The University of the State of New York

The State Education Department
State Review Officer
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No. 14-157

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, Ilana A. Eck, Esq., of counsel

Law Offices of Regina Skyer & Associates, attorneys for respondents, Gregory Cangiano, 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 found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may appeal to a State Review Officer (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]).[1]

III. Facts and Procedural History

This appeal arises from a decision of an IHO that was issued after remand (see Application of the Dep't of Educ., Appeal No. 14-081). Therefore, the parties' familiarity with the extensive factual 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 repeated again in detail (see id.).[2]

According to the parent, the student in this case has received diagnoses of attention deficit disorder-combined type ("ADD-Combined type"), auditory processing disorder, and dyslexia and has difficulties with visual tracking and sequencing (Dist. Ex. 4 at pp. 2, 5; Parent Ex. A at p. 2). The student attended a general education classroom and received integrated co-teaching (ICT) services in a district public school for kindergarten through fifth grade (Tr. p. 161; Dist. Ex. 5).[3] The student attended Bay Ridge beginning in September 2009 (sixth grade) through the 2012-13 school year (ninth grade) (see Dist. Ex. 5; see also Tr. pp. 66-67, 161, 184-85).[4] According to the hearing record, the student received the services of a 1:1 paraprofessional since November 2009 (Tr. pp. 69-70; Parent Ex. B at p. 6).[5]

On May 8, 2013, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (10th grade) (see Dist. Ex. 1 at pp. 1, 12-13). Finding the student eligible for special education and related services as a student with a speech or language impairment, the May 2013 CSE recommended a 15:1 special class placement in a community school with related services consisting of one 30-minute session per week of individual counseling and two 30-minute sessions per week of speech-language

[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 resolve of the issues presented in this appeal.

[3] ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an ICT class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]).

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

[5] The parent, however, testified that the student had received the services of a 1:1 paraprofessional "since the second grade in the public school" (Tr. pp. 164-65).

therapy in a group of three (id. at pp. 8, 12-13).[6] In addition, the May 2013 CSE recommended the use of a scribe to address the student's handwriting needs, as well as assistive technology devices (including a computer and an "FM" unit) and testing accommodations (extended time; revised test format and directions, such as reading questions and directions aloud; use of a calculator; use of aids or assistive technology devices, such as enlarged print, an FM unit, and a computer; and the use of a scribe to record answers) (id. at pp. 8-10). The May 2013 IEP also included a coordinated set of transition activities and measureable postsecondary goals (id. at pp. 3-4, 10-11).

By final notice of recommendation (FNR) dated June 8, 2013, the district summarized the 15:1 special class and related services recommended in the May 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (Dist. Ex. 2).

On July 24, 2013, the parents informed the district that they were "extremely concerned" about the "recommended program" and that the student required a "small, structured school environment" that the "recommended program" could not provide, and the parents requested information about the functional levels of the other students in the program, as well as information about the supports the student would receive (Parent Ex. D).

By letter dated August 9, 2013, the parents advised the district that, since having received the FNR, they repeatedly contacted the assigned public school site to arrange a visit and to obtain additional information without success (see Parent Ex. E). The parents asked the district to provide a "profile of the proposed program" and expressed concern about the district's "recommendation" (id.).

By letter dated August 23, 2013, the parents notified the district of their intentions to unilaterally place the student at Bay Ridge for the 2013-14 school year, to seek reimbursement for the costs of the student's tuition from the district, and to seek the provision of transportation services for the student (see Parent Ex. C at pp. 1-2). Citing various reasons, the parents rejected as inappropriate the May 2013 IEP and indicated that the "recommended school" could not implement the student's IEP (id. at pp. 1, 4).

On September 9, 2013, the parents executed an enrollment contract with Bay Ridge for the student's attendance during the 2013-14 school year beginning September 2013 (see Parent Ex. F at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated September 9, 2013, the parents alleged that the district failed to offer the student a FAPE for the 2013-14 school year (see Parent Ex. A at pp. 1, 3-5). Essentially, the parents resubmitted the August 23, 2013 notice of unilateral placement letter as the due process complaint notice, with some modifications, such as requesting a determination that Bay Ridge constituted the student's pendency (stay-put) placement during the instant

[6] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (Tr. p. 22; see also 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

proceedings based upon an unappealed IHO's decision in the parents' favor, dated May 7, 2013 (compare Parent Ex. A at pp. 1-5, and Parent Ex. B at pp. 1-13, with Parent Ex. C at pp. 1-4). In addition, the parents alleged that the "recommended program" was not appropriate for the student because he required "additional, individualized supports in a smaller and more supportive educational environment" in order to address his "educational, attentional, behavioral, speech/language, and social/emotional needs" (compare Parent Ex. A at p. 3). Further, the parents alleged that the May 2013 IEP noted the student's need for a "'great deal of redirection,' 'he [could] be easily distracted,' and 'require[d] 1:1 attention'" (id.). As relief, the parents requested reimbursement of the costs of the student's tuition at Bay Ridge for the 2013-14 school year (id. at pp. 5-6).

B. Previous Proceedings

On October 4, 2013, the IHO conducted a prehearing conference, and on October 28, 2013, the parties proceeded to an impartial hearing, which concluded on April 8, 2014 after four nonconsecutive days of proceedings (see Tr. pp. 1-217). By decision dated May 6, 2014 (IHO Decision I), the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year, Bay Ridge was an appropriate unilateral placement, and equitable considerations weighed in favor of the parents' requested relief; consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Bay Ridge for the 2013-14 school year (see IHO Decision I at pp. 7-9).

Upon appeal by the district, by decision dated May 4, 2014, the undersigned SRO determined that the IHO's decision left unaddressed or unclear certain issues raised in the parent's due process complaint notice (Application of a Student with a Disability, Appeal No. 14-004). Therefore, the matter was remanded to the IHO to determine on the merits the remaining claims set forth in the parents' September 9, 2013, due process complaint notice (id. at p. 9). In addition, the undersigned directed the IHO to address whether the parents' due process complaint notice "properly included issues such as the student's anxiety—as well as the May 2013 IEP's alleged failure to address the student's emotional deficits—as a basis upon which to conclude the district failed to offer the student a FAPE for the 2013-14 school year" (id.).

C. Impartial Hearing Officer Decision

By interim order dated July 23, 2014, the IHO ordered the parents to submit a memorandum to specify any issues that were unaddressed in the IHO's previous decision and that the parents continued to pursue (Interim IHO Decision at p. 2). Following the parents' submission, by decision dated September 5, 2014 (IHO Decision II), the IHO found that the district failed to offer the student a FAPE for the 2013-14 school year and ordered the district to reimburse the parents for the cost of the student's attendance at Bay Ridge for the 2013-14 school year (IHO Decision II at p. 9).

With regard to the threshold question of whether the parents' due process complaint notice properly included issues such as the student's anxiety, the IHO found that the parents' due process complaint notice specifically alleged that the May 2013 IEP contained insufficient supports to address the student's social/emotional needs and that the IEP contained insufficient annual goals in the area of social/emotional management needs (IHO Decision II at p. 7). Thus, the IHO found

that the issue of the level of support needed to address the student's anxiety was sufficiently raised in the parents' due process complaint notice (id.). Consistent with the IHO's findings in her previous decision, the IHO found that, although the student's April 2013 psychoeducational evaluation discussed the student's anxiety and emotional functioning, the CSE "completely and fatally ignored this emotional overlay in making its program recommendation" (id.). Further, given the absence of a recommendation for a 1:1 paraprofessional, the IHO found that the CSE's recommended 15:1 placement was not appropriate because a 15:1 setting would not provide the student with sufficient academic and social/emotional supports (id. at pp. 7-8).

With regard to the parents' remaining claims, the IHO found: that the parents had an opportunity to participate in the development of the IEP; that the IEP accurately reported the student's present levels of academic achievement and functional performance in the areas of reading, writing, and math; that there was no basis to conclude that the CSE failed to consider alternative placements for the student; that the annual goals, "[w]hile far from perfect," met the underlying criteria of the IDEA; and that the district was not required to offer evidence establishing whether the assigned public school site could implement the student's IEP when the student was not attending that school (IHO Decision II at pp. 7-8).

With regard to the parents' unilateral placement of the student at Bay Ridge, the IHO found that the placement was appropriate because the school offered the student small classes for core academic subjects and afternoon support sessions to compensate the student for the absence of a 1:1 paraprofessional, and because the student had made progress while at Bay Ridge (IHO Decision II at pp. 8-9). The IHO also found that equitable considerations weighed in favor of the parents' request for tuition reimbursement because the parents cooperated with the CSE, participated in the development of the student's IEP in good faith, communicated their concerns with the IEP to the CSE, and attempted to visit the assigned public school (id. at p. 9). As relief, the IHO awarded the parents the costs of tuition at Bay Ridge for the 2013-14 school year (id.).

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 and that Bay Ridge was an appropriate unilateral placement. As an initial matter, the district argues that the parents' due process complaint notice failed to sufficiently raise the issue of whether the IEP appropriately addressed the student's anxiety and social/emotional management needs. Alternatively, the district argues that, even if the parents had raised such a claim, the IEP provided sufficient supports for the student's social/emotional deficits. The district also argues that the IHO erred in finding the recommended 15:1 special class placement inappropriate for the student because the placement would have provided the student with access to non-disabled peers. Further, the district contends that a recommendation of a 1:1 paraprofessional to assist the student in the 15:1 placement would have increased the student's anxiety and low self-esteem. The district also argues that the parents' unilateral placement of the student at Bay Ridge was not appropriate because the nonpublic school was too restrictive and failed to provide the student with all of the mandated services necessary for the student.

In an answer, 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, and that Bay Ridge was an appropriate unilateral placement for the student. In addition, the parents argue that the parties' dispute is moot because the district was required to fund the student's placement at Bay Ridge for the 2013-14 school year pursuant to pendency (stay put) and, as such, the parents have received all of the relief sought in the matter.

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. Mootness

As an initial matter, the parents argue that this matter is moot and that the district's petition should be dismissed on this basis. In support of their claim, the parents argue that the district was required to fund the student's unilateral placement at Bay Ridge during the pendency of the underlying proceedings, which spanned the entire 2013-14 school year (Parent Ex. A at pp. 2-3; see also Tr. pp. 3-4; Oct. 31, 2013 Interim IHO Decision at p. 2) and, therefore, that all of the relief sought by the parents in this matter has been achieved and the dispute between the parties is no longer real or live (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84-85 [2d Cir. 2005]).

To be sure, it is unclear at this juncture the value of the parties continuing this dispute as the district is responsible for the costs of the student's tuition at Bay Ridge for the 2013-14 school year, and the adequacy of the May 2013 IEP is only marginally relevant to any new IEP generated at a different CSE meeting, during which the district is required by the IDEA to assess the student's continuing development in an annual review; thus each school year must be treated separately for purposes of a tuition reimbursement claim, and evaluating a prior year program that the student never attended is not educationally sound on a going forward basis for new IEP planning (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Board of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31, 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Application of a Student with a Disability, Appeal No. 13-199). Therefore, the parents are correct and the tuition reimbursement claim for the 2013-14 school year has been rendered moot by virtue of pendency. However, in light of a limited number of recent district court decisions holding that tuition reimbursement cases may, in some circumstances, be subject to an exception to mootness even when the requested relief has been achieved as a result of pendency, in the interest of administrative and judicial economy, I have addressed the merits of the appeal (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. July 29, 2011]; but see V.M. v No. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-20 [N.D.N.Y. 2013] [explaining that claims seeking changes to the student's IEP/educational programing for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254-55 [S.D.N.Y.

2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010] [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]).

B. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding whether the parents properly raised in their due process complaint notice the issue of whether the IEP appropriately addressed the student's social/emotional needs and, more specifically, the student's anxiety. It is well settled that the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R., 2011 WL 6307563, at *12-*13).

Here, a review of the parents' due process complaint notice supports the finding of the IHO that the parents' sufficiently raised the claim that the May 2013 IEP failed to address the student's social/emotional needs and the student's anxiety (IHO Decision at p. 7). Although the due process complaint notice did not contain the word "anxiety," the parents' due process complaint notice alleged that the student required additional "individualized supports" to address, among other things, his "social/emotional needs" (Parent Ex. A at ¶ 1). Furthermore, the parents stated in their due process complaint notice that, given the student's "documented deficits and noted strengths," the IEP was "devoid of any meaningful academic or social/emotional management needs," and the CSE failed "to propose appropriate academic or social/emotional management needs" for the student (id. at ¶¶ 2, 8). Accordingly, the parents' due process complaint notice can be reasonably read to have included the claim that the IEP failed to address the student's anxiety.

Finally, the parents do not assert a cross-appeal challenging the IHO's determinations which were adverse to the parent (including those claims relating to parental participation, present levels of performance and annual goals in the May 2013 IEP, and appropriateness of the assigned public school site). Further, the district does not appeal the IHO's determination that equitable considerations weigh in favor of the parents' request for relief. Thus, these determinations are now final and binding on the parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

C. May 2013 IEP

1. Present Levels of Performance and Management Needs

Regarding the parties' contention over whether the May 2013 IEP provided sufficient supports for the student's emotional deficits, an independent review of the May 2013 IEP, in conjunction with the evaluative information available to the May 2013 CSE, demonstrates that the CSE adequately described the student's present levels of academic achievement, social development, physical development, and management needs, including the student's anxiety (see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (8 NYCRR 200.1[ww][3][i][d]).

In this case, both the district regular teacher assigned to the CSE and the parent testified that the May 2013 CSE relied on an April 2013 psychoeducational evaluation report to develop the present levels of performance in the May 2013 IEP (Tr. pp. 23, 169-170; see Dist. Ex. 1 at pp. 1-2; see generally Dist. Ex. 4).[7] In addition, the student's social studies teacher from Bay Ridge attended the May 2013 CSE by telephone (Tr. pp. 20-21, 38, 169-170; Dist. Ex. 1 at pp. 2, 15).

On appeal, the district argues that the IHO erred in finding that the student's anxiety issues were not addressed in the May 2013 IEP. The crux of this issue is not one of preferred nomenclature but whether the essence of the student's social/emotional deficits are accurately captured and expressed within the IEP. Thus, while the May 2013 IEP does not specifically utilize the term "anxiety" in its description of the student's social development, the IEP as a whole appears to adequately address the student's social/emotional needs (see Dist. Ex. 1 at pp. 2, 5-6, 8, 13). In the April 2013 psychoeducational evaluation report the student is described as presenting with "the persona of an anxious young man" who was worried about his performance during testing; however, he is also described within the document as being easily "frustrated," becoming

[7] Although the hearing record also includes an April 2013 social history update and an April 2013 speech-language progress report, the record is unclear as to what extent these documents were utilized by the May 2013 CSE in formulating the student's IEP (see generally Tr. pp. 1-217; Dist. Exs. 1, 3, 5). Further, the district teacher testified that he did not recall if the CSE reviewed the prior year's IEP during the annual review meeting (Tr. pp. 32-33).

"overwhelmed" by information, and giving up on a task "even when he had recently solved a similar task successfully" (Dist. Ex. 4 at pp. 2, 4). The report also included information from the parents that, due to the student's learning "difficulties," he experienced "frustration . . . which . . . affected his self-esteem" (id. at p. 2). Although the CSE did not extract the foregoing evaluative information word for word in developing the student's IEP, the May 2013 CSE also relied on behavioral information provided by another source—namely, the student's teacher from Bay Ridge—to describe his emotional difficulties as they manifested in a classroom setting. The May 2013 IEP states that "as per his history teacher," the student "may make many self-disparaging remarks" (id. at p. 2). Additionally, there is no indication in the record that the student has been formally diagnosed with an anxiety disorder or that the exact term "anxiety" is clinically necessary to describe the student's emotional and behavioral difficulties (see generally Tr. pp. 1-217; Dist. Ex. 4).[8] Moreover, other descriptions of the student in the April 2013 psychoeducational evaluation report indicate that the student's condition of anxiety was not pervasive; for example, the evaluation describes the student as "cordial," noting: that he separated easily from his mother; that his affect was age appropriate; that rapport was easily established; that he was engaged during the interview; that he was able to work in a group or individually; that he had friends; and that he enjoyed playing sports, especially basketball (Dist. Ex. 4 at pp. 2, 4-5). The IEP need not incorporate the parents' preferred terminology so long as the description of the student's needs in the IEP is sufficient and accurate, and in this case it was.

Regarding the parties' dispute over the appropriateness of the strategies to address the student's social/emotional management needs, the April 2013 psychoeducational evaluation report stated that the student was "receptive to encouragement" and "required clear directives and encouragement throughout the evaluation," indicating that "once relaxed, he was able to participate to the best of his abilities" and that "he appeared somewhat more relaxed" when he was reassured about the testing situation (Dist. Ex. 4 at pp. 2, 4). Consistent with this description, the May 2013 IEP indicates in the management needs section that the student should be given "encouragement and praise" (Dist. Ex. 1 at p. 2). Contrary to the parents' allegations, I find this to be a meaningful and appropriate support which directly addresses the student's identified social/emotional need (id. at p. 2). Furthermore, the May 2013 IEP provides several testing accommodations that are reasonably calculated to help reduce the student's performance anxiety, including extended time, questions read aloud, directions read and re-read aloud, as well as use of a calculator, computer, an FM unit, enlarged print, and a scribe (id. at p. 10).

In addition, the May 2013 IEP provides two corresponding counseling goals to address the student's social/emotional needs, and the IEP mandates individual counseling services once a week for thirty minutes to implement the goals (Dist. Ex. 1 at pp. 5-6, 8). One of the counseling goals

[8] Even if the student had received such a diagnoses, federal and State regulations do not require the district to set forth students' diagnoses in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and obtain information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *13 [S.D.N.Y. Mar. 31, 2014] [finding that the "absence of an explicit mention" of a particular diagnosis in a student's annual goals was not fatal to the IEP because the goals were adequately designed to address the student's learning challenges as a whole and related to the particular diagnosis]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *10 [S.D.N.Y. Oct. 12, 2011]).

focuses on the student's need to "decrease inappropriate verbal comments about himself" when his "feelings are hurt or when he feels challenged," reflecting the student's emotional difficulties in both academic and social situations (id. at p. 6). The other counseling goal states that the student will improve his social/emotional functioning by describing a social situation and developing a variety of appropriate responses to that situation (id. at p. 5). Based on the foregoing, and contrary to the IHO's conclusion, the evidence in the hearing record demonstrates that the present levels of performance and management needs sections of the May 2013 IEP, together with its corresponding annual goals, related services, and testing accommodations, serve to adequately address the student's social/emotional needs without necessarily using the term "anxiety."

Finally, the parents contend that the May 2013 IEP is inaccurate and contains inconsistent information regarding the student's present levels of academic achievement. Their argument is based on the disparity between the student's grade equivalent academic achievement scores, listed on page one of the IEP as at or below sixth grade, and the student's instructional and functional levels for reading and mathematics, listed on page 12 of the IEP as at ninth grade (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 1 at p. 12; see Dist. Ex. 4 at pp. 3-4). However, consistent with the finding of the IHO (see IHO Decision II at p. 6), review of the May 2013 IEP as a whole indicates that this disparity would not pose any serious impediment to the student receiving an appropriate educational program individualized to his needs. For example, the present levels of performance section of the IEP clearly states that, while the student was currently in ninth grade, his overall academic skills were within the low (borderline) range and estimated to be at the 4.9 grade level and, further, that "all scores fell below grade level" (Dist. Ex. 1 at p. 1). The May 2013 IEP then provides a complete distribution of the student's academic scores as provided by the April 2013 psychoeducational evaluation report, including specific grade equivalent scores, leaving no educator in doubt as to the student's current performance levels (id. at pp. 1-2). Furthermore, there is no evidence in the hearing record suggesting that any of the annual goals in the May 2013 IEP are inaccurate reflections of the student's current functioning levels, and none of the goals indicate that he would be expected to perform on a ninth grade level in either reading or mathematics (id. at pp. 4-8).

Consistent with the findings of the IHO, a review of the information considered by the May 2013 CSE and discussed at the CSE meeting as detailed above, shows that the district adequately reflected the student's present levels of academic achievement and functional performance in an IEP that appropriately indicated the student's special education needs arising from his disability (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see also P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 512 [S.D.N.Y. 2013] [holding that an IEP need not specify in detail every deficit arising from a student's disability so long as the CSE develops a program that is "designed to address precisely those issues"]).

2. 15:1 Special Class Placement in a Community School

On appeal, the parties dispute whether the May 2013 IEP's recommendation for a 15:1 special class placement was appropriate to address the student's education needs. Specifically, the district argues that the IHO erred in finding that the placement did not provide sufficient support for the student's anxiety and that the May 2013 IEP "completely and fatally ignored this emotional overlay in making its program recommendation" (IHO Decision II at p. 7). The district argues that the May 2013 CSE's recommendation of a 15:1 special class in a community school would have

provided the student with adequate support to receive meaningful educational benefit in the LRE. The parties also dispute whether the services of a 1:1 paraprofessional, which the CSE did not recommend for the student, would have been appropriate. The district contends that the presence of a 1:1 paraprofessional would "likely increase the student's anxiety and feelings of low self-esteem in class" (Pet. ¶ 41). In contrast, the parents argue that the student's educational and social/emotional needs could not be met in the recommended 15:1 special class without additional support. As detailed below, a review of the evidence in the hearing record indicates that the recommended 15:1 special class placement would not have sufficiently addressed the totality of the student's demonstrated needs, including his social/emotional difficulties and anxiety, as determined by the IHO, as well as his academic, attentional, processing speed, and handwriting needs.

Regarding the May 2013 CSE's recommendations, State regulations provide that a special class placement with a maximum class size not to exceed 15 students is designed for "students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). With regard to increasing adult support beyond a 15:1 special class setting, State regulation further provides that "[t]he maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]).

Here, according to the district regular education teacher assigned to the May 2013 CSE, the CSE considered but rejected a 12:1 or 12:1+1 special class in a specialized school "because they're mainly more restrictive students with special needs, mainly emotional disturbance" and because the student "did not display any type of emotional issues" (Tr. p. 29; see Dist. Ex. 1 at p. 14).[9] In addition, the district regular education teacher testified that the May 2013 CSE determined that a general education class placement with integrated co-teaching (ICT) services would be "too overwhelming" for the student as enrollment in such a class could go up to 35 students in high school (Tr. pp. 30-31; Dist. Ex. 1 at p. 14). The teacher testified that the May 2013 CSE concluded that a 15:1 special class placement in a community school was the only special class placement for high school students in the district that would be appropriate for the student and that a 15:1 placement would provide him with access to nondisabled peers in non-core classes such as music, art, gym, and lunch (Tr. pp. 28, 43).

Further, the district regular education teacher testified that the May 2013 CSE recognized the student's need for 1:1 attention as indicated in the present levels of performance section of the IEP, and the CSE "made provisions for that in the management needs" section of the IEP by recommending small-group instruction among other strategies and resources (Tr. p. 38). When asked what was meant by a small group in a 15:1 special class, the district teacher clarified that a small group "could be 15" or the teacher could "break up the group of 15 students into a smaller

[9] Although the May 2013 IEP states that a 12:1+1 special class in a community school had been considered and rejected by the CSE, the district regular education teacher explained that this was a typographical error as a "12:1[+]1 in a community school only goes up to 8th grade," and the student was in high school (Tr. pp. 29-30; Dist. Ex. 1 at p. 14).

group of[, for example,] seven or eight student's" (Tr. pp. 38-39). The district regular education teacher testified that the May 2013 CSE did not consider adding special education teacher support services (SETSS) to address the student's need for small group instruction for even a part of the day because "a dual mandate is frowned upon as far as [district] recommendations are concerned" (Tr. p. 39).[10] Although the record reveals that the student had a 1:1 paraprofessional since 6th grade, and the April 2013 psychoeducational evaluation report stated that the student had a 1:1 paraprofessional during the prior 2012-13 school year, the district regular education teacher testified that the CSE neither considered nor recommended a 1:1 paraprofessional (Tr. pp. 31-32, 69-70; Dist. Ex. 4 at p. 1; Parent Ex. B at p. 6).

With regard to the testimony of the district's regular education teacher explaining that the student's emotional deficits were not severe enough to warrant a 12:1+1 special class, as noted above, State regulations provide that a student's need for specialized instruction and the degree of the student's management needs, and not his or her social/emotional functioning in isolation, should inform a CSE's recommendation of a particular placement on the continuum of special education services (see Tr. p. 29; see also 8 NYCRR 200.6[h][4]). Moreover, there is nothing in the State regulations requiring a school district to limit the combination of educational programs with accompanying supports and services that it can recommend to meet the individualized needs of a special education student.[11]

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[10] "SETSS" is not specifically identified in State regulations describing the continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]). Although there is no evidence in the hearing record describing SETSS, nothing suggests that the services referenced would be inconsistent with the description in other cases where SETSS was described as a version of a resource room program provided as a pull-out service in a small group (see Application of the Dep't of Educ., Appeal No. 13-165; see also W.W., 2014 WL 1330113, at *2-*3 [finding that SETSS "entailed removing [the student] from her general education classroom for one period of forty minutes each day and placing her with a special education teacher and a group of six students to address areas that [the student] needed the most help in"] [internal quotation marks omitted; alteration omitted]; B.W. v. New York City Dep't of Educ., 716 F. Supp. 2d 336, 340 [S.D.N.Y. 2010]; Valtchev v. City of New York, 2009 WL 2850689, at *2 [S.D.N.Y. Aug. 31, 2009] [noting in that particular case that a resource room was also referred to as pull-out SETSS and was described as a service whereby special education teachers provide assistance to students in their areas of weakness]). State regulation describes the purpose of a resource room program as "supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

[11] To the extent that the district regular education teacher testified that the district frowned upon "dual mandates" when formulating a student's special education program, placement decisions must be based on a student's unique needs as reflected in the IEP, rather than based on the existing availability of services or general policies applied in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014] [finding that the IDEA's LRE requirement is not limited, in the extended school year (ESY) context, by what programs the school district already offers, but rather must be based on the student's needs]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

Here, the evidence in the hearing record reflects that the student had a number of significant educational and management needs that, cumulatively, consisted of more than "primarily the need for specialized instruction" and that a 15:1 special class without any additional adult support would not have sufficiently addressed his unique, special education needs (see Dist. Exs. 1 pp. 1-2, 4-8; 4 at pp. 2-5). A review of the evaluative information that was before the May 2013 CSE, including the April 2013 psychoeducational evaluation report, shows that the CSE had sufficient up-to-date information about the student's cognitive, processing, academic, attentional, behavioral and social/emotional needs (see Dist. Ex. 4). For example, the April 2013 psychoeducational evaluation report indicated that, cognitively, the student was functioning within the borderline range overall with a full scale IQ composite score of 71 on the Wechsler Intelligence Scale for Children, Fourth Edition (WISC–IV), with relative strength in verbal comprehension skills, borderline functioning in perceptual reasoning and working memory tasks, and scores that fell within the deficient range for speed of processing information (Dist. Ex. 4 at pp. 2, 5; see Dist. Ex. 1 at p. 1). In particular, the evaluator noted that the student demonstrated significant delays in his ability to transcribe, scan, and identify symbols (Dist. Ex. 4 at p. 3). The student was also reported to have a history of auditory processing disorder, "dyslexia," and difficulty with visual tracking and sequencing, and the evaluator indicated that the student required repetition of directives and paraphrasing to assist the student's understanding of questions during testing (id. at pp. 2, 5).[12] As described previously, the student also had social/emotional difficulties such as poor frustration tolerance and presented "as an anxious young man" (id. at pp. 2, 4).

The student's academic scores on the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) fell below grade level with overall skills at the 4.9 grade level and mathematics, which were a particular area of weakness for the student, at a 3.7 grade level (Dist. Ex. 4 at pp. 3-4; see Dist. Ex. 1 at p. 1). During the mathematics portion of the testing, the evaluator noted that the student was frustrated, overwhelmed by the information, would often give up on the task, and performed better when the word problems were read aloud to him (Dist. Ex. 4 at p. 4). In addition, the student's writing skills were described by the evaluator as being delayed, with the parent reporting that the student had difficulty taking notes and had a scribe to address his motor deficits (id. at pp. 2, 5). Further, the April 2013 psychoeducational evaluation report stated that the student had an immature pencil grip and was inconsistent in his written answers, which included awkward sentence formation, spelling errors, and answers unrelated to questions (id. at pp. 4-5).

Turning to the May 2013 IEP itself, the present levels of performance section in the IEP indicated that the student required "a great deal of redirection," was easily distracted, had difficulty multi-tasking, required "1:1 attention" and test modifications, may need help with direction and organization when settling into class, had poor penmanship that impacted his note taking skills, and made many self-disparaging remarks (Dist. Ex. 1 at p. 2). From the information contained in the present levels of performance section in the IEP, the CSE developed management needs that

[12] While the present levels of performance in the May 2013 IEP are devoid of any description of the student's language issues, the May 2013 CSE provided four speech-language goals for the student in the areas of semantics, receptive language, and auditory processing skills (Dist. Ex. 1 at pp. 4-5). Although there is no testimonial or documentary evidence to show that any reports other than the April 2013 psychoeducational evaluation report were relied on by the May 2013 CSE, the April 2013 speech-language progress report stated that the student presented with "significant difficulties with both auditory and language processing skills, as well as with attention, working memory, self-regulation, and executive function skills" (Dist. Ex. 3 at p. 1).

included small group instruction, encouragement and praise, extended time, a scribe to address the student's handwriting needs, scaffolding, and daily use of assistive technology in the form of an FM unit and a laptop (id. at pp. 2, 8-9).

Considering the extent of the student's aforementioned special education needs, the evidence in the hearing record demonstrates that the May 2013 CSE's recommendation of a 15:1 special class in a community school would not provide sufficient support to address the student's needs (Dist. Ex. 1 at p. 8). In particular, the evidence in the hearing record does not establish how the recommended 15:1 special class placement could have provided the requisite level of support to fulfill the mandates of the May 2013 IEP, such as providing the student with "a great deal of redirection," 1:1 attention, small-group instruction, encouragement and praise to help him persevere through frustrating tasks, and a scribe, which in and of itself necessitates the dedicated presence of another individual (id. at pp. 1-2). Furthermore, whereas the student had received 1:1 paraprofessional services in prior years, and the CSE noted the student's need for 1:1 attention and small group instruction on the May 2013 IEP, it is unclear why the district then recommended a 15:1 special class without providing any extra instructional or personnel supports (Tr. pp. 31-33, 71; Dist. Exs. 1 at p. 2; 4 at p. 1).

To the extent that the district argues that the assignment of a 1:1 paraprofessional would have increased the student's anxiety or self-esteem problems, there is no evidence in the hearing record to confirm this argument, and, furthermore, the evidence suggests that, to the contrary, the student was used to relying on, and required, a significant amount of 1:1 support (see Tr. pp. 70-71, 171-72, 174; Dist. Ex. 4 at pp. 1-2).[13]

In view of the foregoing, the recommendation of the CSE to place the student in a 15:1 special class in a community school was inappropriate and denied the student a FAPE for the 2013-14 school year because the 15:1 placement would not have provided the student with sufficient support. While the IHO's findings on the 15:1 special class were limited to the inability of this setting to address the student's anxiety issues, the evidence in the hearing record related to the adequacy of the 15:1 special class also included other matters aside from the student's anxiety, and for the reasons noted above the district failed to establish that the recommended placement was sufficient to address the full spectrum of the student's identified needs as presented in the May 2013 IEP.

[13] To the extent that the IHO found that the 15:1 special class placement was inappropriate, in part, because the May 2013 CSE did not develop a plan to help the student transition to a new and larger school, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom., R.E, 694 F.3d 167; see R.E., 694 F.3d at 195).

D. 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, the next issue is whether the parents' unilateral placement of the student at Bay Ridge was appropriate.

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 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).

Here, 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 that the student's educational program and services received at Bay Ridge during the 2013-14 school year were appropriate and specially designed to address the student's unique needs.

1. Related Services

With regard to the district's assertion that Bay Ridge did not adequately provide related services to the student, in order to establish the appropriateness of a unilateral placement to address a student's needs, parents need not show that the placement provided every special service necessary to maximize the student's potential, but rather, must demonstrate only that the placement provided education instruction specially designed to meet the unique needs of the student (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014]; M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 82 [2d Cir. 2014] [stating that a unilateral placement need not necessarily meet the specific standards of the IDEA or State law]).

Here, as to speech-language therapy, the record reveals that during the 2013-14 school year the student received speech-language services embedded into his English and writing instruction, which was provided by a licensed speech-language therapist daily for a total of ten 45-minute periods per week (Tr. pp. 93-95, 101-02, 131, 133-35; Parent Ex. H). Furthermore, the student's reading and writing classes were modified to proceed at a slower pace and were delivered in a small group, of no more than five students, with peers with similar language and learning deficits who were working at approximately the same rate (Tr. pp. 138-140, 142-43). The small group size and slower pacing allowed the student to receive individualized attention and addressed the student's unique educational needs, including his slow processing speed, poor working memory, focusing deficits, difficulties with visual scanning, reading fluency, comprehension delays, and his challenges with writing and penmanship (Tr. pp. 138, 141; Dist. Ex. 4 at pp. 2-5).

Specifically, the speech-language therapist testified that, to address the student's communication as well as his reading and comprehension needs, she provided modifications including leveled reading material, graphic organizers, a vocabulary development program, timed reading fluency exercises, and strategies for generating questions and comparing passages (Tr. pp. 140-41). To address the student's receptive and expressive communication needs in the context of writing, the speech-language therapist testified that she: broke down the student's assignments and clarified expectations; provided him with guided questions and worksheets for brainstorming; conducted individualized conferencing sessions; encouraged him to copy notes from the board but also gave him note packets; and served as a scribe for the student, as needed (Tr. pp. 143-46,

150).[14] In addition, the speech-language therapist stated that she had read the speech-language goals in the May 2013 IEP and was trying to follow them, although she indicated that some of them were "overreaching" (Tr. pp. 156, 158). The speech-language therapist also testified that she was able to speak with the student's other teachers on a daily basis and was available for consultation (Tr. pp. 133-34, 146).

With regard to the district's argument that the student did not receive individual counseling services for 30 minutes per week as recommended in the May 2013 IEP, the evidence in the hearing record reveals that the student received three 45-minute periods per week of 1:1 academic support with the director of the Bridge Program at Bay Ridge who was a licensed psychologist and special education teacher and who was familiar with the student since middle school (Tr. pp. 53, 66-67, 79; Parent Ex. H).[15] The Bridge Program director testified that during those periods the student received extra help with his academic studies, as well as counseling on social/emotional issues as needed (Tr. pp. 67, 72-73, 75-76). The director of the Bridge Program further testified that much of the student's underlying emotional issues, such as "shutting down" and "getting very quiet," were a result of his weak academic skills, and, by focusing on building the student up academically, the student's frustration tolerance improved (Tr. pp. 70; 75-76). Although the services of a part-time paraprofessional were also put into place for the student at the beginning of the school year, the Bridge Program director reported that the three weekly 1:1 academic support periods turned out to be sufficient for the student and that the paraprofessional was not needed after all (see Tr. pp. 71-72, 79-80). In addition, to address the student's counseling needs, the student also met informally approximately every other week for twenty minutes with the headmaster of Bay Ridge who was also a licensed school psychologist (Tr. pp. 75-77).

Thus, while the May 2013 IEP mandated that the student receive related services of speech-language therapy and individual counseling services, which Bay Ridge did not expressly provide, the embedded speech-language services provided by the speech-language therapist at Bay Ridge, as well as the three periods per week of individual academic support services provided by the school director, sufficiently met the student's unique communication and social/emotional needs.

2. Restrictiveness of Unilateral Placement

The district also argues that the parents' unilateral placement at Bay Ridge was too restrictive for the student because it exclusively served students with disabilities, whereas the May 2013 IEP recommended a community school placement with access to non-disabled peers. While the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts, (C.L., 744 F.3d at 836-37; Frank G., 459 F.3d

[14] In her testimony, the speech-language therapist indicated that because the student "ha[d] a difficult time holding a pencil[] and . . . using the keyboard," "many times, he need[ed] a scribe" (Tr. p. 150). Elsewhere in her testimony, she stated that, despite the student's keyboarding difficulties, the student was leaning how to use a computer to produce his written work (Tr. p. 153). Whichever method the student eventually used, the evidence in the hearing record demonstrates that scribe support was available to the student at Bay Ridge consistent with the management needs section of the May 2013 IEP (Dist. Ex. 1 at p. 2).

[15] The Bridge Program at Bay Ridge is a separate high school program specifically designed for students with special education needs who require more intensive support (Tr. p. 62; Parent Ex. G at p. 1).

at 364 ;Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 552 [S.D.N.Y. 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]). Consequently, not only does the restrictiveness of Bay Ridge not preclude a finding that it was appropriate to meet the student's needs, in this case, the student did have access to nondisabled peers at the unilateral placement.

The evidence in the hearing record demonstrates that for the 2013-14 school year the student was enrolled in the Bridge Program at Bay Ridge that is specifically designed for students with special education needs who require more intensive support (Tr. p. 62; Parent Ex. G at p. 1). During the 2013-14 school year, Bay Ridge consisted of approximately 200 students in the ninth through twelfth grades, with 70 of those students attending the Bridge Program (Tr. pp. 58, 63). The director of the Bridge Program testified that, although the student was with disabled peers for all of his classes, he was mainstreamed for physical education and lunch (Tr. p. 99). Further, the Bridge Program director explained that, as students show the ability to do more mainstream types of activities, there are opportunities for them to integrate into regular classes (Tr. p. 63). This testimony is consistent with the written Bridge Program overview, which states that students who show strength in a particular area of study may be eligible to attend an inclusionary class for that subject (Parent Ex. G). In view of the foregoing, the evidence in the hearing record demonstrates that the student had access to non-disabled peers at Bay Ridge and that further opportunities for mainstreaming existed.

Accordingly, in view of the evidence in the hearing record as detailed above, the parents have established that the student's unilateral placement for the 2013-14 school year at Bay Ridge was appropriate and that the educational instruction was specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365).

VII. Conclusion

The hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2013-14 school year and that the parents' unilateral private placement at Bay Ridge was appropriate. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 24, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER