



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-121

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Thivierge & Rothberg, PC, attorneys for respondents, Christina D. Thivierge, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the district failed to notify respondents (the parents) of the public school site to which the district assigned their son to attend for the 2013-14 school year and awarded the parents tuition reimbursement for the cost of the student's attendance at the Empowering Long Island's Journey through Autism School (ELIJA) for the 2013-14 school year and partial reimbursement for home-based services. The parents cross-appeal from that portion of the IHO's decision reducing the amount of the reimbursement award. The appeal is sustained in part. The cross-appeal is sustained in part.

II. Overview—Administrative Procedures

A party aggrieved by the decision of an IHO may 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]).¹

III. Facts and Procedural History

The parties' familiarity with the facts and procedural history of the case, the IHO's decision, and the specification of issues for review on appeal, is presumed and will not be recited here in detail.² At the time that the district's Committee on Special Education (CSE) convened to develop the student's IEP for the 2013-14 school year, the student, who received a diagnosis of autism at an early age (Parent Ex. C at p. 9; see also Tr. 395), was 14 years old and attending ELIJA school, a non-public specialized school that utilized applied-behavior procedures (Tr. p. 10; Dist. Ex. 7 at p. 2; Parent Exs. C at p. 9; E at p. 1; F; G).³ The student was also receiving home-based applied behavior analysis (ABA) instruction 10 hours a week, and the student's parents received weekly individual parent counseling and training sessions (Parent Ex. C at p. 9).

On May 28, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for 2013-14 school year (Parent Ex. B at p. 30). Finding the student eligible for special education as a student with autism, the CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school (Parent Ex. B at p. 21).⁴ The May 2013 CSE also recommended related services, including: five 45-minute sessions of individual speech-language therapy per week, two in the classroom and three in the therapy room; two 60-minute

¹ The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

² Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

³ The student first began attending ELIJA in September of 2009 (Dist. Ex. 7 at p. 2; Parent Ex. C at p. 1). The Commissioner of Education has not approved ELIJA as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁴ The student's eligibility for special education programs and related services as a student with autism is not in dispute (34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

sessions individual occupational therapy (OT) per week; two 30-minute sessions of individual physical therapy (PT) per week;= and monthly parent counseling and training at the school (id.).⁵

By letter dated May 28, 2013 and sent to the district by facsimile on May 30, 2013, the parents requested continuation of the student's special education and related services for the 2013-14 school year due to the student's receipt of a diagnosis on the "autism spectrum" (Parent Ex. M at pp. 1-2). The parents also informed the district that they would accept any appropriate placement and services that the district recommended; however, if the district failed to offer an appropriate placement and services for the student, the parents noted that they would request tuition reimbursement at public expense for the cost of the student's attendance at a nonpublic school placement (id. at p. 1).

According to the district, a final notice of recommendation dated June 15, 2013 was sent to the parents, identifying the particular public school site to which the student had been assigned to attend for the 2013-14 school year (Dist. Ex. 5). The parents have maintained throughout this matter that they did not receive the June 15, 2013 FNR.

By letter dated June 21, 2013, the parents informed the district that they had not received a copy of the May 2013 IEP and had not yet received any notification identifying a particular public school site for the student to attend (Parent Ex. L at p.1). The parents also informed the district that "unless the [district] offer[ed] an appropriate placement" for the student, they would continue the student's placement at ELIJA at public expense and additionally seek reimbursement for the costs of ABA instruction and supervision/consultation, parent counseling and training, team meetings, speech-language therapy, OT, PT, and transportation (id.). According to the parents, "a few days" or a "week" after the parents mailed their letter of June 21, 2013, the parents received a copy of the May 28, 2013 IEP at the "end of June," but they alleged that did not receive any notification of the particular school site for the student to attend (Tr. pp. 409-11).

On July 8, 2013, the student began the 2013-14 school year at ELIJA and remained there for the duration of the school year (Parent Ex. Q; see also Tr. p. 397; Parent Exs. D; P; R; S; T).

A. Due Process Complaint Notice

By due process complaint notice dated October 1, 2013, the parents requested an impartial hearing to address over 50 claims raised by the parents relative to the 2013-14 school year and the May 2013 IEP developed and recommended by the district's CSE (Parent Ex. A at pp. 1-7). Relevant here, the parents alleged that they never received the June 15, 2013 FNR or any notification of the public school site to which the district assigned the student to attend prior to the start of the 2013-14 school year (id. at p. 2). Having unilaterally placed the student in a nonpublic school for the 2013-14 school year, the parents requested, as relief, reimbursement for the cost of: the student's attendance at ELIJA; transportation expenses for the extended 2013-14 school year; 10 hours per week of home-based ABA instruction; four hours per month of ABA consultation services; one hour per week of parent counseling and training; and related services, consisting of

⁵ The May 2013 IEP indicated that speech-language therapy was to be provided two times per week in the general education classroom. Given that the student was recommended for a special class in a specialized school, this is presumed to be a typographical error, as noted by IHO (see IHO Decision at p. 24).

OT (three 60-minute sessions per week), PT (two 30-minute sessions per week), and speech-language therapy (three 60-minute sessions per week) (collectively, the "related services") (*id.* at p. 7).

B. Impartial Hearing Officer Decision

On January 14, 2014, an impartial hearing convened in this matter and concluded on May 20, 2014, after four days of proceedings (Tr. pp. 1-430). By decision dated July 2, 2014, the IHO found that the parents were entitled to public funding of the cost of the student's attendance at ELIJA for the 2013-14 school year (*see* IHO Decision at pp. 20-29). The IHO reasoned that, although the district claimed that it had mailed an FNR to the parents on or about June 15, 2013, informing the parents of the public school site to which it assigned the student to attend for the 2013-14 school year, the district failed to produce evidence that standard office practice and procedures were followed with regard to such mailing (*id.* at pp. 22-23). In addition, the IHO credited the parents' testimony that they never received the FNR and that they had sent a letter dated June 21, 2013 informing the district that they had yet to receive an FNR (*id.* at p. 22).

Having found that the district failed to inform the parents of the public school site to which it assigned the student to attend for the 2013-14 school year, the IHO found that the student was denied a FAPE (IHO Decision at pp. 23-24). Next, the IHO found that the ELIJA was an appropriate unilateral placement for the student because the student had made progress and received educational benefit and that equitable considerations favored tuition reimbursement because the parents attended the May 2013 CSE meeting, presented progress reports from the nonpublic school, and voiced their opinion to the CSE (*id.* at pp. 24-27).

As relief, the IHO awarded the parents the full amount of the costs of tuition at ELIJA for the 2013-14 school year minus the amount of \$15,000, or \$5,000 for each of the three related services that the IHO found that the student required (OT, PT, and speech-language therapy) but which the nonpublic school failed to provide to the student (*see* IHO Decision at p. 27). The IHO also denied the parents' request for public funding of parent counseling and training and declined to reimburse the parents for four hours per month of services provided by a consultant and supervisor of the home-based related service providers (*id.* at p. 28). Finally, the IHO ordered the district to reimburse the parents for the cost of six hours per week of home-based applied behavioral analysis because the student required generalization of certain skills (*id.* at pp. 28-29).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year. Relative to the IHO's finding that the district failed to establish that the parents received the June 15, 2013 FNR, the district argues that the IHO erred in failing to credit its witness's testimony that standard office practices and procedures were followed and that the IHO erred in finding that the parents rebutted the presumption that they received the FNR in the mail because the parents were required to establish more than a general denial that they did not receive the FNR. Contrary to the findings of the IHO, the district also argues that the parents failed to demonstrate that ELIJA was an appropriate placement for the student; that equitable considerations favor tuition reimbursement; and that they were entitled to six hours per week of home-based ABA services.

In an answer and cross-appeal, the parents respond to the district's petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year. In their cross-appeal, the parents argue that the IHO erred in reducing the amount of tuition reimbursement by \$15,000 due to the failure of ELIJA to provide the related services to the student. The parents also argue that the IHO erred in denying the parents' request for public funding of parent counseling and training and erred in denying the parents' request for the costs of four hours per month of ABA consultation services (*id.* at p. 28). Finally, the parents argue that the IHO erred in awarding the costs of only six hours per week of home-based ABA services, rather than the requested 10 hours.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 [2009]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Access to Special Education Services

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).⁶ The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 560 U.S. 904 [2010]; see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 889 [D. Ariz. 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). [13-150] Additionally, a district "must ensure that . . . [t]he child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation" (34 CFR 300.323[d][1]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *13 [S.D.N.Y. May 27, 2014]).

In this case, as to the district's challenge to the IHO's finding that the parents received no notice of an assigned public school site prior to the beginning of the 12-month or extended 2013-14 school year, although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the

⁶ In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (N.Y. Educ. Law § 2[15]).

student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x. 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

However, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an the IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see Tarlowe, 2008 WL 2736027, at *6 [stating that a district's delay does not violate the IDEA so long as an public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and state regulation, for example, by an FNR which is the mechanism adopted by the district in this case, it nonetheless must be shared with the parent before the student's IEP may be implemented.

Here, the district argues that testimony presented at the impartial hearing demonstrates: that it mailed the FNR on June 15, 2013 consistent with standard office practice and procedure; that the handwriting on the FNR was identified as belonging to a particular employee of the district; that the FNR was not returned in the mail; and that, therefore, a presumption arises that the FNR was received by the parents (see Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see Tr. pp. 18-27). As in this case, when a district presents evidence that showing that a presumption of mailing should apply, the district correctly argues that the parents' mere denial of receipt of the FNR, standing alone, should not rebut the presumption that the parents did not receive the FNR (id. at 829-30; see also Tr. pp. 409-11). However, the IHO did not credit the district witness's testimony that an FNR was mailed, thus seriously weakening the district's argument that the presumption should be applied and, further, found that the presumption of receipt was nevertheless rebutted by the parents' credible testimony, as well as their letter dated June 21, 2013 informing the district that they had yet to receive notification of the assigned public school site (IHO Decision at pp. 22-23). In particular, the IHO found that the parents rebutted the presumption that the FNR was mailed by the district and received by the parents because the district did not respond to, and was unaware of, the parents' letter of June 21, 2013, despite the parents having produced facsimile

confirmation page indicating a credible and successful transmittal of the parents' June 21, 2013 letter to the district at a fax number not contested by the district (see IHO Decision at pp. 4, 22-23; Parent Ex. L at p. 2). Moreover, after the purported June 15, 2013 mailing of the FNR, evidence in the hearing record substantiates the IHO's finding that the district was not able to establish that it followed its own internal practices and procedures, in that the district failed to follow up with the parents with a phone call, as was its practice, after not hearing from them subsequent to the purported mailing of the June 15, 2013 FNR s (IHO Decision at pp. 3-4; Tr. pp. 31, 40-41). An SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this case, while another fact finder may or may not have made the same credibility finding as the IHO, it is clear that review of the non-testimonial evidence and the entire hearing record does not justify or compel a contrary conclusion to the IHO's reasonable credibility determination and findings of fact. Thus, as the IHO based his determination that the district was not entitled to the mailing presumption at least in part on a credibility determination, this finding is entitled to deference and will not be disturbed.

Based on the foregoing, the evidence in the hearing record shows that in the absence of notification, either written or oral, explaining how the student could access her IEP services, constitutes a procedural inadequacy, which, under different circumstances might not have risen to the level of a denial of a FAPE. However, unlike other cases where the parents had actual knowledge of the location at which they could access special education services for a student, in this case, the district presented no independent, reliable evidence that the parents possessed such information (see, e.g., Application of a Student with a Disability, Appeal No. 13-016; Application of the Dep't of Educ., Appeal No. 12-111). This case is also distinguishable from others in that it is clear by the parents' communication to the district that the lack of notice of an assigned public school site informed the parents' ultimate decision to reject the May 2013 IEP and to unilaterally place the student (see Dist. Ex. 8 at p. 1; see e.g., Application of the Dep't of Educ., Appeal No. 12-111). Moreover, given that this student required extended school year services beginning in July 2013, even if the district had identified the particular school site that the student would attend immediately after the parents filed their October 1, 2013 due process complaint notice (after having already notified the district in their June 21 letter of the lack of notification), and assuming that the parents subsequently consented to the district's provision of special education services, given the timing, the delay in implementation of the student's IEP during the 2013-14 school year would constitute a deviation from substantial or significant and material provisions of the student's IEP, that is, all of the services (A.P., 370 Fed. App'x at 205, 2010 WL 1049297; see Van Duyn, 502 F.3d at 822; Bobby R., 200 F.3d at 349). Therefore, under these unique circumstances, the evidence in the hearing record shows that this procedural inadequacy (a) impeded the student's right to a FAPE, and resulted in 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]).

B. Unilateral Placement

In this case, because the district failed to offer the student a FAPE for the 2013-14 school year for the reasons noted above, I now turn to the issue of whether the parents' unilateral placement of the student at ELIJA was appropriate.⁷

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 must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement . . .'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in

⁷ Although the IHO did not address whether the May 2013 IEP was substantively and procedurally appropriate in this case, I am loath to remand to the IHO under the circumstances of this case where the district failed to offer a timely notification of the particular public school site to which the student was assigned to attend (IHO Decision at p. 23).

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).

By way of background, the student's educational needs were identified by a number of evaluative documents, which included: an April 7, 2013 psychoeducational evaluation; an April 11, 2013 home ABA progress report; an April 2, 2013 related services progress report; an April 5, 2013 PT report; a May 23, 2013 district classroom observation; and a May 26, 2013 educational observation report and recommendation (school and home-based ABA program) conducted by a board certified behavior analyst at the request of the parents; and draft goals for the 2013-14 school year provided by ELIJA (Dist. Exs. 6 at pp. 1-2; 7 at pp. 1-4; Parent Exs. H at pp. 1-7; I at pp. 1-9; J at pp. 1-2; C at pp. 1-10). The description of the student's special education needs included in these documents informs the following discussion, and it is presumed that the parties are familiar with the content of such evaluations.

Briefly, although the school psychologist did not obtain formal testing information, the April 2013 psychoeducational evaluation identified the student's behaviors and needs based on the "use of a number of assessment tools" with the evaluation being observatory in nature and consistent with previous outcomes (Dist. Ex. 7 at p. 3). The school psychologist stated in her report that previous testing from 2010 revealed mild cognitive delays on the Stanford-Binet Intelligence Scale with a standard score of 60-74, which yielded the student's intellectual functioning in the first percentile (id.). A review of the report indicated that the student functioned "significantly below age expectation in motor, language, academic and cognitive skills" (id.). The report noted the student displayed "significant levels of autistic behavior that warranted a special class in a specialized environment with 12 months of services to prevent regression when he is not in school" and the student required "speech and motor interventions" to develop "higher levels of adaptive skills" (id.). The school psychologist noted that the student was highly distracted and that he required verbal prompts and brief physical cues to gain the student's attention (id. at p. 2). The report indicated that the student provided eye contact that he was unable to sustain but, generally, the student showed appropriate behavior during the assessment (id.). The psychologist noted that the student's language was "poorly developed" in both receptive and expressive areas as well as presenting with "significant articulation errors" (id.). The psychologist reported that the student required hand over hand assistance with paper-pencil tasks and the student's writing was significantly delayed for copying or drawing (id.).

With regard to social development, the school psychologist observed that the student functioned "well below age expectancy," but the student attended in an unfamiliar setting with an unfamiliar adult for a sustained period of time (Dist. Ex. 7 at p. 2). The April 2013 psychoeducational report noted the student was not significantly self-stimulatory showing appropriate behavior during the evaluation despite the student's waning attention (id.).

The April 2013 psychoeducational report also identified the student's need to work on goals that addressed basic communication of the student's wants and needs through verbal and non-verbal communication using visual cues and picture communication to facilitate exchanges during structured language activities (Dist. Ex. 7 at p. 3). The school psychologist indicated in this report that the student needed to promote peer interactions through natural context using play and fine/gross motor skills (id.). The school psychologist noted that the student required the development of self-care, self-help, and self-regulation to be taught through direct instruction with concrete aids to transition from dependent to independent behaviors (id.). Further, the school psychologist recommended in the April 2013 psychoeducational report that the student needed consistent and constant contact between the school and home environment to reinforce learning from one environment to another (id.). The psychologist recommended that the student receive instruction in a classroom that minimized distractions, provided choices, schedules, and routines interspersed with movement opportunities to manage the student's behavior and to sustain attention and concentration (id.).

The April 11, 2013 progress report provided by the student's home program instructor indicated that the student required intervention to address the student's attending behaviors; joint attention; polite statements; reciprocal conversations; initiation of conversations; ability to follow scripted conversations; articulation skills and responses to "wh" questions (Parent Ex. H at pp. 1-3). The progress report also indicated that the student continued to require instruction on functional daily living skills, which included hand washing, brushing teeth, making his bed, independently showering, and getting dressed (id. at p. 3). Regarding pre-academic skills the progress report indicated that the student needed to continue to work on reading comprehension; matching pictures to text; acquiring writing responses; tracing a dotted line from right to left; letter identification; increasing sight words; typing skills; body part identification; number identification; and the identification and labeling of coins and dollar bills (id. at p. 7).

As to related services, the April 5, 2013 related service provider progress report from the physical therapist noted the student continued to require PT to focus on jumping, stair safety, coordination, strengthening bilateral upper and lower extremities and endurance due to global delays in all areas of functioning and delayed gross motor skills (Parent Ex. I at pp. 1-2). Further motor needs were identified in the April 2, 2013 OT progress report related to delays in hand skills, motor planning, visual perceptual skills and cognitive perceptual skills all of which "affected his independence during the school day" (Parent Ex. J at p. 1). Specifically, the OT progress report indicated that the student's needs related to hand strength, manipulation and dexterity; zipping; visual attention; scanning and shifting eye gaze (id. at pp. 1-2). The OT report also stated that the student required preparatory sensory activities and indicated goals to address needs including taking his jacket on and off and typing his first and last name with a template (id. at p. 2).

While the April 23, 2013 district classroom observation of the student described the student's performance it did not specifically identify the student's needs or make recommendations for future programs (Dist. Ex. 6 at p. 2). However, the May 23, 2013 educational observation report and recommendations indicated that the student lacked alphabet identification skills, independence in self-care skills, social reciprocity, higher rates of spontaneous language production, and independent leisure skills (Parent Ex. C at p. 10). The educational observation report also recommended that the student receive instruction in a specialized school that offered one-to-one intervention using the principle and strategies of ABA and that the student receive

speech/language consultation, home-based OT, center-based PT, home-based ABA services for 10 hours per week, four hours of supervision for the home-based ABA program, and parent training (id. at pp. 9-10).

Consistent with the evidence in the hearing record describing the student's needs, as summarized above, a review of the evidence in the hearing record demonstrates, as discussed below, that the student's educational program and services received at ELIJA during the 2013-14 school year were appropriate and specially designed to address the student's unique needs.

The associate executive director of ELIJA testified that ELIJA's mission was to promote independence and self-management skills, to develop skills in communication and social interaction, and to reduce repetitive ritualistic behaviors using applied behavior analysis (Tr. pp. 147, 150). ELIJA's 13 students ranged in age from 6-17 and were divided by age and skill level within 3 classrooms (Tr. pp. 152-153).⁸ ELIJA is a 12-month comprehensive program using an intensive Applied Behavior Analytic (ABA) teaching approach (Tr. pp. 150, 152, 160; Parent Ex. E at p. 1). ELIJA also uses a structured approach to assess and facilitate the acquisition of meaningful and functional skills creating and implementing individualized goals for each student in a program that runs from 9:00 am to 2:45 pm Monday through Friday (Parent Exs. D; E at p. 1). The associate executive director testified that ELIJA provided one-to-one instruction with daily group sessions for lunch and recess with some dyads throughout the week to work toward the natural environment (Tr. p. 153). In addition to offering home visits and parent training, the associate executive director indicated that ELIJA offered monthly clinic meetings dedicated to each student that involved the family and professionals working with the student to discuss the child and the family's concerns and to adjust the student's program as necessary (Tr. pp. 158-59; Parent Ex. E at p. 1).

ELIJA also provided the student with one-to-one intensive instruction using discrete trial instruction in a classroom of five students with children ranging from 12-17 years (Tr. pp. 152-53, 155, 172; Parent Ex. E at p. 1). To address the student's needs, as discussed in detail above, the evidence in the hearing record indicates that the ELIJA instructors facilitated goals related to attending, mathematics, reading, requesting, socialization, activity of daily living skills (ADLS), behavior, language, motor, fluency, imitation, prevocational skills and leisure skills (Tr. pp. 176-178; Parent Ex. E at pp. 1-10). To address the student's attending needs, ELIJA developed goals to increase the student's independent eye contact in a 1:1 setting with the teacher and a goal for the student to maintain eye contact during conversations with adults or peers (Parent Ex. E at p. 2). The assistant director of ELIJA also indicated the school developed goals to address the student's fluency to reduce his response time by providing the student with repeated practice (Tr. pp. 182-83; Parent Ex. E at p. 4). The assistant executive director indicated that ELIJA used video modeling and audio-visual programs to support the student's listening skills (Tr. pp. 184-85). ELIJA also targeted academic goals for reading and mathematics (Parent Ex. E at pp. 6-7). To address the student's reading needs, ELIJA developed a goal to increase the student's ability to

⁸ The associate executive director explained that ELIJA's students tend have "some sort of intense behavioral deficits" that could include aggression, self-injury, disruptive behavior self-stimulatory behavior, and vocal or motor stereotypy (Tr. p. 153). The associate executive director noted that most of the students come to the school with a need for their behaviors to be managed with a behavior plan (id.). She also testified that most of the students in the school have "extreme deficits in communication" (Tr. p. 154).

independently identify five additional words when written on cards (Tr. pp. 182-83; Parent Ex. E at p. 7). To address the student's needs in the mathematics domain, ELIJA developed goals for the student to count aloud while pointing to objects and identifying numbers printed on cards (Tr. pp. 182-83; Parent Ex. E at pp. 6).

To address the student's deficits in language and communication, ELIJA instructors provided the student with goals to address his ability to answer "who" and "where" questions, respond to questions related to feature, function and class, respond appropriately to two component labels, and to follow two-step directions in the appropriate order (Parent Ex. at pp. 3,7). ELIJA also developed category matching and word-to-picture matching goals to further address the student's receptive language needs (id. at p. 8). To support the student's deficit in articulation ELIJA engaged the student in a vocal imitation program targeting specific sounds and sound combinations (id. at p. 5). The ELIJA communication goals also included a goal for requesting actions of others, using at least a verb and noun, in the one to one setting (id. at p. 8).

With respect to the student's identified motor needs ELIJA also provided the student with a goal to support the student's ability to complete fine motor task independently and correctly within an established time frame and a goal to complete an exercise routine with a peer for two minutes related to physical fitness when given verbal instruction (Parent Ex. E at p. 4). ELIJA provided goals to address the student's behavior, ADL skills community skills, and prevocational skills (Parent Ex. E at pp. 2-3, 6-7, 8-9). Regarding behavior needs, ELIJA addressed the student's inappropriate sexual behavior through redirection and managed his non-contextual vocalizations (Tr. pp. 178-180). The associate executive director testified that when non-contextual vocalization behavior reemerged, ELIJA assessed the behavior by way of a functional analysis and functional behavior assessment to determine the function of the behavior, and why it happened, and then developed a treatment plan (Tr. p. 180). The associate executive director indicated the intervention provided was successful reducing the behavior from an occurrence of 80% of the day to 6% of the day (id.). ELIJA facilitated the development of the student's social and leisure skills with goals to address the student's needs such as completing activities with another peer, independently engaging with a peer about a preferred activity using two exchanges, independently introducing himself to an unfamiliar person, recalling experiences and reciprocating a compliment with an adult (id. at pp. 5, 9-10). ELIJA targeted community and prevocational deficits with goals that facilitated the student's ability to stand correctly during verbal instructions, purchase items in a store, collect office paperwork and deliver supplies (id. at pp. 2, 6-7). ELIJA also addressed the student's ADL needs with goals such as preparing snack or lunch, brushing teeth, wiping his mouth and zipping clothing (id. at pp. 2-3 6-8, 8-9). ELIJA also provided a toileting protocol where the instructors facilitated the student to appropriately indicate the need to use the bathroom and appropriately complete the task (Tr. p. 178).

The associate executive director of ELIJA further indicated the student was provided with incidental teaching in a group during lunch and recess times to facilitate requesting, turn taking, and using peers' names (Tr. pp. 188-189). ELIJA provided the student with community exposure through trips to the library every two weeks which facilitated navigation, making choices, social exchanges, and using appropriate manners such as please and thank you (Tr. pp. 190-92).

As the student required a coordinated program with the home services the associate executive director indicated the ELIJA school staff interacted with the home team as needed to

assess if behaviors were occurring across settings and she indicated this took place every "few months or so" (Tr. pp. 193-194). She also noted the home team contacted the school staff with questions regarding the student's behavior, the home team provided the school with progress reports, and as needed observations could be scheduled "at any time" (Tr. p. 194). The associate executive director noted the school staff had not been at the home recently but they had "many phone conversations" with the parent and "meetings at school" (*id.*).

Turning to the need for parent training, the associate executive director indicated that ELIJA conducted monthly clinic meetings, which consisted of one hour per month dedicated to the student, which the parents are invited to attend, along with any other professionals or close relatives who are involved with the student, and during which those present at the monthly meeting review data from all of the programs that the student was involved in (Tr. pp. 158-59). The parent testified that they attended the individualized clinics where ELIJA provided them with any training that they needed, they reviewed the student's program, received feedback from the school and the parents provided the school with input about what they saw at home (Tr. pp. 398, 401, 422). The parent also indicated they contacted the teacher with any problems and they could observe the student at school at any time (Tr. p. 399). Accordingly, in view of the foregoing evidence in the hearing record, the parents have established that ELIJA provided the student with specially designed instruction designed to meet her unique needs (*M.H.*, 685 F.3d at 252; *Gagliardo*, 489 F.3d at 112; *Frank G.*, 459 F.3d at 365).

In addition, the evidence in the hearing record establishes that the student made progress in several domains during the 2013-14 school year. While 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.*, 523 Fed. App'x 76, 78, 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; *D.D-S. v. Southold Union Free Sch. Dist.*, 506 Fed. App'x 80, 81, 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; see also *Frank G.*, 459 F.3d at 364).⁹ However, a finding of progress is nevertheless a 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]).

According to both the May 23, 2013 educational observation report completed by the board certified behavior analyst and according to the testimony of the associate executive director of ELIJA, the student demonstrated progress in the areas of attending skills, pre-academic skill, motor abilities, language, behavior, social skills and adaptive behavior (Tr. pp. 147, 175, 176-77, 178-79, 183, 184, 186; Parent Ex. C at p. 9). Overall, the certified behavior analyst indicated that the

⁹ 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 v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 115 [2d Cir. 2007]; see *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 [2d Cir. 2006] [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"]).

student showed improvement across all areas targeted (Parent Ex. C at p. 9). The behavior analyst's report indicated that the student showed a decrease in reliance on vocal prompts to emit spontaneous language, improved his access to community based activities, and improved in his ability to follow a schedule on the iPad and to follow his individualized activity schedule (*id.*). In relation to the pre-academic skills the associate executive director stated that the student learned to identify letters and improved in his ability retain letter identification (Tr. p. 184). The hearing record indicated the student demonstrated improvement in his language skills by increasing the length of his sentences, he made progress expressing his needs, met his goals for requesting actions, and he mastered six goals related to vocal imitation which improved his articulation skills (Tr. pp. 166, 177; Parent Ex. C at p. 9). Regarding attending, the associate executive director stated the student "made great progress" as he met and "actually exceeded" the goal addressing eye contact (Tr. p. 175). She also indicated that the student exceeded his goals related to leisure and social skills being able to do two activities with a peer with the instructor up to 5 feet away (Tr. p. 176-177). The hearing record indicated that the student made progress in learning how to put on and remove his jacket with set-up and gestural prompts, made improvements in his exercise goal by walking around a track for two minutes with a peer, mastered walking on treadmill, and nearly met criteria for brushing his teeth and cleaning his glasses (Tr. pp. 177, 183, 186; Parent Ex. C at p. 9; J at p. 2). The certified behavior analyst indicated the student eliminated non-contextual vocalizations, and the associated executive director noted the student's engagement in non-contextual vocalizations reduced from 80% of the day to 6% of the day and his inappropriate sexual behavior was "very, very low" (Tr. pp. 178-180; Parent Ex. C at p. 9).

In sum, the evidence in the hearing record reveals that the student benefitted from the instructional strategies and supports provided by ELIJA that included such things as intensive one-to-one discrete trial instruction, layering of instruction, behavior reduction procedures, video modeling, auditory-visual programming, incidental teaching, use of an iPad, the use of instructional and visual prompts and short breaks (Tr. pp. 152-53, 166 172, 188-189, 184-85, 349; Parent Ex. E at p. 1). The associate executive director also stated that due to the student's "high distractibility" and difficulty sustaining attention, the program at ELIJA was successful using "short bursts of instruction," which were "highly effective" (Tr. p. 166). Furthermore, the evidence in the hearing record discussed above demonstrates that the student was making academic and social/emotional progress at the school (*see* Tr. pp. 166, 176-77, 184; Parent Ex. C at p. 9). Because ELIJA provided the student with an educational program specially designed to meet the student's special education needs (*see* Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419), the parents are entitled to full tuition reimbursement in the absence of any equitable considerations that might weigh against tuition reimbursement, the consideration of which I now turn to.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown, 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]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 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).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Turning to the issue of whether equitable considerations serve as a bar to, or justify a reduction in, tuition reimbursement, the district does not cite to any evidence in the hearing record that would call into question the IHO's findings that the parents fully cooperated with the CSE; participated and cooperated in the IEP development process; provided the CSE with copies of progress reports and other documents that the CSE needed to consider in developing the student's educational program; and provided adequate and timely notice of their intent to unilaterally place the student at ELIJA (see IHO Decision at p. 27). In addition, to the extent that the IHO reduced the amount of tuition reimbursement by a total of \$15,000, or five thousand dollars for each type of related service that ELIJA did not provide to the student, that portion of the IHO's decision must be reversed under the circumstances of this case. Although the appropriateness of the ELIJA program for this student could be a closer question, as noted by the IHO (IHO Decision at p. 27), where the school fails to provide the related services that this student requires, the evidence in the hearing record demonstrates that the program at ELIJA, without additional related services, is likely to produce—and has produced, as detailed above—progress and provided a specifically designed program to address the student's deficits and educational needs (see M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 367 [S.D.N.Y. 2010] [upholding the appropriateness of

the private school placement, despite the absence of any related services provided to the student, because "the curriculum alone" addressed the student's deficits]; see also R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *27 [E.D.N.Y. Jan. 21, 2011] [citing M.N., 700 F. Supp. 2d at 367]).

Having determined that ELIJA was an appropriate placement for the student for the 2013-14 school year and that equitable considerations do not bar an award of tuition reimbursement, the inquiry in this case does not end there, because the IHO awarded six hours of home-based ABA instruction per week (IHO Decision at p. 27). Courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see Mr. and Mrs. A v. New York City Dept. of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see also Forest Grove, 557 U.S. at 239-40).

In its petition, the district challenges the IHO's decision to award the parents reimbursement for six hours per week of home-based ABA services, and the parents argue that the IHO should have awarded them reimbursement for 10 hours per week of home-based ABA services. For the reasons that follow, the IHO's decision to award funding for six hours per week of home-based ABA services will be reversed. While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA requires"]). Similarly, "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are per se [reimbursable]; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA" (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]). Moreover, in this case, the parents assert that the student requires after-school services to generalize the skills learned at school (see, e.g., Answer ¶ 78; see also IHO Decision at p. 28). Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson

R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

Here, the evidence in the hearing record indicates that the student's home program consisted of three instructors who were trained in ABA and whom the parents employed directly (Tr. pp. 380, 352-54; Parent Ex. C at 5-6). The student's participation in a home program included ten hours a week which consisted of one-to-one teaching using applied behavior analysis focused primarily on social skills and adaptive living skills (Tr. pp. 232, 236; Parent Ex. C at p. 1). The associate director from ELIJA noted the student needed to learn skills appropriate to each setting so the home team worked on skills appropriate to that setting including tooth brushing, taking a bath, putting on pajamas and putting away clothing (Tr. pp. 236-37). Due to the student's level of deficit in the area of adaptive living skills the home-based program also targeted the development of the student's independent problem solving skills, leisure skills at home, "chores," making his bed, organizing clothing, showering, toileting, and attending dental visits (Tr. pp. 299, 352; Parent Ex. H at p. 3-4). In addition to the ADL skills targeted in the home program the home team addressed social skills and basic communication skills such as attending skills, greetings, requesting preferred items, color identification, retrieving requested items, extending language, polite responses, participating in conversations, scripted conversations, functional phrases, articulation skills, and identification of safety words (Tr. pp. 343-47, 349-350; Parent Ex. H at p. 5). The home provider indicated that the team also provided parent training, training in typing, watching movies, using the elliptical machine, using an iPad (Tr. pp. 350-51). Regarding the necessity of the after-school services, the associate director from ELIJA testified the home program was appropriate because the student needed to generalize the skills learned at school and the home program provided an opportunity to do so (Tr. p. 236). The behavior consultant and parent also testified that the home program was needed because of the student's difficulty with generalization and maintenance of skills (Tr. pp. 306, 404). The behavior analyst stated that the home program was necessary because the student was not able to "generalize things" as the student could not demonstrate skills learned at school at home without a "home ABA program" (Tr. p. 404). In view of the foregoing and upon review of the hearing record as a whole, the weight of the evidence in the hearing record reveals that the purpose of the after-school services was for the generalization of skills to other environments outside of school and that the student did not require home-based services to make progress at ELIJA (see Tr. pp. 170-71, 236, 306, 398, 402, 404). Thus, I find that the student's after-school program focused primarily on generalization of skills that the student learned at school, which weighs heavily against a finding that the after-school program was designed to address the student's educational needs in, and receive educational benefits from, his school-based program. The purpose of the IDEA is to ensure that a student has meaningful access to a school-based program in which the student is likely to progress, which, in this case, has been clearly been achieved by the ELIJA school program. While I can sympathize with the parents and their desire for publicly funded services in the home in addition to those of their unilaterally chosen school-based program, as stated earlier, 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). Accordingly, that portion of the IHO's decision will be modified to reverse that portion which awarded the parents reimbursement for six hours per week of home-based ABA services.

Finally, in their cross-appeal, the parents challenge the IHO's decision to deny their request for public funding of parent training; reimbursement for the four hours of supervision/consultation and reimbursement for the cost of related services, which consisted of OT, PT, and speech-language therapy (IHO Decision at pp. 27-28). For substantially the same reasons articulated above and by the IHO in his decision, the IHO's decision to deny public funding for parent training; to deny reimbursement for the consultation services; and to deny reimbursement for the related services provided to the student is sustained (id. at p. 28).

VII. Conclusion

The hearing record supports the IHO's determinations that the district failed to offer the student a FAPE, that the parents' unilateral private placement at ELIJA was appropriate, and that equitable considerations weighed in favor of tuition reimbursement. Accordingly, I annul that portion of the impartial hearing officer's decision that ordered a reduction in the amount of tuition reimbursement for the cost of the student's attendance at ELIJA for the 2013-14 school year; annul that portion of the IHO's decision that awarded reimbursement for the cost of six hours per week of home-based ABA services; and affirm the IHO's decision in all other respects. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision, dated July 2, 2013, is modified, by reversing that portion that ordered a reduction in the amount of tuition reimbursement awarded to the parents from \$102,000 to \$87,000; and

IT IS FURTHER ORDERED that the district shall pay directly to ELIJA the student's tuition costs for the 2013-14 school year, 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 has paid any portion of the student's tuition costs at ELIJA for the 2013-14 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**
 October 15, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER