The University of the State of New York

The State Education Department
State Review Officer
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No. 15-001

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

Appearances:
Susan Luger Associates, Inc., Special Education Advocates for petitioner, Lawrence D. Weinberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 a decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for his son's tuition costs at the Gersh Academy (Gersh) for the 2013-14 school year. The appeal must be sustained.

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

With respect to the student's educational history, the hearing record shows that the student started the 2012-13 school year in a 6:1+1 special class at a district public school but transferred, in April 2013, to a different district public school (Tr. pp. 189-90; see Dist. Ex. 3).

On May 2, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 1 at pp. 1, 19).[1] Finding the student eligible for special education as a student with autism, the May 2013 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school (see id. at pp. 1, 15-16, 19-20).[2] The May 2013 CSE also recommended adapted physical education and related services consisting of: two 30-minute sessions of individual occupational therapy (OT) per week; three 30-minute sessions of individual physical therapy (PT) per week; and four 30-minute sessions of individual speech-language therapy per week (id. at pp. 15-16). In addition, the CSE recommended the student receive the assistance of a full time 1:1 paraprofessional for health and safety reasons (id. at p. 16). The May 2013 IEP also included 11 annual goals with corresponding short-term objectives (id. at pp. 4-15).

By final notice of recommendation (FNR) dated May 2, 2013, the district summarized the 6:1+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). The assigned public school site was the same school the student had begun attending in April 2013 (see id.; see also Tr. pp. 189-90; Dist. Ex. 3).

The student attended the recommended program in the district public school for two weeks during the summer 2013 and for approximately six weeks during September to October 2013 (see Tr. pp. 71-73, 195-96). By letter dated September 13, 2013, the parent notified the district of his intention to unilaterally place the student at Gersh for the 2013-14 school year at public expense and to seek the provision of transportation (see Parent Ex. C at p. 1).[3] In his letter, the parent rejected as inappropriate the educational program recommended by the May 2013 CSE, noting the student's lack of progress (id.).

On or before October 7, 2013, the parent executed an enrollment contract with Gersh for the student's attendance during the remainder of the 2013-14 school year, from October 7, 2013 through June 27, 2014 (see Parent Ex. D at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice, dated October 2, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. A at p. 2). Raising several challenges to the CSE process, the parent alleged that the May 2013 CSE: was not properly constituted; failed to provide an interpreter at the CSE meeting for the parent, who attended the meeting briefly by telephone, or for the student's aunt,

[1] The hearing record contains two different versions of the student's May 2013 IEP (see Dist. Ex. 1; Parent Ex. B). For purposes of this decision, only the district's version of the IEP, which includes a completed attendance page with signatures and several undated pages reflecting the student's progress towards his annual goals, will be cited (see Dist. Ex. 1 at pp. 5-15, 22).

[2] The student's eligibility for special education program and related 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]).

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

who attended the meeting in person; conducted an "irresponsibly brief" CSE meeting; failed to include the parent in the development of the annual goals and short-term objectives or discuss the student's management needs; ignored the parent's concerns regarding the appropriate level of individual support that the student required in the classroom; failed to respond to the parent's request to provide the parent with the evaluative reports and failed to provide documents to the parent in the parent's native language; failed to provide CSE members who participated in the meeting by telephone with access to evaluative reports; failed to obtain sufficient evaluative information prior to conducting the CSE meeting; and failed to conduct bilingual assessments of the student, who lived in an environment in which the primary spoken language was not English (although the student was non-verbal) (id. at pp. 2-5). The parent also asserted that a district evaluator concluded, based on an inadequate and inappropriate assessment, that the student would not be included in an English as a Second Language (ESL) class (id. at p. 4).

With regard to the May 2013 IEP, the parent alleged that the CSE: failed to accurately describe in the IEP the student's present levels of academic achievement and functional performance and failed to indicate the student's social/emotional management needs; included annual goals and short-term objectives inadequate in scope and immeasurable; recommended an inappropriate 6:1+1 special class placement, which lacked adequate levels of support, supervision, and individualized instruction and attention; failed to recommend training for the student's full-time health and safety paraprofessional; and failed to include provision of parent counseling and training (Parent Ex. A at pp. 3-5). The parent also asserted that the district public school that the student attended for the beginning of the 2013-14 school year was not appropriate for the student because the student's class was too large, offered insufficient opportunity for 1:1 instruction or attention, employed inappropriate teaching methodologies, and offered inadequate focus on socialization skills (id. at p. 6).

The parent alleged that Gersh was an appropriate unilateral placement for the student because it offered the student: a coordinated therapeutic learning environment; specially trained staff; and appropriate supports, methodologies, supervision, and services to address the student's educational needs (Parent Ex. A at p. 6). The parent also alleged that there were no equitable considerations that would bar or diminish his request for tuition reimbursement because the parent cooperated with the CSE and timely notified district of his intention to seek tuition reimbursement from the district (id.).

As relief, the parent requested the cost of the student's tuition at Gersh for the 2013-14 school year and provision of and/or reimbursement for transportation to and from Gersh and related services (Parent Ex. A at p. 7). The parent also requested compensatory additional services in the form of related services (id.).[4]

B. Impartial Hearing Officer Decision

On May 14, 2014, an impartial hearing convened in this matter and concluded on July, 10, 2014, after two days of proceedings (see Tr. pp. 1-219). By decision dated November 24, 2014, the IHO found that the district offered the student a FAPE for the 2013-14 school year and denied

[4] During the impartial hearing, the parent withdrew his claims for compensatory additional services and transportation (see Tr. pp. 8, 214-15; see also Tr. pp. 56-57).

the parent's request for the costs of the student's tuition at Gersh (see IHO Decision at pp. 10-18). With regard to the parent's claims concerning the CSE process, the IHO found that the CSE was duly constituted and that the attendance of an additional parent member was not required under State regulations (id. at pp. 10-11). As to the parent's allegation that he was not afforded an opportunity to participate at the CSE meeting, the IHO found that there was no evidence that the parent ever requested an interpreter prior to or at the time of the CSE meeting and that the evidence reflected that the parent authorized a relative, the student's aunt, to attend and participate in the CSE meeting on the parent's behalf and that she, also, did not request an interpreter (id. at pp. 14-15). Next, the IHO found that the CSE had adequate evaluative information about the student's functional, developmental, and academic needs to develop an appropriate program for the student (id. at p. 12). In so finding, the IHO explained that the CSE possessed the results of a student annual needs determination inventory (SANDI), an April 2013 classroom observation, a May 2013 PT evaluation, as well as several physician prescriptions for PT, OT, and a 1:1 paraprofessional (id.).

With regard to the parent's allegations concerning the appropriateness of the May 2013 IEP, the IHO found that the annual goals related to the student's educational deficits, as described in the IEP, and targeted the student's needs related to PT, reading, writing, mathematics, communication, adaptive physical education, fine motor skills, visual motor skills, sensory processing, and speech-language therapy (IHO Decision at p. 13). The IHO also found that the short-term objectives included evaluative criteria, procedures, and schedules to measure the student's progress towards the annual goals and short-term objectives (id.). Concluding that the student's IEP was reasonably calculated to enable the student to receive educational benefit, the IHO found that, consistent with the student's needs, the IEP offered "a small class environment with intensive individual programming, continual adult supervision, and a speech[-language] therapy program for the acquisition and generalization of language" (id. at pp. 15-16). In support of his conclusion, the IHO noted information included in the May 2013 IEP that the student made progress during the 2012-13 school year in "a similar program," as well as evidence of the student's progress under the May 2013 IEP during the first marking period of the 2013-14 school year (id. at pp. 16-17). The IHO also found that the related services recommended for the student offered sufficient support (id. at p. 17). Further, the IHO found that the CSE's failure to recommend parent counseling and training in the student's IEP amounted to a procedural violation that did not rise to the level of a denial of a FAPE (id. at p. 14).

Finally, with regard to the implementation of the May 2013 IEP, the IHO found that the parent failed to raise in his due process complaint notice an allegation that the student did not receive the 1:1 paraprofessional services recommended in the May 2013 IEP at the district public school and, therefore, any claim regarding such a claim was beyond scope of the impartial hearing (see IHO Decision at pp. 17-18). Alternatively, the IHO found that, because the student was making progress both before and after a 1:1 paraprofessional was added to his IEP, any delay in the receipt of those services "was not so pervasive" so as to deny student a FAPE (id. at p. 18).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2013-14 school year. Contrary to the findings of the IHO, the parent argues that he was denied the opportunity to participate in the development of the student's IEP for the

2013-14 school year because the CSE did not discuss the annual goals included in the May 2013 IEP during the meeting and the parent was not provided with an interpreter at the CSE meeting, notwithstanding that the district was on notice that he did not speak English. The parent also argues that the district failed to provide him with various critical documents in his native language. The parent further avers that the IHO erred in finding that the CSE obtained sufficient evaluative information because the SANDI assessment contained minimal evaluative information about the student and, prior to CSE meeting, the district failed to conduct a psychological, neuropsychological, or psychoeducational evaluation of the student. Thus, argues the parent, the May 2013 IEP did not include an adequate description of student's academic, functional, and management needs. Next, the parent argues that the annual goals included in the May 2013 IEP were inadequate. Further, the parent contends that the CSE failed to take into consideration and address the student's language needs and limited English proficiency. The parent also argues that the lack of parent counseling and training on the May 2013 IEP contributed to a denial of a FAPE in this instance.

Relative to the implementation of the May 2013 IEP, the parent argues that the student failed to make progress and regressed from May 2013 through September 2013 and, further, that the district failed to provide the student with a classroom with the recommended 6:1+1 ratio or the related services mandated on the May 2013 IEP, including the 1:1 paraprofessional.

The parent also argues that Gersh was an appropriate unilateral placement for the student, in that it provided the student with educational instruction specially designed to meet student's unique needs and related services, including speech-language therapy, PT, and OT, necessary to permit him to benefit from instruction. The parent also cites examples of the student's progress at Gersh during the 2013-14 school year. Finally, the parent argues that equitable considerations would not warrant a reduction or denial of the requested relief. Consequently, the parent requests the costs of the student's tuition at Gersh from October 2013 through the end of the 2013-14 school year and asserts that, as he established his inability to afford the tuition, the district should be ordered to directly fund the amount owed.

In an answer the district responds by admitting and denying the allegations raised by the parent in his petition and generally argues to uphold the IHO's decision in its entirety. In particular, the district argues that, to the extent any procedural violations of the IDEA or State regulations are found, those violations did not rise to level of denial of FAPE. In addition, the district argues that equitable considerations do not weigh in favor of the parent's requested relief because the parent's 10-day notice letter of September 13, 2013, failed to indicate the parent's concerns with the student's May 2013 IEP.

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. The May 2013 CSE

1. Parental Participation

The parent argues on appeal that the district failed to provide him with an interpreter at the May 2013 CSE meeting and failed to provide certain critical documents to the parent in the parent's

native language and that such failures impeded the parent's opportunity to participate in the development in the student's IEP.[5]

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of the Dep't of Educ., Appeal No. 12-215; Application of a Child with a Disability, Appeal No. 05-119).

In this case, the hearing record reflects that the parent's native language is other than English (see Tr. pp. 190-91; Parent Ex. B at p. 14). The evidence in the hearing record indicates that the parent participated in the May 2013 CSE meeting briefly by telephone and, by the parent's request, then the student's aunt continued to participate on the parent's behalf (see Tr. pp. 23, 29-30, 31-32). The student's aunt signed the May 2013 CSE meeting attendance sheet as a "family members/translator" (Dist. Ex. 1 at p. 22). The district school psychologist testified that the aunt neither requested an interpreter at the CSE meeting nor exhibited any difficulty understanding and participating in the proceedings at the CSE meeting (see Tr. p. 29-30, 32). The hearing record is unclear as to the aunt's ability to act as an interpreter or, for that matter, her own ability to effectively communicate in English without an interpreter (Tr. pp. 23, 29-30; see generally Tr. pp. 186-214).[6] However, in this instance, while the district could have encouraged potentially better parent participation in the development of the student's IEP by taking appropriate action to ensure that the parent himself clearly understood the proceedings at the CSE meeting, given the aunt's participation, even if the lack of an interpreter constituted a procedural deficiency, it does not, under the circumstances of this case, ultimately contribute to my determination that the district failed to offer the student a FAPE for the 2013-14 school year.

Next, the parent asserts that the district failed to provide him with translated copies of critical documents, including the student's IEP, a procedural safeguards notice and prior written notices. Initially, in this case, despite having knowledge that the parent's native language was not English (Dist. Ex. 1 at p. 19; see also Tr. pp. 23, 190), the hearing record indicates that the district did not provide the parent with any documents in his native language (see Tr. pp. 188, 209-10),

[5] With regard to the parent's assertion that the district deprived him of an opportunity to participate in the development of the annual goals strictly by virtue of when the goals were drafted, this claim, without more, is without merit, as "there is no 'requirement in the IDEA or case law that the IEP's statement of goals be typed up at the CSE meeting itself, or that parents or teachers have the opportunity to actually draft the goals by hand or on the computer themselves, or that the goals be seen on paper by any of the CSE members at the meeting'" (E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y Sept. 29, 2012], quoting S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *11 [S.D.N.Y. Nov. 9, 2011]).

[6] In fact, the parent prevaricates in his petition by declining to take a position regarding the aunt's fluency in English, alleging instead that "[i]t is unclear from the record how much English [the student's] aunt speaks" (Pet. ¶ 57).

such as a copy of a procedural safeguards notice (see 34 CFR 300.504[d], citing 300.503[c]; 8 NYCRR 200.5[f][2]) or a copy of a prior written notice or the results of any assessment of the student (see 34 CFR 300.503[c]; 8 NYCRR 200.4[b][6][xii], 200.5[a][4]).[7] Under these circumstances, the hearing record supports a finding that the district's failure in this regard constituted a procedural violation of the IDEA, the effect of which is further discussed below.

2. Sufficiency of Evaluative Information

On appeal, the parent argues that the IHO erred in finding that the CSE obtained sufficient evaluative data to identify the student's present levels of academic achievement and management needs of the student and to develop an appropriate educational program for the student. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

According to the hearing record, at the most, the May 2013 CSE may have had before it the following evaluative information to develop the student's IEP for the 2013-14 school year: results of a SANDI assessment conducted by a classroom teacher, an April 2013 classroom observation, a May 2013 PT evaluation, as well as several physician prescriptions for PT, OT, and

[7] Neither federal nor State regulations require that a district provide parents with a copy of the IEP in their native language (Letter to Boswell, 49 IDELR 196 [OSEP 2007] [noting that "[t]here is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated" and that schools are still required to provide parents with full information, in the native language, of all information relevant to activities for which consent is sought]; see 34 CFR 300.320; 8 NYCRR 200.4[d][2]). Although not required, providing the parents with a copy of an IEP in their native language would be in keeping with the spirit of the IDEA and is one way to demonstrate that the parent has been "fully informed of the student's educational program" (Letter to Boswell, 49 IDELR 196).

a 1:1 paraprofessional (see Tr. pp. 18, 25-26, 28, 31; see generally Dist. Exs. 1; 3-8).[8] The reported findings of the April 2013 classroom observation totaled four lines of text and provided no information about the "student's academic performance" and minimal information about the student's "behavior in the areas of difficulty": "[The student] was wearing a polo shirt, sweat pants, and sneakers. He was sitting at his seat. [T]here were [five] other children in his class. He was not responsive to his name. He wears a diaper and has no history of [e]arly intervention. He lives with his father who is of [foreign] descent. He came to the [the public school] after th[e] recent holidays from a school that did not have ABA" (Dist. Ex. 3; see 8 NYCRR 200.4[b][1][iv]).

The May 2013 PT evaluation report described that the student had received a diagnosis of autism (see Dist. Ex. 4 at p. 1). According to the PT evaluation report, the student did not respond to his name, follow verbal directions, or spontaneously engage in play or gross motor activities (id.). The report indicated that the student required constant supervision to safely direct him (id.). The physical therapist summarized that the student "exhibit[ed] significant gross motor, balance, coordination and motor planning deficits as well as decreased overall muscle strength" (id.). The physician prescriptions offered no information about the student's needs underlying the recommended services, except that the recommendation for the 1:1 paraprofessional related to the student's safety (see Dist. Exs. 5-8).

The principal evaluative document upon which the IHO found the CSE to have relied upon in developing the student's May 2013 IEP was the SANDI assessment, which was not included in the hearing record (see IHO Decision at pp. 12, 20-22). The district psychologist described the SANDI assessment as an "exam done by a classroom teacher" to "show the classroom teacher" the student's "present levels of performance" (Tr. p. 18). The May 2013 IEP indicated that this assessment, conducted at the beginning of the 2012-13 school year, "test[ed] students on a range of skills from kindergarten through sixth grade" and that administration with the student yielded scores in the areas of reading, writing, mathematics, communication development, which, according to the IEP, revealed that, "[i]n all areas [the student] displayed basic skills within the range of task listed as appropriate for Kindergarten level students" (Dist. Ex. 1 at p. 1).

As the SANDI assessment was not included in the hearing record, it is unclear how the IHO evaluated the sufficiency of this assessment and reached a conclusion in the absence of the document itself. Moreover, as described above, the remaining information before the CSE offered a very sparse view of the student's needs, failing to described the student's "global delays" or his abilities (see Dist. Ex. 1 at p. 1; see generally Dist. Exs. 3-9). Given the paucity of evaluative information about the student, the IHO erred in finding that the evaluative data in the hearing record was sufficient to develop the student's IEP for the 2013-14 school year.

Finally, the evidence in the hearing record indicates that on or about April 9, 2013, the parent requested that the CSE conduct additional evaluations or assessments of the student (see Dist. Ex. 11 at p. 4). In addition, subsequent to the May 2013 CSE meeting, by letter dated July

[8] Absent CSE meeting minutes, evident correlation between information in evaluative documents and the IEP, or clearer testimony from a member of the CSE, other than the SANDI assessment, it is not entirely clear whether the May 2013 CSE had before it the classroom observation or the physician prescriptions. However, as described above, even if the May 2013 considered all of the foregoing, these documents offered an inadequate description of the student's needs or abilities.

26, 2013, the parent requested that the district conduct assessments of the student in Russian (Dist. Ex. 10 at p. 3).[9] Although there is no evidence in the hearing record indicating what specific evaluations were requested by the parent, there is also no evidence demonstrating that the CSE conducted any additional evaluations (beyond the PT evaluation) or notified the parent of the reasons for its determination that no additional evaluative data was needed to determine the student's needs (see 8 NYCRR 200.4[b][5][iv]). Thus, the failure of the CSE to respond to the parent's requests to conduct additional evaluations of the student, including a bilingual assessment, or to notify the parent in writing of the reasons for why the CSE determined that no additional evaluative data was necessary to determine the student's needs, also amounts to a procedural violation of the IDEA.

B. May 2013 IEP

1. Present Levels of Performance and Annual Goals

The parent also argues on appeal that the May 2013 IEP failed to include a sufficient description of student's academic, functional, and management needs or appropriate annual goals to address the student's needs.

Among the other 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]). In addition, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In the present case, given the district's failure to establish that the May 2013 CSE considered sufficient evaluative data about the student, as discussed above, the dearth of such information in the hearing record precludes meaningful review of the parent's claims with regard

[9] School districts must ensure that assessments and other evaluative materials used to assess a student are "provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer" (34 CFR 300.304[c][1][ii]; 8 NYCRR 200.4[b][6][i][a]).

to the sufficiency of the IEP's description of the student's academic, functional, and management needs or the appropriateness of the annual goals and corresponding short-term objectives in the May 2013 IEP (see Dist. Ex. 1 at pp. 1-14). That is, given the above deficiencies with the district's presentation of the information available to the CSE, I decline, after reviewing the entire record, to simply presume that the May 2013 IEP included a full and complete description of the student's needs or annual goals aligned with those needs. This is especially so given the district's other failures in this case, as described further below.

2. Special Factors—Limited English Proficiency

Turning next to the question of whether the May 2013 CSE addressed the student's language needs, a CSE must consider special factors including a student's communications needs and, in the case of a student with limited English proficiency, how the student's language needs relate to the student's IEP (34 CFR 300.24[a][2][ii], [iv]; 8 NYCRR 200.4[d][3][ii], [iv]). Pursuant to State guidance, when developing an IEP for a limited English proficient student with a disability, the CSE must consider the student's language needs as they relate to the student's IEP, "as well as the special education supports and services a student needs to address his or her disability and to support the student's participation and progress in the general education curriculum" ("Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/English Language Learners (ELLs) who are Students with Disabilities," pp. 1-2, Office of Spec. Educ. [Mar. 2011], available at http://www.p12.nysed.gov/specialed/publications/bilingualservices-311.pdf). Such considerations include, but are not limited to: the student's need for "special education programs and services to support the student's participation and progress in English language arts instruction, content area instruction in English and ESL instruction; and whether the student needs bilingual special education and/or related services" (id. at p. 2). In this case, the CSE was required to "consider specially designed instructional programs provided by appropriately qualified staff" to address the student's needs with regard to "understanding, speaking, reading, writing and communicating in English" (id.).

Here, the CSE indicated in the May 2013 IEP that the primary language of the parent, and presumably that the student was exposed to at home, was not English (Dist. Ex. 1 at p. 19). However, the CSE checked the box "not applicable" in the space on the May 2013 IEP to indicate whether or not a student with limited English proficiency needs a special education service to address his language needs as they related to the IEP and, further, indicates that the student's educational placement would be provided in English (id. at pp. 13, 15-16, 20). There is no explanation within the IEP of the extent to which the student may have benefited from ESL instruction, bilingual special education, or any other support or service to address the student's needs with regard to understanding and communicating in English (see generally id.). Further, as discussed above, the district did not submit any evaluative information that described the student's language needs. As a result, there is insufficient information in the hearing record to determine the student's ability to understand in English or the extent to which the student may have required ESL or bilingual instruction. Consequently, as discussed below, the failure of the May 2013 CSE to how the student's language needs related to the IEP contributes to a finding that the district denied the student a FAPE for the 2013-14 school year.

3. Parent Counseling and Training

The parent also argues that the CSE failed to recommend parent counseling and training in the student's May 2013 IEP and that this procedural violation, when considered cumulatively with the other alleged procedural violations in this case, amounted to a denial of a FAPE. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). Courts have held, however, that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141–42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

In this case, it is undisputed that the May 2013 CSE did not recommend parent counseling and training as a related service in the student's IEP (see generally Dist. Ex. 1); however, this violation alone does not support a finding that the district failed to offer the student a FAPE.[10] The cumulative impact of this violation and the other deficiencies described above must be considered.

C. Cumulative Impact

To the extent the district's violations described above constitute procedural violations, a finding that the district denied the student a FAPE is appropriate 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]). Further, under the circumstances of this case, I find it

[10] The district is cautioned that it cannot continue to disregard its legal obligation to include parent counseling and training in a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice, in the parent's native language, on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

appropriate to consider the cumulative impact of the identified deficiencies in order to determine whether or not the district offered the student a FAPE (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 434 [S.D.N.Y. 2014]).

While the procedural violations described above, standing alone or when considered individually, might not result in the denial of a FAPE, the aggregate effect of the violations in this case—including the district's failure: to obtain and produce sufficient evaluative information in the hearing record necessary to examine the appropriateness of the May 2013 IEP; to conduct a bilingual assessment of the student; to provide the parent with the proper notices and results of evaluations in his native language; to address the student's limited English proficiency and language needs; and to recommend parent counseling and training in the IEP—requires reversal of the IHO's finding that the district offered the student a FAPE for the 2013-14 school year (see R.E., 694 F.3d at 191; R.B., 15 F. Supp. 3d at 434). While multiple procedural violations may not result in the denial of a FAPE when the "'deficiencies . . . are more formal than substantive'" (id. [omission in original], quoting F.B., 923 F. Supp. 2d at 586), here the procedural violations identified above denied the parent a substantial opportunity to participate in the process of developing an appropriate educational program for the student and also included the district's failure to produce evidence in the hearing record that would meaningful review of the parent's claims raised in his due process complaint notice. Accordingly, the violations identified above, when considered cumulatively with the district's failure to establish the appropriateness of the May 2013 IEP, resulted in the denial of a FAPE for the 2013-14 school year.

D. Implementation

Lastly, the parent argues that the student did not receive the 1:1 paraprofessional services that were recommended in his May 2013 IEP. Finding that this claim was beyond the scope of the impartial hearing, the IHO explained that the parent failed to allege in his due process complaint notice any allegation regarding the failure of the district to provide the student with the 1:1 paraprofessional services recommended in his IEP (see IHO Decision at pp. 17-18). Review of the due process complaint notice supports the IHO's determination in this regard (see Parent Ex. A at pp. 2-7; see also 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]). However, the hearing record contains evidence indicating that the student was not receiving the paraprofessional services recommended in the May 2013 IEP (see Tr. pp. 78-79, 87, 201-03; Dist. Ex. 1 at p. 2; Parent Ex. U at p. 2).[11] Accordingly, the parent's claim that the district

[11] To the extent that the district argues that its failure to provide the student with the services recommended in the student's May 2013 IEP was of no consequence because the student allegedly made progress under the May 2013 IEP, a demonstration of progress does not excuse the district from its obligation to provide any related services, including the 1:1 paraprofessional, recommended in the student's May 2013 IEP (see Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 76 [D.D.C. 2007] [stating that educators may not "distinguish in the abstract between important and unimportant IEP requirements" and that "all the requirements in an IEP are significant, and educators should strive to satisfy them"]).

failed to implement the student's May 2013 IEP by failing to provide him with 1:1 paraprofessional services is dismissed without prejudice.

E. Unilateral Placement

Having concluded that the district failed to offer the student a FAPE for the 2013-14 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 shows that Gersh 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 provide an educational program which meets 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. 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).[12] 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

[12] When a student is unilaterally placed at a nonpublic school, however, the parents do not have to establish that the nonpublic school satisfied all of the requirements under the IDEA and State regulations (see Carter, 510 U.S. at 14).

> 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).

1. Specially Designed Instruction

An independent review of the evidence in the hearing record demonstrates that the student's educational program and services at Gersh during the 2013-14 school year were appropriate and specially designed to address the student's unique needs.[13] As to the student's needs, the evidence in the hearing record produced by the parent in this case includes a November 2013 speech-language progress report and a November 2013 new student 30-day review, as well as information about the student's needs and progress collected later in the 2013-14 school year (see generally Parent Exs. J-U). At the time the student began attending Gersh in October 2013, he demonstrated significant deficits across all domains (see Tr. pp. 132-33, 157-58; Parent Ex. U at pp. 2-3; see generally Parent Exs. J-P). A May 7, 2013, psychological evaluation indicated that, overall, the results of the testing were consistent with a diagnosis of an autism spectrum disorder (Parent Ex. U at p. 3). Specifically, the student received: a full scale IQ of 40, in the moderate range of intellectual disability, on the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) and an adaptive behavior composite score of 35, in the low range according to the Vineland-II Adaptive Behavior Scales (VABS), with significant deficits noted in communication, socialization, motor and daily living skills; the student's performance on the Childhood Autism Rating Scale (CARS-II) fell in the severe range with respect to symptoms of autism spectrum disorder (id. at pp. 2-3).[14]

[13] As discussed above, the district elected to enter into the hearing record a minimal amount of evaluative information on or assessments from the student's records, thus effectively abandoning its foremost opportunity to put forth its own viewpoint of the student's special education needs and the extent to which the unilateral placement either addressed or failed to address those needs. Accordingly, to the extent the reports and assessments relied upon by Gersh in developing the student's educational program were not sufficiently accurate or complete for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and not the parent (see 34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]; A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). Moreover, because a "private placement need not provide . . . an IEP for the disabled student," Gersh had no duty to conduct the tests or evaluations that underlie a successful IEP (Frank G., 459 F.3d at 364).

[14] This information was reflected in a summary of the student's May 7, 2013, psychological evaluation, which was included within a May 12, 2014, neuropsychological report of the student, which was not challenged by the district (see Parent Ex. U at pp. 2-3).

The student also demonstrated very limited eye contact, did not respond to his name, required assistance to ambulate safely, and was unable to sit in a chair—although he was able to sit in a bean bag for individual or group activities if given immediate reinforcement (Tr. p. 157; Dist. Ex. 4 at pp. 1-2; Parent Ex. U at p. 3).[15] The student showed little interest in playing with peers and had no real communication skills aside from pointing or pulling a person's hand toward an object that he wanted (Tr. p. 157; Parent Exs. J at p. 1; K at p. 1; U at p. 3). He was not toilet trained and screamed and became aggressive during toileting, refusing to sit on the toilet (Tr. pp. 157-58). The student also became agitated and aggressive when demands were placed on him (Parent Ex. J at p. 1). His aggressive behaviors included hitting, biting, hair pulling, kicking, biting his own hand or lip, yelling, and crying, especially when he was trying to communicate something that he wanted (Tr. pp. 132-33, 158; Parent Exs. J at p. 1, O at p. 1; P at p. 1). The student required constant refocusing and supervision, maximal prompting or hand-over-hand assistance to complete tasks or to follow a direction, and a 1:1 paraprofessional for safety reasons (Tr. pp. 158, 164-65; Parent Exs. J at pp. 1, 2; L at p. 1; U at p. 3).

The student attended the BASE (behavioral, academic and social enrichment) Institute at Gersh, which was described in the hearing record as a 12-month educational program that provides academic, social, and behavioral interventions for students, ages five to twenty-one, who have received a diagnosis of an autism spectrum disorder or other developmental disability (Parent Ex. H at p. 1; see Tr. p. 121). With regard to the student's need for intensive support and individualized attention, the evidence in the hearing record demonstrates that Gersh provided an appropriate level of support in the classroom. For example, the evidence reflects that the student's class at Gersh included six students, ages six to nine years, each of whom was assigned a 1:1 paraprofessional (Tr. pp. 125, 137). The classroom staff also included a classroom teacher and a teaching assistant (Tr. pp. 125, 137-38). Testimony by the principal at Gersh indicated that the 1:1 paraprofessional was assigned to the student in order to address his behavioral and health needs, specifically because the student was at risk for elopement if someone was not with him and required assistance with his toilet training (Tr. p. 138).

With regard to grouping of the student with similar peers, the principal at Gersh indicated that the school examined the profile of the students that could be grouped together including their strengths, the skills they needed to develop, the kind of environment they needed, and the most appropriate placement for each student (Tr. pp. 136-37). She further indicated that the student's classroom consistent of with very similar social and academic management needs (Tr. pp. 137, 139). Testimony by the student's teacher at Gersh also indicated that the students in her class all required the same kind of attention (Tr. p. 175). With regard to verbal skills, the principal indicated that, while the student was nonverbal, some of the students in the class were slightly more verbal and some had language that required prompting—meaning, they were not fluent speakers but they did have language (Tr. p. 139). She testified that, for someone of his age and significant level of deficit, the student needed to be in an environment such as that offered at Gersh that was

[15] The student's current teacher testified that, when the student began attending Gersh in October 2013, she was the teacher assistant in the student's classroom; however, she became the classroom teacher in his class in January 2014 (Tr. p. 156).

"programmatically individualized" as well as expressively and receptively "language rich" (Tr. p. 137).[16]

To address the student's behavioral needs, including the student's display of aggressive behaviors, the principal at Gersh indicated that the school completed a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) (Tr. pp. 133-34; see generally Parent Exs. O; P). She indicated that the director of therapeutic services at Gersh initially took "ABC" data on the student that documented how many times a day the aggressive behavior occurred, at what time it occurred, and what happened before and after the behavior was exhibited (Tr. p. 134). Based on the data collected, a BIP was then developed by the social worker, the teacher, and the intervention specialists at Gersh (Tr. pp. 134-35; see Tr. pp. 129-31). The BIP identified the student's target behaviors (physical aggression i.e., hitting, biting, pulling staff hair, kicking, putting his hand in his mouth; and the student's lack of toileting skills), the functions of those behaviors (attention seeking, frustration, task avoidance, sensory, lack of skill-toileting), and the desired replacement behaviors that the student would learn (decreased physical aggression, increase in ability to express wants and needs through the use of pictures and sign language, become toilet trained, and decrease putting his hand in his mouth) (Parent Ex. P at p. 1). The student's BIP also included proactive strategies to prevent each of the target behaviors (id.). For example: planned ignoring and the provision of a replacement fidget were to be utilized when the student put his hand in his mouth; the "'first-then"' method would be employed when the student was presented with a task (["Student"] first do____ then you get____"); the student would receive frequent breaks of three to five minutes after attending to task (taking a functional walk such as delivering something to the office, laying down on a bean bag, walking around the classroom, playing with a toy); and to address behaviors resulting from sensory needs, the staff would provide the student with sensory input in the form of pressure to his head/ears (id.). To address the student's lack of toileting skills, the BIP indicated that the student would be brought to the bathroom every 30 minutes by his paraprofessional in a private bathroom in a designated location (id. at p. 2). In addition to preventative strategies, the BIP also included reactive strategies that would be utilized to address the target behaviors including verbal and tactile (gesturing, holding his hand) redirection and the provision of breaks when needed (id.). For example, the student's teacher indicated that she utilized verbal or physical redirection when the student exhibited physical aggression (Tr. pp. 158-59). Additionally, the BIP further indicated that, if the student was unresponsive to staff support and engaged in aggressive behavior towards himself or others, nonviolent crises intervention would be used as a last resort (Parent Ex. P at p. 2).

In addition, the student's teacher indicated that the student's behavior was also addressed using a token system throughout his day (Tr. p. 159). She testified that the student would choose

[16] In its answer, the district failed to raise any argument challenging the appropriateness of the parent's unilateral placement of the student at Gersh for the 2013-14 school year, leaving it to me to guess what its concerns may or may not be. However, to the extent that the district expressed any concerns during the underlying proceedings relative to whether Gersh was the least restrictive environment for the student (see IHO Ex. XII at pp. 3-4), there is little evidence in the hearing record indicating that students at Gersh had access to nondisabled general education peers. However, the student's teacher testified that her class took walking trips into the community to visit, for example, the supermarket in order to shop for an upcoming cooking activity and that, at times, they took trips on a bus (Tr. p. 175). Given the student's deficits, there is nothing in the hearing record to demonstrate that the student was ready to benefit from a less restrictive setting, and the parent is not held as strictly to the standard of placement in the least restrictive environment as school districts (see Frank G., 315 F.3d at 364).

one of the preferred items to work for (e.g., cookies or a sensory toy) that was displayed on the back of his token system chart, which would then be placed on the front of the chart to remind him of what he was working for (id.). When the student had earned five stars, he then received the preferred activity (id.). The teacher testified that the token system definitely helped decrease the student's aggressive behaviors, noting that the frequency had reduced from 15 to 20 times per day at the beginning of the school year, to between zero and five times per day by the end of the 2013-14 school year (Tr. pp. 159-160).

The evidence in the hearing record also demonstrates that the educational program at Gersh appropriately addressed the student's pre-academic needs, which was the principal area of need for this student. For example, Gersh's principal indicated that, at Gersh, they used ABA (applied behavior analysis) to address both academics and behavior; however, the school initially focused on getting students "self-regulated enough to be available to learn" (Tr. p. 122; Parent Ex. H at p. 1). In this regard, the principal's testimony indicated that an informal assessment or checklist of students' prerequisite skills for learning is completed to determine their abilities related to whether they can make eye contact, how long they are able to sit, whether they are able to follow a one-step direction or imitate a motion (see Tr. pp. 127, 128). She testified that these were the kinds of pre-readiness skills to learning that the student worked on at Gersh (Tr. p. 127). The principal indicated that these skills were addressed at Gersh two to three times per day through discreet trial teaching and the ABA methodology of behavior modification and reinforcements (and timing of reinforcements) and that data was collected on the student's performance in order to determine progress, which was reviewed on a quarterly basis (Tr. pp. 123, 127-28, 131-32; see also Tr. p. 173; Parent Exs. M; Q; T).

To address the student's communication deficits, the principal at Gersh testified that, in addition to making students available for learning prior to teaching functional life skills and functional academics, another key part of their program was to provide students with a means of communication (Tr. pp. 128-29).[17] The hearing record reflects that, at the start of the 2013-14 school year, the student primarily communicated through gestures, pointing, and pulling the therapist towards a desired object; however, testimony by the principal at Gersh indicated that they use sign language for their nonverbal students and that, at the end of the 2013-14 school year, the student was able to communicate several things using sign, including "thank you," "no more," and "sorry," as well as "all done," "hello," and "more" (Tr. pp. 129, 144-45; see also Tr. pp. 162-63; Parent Ex. K). The principal's testimony indicated that they also worked with the student to communicate his wants and needs using PECS, a picture exchange communication system, which she described as a "system of symbols and pictures" wherein the student selects a picture of something that he wants from a chart, such as water or a sandwich, and hands it to the adult who is working with him, in order to let the adult know what he wants or needs (Tr. pp. 92, 145). The student's teacher testified that the student also utilized PECS symbol pictures to choose the

[17] The hearing record reflects that academics were not addressed with the student at Gersh during the 2013-14 school year (see Parent Ex. S). A review of the student's 2013-14 report card reflects the student received ratings of "NA" (not assessed) in the areas of English language arts (ELA), science, social studies, mathematics, and career development (id.). Testimony by the principal at Gersh also indicated that the student received a rating of NA on his report card for ELA because, during the 2013-14 school year, the student "wasn't up to that yet" (Tr. pp. 180-81). She testified that they first worked with the student on pre-readiness skills, such as eye contact, and that the student would be starting to learn about letters the following school year (Tr. pp. 180-81).

preferred item with which he wanted to work, and that PECS symbol pictures were displayed on the back of his token reinforcement system (Tr. p. 159). Consistent with the foregoing, a review of the student's goals on his 2013-14 progress report from Gersh indicates that, in the area of speech-language therapy, the student worked on: responding to his name; using nonverbal methods to communicate his needs; and attending to an activity for five minutes by following simple verbal directions (Parent Ex. T at pp. 4-6). Testimony by the student's teacher further indicated that she and the student's paraprofessional would also work on sign language and using PECS symbols to communicate, in the classroom setting (Tr. p. 169).

The evidence in the hearing record also demonstrates that Gersh addressed the student's unique social/emotional needs. A review of the student's class schedule reflects that the student's social skills were addressed four times per week (see Parent Ex. I). The principal at Gersh testified that, once a means of communication was developed, staff at Gersh addressed the social/emotional needs through social interaction among students, including working on students' ability to speak to one another, sit next to one another, and participate in social activities (Tr. p. 129). The principal also indicated that there was a hierarchy of how Gersh taught socialization skills beginning with participating in a group setting and moving next to talking to one another (id.). The principal indicated that she had recently observed this initial step in the student's classroom where the class sat as a group around a table for a cooking activity and each student was asked certain questions (id.). The principal further indicated that the next step was for the students to actually talk to each other (id.). Finally, the student's report card reflected that, overall, during the 2013-14 school year, the student demonstrated emergent skills in the area of socialization (although he had not yet demonstrated the ability to participate in reciprocal conversation) (see Parent Exs. I; S).

Next, the evidence in the hearing record demonstrates that the Gersh appropriately addressed the student's related service needs. The hearing record reflects that Gersh employed its own speech-language and occupational therapists and that PT services were provided by an agency that contracted with Gersh (Tr. p. 150). Testimony by the principal at Gersh indicated that, when the student enrolled in October 2013, Gersh offered him the same related services that were on his May 2013 IEP, including speech-language therapy, PT, and OT (Tr. p. 139). Gersh also provided the student with a 1:1 paraprofessional to address his behavioral and health needs; specifically, elopement and toileting skills (Tr. p. 138). A May 2014 neuropsychological evaluation also reflects that, at that at the end of the 2013-14 school year, the student continued to receive speech-language therapy, PT, and OT (see Parent Ex. U at p. 9; see also Parent Exs. I; K; L at p. 1).

With regard to speech-language therapy, a November 3, 2013, speech-language progress report indicated that the student initially underwent a 30-day informal assessment period and, according to the student's 2013-14 class schedule, received four 30-minute speech-language therapy sessions per week at Gersh (Parent Exs. I; K). The student's speech-language goals addressed his needs related to responding to his name, using nonverbal methods to communicate his needs, and attending to an activity by following simple verbal directives (see Parent Ex. T at pp. 4-6). In addition, testimony by the principal at Gersh indicated that, in the elementary grades, because the majority of the students were nonverbal like the student in this case, the student was

brought together in a group three times per day to work on receptive and expressive language skills (Tr. pp. 123-24).[18]

The hearing record also reflects that Gersh addressed the student's OT needs by providing him with two 30-minute sessions of OT per week (Parent Exs. I; L at p. 1). A January 2014 OT annual review report indicated that the OT sessions addressed improvement of the student's play skills, his ability to follow simple one-step commands with assistance, complete a 10-piece puzzle, and turn pages of a book appropriately (Parent Ex. L at p. 1). The student's 2013-14 progress report reflected correlating goals and short-term objectives, which included increasing the student's ability to imitate actions with objects (i.e., place block in bucket, hit drum, push toy car), manipulating the pages of a book to increase his functional independence in the classroom, imitating simple lines and shapes to improve motor strength, endurance, and visual motor skills, and completing or building with puzzles, blocks and/or patterns to increase eye hand coordination and visual perceptual skills (Parent Ex. T at pp. 9-13).

Finally, the parent has demonstrated that Gersh appropriately addressed the student's need for PT by providing the student with PT services for 30 minutes, once per week (Parent Ex. I). Consistent with the goals reflected in the student's 2013-14 progress report, testimony by the student's teacher indicated that the student's PT goals included increasing the student's ability to walk on a balance beam, hopping on one foot, and catching a ball without losing his balance (Parent Ex. T at pp. 6-9). The progress report indicated that the student also worked on his ability to imitate gross motor skills with minimal assistance, such as tapping the table, clapping his hands, and waving (id. at p. 9). While at Gersh the student received less than the three 30-minute sessions of PT per week that was recommended in the student's May 2013 IEP, the 2013-14 progress report indicated, as discussed in more detail below, that the student made progress in the gross motor domain (see Dist. Ex. 1 at p. 16; Parent Exs. I; T at pp. 6-9).

2. Progress

In addition, the evidence in the hearing record demonstrates that the student made progress at Gersh during the 2013-14 school year. Generally, a finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [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,

[18] The hearing record is unclear as to whether the speech-language groups described above are in addition to the speech-language services reflected on the student's 2013-14 daily schedule (see Tr. pp. 123-24; see also Parent Ex. I).

2012]; see also Frank G., 459 F.3d at 364).[19] However, a finding of progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522, and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Here, a review of the student's 2013-14 progress report from Gersh reveals that he met a total of 11 of his 16 annual goals including: all three of his study skills goals; his mathematics goal (matching); all three of his speech-language goals; two of his four gross motor PT goals; one of his four goals related to OT; and his daily living skills goal (Parent Ex. T at pp. 1-14).[20] Additionally, the progress report indicated that the student had made progress toward the remaining gross motor goals (id. at pp. 7, 8). With regard to his unmet OT goals, comments in the progress report reflected that the focus of the student's therapy had been on sensory modulation to improve the student's focus and attention as well as on "larger, more gross, visual motor skills " that needed to be addressed prior to learning the skills initially targeted (see id. at pp. 10, 11, 12). In addition, the January 2014 OT annual review reported that the student had become more comfortable in OT sessions, was tolerating exposure to new tasks, and that although he largely required hand over hand assistance or moderate to maximum verbal cues to follow one-step directions, he had recently demonstrated ability to respond to his 1:1 paraprofessional by turning around to find her when she said his name and when she stated "we are going to the bathroom" (Parent Ex. L at p. 1). A review of the student's 2013-14 report card also shows that the student progressed in many of the skills related to work habits and classroom behavior (Parent Ex. S). Specifically, the student improved in his ability to follow class routines, complete assignments, cooperate in group activities, follow oral directions, and communicate his needs appropriately (id.). The report card also indicated improvement in the student's ability to understand general concepts in adapted physical education, in his effort and participation in art, in appropriate hygiene, and with regard to social skills, in his ability to participate appropriately in a structured group (id.).

The hearing record also reflects testimonial evidence of the student's substantial progress at Gersh during the 2013-14 school year. For example, the principal at Gersh testified that the student had made some "great gains," which included the ability to now sit in a chair and sustain attention to whoever is working with him (Tr. p. 142). The student was also now able to follow one-step directions and match colors (Tr. p. 143). She indicated that the student's interfering behaviors had decreased significantly in that the behaviors that the student had exhibited "all day long every day" were now only "momentary" (see Tr. p. 144; see also Tr. pp. 159-60). The student

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

[20] The annual goal that addressed completing puzzles and building with blocks was divided into two separate short-term objectives and, although the student did not achieve both of these objectives and thereby meet or achieve the annual goal, the progress report reflects that the student was able to meet or achieve one of these short-term objectives: to "copy a simple block pattern using 2-5 blocks in 5 minutes" (Parent Ex. T at pp. 12-13).

was now receptive to following a direction and to receiving reinforcement for doing so (see Tr. p. 144). The principal testified that ABA was responsible for making the student "available to now sit in a chair and be able to learn" (id.). With regard to the student's interfering behaviors, while the student initially required a month to master a new skill, for example, to imitate touching his nose, after a year at Gersh he was able to master newly introduced tasks within six or seven days (Tr. pp. 146-47). As noted above, the principal's testimony indicated that he was now able to communicate both with sign and using PECS (Tr. pp. 144-45). She further indicated that the student had auditory sensitivity and was unable to sit in the cafeteria when he first attended Gersh; however, the student eventually was able to eat in the cafeteria instead of his classroom (Tr. p. 145). The principal also testified that, while the student was initially afraid to sit on the toilet, he had demonstrated ability to sit and use the toilet successfully many times (Tr. pp. 145-46).

Testimony by the student's teacher also reflected the progress made by the student during the 2013-14 school year at Gersh. The teacher indicated that, when the student started attending Gersh, he was missing many pre-readiness skills (Tr. p. 163). She testified that the area that the student had made the most significant progress in was his ability to sit in a chair for an extended period of time, which allowed him to better focus and learn (Tr. p. 174). The teacher described how the student could now make eye contact for approximately seven seconds, respond to his name, imitate motor skills (such as tapping the table, clapping his hands, waving, putting his arms up, touching his nose and touching his stomach), feed himself and use utensils independently, and follow some one-step directions such as to stand up, sit down, and throw his garbage away (Tr. pp. 164-66). The teacher testified that the student was also able to match all of the shapes, and could "receptively on his own touch colors with a distraction of one other color" (Tr. p. 165).[21] Consistent with testimony by the principal, the teacher also indicated that the student was able to master new tasks more quickly (Tr. pp. 146-47, 166). With regard to group participation, the teacher testified that the student had gone from demonstrating no eye contact, no ability to sit, and no ability to attend, to sitting in group activities for up to 20 minutes (Tr. p. 168). With regard to the student's performance in OT and PT, the teacher testified that she was aware of the student's goals in these areas and that he made progress towards his related service goals (see Tr. pp. 169-71). Testimony by the student's teacher also reflects that the student progressed while at Gersh with his use of sign language—from using no signs to at least six signs (Tr. pp. 162-63). With regard to the student's social skills, the teacher testified that the student was then able to respond to his name, gives eye contact, and wave hello when greeted in the hall (Tr. p. 174). He also progressed to participate in parallel play with another student, utilizing the same play materials (Tr. p. 175).

In sum, the evidence in the hearing record reveals that the student benefitted from instructional strategies and supports provided by Gersh. Because Gersh provided the student with an educational program specially designed to meet the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419), the parents are entitled to full tuition reimbursement in the absence of any equitable considerations that might weigh against tuition reimbursement, the consideration of which follows.

[21] The student's teacher testified that after the student had mastered pre-readiness skills, they began to address colors and shapes and "things like that" (Tr. p. 165).

F. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown 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 69 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, 315 F.3d at 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]).

Turning to the issue of whether equitable considerations warrant a reduction in tuition reimbursement in this case, the district argues that the parent's letter, dated September 13, 2013, failed to constitute adequate and timely notice of his intent to unilaterally place the student at Gersh and failed to state his concerns with the educational program recommended by the CSE. A review, of the parent's letter, reflects that the parent expressed, albeit tersely, his concern with the "program recommendation," noting that the student had failed to make progress in the district's educational placement (Parent Ex. C at p. 1). In addition, the parent informed the district of his intent to enroll the student at Gersh at public expense (id.). Moreover, even if the parent's 10-day notice letter were construed to inadequately inform the district of his concerns with the recommended program, the parent identified all of his perceived concerns with the May 2013 IEP less than three weeks

later when he filed his due process complaint notice on October 2, 2013 (Parent Ex. A). Thus, by no later than October 2, 2013, the district had knowledge and was aware of the parent's perceived deficiencies with the IEP and had an opportunity to remedy those deficiencies (cf. Application of a Student with a Disability, Appeal No. 14-162). Finally, the district points to no evidence in the hearing record that would suggest that the parent failed to cooperate with the CSE or to participate and cooperate in the IEP development process.[22]

VII. Conclusion

In sum, the evidence in the hearing record reveals that the student benefitted from instructional strategies and supports provided by Gersh. Because Gersh provided the student with an educational program specially designed to meet the student's unique special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419) and because equitable considerations weighed in favor of the parent's request for relief, the necessary inquiry is at an end. The parties' remaining contentions have been considered and need not be addressed in light of the determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 24, 2014, is modified by reversing those portions that found that the district offered the student a free appropriate public education for the 2013-14 school year and that denied the parent's request for the costs of the student's tuition; and

IT IS FURTHER ORDERED that, to the extent that the parent has paid any portion of the student's tuition costs at Gersh for the 2013-14 school year, the district shall reimburse the parent for such costs upon the submission of proof of payment to the district and shall pay directly to Gersh the balance of the student's tuition for the 2013-14 school year.

Dated: **Albany, New York**
February 25, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[22] Furthermore, review of the hearing record shows that the parent has satisfied the criteria for direct payment of the student's tuition as outlined in Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 (S.D.N.Y. 2011), given the parent's legal obligation to make tuition payments to Gersh, his income as reflected on his income tax return versus the costs of Gersh, and information regarding the status of the student's mother (see Tr. pp. 187-88; Parent Exs. D; F).