim for tuition costs.

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. v. New York City Dep't of Educ., 694 F.3d 167, 185, 194 [2d Cir. 2012], cert. denied, 133 S. Ct. 2802 [2013]; M.C. v. Voluntown, 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"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise 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]; 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 M.C., 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).

By way of background, the hearing record shows that the student attended both general education and special education schools in California (Parent Ex. E at p. 1). After moving to Maryland in April 2011, the student's father passed away and the family moved to New York in August 2011, at which point the student attended a general education class at a private school in a classroom with 14 students and 3 adults (Tr. pp. 97-98). However, in October 2011, the student was identified as a "flight risk" and the parent withdrew him (Tr. p. 99). According to the November 2011 IEP, the student has been expelled from three schools over the years (Dist. Ex. 3 at p. 2).

Subsequently, the parent referred the student to the CSE and the student's November 2011 IEP was developed (Dist. Ex. 1; Parent Ex. I). The parent attended the November 2011 CSE meeting, provided the CSE with the student's IEP from California, and participated in discussions regarding the student's special education program, expressing concerns about the recommended 12:1+1 special class in a community school (Tr. pp. 99-100; see Dist. Ex. 3 at pp. 5, 8, 12).

By letter to the district dated December 6, 2011, the parent again expressed her reservations about the recommended placement, indicating that the 12:1+1 special class would not provide sufficient "individualized instruction and attention" for the student (Parent Ex. B). Although the letter indicated that the parent received the FNR and "signed this notice consenting to the services and program recommendations," she also states that she did not receive an "actual offer of placement" with a "specific school recommendation" (Parent Ex. B). It appears that the district subsequently sent the FNR on January 9, 2012 (Dist. Ex. 4). Thereafter, the parent visited the assigned public school site (Parent Ex. C at p. 1). Upon visiting the assigned school, the parent testified that she was unable to garner much information from the assistant principal, who accompanied her on the tour (Tr. pp. 101-02).[5]

By letter to the district dated January 10, 2012, the parent requested additional information about the assigned public school site and reiterated her concerns about the CSE's recommendations for the student (id. at p. 1). Subsequently, by letter to the district dated January 19, 2012, the parent rejected the recommendations made by the November 2011 CSE and the assigned public school as not appropriate for the student and stated the reasons for her objections (Parent Ex. D at pp. 1-2). She also indicated that the district never responded to her previous correspondences requesting additional information about the assigned public school classroom (Tr. p. 105; Parent Ex. D at p. 2). On February 1, 2012, the parent signed an enrollment contract with Yaldeinu for the 2011-12 school year (Parent Ex. F at pp. 1-3). Commencing in February 2012, the student began attending Yaldeinu for the remainder of the 2011-12 school year (Tr. pp. 24, 106). The parent testified that, had the district recommended an appropriate public school site for the student, she would have enrolled the student (Tr. p. 109).

Based upon the evidence contained in the hearing record, I find that the parent acted reasonably under the circumstances of this case and cooperated with the district in good faith to develop an appropriate IEP for the student. The parent did nothing to hinder the district from

[5] While I have deep reservations about claims of a denial of a FAPE arising from a parent's visit to an assigned public school site, which the student never attended, the practice of visiting an assigned school has value for purposes of equitable considerations, especially if it prompts the parents to exercise their right to request another CSE meeting to make specific modifications to the IEP.

developing an appropriate IEP. While the parent did not include a specific request to reconvene the CSE in her December 2011 and January 2012 letters to the district (Parent Exs. B; C; D), she was not required to do so and it does not weigh against her. However, the district not only conceded that it failed to offer the student a FAPE for the 2011-12 school year, it also did little, equitably speaking, to better its position, such as by voluntarily holding an additional CSE meeting (or offering to modify the IEP without a meeting) to increase the chances of satisfactorily addressing the contents of the parent's concerns with the IEP.[6] Had the district done so and the parent then refused appropriate corrections to the IEP, the district's argument that the parent did not intend to enroll the student in the public school might have been more convincing. Therefore, I find that equitable considerations favor the parent overall and justify an award of tuition reimbursement under the circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *8-*9 [S.D.N.Y. Jan. 3, 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 679-80 [S.D.N.Y. 2012]; R.K. v. New York City Dep't of Educ., 2011 WL 1131522, at *4 [E.D.N.Y. Mar. 28, 2011]).

D. Relief

With regard to fashioning equitable relief, one court has addressed whether 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]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428); see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that, in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[7] Since the parent has selected Yaldeinu as the unilateral placement, and her financial status is at issue, I assign to the

[6] To be clear, a CSE is not required, under state regulations, to reconvene simply because a parent provides 10-day notice identifying concerns; however, when a parent has provided a 10-day notice window—which was envisioned as providing public schools with an opportunity to cure deficiencies in the IEP—and the district makes no attempt at all, such inaction does nothing to enhance a district's position in the weighing of equitable factors.

[7] The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove v. T.A., 557 U.S. 230, 244 n.11 [2009]; see 20 U.S.C. § 1415[i][2][C][iii]).

parent the burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Yaldeinu and whether she is legally obligated for the student's tuition payments (Application of the Dep't of Educ., 12-132; Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, the hearing record reflects that the parent entered into an enrollment contract, dated February 1, 2012, with Yaldeinu for the student's tuition for the remainder of the 2011-12 school year (Parent Ex. F at pp. 1-3). Although the enrollment contract specified that a $2,000.00 nonrefundable deposit was due upon the execution of the contract, the parent never paid such a deposit (Tr. p. 106; Parent Ex. F at p. 1). The contract contained a payment section setting forth the cost of tuition for the remainder of the school year, from February 2012 through June 2012, as $48,000.00 and required payments of $9,200.00 per month on the first of each month, commencing February 1, 2012 (Parent Ex. F at p. 1). Under the terms of the contract, the parent acknowledged that, when signed, the contract constituted an "unconditional commitment for payment of the full tuition for the school year" (id. at p. 2). The parent made only one payment to Yaldeinu in April 2012, in the amount of $100.00 (Tr. p. 106; Parent Ex. J). The parent testified that if she did not prevail at the impartial hearing she would work and raise funds in order to pay the tuition, but also explained that Yaldeinu agreed to develop a payment plan for her (Tr. p. 109).

Regarding the parent's proof of inability to pay the student's tuition to Yaldeinu, the hearing record contains the parent's 2010 federal tax return, filed jointly with her now deceased husband (Parent Ex. G). The 2010 tax return reflects that the parents' income, while the student's father was living, was significantly less than the cost of tuition at Yaldeinu for the 2011-12 school year (compare Parent Ex. F at p. 1, with Parent Ex. G at p. 1). While there is little other evidence regarding the parent's financial situation, and in particular no testimony as to the parent's income for 2011, if any, or the parent's actual assets, liabilities or expenses during any period, the parent persuasively testified that she was a widow and a mother of four children, all under the age of seven, currently seeking employment and that she had minimal resources except for social security payments as a result of her husband's death (Tr. p. 108). I also acknowledge that the parent recently moved to New York (Tr. p. 96). Based on the parent's testimony and because of the significant shortfall between the parent's income and the cost of tuition at Yaldeinu, I find that the parent has met her burden of establishing an inability to pay the cost of the student's tuition at Yaldeinu for the February to June portion of the 2011-12 school year (Tr. pp. 108; Parent Exs. F at p. 1; G at p. 1). This case is notably different from circumstances in which objective information regarding financial resources and a spouse was not presented to the IHO or SRO during the administrative proceedings (see A.R., 2013 WL 5312537, at *11 [accepting additional evidence at the District Court level and determining that the additional evidence supported parent's assertion regarding a lack financial resources]).

After a review of the hearing record, I find that the evidence sufficiently supports the conclusion in this case that the parent remained "legally obligated" to pay the tuition at Yaldeinu (Mr. and Mrs. A., 769 F. Supp. at 406). I also find that, based on the testimony of the parent and the 2010 income tax return contained in the hearing record, that the parent established her inability to front the cost of the student's tuition at Yaldeinu (Tr. p. 109; Parent Exs. F at p. 1; G at p. 1). Under the circumstances of this case, I find that equitable considerations do not preclude the

parent's claim for direct funding of the student's tuition at Yaldeinu for that portion of the 2011-12 school year, commencing in February 2012, under the factors described in Mr. and Mrs. A.

VII. Conclusion

In summary, I find that the IHO's determination that Yaldeinu was not an appropriate placement for the student for the 2011-12 school year must be reversed. I also conclude that equitable considerations favor the parent's request for the tuition costs for that portion of the 2011-12 school year during which the student was enrolled at Yaldeinu.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 18, 2013 is modified by reversing those portions which determined that Yaldeinu was not an appropriate placement for the student for the 2011-12 school year; and

IT IS FURTHER ORDERED that the district shall directly pay the student's tuition costs to Yaldeinu for that portion of the 2011-12 school year, during which the student was enrolled, to the extent that such tuition costs have not already been paid by the parent; and

IT IS FURTHER ORDERED that, to the extent that the parent may have paid any portion of the student's tuition costs at Yaldeinu for the 2011-12 school year, the district shall reimburse the parent for such costs upon the submission of proof of payment to the district.

Dated: **Albany, New York**
September 30, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER