The University of the State of New York

The State Education Department
State Review Officer
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No. 14-162

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
New York Legal Assistance Group, attorneys for petitioner, Yisroel Schulman, Esq., Sandra Robinson, Esq., and Laura Davis, Esq., of counsel

Quinn Emanuel Urquhart & Sullivan LLP, attorneys for petitioner, Ellison Ward, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at Reach for the Stars (RFTS) for the 2008-09 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see E.M. v. New York City Dep't of Educ., 1:09-cv-10623-DAB [S.D.N.Y. Sept. 19, 2014]). The factual background, including the student's educational history, was discussed in the prior decision relative to this appeal and, as such, need not be repeated again in detail, as the parties' familiarity with the facts therein is presumed (see Application of a Student with a Disability, Appeal No. 09-079).

Briefly, the hearing record reflects the student attended RFTS since September 2005 (Tr. pp. 301-02, 357 see Dist. Ex. 1 at p. 2).[1] On March 5, 2008, the CSE convened to develop the student's IEP for the 2008-09 school year (Dist. Ex. 2 at pp. 1-2). 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, as well as the related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (id. at pp. 1, 15, 17).[2]

In a final notice of recommendation (FNR) dated May 21, 2008, the district summarized the 6:1+1 special class placement and related service recommendations contained in the March 2008 IEP and identified the particular public school site to which the district assigned the student to attend for the 2008-09 school year (Parent Ex. K). The version of the FNR entered into the hearing record contains an undated handwritten notation indicating that the parent "visited the recommended placement" and found it inappropriate and stating the parent's intent to re-enroll the student at RFTS and "request[] an impartial hearing for tuition" (id.; see Tr. p. 320; Parent Ex. L).

By letter dated August 15, 2008, the parent rejected the district's program and further advised that she intended to enroll the student at RFTS for the 2008-09 school year and seek the costs of the student's tuition from the district (see Parent Ex. M). In a due process complaint notice, dated November 26, 2008, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2008-09 school year (see Parent Ex. A at pp. 1-3).

An impartial hearing convened on March 20, 2009 and concluded on May 15, 2009, after four days of proceedings (see Tr. pp. 1-435). In a decision, dated June 3, 2009, the IHO dismissed the parent's due process complaint notice based upon her lack of standing to bring suit (IHO Decision at pp. 19-20). In an appeal from the IHO's decision, the SRO affirmed and further concluded that, in the alternative, the evidence in the hearing record demonstrated that the district offered the student a FAPE for the 2008-09 school year (Application of a Student with a Disability, Appeal No. 09-079).

The parent sought judicial review of the SRO decision and, although the District Court disagreed with the IHO and SRO as to the issue of standing, it affirmed the SRO's alternative conclusion that the district offered the student a FAPE (E.M. v. New York City Dep't of Educ., 2011 WL 1044905 [S.D.N.Y. Mar. 14, 2011]). On appeal, the Second Circuit affirmed the District Court's conclusion regarding standing but declined to endorse the SRO's FAPE analysis because he impermissibly relied upon retrospective testimony to support his conclusion that the student did not require further 1:1 support than provided in the March 2008 IEP (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462-63 [2d Cir. 2014]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167 [2d Cir. 2012]). Accordingly, the Second Circuit remanded the case to the District Court for further proceedings, noting that the Court could "either decide the merits of the IEP claim, or, perhaps more profitably, remand the matter to state administrative officers for a complete reexamination in light of our instructions in R.E." (E.M., 758 F.3d at 463). The District Court, in turn, remanded the case to the Office of State Review (E.M., 1:09-cv-10623-DAB). Upon remand,

[1] RFTS has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7; see also Parent Exs. D; EE).

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

the SRO who heard the case previously was unavailable and the matter came before the undersigned. I reviewed the record of the impartial hearing proceedings, prior State-level submissions and administrative decisions, the decision of the Second Circuit, and the District Court's remand order. The parties were granted leave to file additional submissions with the Office of State Review, and both the district and the parent submitted memoranda presenting arguments related to the remaining issue as remanded by the Court.

IV. Arguments on Remand

In her submission on remand, the parent contends that the district failed to offer the student a FAPE because the March 2008 IEP did not offer sufficient 1:1 support for the student. As relief, the parent requests the costs of the student's education for the 2008-09 school year.

In its submission on remand, the district argues that, retrospective evidence notwithstanding, the SRO correctly determined that the March 2008 IEP addressed the student's needs and offered her a FAPE. Specifically, the district contends that the support available within a 6:1+1 special class would meet the student's needs.

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, 180-83, 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., 694 F.3d at 189-90; 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. Scope of Review

At the outset, it is necessary to clarify which issues are properly presented in this appeal. In remanding this matter, the Second Circuit indicated that the District Court was "free to reexamine any part of its prior analysis, and any other arguments that it did not need to address in its initial decision" (E.M., 758 F3d at 463). On remand to the Office of State Review, the parties were offered a further opportunity to develop the issues in dispute and confined their arguments to the single issue of whether the March 2008 IEP met the student's need for 1:1 support. Therefore, the remaining issues contained in the parent's due process complaint notice or petition, including the adequacy of the March 2008 IEP's annual goals, have been abandoned and will not be addressed.[3]

B. March 2008 IEP: 1:1 Support

Thus, the crux of the dispute on remand is whether the March 2008 IEP prescribed a sufficient amount of 1:1 support to manage the student's needs. A review of the evidence in the hearing record supports the parent's argument that the March 2008 CSE failed to do so and, thus, denied the student a FAPE for the 2008-09 school year.

The March 2008 CSE considered a February 2008 psychoeducational evaluation, as well as speech-language therapy and OT goals prepared by RFTS and forwarded to the CSE (Tr. pp.

[3] Moreover, as originally pled in her July 2009 petition, the parent's challenge to the annual goals was confined to the fact that they were not developed during the CSE meeting. Under the circumstances of this case, the March 2008 CSE's development of the student's annual goals was permissible (E.A.M. v. New York City Dep't of Educ.2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *11 [S.D.N.Y. Nov. 9, 2011]).

29, 59-61; see generally Dist. Ex. 1; 2 at pp. 11-14).[4] A review of the March 2008 IEP confirms that the CSE primarily developed the student's present levels of performance based upon the information contained in the February 2008 psychoeducational evaluation report (compare Dist. Ex. 1 at pp. 2-4, with Dist. Ex. 2 at pp. 3-6). The March 2008 IEP indicates that: the student was nonverbal; her present levels of performance and learning characteristics were characterized by extreme deficits specific to receptive and expressive language, social/emotional skills, academics, cognitive skills, attention and her need for constant supervision; and she was dependent on others for all daily living skills, including toileting (Dist. Ex. 2 at pp. 3-6; see Tr. pp. 32-35; Dist. Ex. 1 at pp. 2-4).[5]

With regard to the student's need for 1:1 support, the March 2008 IEP stated that the student was "extremely active," "need[ed] constant supervision," and was "dependent on others for all daily living skills" (Dist. Ex. 2 at p. 4). Moreover, the associate director at RFTS, who participated in the March 2008 CSE by telephone, testified that she told the CSE the student exhibited "aggressive" and "self[-]injurious" behaviors and was "in need of . . . one to one [support] at all times" (Tr. pp. 342-43; see Dist. Ex. 2 at p. 2; Tr. p. 340). With respect to such behavioral needs, the March 2008 CSE developed a behavioral intervention plan (BIP), which was appended to the March 2008 IEP (see Dist. Ex. 2 at p. 18). This BIP identified the student's interfering behaviors as engaging in "tantrum[s]," "putting pressure on her eyes," and engaging in "self-injurious behavior" (id.). The information before the March 2008 CSE—and, thus, the resultant IEP—was silent as to the frequency of the student's interfering behaviors or the level of support needed to address them (see generally Dist. Exs. 1; 2). Although the district submitted a classroom observation of the student into evidence—which is one mechanism by which the district could have obtained such information—this observation post-dated the March 2008 CSE meeting and, thus, was not considered (see Dist. Ex. 9). Moreover, even assuming that the CSE could have considered this observation, it does not indicate the period of time in which it was conducted or provide sufficient detail regarding the student's interfering behaviors in a classroom setting or how an "ABA therapist" at RFTS, who worked with the student on a one-to-one basis, did or did not engage with the student during the observation (id.).

Thus, the evidence in the hearing is, at best, inconclusive as to the extent of the student's need for full-time 1:1 support but, given that the March 2008 IEP recognized the student's constant need for supervision and dependence on others (see Dist. Ex. 2 at p. 4) and given the lack of evaluative information before the CSE offering different or additional information about the student's needs (see generally Dist. Exs. 1; 2), in this instance, the evidence in the hearing record does not support the sufficiency of the district's recommended program. Thus, without taking into account the retrospective testimony of the district special education teacher from the assigned public school site regarding the additional support the student would have received in the classroom had she attended (see Tr. pp. 179, 205, 207, 209-11), the evidence in the hearing record

[4] Testimony by the district representative indicates that, in response to the district's request for OT and speech-language progress reports prior to the March 2008 CSE, RFTS provided the district with OT and speech-language goals (Tr. pp. 59-61).

[5] Although the student's present levels of performance are not in dispute, the March 2008 CSE's heavy reliance on the February 2008 psychoeducational evaluation report, by itself, resulted in a somewhat generic description of the student's needs in this instance as a consequence of the content available in such report (see Dist. Ex. 2 at pp. 3-6; see also Dist. Ex. 1 at pp. 2-4).

is insufficient to support a conclusion that the March 2008 IEP offered the student an adequately supportive educational program. Based on the foregoing, I agree with the parent that district did not meet its burden to show that the March 2008 IEP provided the student with a FAPE for the 2008-09 school year.

C. Unilateral Placement

Having concluded that the district failed to offer the student a FAPE for the 2008-09 school year, it is next necessary to consider whether the unilateral placement selected by the parent was appropriate. As discussed in more detail below, the evidence in the hearing record indicates that RFTS provided educational instruction specially designed to meet the student's unique needs.

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 offer an educational program which met the student's special education needs (see Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id.). 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; Hardison, 773 F.3d at 386; 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).

The evidence in the hearing record indicates that RFTS is a school dedicated to serving students on the "autism spectrum" (Parent Exs. B at p. 2; C). As such, the school provides multidisciplinary programming comprised of "customized individual education plans" for each student, a 1:1 student-to-teacher ratio, and intensive speech-language therapy, OT, and sensory integration therapy, all with an emphasis on peer socialization (Parent Ex. B at p. 4; see Tr. pp. 351-52, 355-56). During the 2008-09 school year at RFTS, the student received instruction in a 1:1 educational setting from a therapist who utilized the Applied Behavioral Analysis (ABA) methodology (see Tr. pp. 351-52, 356-57). The student's classroom included one teacher, four ABA staff (including a head teacher who was BCBA certified), a speech-language pathologist who provided services to the students in the classroom, and four other students (Tr. pp. 231-32; Parent Exs. H; I).[6] The student also received five 45-minute sessions per week of individual OT and five sessions per week of individual speech-language therapy lasting "between 45 minutes to an hour" (Tr. p. 252; see Parent Exs. O at p. 1; P at p. 1).

RFTS developed an IEP for the student for the 2008-09 school year which identified and targeted her needs in the areas of expressive and receptive language, community skills, pre-academic skills, social and leisure skills, activities of daily living skills, and behavior skills (Parent Ex. N at pp. 1-13; see Tr. p. 356). In addition, RFTS created annual goals and short-term objectives for speech-language therapy and OT (see Parent Exs. O at pp. 7-8; P at pp. 6-14). Although RFTS did not offer the student PT services, which were recommended in the March 2008 IEP, a review of the IEP generated by RFTS as well as a January 2009 RFTS OT progress report indicates that RFTS identified and met the gross motor needs of the student (see Tr. pp. 269, 305-06; Parent Exs. N at pp. 1-12; O at pp. 1-8; see also M.N. v. New York City Dept. of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 2010] [upholding appropriateness of different delivery of related services that nevertheless met the student's identified needs]).

RFTS also utilized a sensory diet and a BIP to address the student's self-regulation needs and interfering behaviors for the 2008-09 school year (Tr. pp. 242, 362-364; see Parent Ex. O at

[6] According to the student's head teacher at RFTS, "BCBA" certification means that, by the time of the impartial hearing, the Applied Behavioral International Organization issued the teacher certification as a behavioral analyst (Tr. pp. 227-29). The head teacher testified that, although BCBA certification was not required by the State, BCBA certification meant she was knowledgeable about the principles of ABA and that she was able to write behavioral programs as necessary (Tr. p. 228).

pp. 9-10). In addition, as the student's primary modes of communication consisted of her augmentative communication device and pointing, RFTS incorporated the student's access to and use of her augmentative communication device "from the minute she gets off the bus until the end of the day" in order for the student to make requests (Tr. p. 241; see Tr. pp. 238-41, 362). Consistent with testimony by the director of RFTS and the student's head teacher, the student's daily schedule at RFTS during the 2008-09 school year incorporated ABA instruction throughout the day (Tr. pp. 234-39, 251, 351-52; Parent Ex. G). RFTS staff additionally maintained a data book that contained all of the programs the student worked on and data pertaining to each of her target areas (Tr. pp. 245-46, 249-50; see generally Parent Exs. Q-BB).

According to the student's head teacher at RFTS during the 2008-09 school year, the student received constant 1:1 support all day, even during group instruction periods (Tr. pp. 231, 233-34, 264). Additionally, a classroom profile introduced at the impartial hearing demonstrated that the student was grouped in the classroom with four other students all diagnosed with autism (Parent Ex. H; see Tr. pp. 233-34). This classroom profile also reflects that, similar to the student, two of these students were non-verbal while the other two were "emerging verbal" communicators (Parent Ex. H). All students in the class had "[l]imited" social skills and were ambulatory (id.). As for behavioral needs, the classroom profile indicated that two students in the class had "intensive" needs while the other two other had "moderate" needs (id.).[7]

In addition, the evidence in the hearing record demonstrates that the student made progress at RFTS during the 2008-09 school year. While evidence of progress is not dispositive in determining whether a unilateral placement is appropriate, it is a factor that may be considered (Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 364; Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013]; 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 [2d Cir. Dec. 26, 2012]).

At the impartial hearing, the educational director of RFTS testified that, during the 2008-09 school year, the student made "steady progress[] throughout the school year" (Tr. p. 362). The educational director further testified that the student became more "fluent" in the use of her augmentative communication device, which, at the time of the impartial hearing, was a more advanced model than the communication device she used at the beginning of the school year (Tr. pp. 362, 366). Behaviorally, the student demonstrated a decrease in her self-injurious behaviors (e.g., hitting her head, poking her eyes, tapping, biting herself, hitting or kicking others, swiping task-related material), followed more one-step directions, and demonstrated more acceptance of demands that were placed upon her (Tr. pp. 362-65). The student was also able to sort a greater amount of functional items than she could at the beginning of the school year (Tr. p. 362). In regard to the use of a toileting schedule, the student generally remained dry, with only one or two accidents per week (Tr. p. 366). The educational director also noted that, because of

[7] To the extent the district continues to assert, as it did before the District Court, that RFTS was inappropriate because it did not offer the student access to nondisabled peers, this argument is without merit (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 837 [2d Cir. 2014] [holding that "while the restrictiveness of a private placement is a factor [in assessing the appropriateness of a unilateral placement], by no means is it dispositive" and that "where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option"]).

multidisciplinary work led by speech-language therapy and OT providers, the student tolerated a wider variety of food textures and tastes (Tr. pp. 366-67). For example, at the time of the impartial hearing, the student ate a mixture of textures within a salad (id.). The educational director further indicated that the student required prompting in order to learn new acquisition skills, but was consistent with her independent level in maintaining skills she had mastered (e.g., matching identical objects, sorting some identical objects, receptively following a handful of directions, stacking blocks, and completing some simplistic puzzles) (Tr. pp. 367-68).

The RFTS speech-language pathologist supervisor, who provided services to the student during the 2008-09 school year in tandem with one of four speech-language pathologists whom she supervised, also attested to the student's progress (Tr. pp. 297-97). Specifically, the supervisor testified that the student used her upgraded augmentative communication device in the classroom in order to identify scheduled changes or upcoming activities (Tr. p. 296). In addition, the student activated her upgraded augmentative communication device to announce activities (e.g.; "time for circle everyone," "time for story time," and "get ready for lunch") and communicated whose turn it was during a turn-taking activity (id.). The student also used an icon on the communication device's touch screen that activated voice output whereby she also identified and greeted adults and peers (Tr. pp. 296-97). According to the supervisor, the student also used the augmentative communication device during other joint attention and play activities (Tr. p. 297). The supervisor further testified that she worked closely with the parent and that the student used her original augmentative communication device (which was similar to the upgraded communication device she used at school) at home (id.).[8]

Similarly, the RFTS occupational therapist, who provided services to the student during the 2008-09 school year, testified as to the student's progress (see Tr. pp. 396-99).[9] This provider testified that the student improved in her overall awareness and in her ability to relate to others, especially teachers (Tr. pp. 396, 399). In addition, the provider opined that the student improved her visual motor skills (e.g., copying or imitating shapes on the board with a vertical axis, fixating on and establishing eye contact with a specific activity) (Tr. p. 399).[10]

Based upon this evidence, I conclude that the parent sustained her burden to establish that the student's placement at RFTS during the 2008-09 school year offered specially designed instruction to meet the student's needs.

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[8] Testimony by the student's occupational therapist indicated that, during a physical education class, the student used either her augmentative communication device or, if running around a lot, a "wallet" filled with pictures to express what she wanted to do (Tr. pp. 397-98). The hearing record reflects that the student's speech-language pathologist prepared the wallet for the student and showed staff how to use it with her (Tr. p. 398).

[9] The student's occupational therapist at RFTS knew the student since her initial enrollment at RFTS in September 2005 (Tr. p. 396).

[10] Although, in some cases, after the fact testimony at an impartial hearing would not rise to the level of objective evidence necessary to sustain a parent's burden, the RFTS staff members' personal knowledge of the student and concrete examples constitute sufficiently objective evidence in this case (cf. Hardison, 773 F.3d at 387-88 [witness's testimony did not constitute objective evidence where he "did not know any details of how [the student] was progressing academically or how her psychological progress tied into her educational progress"]; see also Cerra, 427 F.3d at 195-96).

D. 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; E.M., 758 F.3d at 461; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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 v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); 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]).

Here, the evidence in the hearing record supports the district's argument that the parent provided the district with timely but inadequate notice. The parent attended the March 2008 CSE meeting accompanied by an advocate (Dist. Ex. 2 at p. 2; see Tr. pp. 26, 48). Sometime after receiving the FNR, the parent submitted a handwritten notation to the district indicating that the assigned public school site was not appropriate for the student and stating her intent to reenroll the student at RTFS for the 2008-09 school year (Parent Ex. K; see Tr. p. 320).[11] When the parent,

[11] This notation is undated (see Parent Ex. K); however, it appears that it was delivered by certified mail, return receipt requested, and stamped by the United States Post Office on June 12, 2008 (see Parent Ex. L at p. 3).

through her advocate, provided notice again on August 15, 2008, she again failed to identify any concerns with the March 2008 IEP (see Parent Ex. M).[12] The parent finally identified her specific concerns with the IEP in her due process complaint notice dated November 26, 2008, the day before the 2008 Thanksgiving holiday (Parent Ex. A at p. 2). Therefore, the district was without knowledge as to the IEP's perceived deficiencies until that time and, thus, deprived of an opportunity to remedy them (see Amy N., 358 F.3d at 160).

An additional matter raised by the district relevant to equitable considerations is the length of time for which the parent seeks tuition reimbursement in this proceeding. While the parent seeks reimbursement for the 2008-09 school year, the March 2008 IEP indicated that an annual review was scheduled for March 2009, several months prior to the end of the 2008-09 school year (see Dist. Ex. 2 at p. 2; see also Educ. Law § 2[15]). However, under the circumstances of this case, where the parent exercised a Burlington/Carter remedy based on a full 12-month school year from July 1 to June 30, a scheduled annual review does not preclude the parent from recovering tuition for the remainder of the disputed school year (see Dist. Ex. 2 at p. 1).[13]

Therefore, based upon the parent's failure to identify any concerns with the March 2008 IEP until November 26, 2008, I find that appropriate relief in this proceeding spans from the time school reconvened after the Thanksgiving holiday on December 1, 2008 through June 30, 2009. The parties do not appear to dispute that, pursuant to a contract between the parent and RFTS, the amount of the student's tuition at RFTS for the 2008-09 school year was $85,000 (Parent Ex. E at p. 1).[14] Therefore, the parent shall be entitled a pro-rated award based upon the above period; i.e. 7 months out of the 12-month school year as defined by the Education Law (Educ. Law § 2[15]). This amounts to 58 percent of the requested tuition, or $49,300.00.

E. Relief

Finally, the district argues that the parent is not entitled to the direct funding of the student's tuition at RFTS.

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M., 758 F.3d at 453 [noting that "the broad

[12] This letter contains stock language, framed in the form of four alternative explanations, purportedly explaining why the parent found the IEP deficient (see Parent Ex. M).

[13] Furthermore, the district's argument to the contrary is particularly unavailing where the district did not immediately implement the March 2008 IEP and did not identify the location where the student could access the services until May 21, 2008 (see Parent Ex. K).

[14] The district does not argue that this amount was excessive.

spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]).

Here, the parent established a legal obligation to pay the student's tuition at RFTS for the 2008-09 school year (Parent Ex. E; see E.M., 758 F.3d at 453). In addition, the parent's testimony and income tax return sufficiently establish that the parent was unable to front the cost of the student's tuition at RFTS for the 2008-09 school year (Tr. pp. 317-18; Parent Ex. DD). Under these circumstances, the appropriate equitable relief consists of direct funding of the student's tuition at RFTS for the 2008-09 school year subject to the adjustment described above based upon the parent's failure to provide the district with adequate notice (see Mr. and Mrs. A., 769 F Supp. 2d at 406; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). Accordingly, I find that the parent is entitled to direct funding of the student's tuition at RFTS for the 2008-09 school year under the factors described in Mr. and Mrs. A. (see 769 F. Supp. 2d at 406).

VII. Conclusion

A review of the evidence in the hearing record reveals that the district failed to offer the student a FAPE for the 2008-09 school year, that RTFS offered specially designed instruction to meet the student's needs, that equitable considerations warrant a partial reduction of the amount of tuition awarded to the parent, as detailed above, and that the parent is entitled to direct funding of this amount.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall directly pay $49,300.00 to RTFS for a portion of the costs of the student's tuition for the 2008-09 school year.

Dated: **Albany, New York**
February 11, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER