The University of the State of New York

The State Education Department
State Review Officer
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No. 15-076

Application of a STUDENT WITH A DISABILITY, by her parents, 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:
Ben Kinzler, Esq., attorney for petitioners

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their daughter's tuition at the Special Torah Education Program (STEP) for the 2012-13 school year. The district cross-appeals from the IHO's determination to the extent that the IHO failed to rule on its motion to dismiss. The appeal must be dismissed. The cross-appeal must be dismissed.

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

The evidence in the hearing record regarding the student's educational history is sparse. At the time of the impartial hearing, the student had been attending STEP since the 2010-11 school year (Tr. pp. 54-55).[1] The student had resided in a group home operated by the Office for People with Developmental Disabilities (OPWDD) for approximately 13 years (Tr. pp. 111, 113).

[1] The Commissioner of Education has not approved STEP as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

According to the evidence in the hearing record, the student has received diagnoses of an attention deficit hyperactivity disorder (ADHD), microcephaly, and mental retardation with autistic features (Tr. p. 48).

A CSE convened on April 16, 2012, to develop the student's IEP for the 2012-13 school year (Parent Ex. B at pp. 6-7, 11). Finding the student eligible for special education as a student with an intellectual disability, the April 2012 CSE recommended a 12-month school year program consisting of a 12:1+1 special class placement in a specialized school with related services of individual speech-language therapy, physical therapy (PT), and occupational therapy (OT), as well as the support of a full time 1:1 crisis management paraprofessional (id. at pp. 1, 6-7).[2]

By final notice of recommendation (FNR) dated June 12, 2012, the district summarized the special class placement, 1:1 paraprofessional, and related services recommended in the April 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. C).

By letter dated October 12, 2012, a representative from the student's group home advised the district that, after visiting the assigned public school site, she was rejecting the "placement" because it was not appropriate for the student (Parent Ex. D; see Tr. pp. 114-15). The letter further indicated that, "in conjunction with [the student's] parents, arrangements ha[d] been made for [the student] to attend [STEP]" and that "they w[ould] be seeking reimbursement/funding [from the district] for the cost[s]" of the student's attendance at STEP, as well as for the costs of the related services set forth in the April 2012 IEP (Parent Ex. D).

On September 4, 2012, the parent executed an enrollment agreement with STEP for the student's attendance during the 2012-13 school year (Parent Ex. E).

A. Due Process Complaint Notice

In a due process complaint notice dated April 1, 2014, the parents alleged that the district failed to offer the student a FAPE for the 2012-13 school year (Parent Ex. A at pp. 1-2). Specifically, the parents alleged that the April 2012 CSE failed to adequately evaluate the student (id. at p. 2). The parents further alleged that the CSE failed to properly "diagnose" the student's disabilities (id.). Additionally, the parents asserted that the CSE failed to recommend sufficient and appropriate annual goals and services for the student (id.). Next, the parents contended that, whereas the IEP listed the student's eligibility category as "intellectual disability," the FNR listed "mental retardation" (id.). The parents further contended that the recommendation in the April 2012 IEP for a special class with instruction in English and the support a non-English speaking paraprofessional was not appropriate because the student "would be dependent on translation to understand the instruction" (id.). Additionally, the parents contended that the April 2012 IEP contained annual goals related to socialization that could not be implemented if the student's classroom included peers that spoke "a different language" than the student (id.). The parents also argued that the "proposed class in the proposed program" was "too large" for the student given her need for "individual attention" and "her tendency to run off" (id.). Lastly, the parents argued that

[2] The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

STEP was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of their request for relief (id. at p. 3). As relief, the parents requested "funding and/or reimbursement" of the costs of the student's tuition at STEP for the 2012-13 school year (id.).

B. Impartial Hearing Officer Decision

On June 12, 2014, an IHO (IHO 1) conducted a pre-hearing conference; however, for reasons not explained in the hearing record, the parents' attorney failed to appear (Tr. pp. 1-11). During the prehearing conference, counsel for the district informed IHO 1 that it would be making an application to dismiss the parents' claims with regard to the 2012-13 school year on the ground that such claims were barred by the two-year statute of limitations period (Tr. pp. 5-6). IHO 1 set a tentative motion schedule for the district to submit its motion in writing and for the parents to respond (Tr. pp. 7-8). On June 24, 2014, IHO 1 conducted another pre-hearing conference at which the district, for reasons unexplained, failed to appear (Tr. pp. 12-22). During this second prehearing conference, the parents' attorney represented that he would be submitting a finalized written opposition to the district's motion to dismiss and IHO 1 advised that she would make a ruling on the district's motion to dismiss shortly thereafter (Tr. pp. 19-21).

On August 27, 2014, and subsequent to the recusal of one or more IHOs, including IHO 1, a new IHO (IHO 2) was appointed to preside over this matter (Tr. p. 25). On September 5, 2014, IHO 2 conducted a prehearing conference and, on September 10, 2014, provided a summary of the prehearing conference to the parties (IHO Exhibit I; see 8 NYCRR 200.5[j][3][xi]). On November 3, 2014, the parties continued to a hearing on the merits, which concluded on May 6, 2015, after four additional days of proceedings (see Tr. pp. 1-157).[3] On the second day of the impartial hearing, the district conceded that it had not offered the student a FAPE for the 2012-13 school year and rested its case without presenting testimonial or documentary evidence (Tr. pp. 37-38).

In a decision, dated June 11, 2015, IHO 2 concluded that the parents failed to establish that STEP was an appropriate unilateral placement for the student for the 2012-13 school year (IHO Decision at pp. 8-9). First, with respect to the testimony of the STEP principal, IHO 2 noted that, given the lack of evidence regarding his educational or professional background or his observations of the student in the classroom, there was no basis for concluding that the STEP principal had expertise to evaluate the student's program (id. at p. 8). IHO 2 further noted that the hearing record did not contain any "progress reports, related service provider reports, behavior plans, testing or any other material of that nature to support th[e] testimony" of the STEP principal or how the program at STEP addressed the student's unique needs (id.). Similarly, IHO 2 found a lack of evidence regarding methodologies utilized with the student, the teacher's supervision, meetings for exchange of information about the student, or any professional development activities by the staff (id. at p. 9). Additionally, IHO 2 noted that, although the STEP principal testified that the student made "substantial progress," the testimony was not supported by documentary evidence and "was in part insufficiently specific" and "anecdotal in nature" (id.). In addition, IHO 2 was

[3] During the course of the impartial hearing, the parents filed a subsequent due process complaint notice dated March 20, 2015, with respect to the student's 2013-14 school year. In an interim order dated April 22, 2015, IHO 2 declined to consolidate the two matters, reasoning, in part, that doing so would prevent the timely conclusion of the instant matter (IHO Exhibit III at pp. 2-3).

not persuaded by the testimony of the residential director of the student's group home describing the student's progress because the residential director could not recall "significant facts" regarding the student's education and the director concluded that she "may have misremembered the degree of progress" the student made during the 2012-13 school year (id.). IHO 2 also noted that evidence of progress, while relevant, was, by itself, insufficient to establish the appropriateness of a unilateral placement (id.). Having determined that the parents did not meet their burden to establish that STEP was an appropriate unilateral placement for the student for the 2012-13 school year, the IHO declined to address whether equitable considerations weighed in favor of the parents' request for relief (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that IHO 2 erred in finding that they failed to meet their burden to prove that STEP was an appropriate unilateral placement for the student for the 2012-13 school year. As a preliminary matter, the parents argue that, in making her determination, IHO 2 failed to apply applicable law or misapplied applicable law. The parents further argue that IHO 2 demonstrated bias by attacking the credibility and/or competency of the parents' two witnesses. The parents assert that that the evidence in the hearing record demonstrates that STEP provided the student with educational instruction designed to meet her needs and that the student received meaningful educational benefit. The parents request the "relief sought [] in their due process" complaint notice.[4]

In an answer and cross-appeal, the district responds to the parents' petition by variously admitting and denying the allegations raised and asserting that IHO 2 correctly determined that the parents failed to demonstrate that STEP was an appropriate unilateral placement for the student for the 2012-13 school year. In its cross-appeal, the district asserts that IHO 2 failed to rule on its motion to dismiss, which the district claims it raised as an affirmative defense during the impartial hearing. The district's motion to dismiss dated June 17, 2014 is attached as an exhibit to its cross-appeal (see generally Cross-Appeal Ex. 1).

In an answer to the district's cross-appeal, the parents argue that the district's cross-appeal should be dismissed and noted that they submitted opposition papers in response to the district's motion to dismiss on June 26, 2014 and that IHO 1 denied the district's motion to dismiss in a written decision.

In a reply, the district argues that the parents' answer to the district's cross-appeal should be rejected because the parents failed to properly serve the answer to the cross-appeal and provide proof of service upon the district's request. However, in a letter dated September 29, 2015, the district made a request to withdraw its reply.

[4] In the future, the parents' counsel is reminded that the petition should set forth their request for relief with particularity, in light of the hearing record that has been developed rather than incorporate by reference the relief sought in the due process complaint notice.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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, 9-14 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. Aug. 19, 2008]. A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law

§ 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

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).

VI. Discussion

A. Preliminary Matters

1. Cross-Appeal

At the outset, it should be noted that an inordinate amount of time and energy has been expended in this case on clarifying and correcting routine procedural matters that are fairly commonplace in legal practice.

As noted above, the district argues in its cross-appeal that IHO 2 failed to rule on its motion to dismiss. Related to this defense, the district included with its cross-appeal a copy of its written motion to dismiss, and the parents included reference in their answer to the cross-appeal to the existence of their written opposition papers and a written decision on the motion by IHO 1 but failed to submit such documents to the Office of State Review. Under State regulation, "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" and "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" shall be included as part of the record of an impartial hearing (8 NYCRR 200.5[j][5][vi][b], [c]). Accordingly, under State regulations, the parents' opposition papers and IHO 1's written decision on the motion should have been made part

of the hearing record upon submission to IHO 1 and thereafter submitted to the Office of State Review by the district.[5]

Because they were referenced by both parties in their papers and clearly not referenced in IHO 2's decision from which both parties appeal, the need for a complete hearing record became apparent and, , by letter dated September 2, 2015, the Office of State Review directed the parties to consult with each other to ascertain whether the documents were missing from the existing hearing record and, if the parties could not agree, to notify the Office of State Review by September 9, 2015 in writing setting forth the reasons for their disagreement. By letter dated September 9, 2015, the district represented that the two documents were not entered as part of the hearing record, but without any further explanation. The district also indicated that it had tried to reach the parents' attorney to no avail.

More troubling, is that as of the date of this decision, the Office of State Review has not received a response from the parents' attorney and, to date, the parents' opposition papers and IHO 1's written decision on the motion have not been received by this Office. Further, neither party has offered an explanation regarding the outstanding documents.[6] Counsel for the parties, in exchange for the privilege of practicing, have responsibilities to the legal system in which they practice and this system of due process administrative review in particular cannot function effectively within the stringent deadlines imposed by law if counsel for the parties exhibit such inattentiveness to specific directives as basic as identifying and submitting elements of the hearing record already in existence.

Although partially responsive, the district is still not without fault in these procedural nonconformities. Because an SRO is required to examine the entire hearing record prior to rendering a decision and is charged with "conduct[ing] an impartial review of the findings and decision appealed," the district's failure to file the complete hearing record, has significantly impeded the review process of an already prolonged case (see 34 CFR 300.514[b][2][i], 300.515[b]; 8 NYCRR 200.5[k][2]). Such nonconformance, in this case in particular, has the potential to have particularly negative consequences for the student, who is now 19 years old and resides in a group home and whose parents reside in a home for disabled adults (Tr. pp. 5, 111, 113).

Given the unrebutted representations that a written decision was rendered on the motion to dismiss by IHO 1, I decline to simply guess at the substance of that decision and cannot review

[5] In addition, it was incumbent on IHO 1 to include items such as the motion to dismiss and the responsive papers in the administrative record. As a consequence of this failure, there is nothing in the hearing record that indicates that IHO 2 was made aware that such a motion was made. Thus, I find it difficult to find any fault in IHO 2 for not ruling on a motion when there is no indication in the hearing record that IHO 2 was made aware of the district's motion to dismiss.

[6] As another example of a lack of communication between the parties, the district attached several emails to its reply to the parents' answer to the cross-appeal, in which the district requests that the parents' attorney provide it with proof of service of the parents' answer to the cross-appeal. Although the district has since withdrawn its reply, the emails demonstrate the failure of the parents' attorney to reply to a simple request by the district. It should go without saying and pursuant to basic civility in legal practice, that matters of this kind should not require intervention by the SRO.

the decision for error without having a copy of the same in the administrative hearing record. Moreover, given its concession that it denied the student a FAPE and its decision not to offer any evidence at the impartial hearing, it is unclear upon what evidentiary basis the district could assert that the parents' claims accrued (see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014] [noting that because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry"]). Accordingly, the district's cross-appeal is dismissed for failure to file elements of the hearing record or otherwise offer a satisfactory explanation for each missing document.

2. IHO Bias

The parents argue that IHO 2 exhibited "unjustified bias" by attacking the credibility and competency of the parents' two witnesses in her decision (Pet. ¶ 15). Based on a careful review of the record, the parents' allegations are without merit.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066). An IHO must also render a decision based on the hearing record (see, e.g., Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064).

The parents' allegations of IHO bias miss the mark by a significant margin. Contrary to the representations made by parents' counsel, a review of IHO 2's decision reveals that IHO 2 did actually not make any credibility determinations regarding the testimony of the parents' two witnesses.[7] First, with regard to the testimony from the STEP principal, IHO 2 noted in her decision that there was no information in the hearing record to conclude that the STEP principal had expertise to evaluate the private school program (IHO Decision at p. 8). In addition, IHO 2 noted that the hearing record did not contain any documentary evidence to support the testimony from the STEP principal, including testimony regarding the student's progress (id.). With respect to the testimony from the residential director, IHO 2 noted that she was not "persuaded" by her testimony because she could not "recall significant facts concerning the student's education" (id. at p. 9). These portions of IHO 2's decision clearly amount to explanations of the weight she afforded the conflicting evidence in the case, not credibility determinations directed at the STEP principal (see, e.g., S.W. v New York Dept. of Educ., 2015 WL 1097368, at *15 n.6 [SDNY Mar.

[7] Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist., 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

12, 2015] [noting that an IHO's decision to discredit portions of a document was not based on a credibility determination of a witness and that the SRO had the same ability to weigh the evidence]; see, e.g., Matrejek, 471 F. Supp. 2d at 429).

Therefore, to the extent that the parent disagrees with the conclusions reached by IHO 2—or with the weight afforded to testimonial evidence presented at the impartial hearing by the parents' two witnesses—such disagreement provides no basis at all for finding actual or apparent bias by an IHO (see Application of a Student with a Disability, Appeal No. 13-083). Overall, an independent review of the hearing record demonstrates that the parents had the opportunity to present their case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Thus, the parents' assertions of IHO bias are dismissed.

B. Unilateral Placement—Appropriateness of STEP

In this case, the district conceded that it did not offer the student a FAPE for the 2012-13 school year; consequently, the next issue is whether the parents' unilateral placement of the student at STEP during the 2012-13 school year was appropriate. For the reasons that follow, the evidence in the hearing record supports the IHO's finding that the parents did not meet their burden to establish that STEP provided the student with instruction specially designed to meet her unique needs and, therefore, that STEP was not an appropriate unilateral placement for the student for the 2012-13 school year.

1. IHO's Application of the Law

On appeal, the parents assert that IHO 2 failed to apply applicable law or misapplied applicable law when reaching her determination. Upon review, the evidence in the hearing record does not support the parents' assertions.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005]). However, New York State has placed the burden of proof 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]). Further, as described above, 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). To qualify for reimbursement under the IDEA, parents need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. (Gagliardo, 489 F.3d at 112, see Frank G., 459 F.3d at 364-65).

In the instant case, there is no evidence that IHO 2 failed to apply or misapplied applicable law in reaching her determination. On the contrary, IHO 2 cited to notable Second Circuit Court of Appeals decisions such as Frank G. and Gagliardo, as well as the New York Education Law in making her determination that the parents failed to meet their burden to establish that STEP was an appropriate unilateral placement for the student. Although the parents disagree with the

conclusion reached by IHO 2, such disagreement does not demonstrate that IHO 2 failed to apply or misapplied applicable law in her determination. Furthermore, I have conducted an impartial review of the entire hearing record and rendered an independent decision thereon (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012]), and have found no reason to disturb the determination of IHO 2 regarding the appropriateness of the parents' unilateral placement of the student.

2. The Student's Special Education Needs

In this instance, although the student's special education needs are not directly in dispute, a discussion thereof facilitates a determination regarding whether the parent's unilateral placement at STEP was appropriate. The hearing record does not include any documentary evidence, such as evaluations, assessments, or progress reports, detailing the student's needs, however, the parents' two witnesses did provide at least a partial explanation of the student's needs. Under the circumstances of this case—where the district conceded that it failed to offer the student a FAPE for the 2012-13 school year and elected to not submit any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs—the district has effectively abandoned any opportunity to assert its position regarding the student's needs (Tr. pp. 37-38). Accordingly, to the extent that the information in the hearing record is not sufficiently accurate or complete for the purposes of determining the student's needs, the responsibility for such deficiency has been held to lie with the district and not the parent (see 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 lay with the district]).

According to the STEP principal, the student functioned at a pre-kindergarten to kindergarten level in mathematics and reading, was very distractible and unfocused, demonstrated behaviors such as biting herself, kicking, screaming, throwing herself, and walking around the classroom, and became "very jumpy" (Tr. pp. 53, 55, 61, 67). Additionally, the principal testified that the student demonstrated self-stimulatory behaviors, spoke in one to two word phrases, "didn't speak perfectly clear," "grab[bed] things and swallow[ed] things," and did not work or play with others, listen, or follow directions (Tr. pp. 50-51, 53-55, 59-63). The principal further testified that the student had a "visual problem" where the student did not "look forward" but instead "look[ed] sideways most of the time" (Tr. pp. 63-64). The STEP principal also testified that the student's face would be "slightly down and looking slightly up" and that student did not "look[] at things from the correct angle" (id.). In addition, the STEP principal explained that the student exhibited difficulty "focus[ing] on letters" and, as a result, the staff at STEP did not "really get too much into the ABC's" and similar activities, noting that such activities were "frustrating" for the student (id.). Additionally, according to the principal, when the class went to the store, the student could not see where she was going and, as a result, did not look for danger, knocked things over, and could not find products such as milk (Tr. pp. 64-65). The principal also testified that the student had difficulty swallowing, which caused her to drool, required prompting to swallow, and resulted in a choking danger because the student did not control the amount of food she placed in her mouth (Tr. pp. 59, 63-64). Further, the student threw herself back and screamed during toileting, resisting assistance (Tr. p. 67).

The residential director also testified regarding the student's needs and behaviors (see Tr. pp. 111-149). Consistent with the principal's testimony, the residential director testified that with respect to hygiene and activity of daily living skills (ADLs), the student went into the bathroom but was completely dependent, requiring "hands on assistance" for toileting (Tr. pp. 116-17, 123). The residential director further testified that the student was unable to hold a fork or spoon and was in danger of choking because of the large pieces of food she placed in her mouth (Tr. pp. 124, 127). Additionally, with respect to academics, the residential director noted that the student was "on a very low level" and had not learned sight words, colors, counting, or letters (Tr. pp. 125-27). The residential director also testified that the student's attempts at communication were not understood and that, with respect to social skills, the student related to others by jumping, approaching, and touching them, and that she had not been "really appropriate with her social matters" (Tr. pp. 125-26, 129-30). Further, with respect to the student's gross motor skills, the residential director testified that the student's gait was "not so straight" and that she would often fall (Tr. p. 128).

Thus, the testimonial evidence provided by the parent's two witnesses in this case was sufficient to identify the student's unique individual needs; however, the parents did not thereafter meet their burden by providing sufficient evidence to establish that STEP provided the student with instruction and services specially designed to meet those needs.

3. Specially Designed Instruction

The parents argue that, contrary to the IHO's findings, the hearing record contains sufficient evidence describing how the educational program at STEP addressed the student's needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

According to the testimony from the STEP principal, during the 2012-13 school year, approximately 30 students attended the school (Tr. pp. 47-48). The STEP principal testified that the student was in a "small class" that consisted of four students with a teacher, an assistant, and the student's "para" (Tr. pp. 48, 51, 88). According to the STEP principal, "all the staff [wa]s bilingual" and the student's teacher and the program director at STEP were licensed special education teachers (Tr. pp. 52, 60). In addition, the principal testified that the student was in a classroom with other students within three years of her age (Tr. pp. 89-90).

Notwithstanding the foregoing, the hearing record contains insufficient evidence regarding the manner in which STEP addressed the student's special education needs. As previously noted, no documentary evidence regarding the student's program at STEP was introduced during the impartial hearing. Accordingly, testimonial evidence provided the only insight into the student's program at STEP and, although testimonial evidence may provide a sufficient basis for a finding that a unilateral placement met the student's needs, in this instance the proffered testimony did not sufficiently establish how or to what extent STEP adapted the content, methodology, or delivery of instruction to meet the student's unique special education needs.

For example, when referencing the STEP daily schedule, the principal testified, "there is nothing that we do that's just only for fun" and "everything in the day has a benefit to it" (Tr. pp. 86-88, 90; see Parent Ex. H). Additionally, the principal testified that "every single thing" that the staff did with the students at STEP—such as "coming in, walking up the stairs, using the elevator, hanging up [a] coat, eating, playing"—was aimed at helping the students achieve independence or "a higher level" skill (Tr. p. 91). However, while generally describing the daily schedule as it applied to all students at STEP, the hearing record does not include evidence to further describe how the STEP staff adapted these activities or the delivery of instruction during these tasks to meet the student's unique needs (see generally Tr. pp. 1-157; Parent Exs. A-I; IHO Exs. I-VI).

Regarding academic, vision, and ADL skills, the principal testified that it was hard for the student to focus on letters, therefore, STEP did not "really get too much into the ABC's and stuff like that" due to her vision difficulties and resultant frustration with such tasks (Tr. p. 64). Rather, the student worked "more on sight words . . . and larger things" (id.). In addition, the principal testified that STEP used pictures, "big signs," other students, and objects in the room to "get [the student] to find them," look around, and identify happy and sad (Tr. pp. 64-65). When out in the community, STEP staff provided verbal prompts to the student to look at the traffic light to improve safety awareness (Tr. pp. 65-66). The principal also stated that the student was "learning how to follow instructions . . . and fulfill a task," and learning hygiene/toileting skills, but did not otherwise indicate how this learning was accomplished (Tr. pp. 54, 67).

Next, the principal testified that STEP "worked with" the student's residential director and the student's speech-language therapist to address the student's drooling, food stuffing, and swallowing issues, but, again, the principal did not specify how staff specifically addressed these needs (Tr. pp. 59-60). He further testified that the student learned how to express her wants and needs, but other than indicating the student required "prompting" to "swallow and then respond clearly," the principal did not describe what that entailed (Tr. pp. 62-63).

The principal further testified without elaboration that the school implemented a behavioral modification program for the student and that the student "worked on" how to follow instructions of a game, play with others "while behaving," and learn how to control her behavior during activities such as playing games and completing arts and crafts activities (Tr. pp. 60-62).

Lastly, with respect to the student's related services, the principal testified that the student received "the full amount of services for all 12 months," including speech-language therapy, OT, and PT (Tr. pp. 51-52; Parent Ex. F). However, aside from the student's class schedule at STEP which indicates that STEP provided the student with the aforementioned related services, the hearing record fails to contain sufficient evidence regarding which areas of need the particular related services addressed (see generally Tr. pp. 1-157; Parent Exs. A-I; IHO Exs. I-VI).[8] Without sufficient evidence, a determination cannot be made regarding whether the related services the student received at STEP addressed the student's needs (see L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's]

[8] For example, the student had deficits in the areas of articulation and swallowing; however, the evidence in the hearing record did not identify whether both, one, or neither of these areas of needs were addressed at STEP. (see Tr. pp. 50-51, 53-55, 59-63).

qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

Upon consideration of the foregoing, although the STEP principal's testimony generally described the student's school, classroom setting, related services, and the activities the student participated in at STEP, the hearing record as a whole lacks sufficient information regarding how STEP actually provided educational instruction that was specially designed to meet the unique needs of the student. For example, the supports described by principal, such as prompting and small class sizes (Tr. pp. 48, 52-53), are the type of supports from which any student would receive benefit, rather than special instruction tailored to this student's unique needs (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]; Doe v. E. Lyme Bd. of Educ., 790 F3d 440, 451 [2d Cir 2015] [affirming the determination that small class size and modified grading, alone, did not constitute special education]; Hardison v. Bd. of Educ., 773 F.3d 372, 387 [2d Cir. 2014] [upholding an SRO's finding that the parents unilateral placement of the student was not appropriate because the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress"]; see also Frank G., 459 F.3d at 365 [declining to determine whether small class size alone constituted special education]).

Overall, while the STEP principal generally described a limited number of strategies to address life skills and the student's visual needs, the proffered testimony by the STEP principal provides very little, if any, evidence regarding how STEP provided the student with specially designed instruction to meet her unique needs. Although it is a significant area of need, the hearing record is largely silent on how STEP addresses the student's vision deficits.[9] Similarly, the residential director testified that "the STEP school gave a lot to [the student]," and identified generally what the student was working on for the 2012-13 school year, however, she did not identify how instruction was being provided at STEP (Tr. pp. 125, 128). Accordingly, the evidence in the hearing record cannot support a finding that STEP was an appropriate unilateral placement for the student for the 2012-13 school year and thus there is insufficient reason to overturn the IHO 2's ruling.

[9] I found the one example of prompting the student to look at the traffic signal supportive of the manner in which they approached her vision deficit, but in these circumstances one example is insufficient evidence to describe how a unilateral placement addresses a significant area of deficit. The student should be working on more than just crossing the street in terms of functional skills that are impacted by her reduced vision—and that may possibly be true—but the evidence is not actually in the hearing record.

4. Progress

Finally, in support of their argument that STEP was appropriate for the student, the parents argue that the student made progress at STEP. Based on the testimonial evidence provided by the STEP principal and residential director, the student demonstrated progress with respect to behavioral, social and ADL skills (see Tr. pp. 53-56, 59-63, 65-68, 91-92, 117-30).

However, despite the testimonial evidence in the hearing record supporting the parents' contentions that the student made progress at STEP, the Second Circuit has 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"]).

While I am sympathetic to the student and the parents' circumstances and understand the parents' placement of the student at STEP, which offered the type of environment that resulted in progress in the student's behaviors, social skills, and ADLs, the student's progress at STEP, alone, does not overcome the lack of evidence in the hearing record establishing that STEP provided the student with specially designed instruction to address her needs. Moreover, the hearing record lacks any evidence pertaining to the student's progress in social skills, ADL's, motor skills, communication and academics, such as evaluations, assessments or progress reports.

Based on the foregoing, the IHO correctly found that the parents did not meet their burden to establish that STEP's educational program provided the student with educational instruction specially designed to meet her unique needs (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365; see also Rowley, 458 U.S. at 188-89).

VII. Conclusion

The hearing record provides evidence of a student and her family for which one can only experience empathy. However, such empathy is not a sufficient basis upon which to find that the parents have met their burden of proof or to overturn the IHO's reasoned conclusion that that STEP was not appropriate when measured by evidence available in this case. In summary, having

determined that the evidence in the hearing record demonstrates that the parents failed to sustain their burden in establishing the appropriateness of the student's unilateral placement at STEP for the 2012-13 school year, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations supported the parent's requested relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 9, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER