The University of the State of New York

The State Education Department
State Review Officer
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No. 13-169

**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:**
Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

Courtenay Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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 by respondent (the district) for the costs of the student's tuition at the Beacon School (Beacon) for the 2012-13 school year. The appeal must be sustained in part.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [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

In this case, on March 7, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (Dist. Ex. 1 at pp. 1, 9). Finding that the student remained eligible for special education and related services as a student with an other health impairment, the March 2012 CSE recommended a 12:1+1 special class placement in a community school with the following related services: two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a small group (id. at pp. 1, 6-7, 9-10).[1] In addition, the

[1] The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

March 2012 CSE determined that the student did not require strategies or supports to address his behavioral needs, and that the student did not require a behavioral intervention plan (BIP) (id. at p. 2).

By final notice of recommendation (FNR) dated August 3, 2012, the district summarized the recommendations made by the March 2012 CSE for the 2012-13 school year and notified the parents of the particular public school site to which it had assigned the student (Dist. Ex. 2). In a handwritten notation on the FNR dated August 13, 2012, the parent indicated that she could not accept or reject the assigned public school site until she visited in September 2012 (Parent Ex. D at p. 1).

By letter dated August 15, 2012, the parent informed the district that she could not observe the public school site because the school was not in session and that she intended to enroll the student at Beacon and seek funding from the district for 2012-13 school year if the public school site was not appropriate (Parent Ex. E at p. 1).

On September 1, 2012, the parent executed an enrollment contract with Beacon for the student's attendance during the 2012-13 school year (Parent Ex. T at p. 1).[2]

In a second handwritten notation on the FNR dated September 24, 2012, the parent indicated that she visited the assigned public school site on September 14, 2012 (see Parent Ex. D at p. 1). Based upon her visit, the parent stated that the observed classroom was not academically or behaviorally appropriate for the student because the instructional level was too advanced, the student could not work independently like the students in the observed classroom, and the observed classroom, was not geared to students with behavioral issues (see id.). Additionally, the parent informed the district of her intention to continue the student's enrollment at Beacon and seek funding from the district for the 2012-13 school year (id.).

**A. Due Process Complaint Notice**

In a due process complaint notice dated March 11, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at p. 1). In particular, the parent asserted that the March 2012 CSE was not properly composed and failed to administer a functional behavior assessment (FBA), develop a BIP, and consider a classroom observation of the student (id. at p. 2). The parent also asserted that the March 2012 IEP failed to include annual goals to address the student's behavioral issues, his difficulty adhering to authority, and his difficulty dealing with anger and frustration (id.). In addition, the parent alleged that the assigned public school site was not appropriate for the student because the student had difficulty with transitions, the public school site could not provide the related services mandated on the March 2012 IEP, and the students at the public school site were not academically and behaviorally similar to the student (id.). As relief, the parent requested reimbursement for the costs of the student's tuition at Beacon for the 2012-13 school year, for the district to either provide the student's related services recommended in the March 2012 IEP or

[2] The Commissioner of Education has not approved Beacon as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

reimburse Beacon for the cost of providing the related services, and for the district to provide round-trip transportation to Beacon (id. at p. 3).

### B. Impartial Hearing Officer Decision

On May 8, 2013 an impartial hearing convened in this matter and concluded on June 11, 2013, after two days of proceedings (see Tr. pp. 1-319). By decision dated July 29, 2013, the IHO concluded that the district offered the student a FAPE for the 2012-13 school year and dismissed the parent's due process complaint notice (see IHO Decision at pp. 5-9).

In support of his conclusion that district offered the student a FAPE, the IHO initially determined that the March 2012 CSE was properly composed (IHO Decision at p. 8). Next, the IHO found that the March 2012 CSE's failure to conduct an FBA and to develop a BIP were not "fatal flaws within themselves" but were to be examined "within the totality" of the IEP and measured relative to the student's needs" (id.). The IHO found that the March 2012 IEP was "specific in detail" and included appropriate annual goals based upon the "reports[,] opinions[,] and evaluations of the student's current teachers, seasoned professionals and standardized psychological testing instruments" (id.). As for the parent's allegations related to the assigned public school site, the IHO found that neither the IDEA nor State regulations required the district to identify the manner in which a student would be grouped with other students at the assigned public school site on an IEP and that, contrary to the parent's assertion, the public school site could deliver the special education program and related services identified within the March 2012 IEP (id.).

## IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year. The parent argues that the IHO erred in deciding that the district's failure to conduct an FBA and develop a BIP did not rise to the level of a denial of a FAPE. Furthermore, the parent asserts that, contrary to the IHO's finding, the March 2012 IEP was devoid of specific detail regarding the student's behavioral deficits and that the annual goals lacked detail regarding the manner in which the student's behaviors would be addressed. The parent argues that the IHO erred in finding that the public school site was capable of delivering the related services identified within the March 2012 IEP. In addition, the parent asserts that she satisfied her burden to establish that Beacon was an appropriate placement for the student for the 2012-13 school year and that equitable considerations favored her request for tuition reimbursement.

The district answers the parent's petition, denying the allegations raised therein and asserting that the IHO correctly determined that the district offered the student a FAPE. The district further asserts that Beacon was not an appropriate placement for the student. With respect to equitable considerations, the district alleges that the parent had no intention of enrolling the student in the public school site, the parent's 10-day notice was insufficient as a matter of law, and the parent showed a lack of good faith cooperation by not being wholly forthcoming with information during the March 2012 CSE meeting. Finally, the district requests that, if the parent is deemed entitled to an award of tuition reimbursement, any award be reduced, asserting that the

parents are not legally entitled to receive tuition reimbursement for time spent devoted to religious instruction at Beacon.

**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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free

Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

## VI. Discussion

### A. March 2012 IEP: Consideration of Special Factors—Interfering Behaviors

The parent asserts that the IHO erred in deciding that the district's failure to conduct an FBA and develop a BIP did not rise to a denial of a FAPE. Under the IDEA, a CSE 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 CSE 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]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East 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]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [2008]).

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," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if

required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although state regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

It is undisputed that the district did not conduct an FBA in this case. However, in developing the student's IEP for the 2012-13 school year, the March 2012 CSE considered a psychological evaluation and updated social history, both conducted in June 2010, a January 2012 Beacon IEP progress report, and a February 2012 classroom observation, along with input from the student's then-current Beacon teacher and the Beacon principal (Tr. pp. 105-06, 108, 119-21, 126-27; Dist. Exs. 1 at pp. 1-2; 3; 6; 7; 8). As set forth below, the sum of the evaluative information before the CSE revealed that the student's behaviors impeded his learning and the learning of others.

The June 2010 psychoeducational evaluation, reviewed by the CSE, was conducted by a school psychologist as part of a triennial evaluation of the student (Dist. Ex. 8 at p. 2). According to the school psychologist, during the evaluation the student spoke in a very quiet tone using one word or short phrases (id.). The psychologist noted that the student "did not [initiate] any conversation," spoke only in response to direct questions, and did not elaborate on responses (id. at p. 3). In addition, the psychologist described the student's affect as flat and reported that he showed little interest in what he was doing (id.). The psychologist reported that, according to the student's mother, the student had several diagnoses and, although the student's behavior had improved, there were still "issues" with oppositional behaviors and inappropriate responses to perceived threats (id. at pp. 3, 4). The parent also reported to the psychologist that the student's aggressive behaviors had lessened (id. at pp. 4, 5). The psychologist stated that the student appeared to be reluctant to do tasks that he perceived as too difficult or that did not interest him and that he required frequent prodding and encouragement to engage in these tasks, to which he was not responsive (id. at p. 3). She described the student as "passively oppositional" (id. at p. 4). Based on her evaluation, the psychologist concluded that the student's overall cognitive functioning fell within the "borderline" range (with a full scale IQ of 70) but opined that the student's test taking style negatively impacted his performance (id. at pp. 3, 5). The psychologist also reported that the student had significant delays in all academic areas (id. at pp. 4-7).

In addition to the psychoeducational examination, the CSE reviewed the June 2010 updated social history, prepared by a social worker for the district, based on an interview with the student's mother (Dist. Ex. 7 at p. 1). According to the social history, the student's behavior at home and school continued to be challenging (id. at p. 3). The social history described the student as oppositional and impulsive but noted that he had become less confrontational and had begun to develop a sense of danger (id.). The social history further indicated that the student's behavior had become more appropriate and that he was able to play with peers unsupervised (id.). According

to the social history, the student participated in little league, and at times would throw his glove down or pout if he did not get to play, but did not engage in "major temper tantrums" (id. at pp. 3-4). However, the report also stated that the student occasionally had difficulty accepting "no" and would yell, slam doors, and throw objects (id. at p. 4). In addition, the social history indicated that these behaviors could occur approximately once a week and last for approximately 15 minutes, which was characterized as "a tremendous improvement over past behavior" (id.). The social history report indicated that, at the time, the student was on three different medications and was seeing both a psychiatrist and a therapist, in addition to the counseling received at school (id. at p. 3).[3]

The CSE also reviewed a January 2012 Beacon IEP progress report (Dist. Ex. 6). With respect to the student's behavior and social skills, the student's teachers indicated that the student was a very charming boy with good social skills (id. at p. 8). They described the student as friendly and noted that, for the most part, he tolerated others "nicely," even when annoyed (id.). However, the student's teachers also noted that, at times, the student became rigid and edgy and that, when he did, his mood changed drastically and he was easily angered (id.). According to the teachers, the student could become physically and verbally aggressive, a "phenomenon" that they reported occurred approximately once a week (id.). The student's teachers also noted that the student had come a long way in learning how to control his behaviors and was now expected to do everything in class "upon first instruction" (id.).

Lastly, the March 2012 CSE reviewed a report of the district's observation of the student in his Beacon classroom, conducted in February 2012 (Dist. Ex. 3 at p. 1). The observation report, prepared by a district special education teacher, described the student's participation in his seventh grade classroom (id.). The special education teacher reported that the student's teacher was absent on the day of the observation and, therefore, the assistant teacher was in charge of the classroom (id.). She noted that there were five students in the class and the student was sitting in the front of the room, to the left of the teacher's desk (id.). The special education teacher observed that the student had difficulty responding to a question posed by the assistant teacher that required the students to calculate a difference in time (id.). She noted that the student did not appear to understand the meaning of the word "difference," as used in the question, and needed the question rephrased after hearing it three times (id.). According to the special education teacher, the student played with a Rubik's cube for the majority of the observation and refused to put it away, even after being asked and told to do so by the assistant teacher several times (id.). The special education teacher noted that the student seemed to be negotiating for hot chocolate and observed that the student requested that the assistant teacher text his mother to tell her he forgot something (id.). The special education teacher also noted that the student put on "huge, black rimmed glasses," which were not prescription, and then argued with the assistant teacher when the glasses became a disturbance (id.). According to the special education teacher, the student seemed to crave constant attention (id.). She described how, after reading aloud in a halting manner, the student laid down across his desk with his head down, while making yawning sounds (id.). The special education teacher also reported that during the observation the student "told another student he would stab him" (id.). Next, the special education teacher detailed the student's behaviors

[3] At the impartial hearing, the parent testified that the student continued to be treated with three medications at the time of the March 2012 CSE meeting (Tr. p. 308).

during a lesson, describing how the student made noise with his feet, stood up when another student answered a question incorrectly, and yelled when he knew an answer but the assistant teacher gave the answer to another student (id.). She noted that all the while the student had "a cunning smile on his face" (id.). The special education teacher reported that, when the assistant teacher went to answer the phone, the student opened the desk drawer and took cookies out of his bag, which resulted in another discussion with the assistant teacher in order for the student to put the cookies away (id.). The student then pulled out a novel and started flipping through it (id.). The special education teacher stated that, throughout the observation, the student was "manipulative, a negotiator and attention seeking" and reported that he banged his head against a nearby bulletin board (id.). She noted that "[a]ll this was with a smiling, out going manner about him" (id.).

The parent, the student's then-current teacher, and the Beacon principal were among the participants at the March 2012 CSE meeting (Tr. p. 103). The principal testified that the CSE asked the Beacon representatives to describe, in general, the student's academics and behavior but that the CSE did not ask for data or specific goals (Tr. pp. 244). The parent testified that, while the March 2012 CSE did discuss the student's behaviors and behavioral needs, she could not recall the extent to which they were discussed (Tr. pp. 291-95, 309-15). She also indicated that "everybody" knew about the student's behavioral needs and, in particular, that the district special education teacher had participated in several CSE meetings for the student in the past and that the student's behaviors were also discussed at such meetings (Tr. pp. 280, 314-15).

Despite the CSE's review of the evaluative material, detailed above, the hearing record reveals that the March 2012 IEP failed to adequately identify the student's behaviors. To the extent that the district chose to rely upon Beacon reports and personnel to describe the student's behaviors, the hearing record shows that reports from the private school were internally inconsistent and the description of the student's behavior in the March 2012 IEP was, therefore, also inconsistent. For example, the March 2012 IEP states that the student's classroom teacher reported the student to be socially appropriate; however, the IEP also cites a January 2012 counseling report, in which the student was described as having difficulty dealing with his anger and frustration in an age and socially appropriate manner (Dist. Ex. 1 at p. 2).[4] In addition, the social development section of the IEP, which reportedly reflected information presented to the CSE by the student's teacher, stated that the student was not verbally or physically aggressive, in direct contradiction of information contained in the January 2012 Beacon progress note (Tr. p. 126; compare Dist. Ex. 1 at pp. 1-2 with Dist. Ex. 6 at p. 8). Moreover, the March 2012 IEP did not adequately reflect the frequency or intensity of the student's attention seeking behaviors as described in the district's February 2012 classroom observation (compare Dist. Ex. 1 at pp. 1-2 with Dist. Exs. 3; 6 at p. 8).[5]

[4] The January 2012 counseling report is not part of the hearing record.

[5] The district special education teacher downplayed the severity of the behaviors exhibited by the student during the classroom observation, noting that the student's actions were problematic but "not to the degree that he was an angry, threatening child," indicating instead that his behaviors were immature, impulsive, and "babyish" (Tr. pp. 117-18). However, the district special education teacher's description of the student, after observing the student for approximately 45-minute to one-hour, is not sufficient to overcome information, such as that provided by the January 2012 Beacon progress report, which indicated that the student's drastic mood changes and resultant aggressive behavior occurred approximately once a week (see Tr. p. 118; Dist. Ex. 6 at p. 8).

The contradictory descriptions of the student, as well as the severe behaviors described in the evaluative materials, underscore the need for additional information about this student, which the district could have obtained had it followed the procedure for conducting an FBA. As set forth above, an FBA may have resulted in an identification of the student's behaviors, a concrete definition of the behaviors, an analysis of the frequency, duration, intensity, and/or latency of the behaviors across various conditions, as well as a consideration of the causes and triggers of the behaviors (8 NYCRR 200.1[r], 200.22[a][3]). The March 2012 IEP fails to describe the student's behaviors with that degree of detail or analysis.

The CSE's failure to adequately identify the student's interfering behaviors resulted in an IEP that failed to sufficiently address the student's needs. The special factor procedures set forth in State regulations require that the CSE "consider the development of a [BIP] for a student with a disability when," among other reasons, "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" (8 NYCRR 200.22[b][1]). While reports reviewed by the March 2012 CSE, including the district's own classroom observation of the student, showed that the student's behavior impeded his learning, the March 2012 IEP does not indicate that the student required a BIP (Dist. Ex. 1 at p. 2).

The district special education teacher explained that the CSE determined that the student's behaviors could be addressed by a classroom management system and that, therefore, the student did not require development of a BIP (Tr. pp. 127-29; Dist. Exs. 1 at p. 2; 3). However, at the time of the district's February 2012 observation, the student was already attending Beacon, described as a school for students with behavioral and social difficulties, where he already participated in a classroom management system (Dist. Ex. 3; see Tr. pp. 163, 178-79, 243). The district special education teacher testified that the student responded well to the classroom management system employed by Beacon; however, her February 2012 observation report regarding the student belies her conclusion (see Tr. pp. 127-29; see also Dist. Ex. 3 at p. 1).[6] The special education teacher testified that the student's behavior was not such that he required his own specific "document" or paraprofessional assigned to him (Tr. p. 129). She confirmed that, based on her observation, her professional opinion was that the student did not need an FBA or BIP (Tr. p. 129). However, the special education teacher also testified that, during her February 2012 observation, the student "was in constant motion" and was constantly speaking and interacting with the assistant teacher and other students, as well as "calling attention to himself" (Tr. p. 116). Most notably, the special education teacher admitted that, during the time of her February 2012 classroom observation, the student was not receiving "too much" educational benefit in the Beacon classroom (Tr. 119). Moreover, the March 2012 IEP does not describe the student's functioning under Beacon's classroom management plan or otherwise set forth an intervention, accommodation, or program modification that would address the student's behaviors (see 8 NYCRR 200.22[b][2] ["If 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

[6] Although the district special education teacher suggested that the student's attention-seeking behavior during her observation may have been due, in part, to the absence the classroom teacher, there is no evidence that the district subsequently attempted to conduct a second observation of the student when the teacher was present (see Tr. p. 147-48).

others, the IEP shall so indicate"]; see generally Dist. Ex. 1).[7] The district special education teacher testified that, although she could not speak for every teacher, in general, a district 12:1+1 special class would have a behavior modification program in place to reward students for appropriate classroom behavior and that the student responded to such a program (Tr. pp. 129, 149), however, under the circumstances of this case, I find that reliance solely classroom-wide measures that are not individualized to this student was inadequate, especially when the evidence shows that this student exhibited persistent behaviors that impeded his learning, despite consistently implemented school-wide or classroom-wide interventions and, therefore, the district should have conducted an FBA and developed a BIP for the student.

Under the circumstances of this case, I find that the CSE was required to conduct an FBA to determine the factors related to the student's interfering behaviors and erred by concluding that the student's behavior did not seriously interfere with instruction (20 U.S.C. § 1414 [d][3][B][i]; 34 CFR 300.324 [a][2][i]; 8 NYCRR 200.4 [d][3][i], 200.22[a], [b]; see also Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005] [noting that safety concerns may be considered, where appropriate, in the development and review of an IEP]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *18-*20 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *10-*11 [E.D.N.Y. Aug. 7, 2008]).

Notwithstanding all of the foregoing, the absence of an FBA and a BIP might not result in a denial of FAPE if the CSE had nevertheless addressed the student's interfering behavior and created an IEP based upon information provided by the student's teachers, providers, parents and classroom observation conducted by the district (see R.E., 694 F.3d at 190-91; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *5, *8 [S.D.N.Y. Mar. 21, 2013] [finding that, even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"]). In this case, in addition to failing to adequately identify the student's problem behaviors, the March 2012 IEP also failed to prescribe ways to manage them.

With respect to the student's social development, the March 2012 IEP indicated that the student needed positive reinforcement and encouragement, prompting and redirection to remain on task, and counseling to enable him to be more open with authority figures and to assist the student in demonstrating appropriate behaviors when dealing with anger and frustration (Dist. Ex. 1 at p. 2). In addition, under "management needs" the IEP stated that the student required a small, self-contained environment with the support of counseling and OT to address the student's academic, social/emotional, and graphomotor needs (Tr. p. 127; Dist. Ex. 1 at p. 2). In part, these strategies and management needs simply reiterate the CSE's recommendation that the student be placed in a 12:1 +1 special class with related services of OT and counseling (Dist. Ex. 1 at p. 6-7). The additional strategies of positive reinforcement and encouragement, prompting, and redirection, while arguably intended to address the student's behavioral needs, are not sufficient in

[7] According to the Beacon principal, Beacon personnel did not share specific information regarding the student's performance relative to the school's behavior management system with the CSE, because the CSE did not request it (Tr. p. 242-44).

light of the severity and nature of the student's behaviors, which evidence in the hearing record describes as aggressive (see Dist. Ex. 6 at p. 8). Thus, these strategies and supports are inadequate to address the student's significant interfering behaviors, such that they might overcome the conclusion that the district's failure to develop a BIP for the student resulted in a denial of a FAPE (Dist. Ex. 1 at pp. 1-2).

Likewise, the hearing record shows that the annual goals designed to address the student's maladaptive behaviors were insufficient to address the student's behavioral needs in the absence of a BIP. A review of the March 2012 IEP shows that it contained three proposed goals to address the student's behaviors in the classroom and one goal to be addressed in counseling (Dist. Ex. 1 at pp. 5-6). The three classroom behavior goals targeted the student's ability to focus, to control his anger, and to complete all work required in class (id.). The district special education teacher indicated that based on her observations, these goals were appropriate to address the student's classroom management needs (Tr. p. 136). In addition to the classroom goals, the counseling goal addressed the student's difficulties adhering to authority and dealing with frustration by targeting the student's ability: to request a break when frustrated or angry; to verbalize his emotions; to use polite language, even when frustrated; to use self-control; to respect others' property; and to respond appropriately to authority figures even when upset (Tr. p. 136; Dist. Ex. 1 at p. 6). Once again, while these annual goals targeted some of the student's behaviors, they could not substitute in this instance for a properly drafted BIP based upon an FBA, given the severity of the student's behavioral needs (i.e. weekly incidents of physical and verbal aggression and an observed threat to stab another student).

In A.C., the Second Circuit concluded that the failure to conduct a FBA did not make the IEP legally inadequate because the IEP noted (1) the student's attention problems, (2) the student's need for a personal aid to help the student focus during class, and (3) the student's need for psychiatric and psychological services (A.C., 553 F.3d at 172-73; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]). Unlike the IEP in A.C., the student's March 2012 IEP failed to provide an adequate description of the student's interfering behaviors and failed to recommend appropriate strategies and supports to adequately address the student's behavior problems. Accordingly, I find that the CSE's failure to comply with State regulation and conduct a FBA and BIP deprived the student of educational benefits as the CSE failed to consider the special factors related to the student's behavior concerns that impeded his learning.

**B. Challenges to the Assigned Public School Site**

The parent argues that the IHO erred in finding that the public school site was capable of delivering the related services identified within the student's March 2012 IEP. The district argues that the IHO properly concluded that the parent's arguments that the public school site could not implement the March 2012 IEP were speculative.

Initially 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 placement. 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., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly 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" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also 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]).[8]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because the "appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing, the parent cannot prevail on the claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186; K.L., 2013 WL 3814669, at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273).

In this case, the district timely developed the student's 2012-13 IEP and offered it to the student. It is undisputed that the parent enrolled the student at Beacon prior to the time that the district became obligated to implement the March 2012 IEP and rejected the IEP before visiting the assigned school (Parent Exs. E; J). As the time for implementation of the student's IEP at the assigned public school site had not yet occurred when the parent rejected the district's offer, the parent's various challenges relating to the assigned school, including the public school site's ability to provide the related services, were speculative claims. These were claims regarding the execution of the student's program and the district was not obligated to present retrospective evidence of the IEP's implementation to refute them (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273). Accordingly, there is no reason under these factual circumstances to disturb the IHO's rejection of the claims related to the assigned public school site.

**C. Unilateral Placement**

The parent asserts that she satisfied her burden of proving that Beacon was an appropriate placement for the student for the 2012-13 school year. 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,

[8] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y., 584 F.3d at 420 [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (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], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]; see also Educ. Law § 4404[1][c]). "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 [identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; 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]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

(Gagliardo, 489 F.3d at 112; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; Frank G., 459 F.3d at 364-65).

As set forth in greater detail below, the hearing record does not establish that Beacon provided education instruction specially designed to meet the student's unique needs.

The hearing record describes Beacon as a "program comprised of self-contained classes" for students with social, behavioral and/or learning difficulties (Tr. p. 163). The program provides individual and group instruction that is tailored to the student's academic, social, and behavioral needs (Parent Ex. B). The Beacon principal testified that the school's curriculum was based on the common core curriculum and then individualized to each student's needs (Tr. p. 185). According to the principal, during the 2012-13 school year, there were 39 students enrolled at Beacon with five to seven students and one "master teacher" per classroom (Tr. pp. 164-65).

One of the of the factors to consider in determining if a private school is appropriate when considering the totality of the circumstances is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient" (Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]). Here, the March 2012 IEP was found to be deficient in addressing the student's behavioral needs. While the Beacon principal testified that the student had a BIP during the 2012-13 school year, the student's actual BIP is not included in the hearing record (Tr. pp. 177-78). Although the Beacon principal described the BIP as a classroom management plan (which the principal also described as a classroom behavior modification system) with individualized goals tailored to the student; she failed to provide details regarding the student's goals (Tr. pp. 178, 206). The hearing record suggests that one of the student's individual goals may have targeted his outbursts in class such as "acting out" or "calling out," yet the student's actual goals are not described (Tr. p. 178). The principal testified that the classroom management plans were "data generated;" however, no such data is included in the hearing record (Tr. p. 243). Furthermore, while the principal's testimony describes the use of a "daily report card" as part of the behavior modification system, no report card, or summary of report cards is included in the hearing record (Tr. p. 177-78).[9]

The hearing record includes anecdotal evidence of Beacon's behavioral programs for the 2012-13 school year; however, as set forth above, there is sparse objective evidence to support how Beacon addressed the student's outbursts and what strategies, if any, were used to help the

[9] The principal described the daily report card as a scorecard used to report the student's behavior during each subject during the school day, based on a scale of five to one (Tr. p. 177-78). According to the principal, the student received a score of five if he refrained from any kind of outburst and his score decreased with each outburst (id.). The student's score for each subject was recorded, tallied at the end of the day, sent home to be signed, and returned to the teacher the next day (id.). Daily scores were added up towards a larger reward of earning a class trip (Tr. pp. 178-79). The principal was unable to report how many class trips the student might have missed during the school year as a result of his behaviors (Tr. p. 179).

student learn to control his interfering behaviors.[10] Under the circumstances, to the extent that there is only scant information in the hearing record regarding how the Beacon program was specially designed to address the student's academic needs, social/emotional needs and, in particular, his behavioral needs, the objective evidence weighs against a finding that Beacon was reasonably calculated to enable the student to receive educational benefits.

The parent asserts that Beacon was an appropriate placement for the student, in part, based on evidence that the student made progress at the private school. 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., 2013 WL 1277308, at *2; D. D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 492 [S.D.N.Y. 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). However, while evidence of progress at Beacon, or a lack thereof, is a relevant factor to be considered the Second Circuit has explained that evidence of progress is not by itself sufficient to establish that a unilateral placement is appropriate (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]; see also Application of the Bd. of Educ., Appeal No. 11-078; Application of the Dep't of Educ., Appeal No. 11-051).

According to the principal, the student made significant progress across academic, social/emotional, and behavioral domains (Tr. pp. 208-212). Specifically, the principal testified that the student improved in his reading fluency, and was reading at a faster pace—not stopping as frequently to sound out words (Tr. pp. 208-09). She also indicated that his reading comprehension improved as well as his attention to focus on understanding "what the story is all about" (Tr. p. 209). Furthermore, the December 2012 Beacon IEP progress report indicated that the student had exhibited some improvement in reading comprehension, in literal and inferential comprehension questions, and in his ability to label basic elements of a story (Parent Ex. G at p. 3). In writing, the principal testified that, initially, the student was very resistant to writing but, by the end of the school year, he was able to write a decent paragraph that was more functional and organized (Tr. p. 210-11). She indicated that his punctuation had improved as well (Tr. p. 211). The December 2012 Beacon IEP progress report also indicated that the student had made progress writing, that he was able to come up with ideas and write two paragraphs on a given subject, with some help (Parent Ex. G at p. 4).

With regard to math, the principal indicated that, by the end of the 2012-13 school year, the student was able to do math at a faster pace, that he mastered multiplication tables, and was working on long multiplication and long division (Tr. pp. 209-10). She further testified that the

[10] The December 2012 Beacon IEP includes behavioral/social goals targeting the student's ability: to control his anger by displaying more flexibility when things don't go his way; to express his frustration in an appropriate manner; to control his behaviors and outbursts; and to anticipate consequences of his actions (Parent Ex. G at p. 9). However the progress chart indicates that these goals were initiated in September 2006 and the first progress report is dated December 2011 (id.).

"biggest thing" in which he made progress with regard to math was his confidence and that, even though the work was still modified at the end of the school year, his anxiety had improved (Tr. pp. 209-10). The December 2012 Beacon IEP progress report indicated that the student had a "decent grasp" of basic math skills including multiplication and division (Parent Ex. G at p. 6). The December 2012 Beacon IEP progress report includes long term and short term goals in the areas of OT, counseling, reading, writing, spelling, mathematics, history, science, and behavior/social functioning (Parent Ex. G at pp. 1-9). Each page of the progress report includes a brief summary of the student's skills in that area as well as a chart used to record progress for the long term and short term goals (id.).[11] However, all of the long term and short term goals in the chart are marked "continue" without any additional information regarding whether or not progress had been made on the individual goals (id.). Furthermore, the progress report included in the hearing record documents the student's progress through December 2012; however, the additional progress reports for March 2013 and June 2013, as indicated on the chart schedule, are not included (id.).

With regard to the student's social/emotional and behavioral progress, the hearing record indicates that the student became "less explosive" by the end of the school year (Tr. p. 211). The principal testified that the student's behaviors occurred less frequently and that he had learned to deal with frustration by talking about it (id.). The principal indicated that the student did not leave the room anymore and did not slam books like he used to (id.). Moreover, she testified that it took him less time to "get out of it" when he did become frustrated and shut down (id.). The principal described the student as having "matured tremendously" and indicated that he was more willing to comply and do work and was less manipulative (Tr. pp. 211-12). The parent testified that student was valedictorian at the graduation because he had improved the most since the beginning of the school year (Tr. pp. 212, 286). The December 2012 Beacon IEP progress report indicated that the student had shown improvement in some of his behaviors, that he had begun to show "a little more control" when upset, and that he had been trying to refrain from becoming aggressive when frustrated (Parent Ex. G at p. 2). The parent described 2012-13 as "his most successful year since he's been in school" and also indicated that "as his behaviors improve his academics improve" (Tr. pp. 285-86). However, as discussed above, the hearing record does not contain any objective evidence to support the parent's conclusion. Accordingly, evidence of the student's progress is not dispositive of the parents' claim that Beacon was appropriate to meet his special education needs, and it does not overcome the inadequacies of the evidence regarding how Beacon provided the student with special education and related services that were tailored to address his unique needs.

Therefore based on the above, the hearing record demonstrates that the parent did not satisfy her burden of proving that Beacon was an appropriate placement for the student for the 2012-13 school year.

**VII. Conclusion**

Having determined that the parent failed to establish the appropriateness of the student's unilateral placement at Beacon for the 2012-13 school year for an award of tuition reimbursement, the necessary inquiry is at an end and whether or not equitable considerations support an award of tuition reimbursement need not be addressed (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60,

[11] The December 2012 Beacon IEP progress report included the following chart key: "I=initiate" "C=continue" or "M=mastered" (Parent Ex. G at pp. 1-9).

66 [2d Cir. 2000]). I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

**THE APPEAL IS SUSTAINED IN PART.**

**IT IS ORDERED** that the IHO's decision, dated July 29, 2013, is modified by reversing those portions which found that the district offered the student a FAPE for the 2012-13 school year; and

**IT IS FURTHER ORDERED** that, if it has not already done so, the CSE shall, within 60 days of the date of this decision, conduct an FBA of the student in accordance with State regulation and, at the next CSE meeting to develop an IEP, consider whether a BIP should be developed for the student based upon the results of the FBA.

**Dated:** **Albany, New York**
**November 15, 2013**

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