The University of the State of New York

The State Education Department
State Review Officer
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No. 16-018

Application of a STUDENT WITH A DISABILITY, by his 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:
Law Offices of Regina Skyer and Assoc., attorneys for petitioners, Jesse Cole Cutler, Esq., and Linda Goldman, Esq., of counsel

Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, Esq., of counsel

DECISION

I. Introduction

This State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see D.F. v. New York City Dep't of Educ., 2016 WL 1274579 [S.D.N.Y. Mar. 16, 2016]). This proceeding initially arose 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 parents) previously appealed from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Cooke Center Academy (Cooke) for the 2012-13 school year. The 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

As indicated above, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see D.F., 2016 WL 1274579). The factual and procedural background as it relates to this appeal is discussed below.

From kindergarten through second grade the student attended an 8:1+2 special class at an approved nonpublic school (see Tr. pp. 409-13; Dist. Exs. 5 at p. 1; 8 at p. 1). Beginning in third

grade and continuing into fourth grade (the 2011-12 school year), the student attended Cooke (Tr. pp. 204-05, 411-14; Dist. Ex. 9 at p. 1).

On March 22, 2012, the CSE convened to develop an IEP for the 2012-13 school year (Dist. Ex. 3 at pp. 1, 11). Finding that the student remained eligible for special education and related services as a student with autism, the March 2012 CSE recommended 12-month services in a 6:1+1 special class placement at a specialized school (id. at pp. 1, 7-11).[1]

By a letter dated June 15, 2012, the parents informed the district that until an appropriate program and placement was recommended and the district cured the procedural and substantive defects that they believed were present within the March 2012 IEP, they intended to enroll the student at Cooke and seek funding from the district (Parent Ex. A at p. 2). Specifically, as relevant to this appeal, the parents indicated that the student would not be appropriately placed in a 6:1+1 special class placement in a specialized school (id.). The parents indicated that due to their concern that the student required appropriate peer grouping in the classroom and the fact that the March 2012 CSE essentially admitted that the district did not have supports sufficient for the student in a 12-student special class in the public schools and would not have suitable peers in the recommended 6:1+1 special class, it was imperative that the district offer a timely final notice of recommendation (FNR) identifying the student's particular school so that the parents could visit the proposed public school site and assess its appropriateness (id.).

In a FNR dated June 21, 2012, the district identified the particular school to which it assigned the student for the 2012-13 school year (Dist. Ex. 10).

By a letter dated June 29, 2012, the parents indicated that they visited the assigned public school site on June 26, 2012 and argued that it was inappropriate for the student (Parent Ex. C at pp. 1-3). The parents notified the district that they could not "accept this placement" but remained open to considering other public school sites where the student's peer social needs could be met (id. at p. 3). The parents also asserted that the "educational environment that was recommended" was more "restrictive" than the student's current classroom environment and was inappropriate (id.).

In a due process complaint notice dated July 11, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 1 at pp. 1-5). Relevant to this appeal, the parents alleged that the March 2012 CSE's recommendation of a 6:1+1 special class in a specialized school was "wholly inappropriate and overly restrictive" for the student (id. at p. 3).

An impartial hearing convened on September 11, 2012 and concluded on December 14, 2012, after four days of proceedings (see Tr. pp. 1-539). In a decision dated January 14, 2013, the IHO concluded that the district offered the student a FAPE for the 2012-13 school year (IHO Decision at pp. 14-17). As relevant to this appeal, the IHO found that a 6:1+1 special class was not too restrictive given the student's extensive sensory and management needs (id. at p. 14). The IHO noted that it was undisputed that the March 2012 IEP did not specifically provide for mainstreaming opportunities despite recommendations in the April 2010 speech-language

[1] The March 2012 CSE specifically recommended a 6:1+1 special class for instruction in English language arts (ELA), math, social studies, and science (Dist. Ex 3. at p. 8).

progress note and the June 2012 neuropsychological evaluation report that the student be given an opportunity to interact with typically developing peers (id.).[2] The IHO also found that the hearing record failed to establish that the student required mainstreaming in order to make progress (id.). The IHO further found that the lack of specifically articulated mainstreaming opportunities on the IEP did not rise to the level of a denial of FAPE (id.).

In an appeal from the IHO's decision, an SRO affirmed the IHO's decision, specifically finding that the March 2012 CSE's placement recommendation—namely, a 6:1+1 special class—would have provided the student with educational benefit (Application of a Student with a Disability, Appeal No. 13-021).

The parents sought judicial review of the SRO's decision in the United States District Court for the Southern District of New York (D.F., 2016 WL 1274579). The District Court remanded the case to the Office of State Review for clarification and additional fact-finding "if necessary," as to whether a 6:1+1 special class placement in a specialized school complied with the IDEA's mandate that students be educated in the least restrictive environment (LRE) (D.F., 2016 WL 1274579 at *11).

The District Court found that the SRO did not properly evaluate the parents' claim in their due process complaint notice that the March 2012 CSE's recommendation of a 6:1+1 special class in a specialized school was "wholly inappropriate and overly restrictive" (D.F., 2016 WL 1274579 at *12; see Dist. Ex. 1 at p. 3). The District Court found that the SRO did not provide an explanation as to why the student's needs could not be met in a less restrictive environment than a 6:1+1 special class (D.F., 2016 WL 1274579 at *12). The District Court noted that the SRO was required to apply the test articulated by the Second Circuit in P. v. Newington 546 F.3d 111, 118-19 [2d Cir. 2008] and determine whether the district's recommended placement mainstreamed the student to the maximum extent appropriate (id.). The District Court noted specific evidence in the hearing record which bore on this issue (id. at *13).

The District Court next considered the IHO's decision and concluded that the IHO, like the SRO, did not apply the Newington test to determine whether the student's recommended placement was in the LRE (D.F., 2016 WL 1274579 at *13). The District Court held that the IHO erred in finding that the district must provide a placement with mainstreaming only to the extent that the student was found to require mainstreaming (id.). The District Court noted that a district must maximize a student's mainstreaming opportunities regardless of whether a student is found to require mainstreaming or not (id.).

The District Court concluded that the SRO and the IHO did not make a proper determination as to whether the March 2012 CSE's recommended placement was in the LRE (D.F., 2016 WL 1274579 at *14). The District Court found that the hearing record contained substantial evidence on the appropriateness of the district's recommended placement, and determined that the SRO was better suited to evaluate that evidence (id.). Accordingly, the District Court remanded the case to the undersigned with directions to consider the standard set out in Newington and, if it is determined that the district failed to offer the student a FAPE, to evaluate whether Cooke was

[2] The IHO mistakenly cited to nonexistent Dist. Ex. 11; it appears she meant to cite to Dist. Ex. 8 (see IHO Decision at p. 14; Dist. Ex. 8 at p. 7).

an appropriate placement and whether equitable considerations favored reimbursement of the student's tuition for the 2012-13 school year (id.).

Upon remand, I reviewed the record of the impartial hearing proceedings, prior State-level submissions and administrative decisions, as well as the District Court's order of remand. As part of the review process, the parties were directed in a letter dated April 6, 2016 to notify the Office of State Review in writing of their respective positions regarding the adequacy of the hearing record to address the remanded issue and their respective positions on the remanded issue.

Both the district and the parents submitted memoranda presenting arguments related to the remaining issue as remanded by the Court.

IV. Arguments upon Remand

In their submission on remand, the parents assert that the March 2012 CSE failed to consider a continuum of placements that could serve the student's needs in the LRE. The parents contend that the hearing record demonstrates that the March 2012 CSE's recommendation of a 6:1+1 special class in a specialized school was based principally upon what services were available within the district on a 12-month basis. The parent argues that the hearing record shows that the March 2012 CSE recommended a specialized school because the district only had 10-month programs available in community schools and the March 2012 CSE agreed that the student needed a 12-month program.

In its submission on remand, the district initially states that the parties conferred and agreed that there is an adequate record to address the remanded issue. The district next contends that the March 2012 CSE properly considered a continuum of related services and options, and found the optimal balance between mainstreaming and the ability to meet the student's needs. The district argues that the March 2012 CSE's recommendation of a 6:1+1 special class in a specialized school was appropriate for the student given his significant needs and, as such, overrides any requirement that the student be provided with mainstreaming opportunities. Additionally, to support its arguments, the district points to the lack of difference in restrictiveness between Cooke and the 6:1+1 special class in a specialized school and the testimony of the student's Cooke teacher during the 2012-13 school year that there is no general education population at Cooke and the student did not have the skills to interact with general education peers.

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; Newington, 546 F.3d at 118-19; 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 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. March 2012 IEP: LRE

The issue on remand is whether the student's recommended placement in a 6:1+1 special class in a specialized school is appropriate, and specifically whether this placement complies with the IDEA's mandate that students be educated in the LRE. The parents argue that the hearing record demonstrates that the March 2012 CSE's recommendation of a 6:1+1 special class in a specialized school was based principally upon consideration of what was available within the district's continuum of 12-month services. The district argues that the March 2012 CSE properly considered a continuum of related services and options to find the optimal balance between mainstreaming and the ability to meet the student's needs.

The IDEA requires that a student's recommended program must be provided in the 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir.1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the

inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[3]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

Preliminarily, it is useful for purposes of this remand to review how the LRE issue was addressed in the parents' due process complaint notice and during the impartial hearing. Although the parents' due process complaint notice contains the phrase "overly restrictive," the bulk of the parents' expressed concerns with the March 2012 CSE's recommendation of a 6:1+1 special class related to the functional grouping of an observed classroom consisting entirely of special education students within the assigned public school site (see Dist Ex. 1 at pp. 1-5). Indeed, with the exception of the phrase "overly restrictive," the relevant paragraph in the due process complaint notice pertains solely to the parents' concerns with the functional grouping of the observed classroom and the district's alleged admission that a 6:1+1 configuration was inappropriate (id. at pp. 3-4; see also id. at pp. 4-5 [detailing additional parental concerns with functional grouping]).[4] Similarly, the focus of the two June 2012 letters in which the parents rejected the district's recommended services was the functional grouping of the assigned public school classroom (see Parent Exs. A at pp. 1-2; C at pp. 1-3). The parties did not discuss the issue of LRE at length at the impartial hearing (that is, the extent of the student's access to nondisabled peers); indeed, the IHO identified the source of the LRE argument as the parents' closing argument, not their due process complaint notice (IHO Decision at p. 14 [citing Tr. p. 522]).

Turning to the evidence in the hearing record concerning the student's program and placement for the 2013-2014 school year, present at the March 2012 CSE meeting were a district special education teacher (who also served as the district representative), a district school psychologist, the student's special education teacher from Cooke via telephone, a Cooke representative, and the student's parents (Tr. pp. 24-25, 205, 415-17, 421-22, 486; Dist. Exs. 3 at p. 13; 4 at p. 1; Parent Ex. B at p. 1). The district special education teacher stated that in developing the student's March 2012 IEP, the March 2012 CSE considered the student's "most recent" (March 2012) Cooke progress reports and report cards, the previous year's IEP, and input from the student's teacher at Cooke and the parents (Tr. pp. 25-29; see also Dist. Ex. 9; Parent Ex. B at pp. 1-3). The district special education teacher stated that there could have been other documents available to the March 2012 CSE, but that for this particular annual review the student's progress reports were the "significant" documents (Tr. p. 27).

The March 2012 IEP's present levels of performance section mirrored the March 2012 Cooke progress report in stating that although the student's interfering behaviors occurred with

[3] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

[4] A portion of the paragraph reads: "the [p]arents informed the [CSE] that [the student] was currently functioning well in a classroom of 12 students, many of whom were typically social. The parents questioned whether the 6:1:1 program could provide appropriate peer social models . . ." (Dist. Ex. 1 at p. 3).

less frequency and that he could be redirected, at times the student would scream, bang his head, and stomp his feet (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 9 at p. 2). In addition, the March 2012 IEP stated that the student's sensory processing difficulties often impeded his ability to remain focused for classroom activities, that he sometimes needed support during transitional periods, and that he had difficulty with flexibility and changes in routine (Dist. Ex. 3 at p. 1; see Dist. Ex. 9 at p. 2). Also, the March 2012 IEP provided environmental, human, and material resources to address the student's identified academic and social/emotional needs including: small group instruction, direct teacher modeling, one-to-one modeling, sensory breaks, redirection to task, time to employ strategies when feeling frustrated, and the use of a sensory diet to aid self-regulation (Dist. Ex. 3 at pp. 1-2). A review of additional evaluative information, also available to the March 2012 CSE, revealed recommendations for a highly structured language-based school, with a low teacher to student ratio (Dist. Ex. 8 at p. 7).

Regarding participation in activities with nondisabled peers, the March 2012 IEP indicated that the cognitive, social, sensory, and educational needs of the student precluded placement in a general education environment (Dist. Ex. 3 at p. 10). A review of the March 2012 IEP and two sets of accompanying meeting minutes—one created by the district, and another created by Cooke staff—reveals that the March 2012 CSE only considered special class placements for the student (Dist. Exs. 3 at pp. 8, 12; 4 at pp. 1-3; Parent Ex. B at pp. 2-3). Further, the meeting notes prepared by a Cooke employee indicated that the parents wished that the CSE could provide a placement comparable to the student's current placement at Cooke (Parent Ex. B at p. 2).[5]

Turning to the first prong of the Newington test—whether the student can be educated satisfactorily within a regular education environment—the parties do not articulate any meaningful arguments relating to this issue and appear to concede that the answer is no. This conclusion is supported by the evidence in the hearing record, which supports the March 2012 CSE's recommendation to place the student in a special class setting, consistent with his then-current placement at Cooke, as opposed to a general education class setting. Further, and consistent with the findings in the prior decision by the undersigned, the March 2012 CSE's recommendation of a 6:1+1 special class was reasonably calculated to enable the student to receive educational benefit for the 2012-13 school year (Application of a student with a Disability, Appeal No. 13-021).

The second prong of the Newington LRE test—whether the district mainstreamed the student to the maximum extent appropriate—involves determining whether the school made efforts to include the student in school programs with nondisabled students whenever possible (Newington, 546 F.3d at 120; see also L.G. v. Fair Lawn Bd. of Educ., 486 Fed. App'x 967, 973 [3d Cir. Jun. 28, 2012]). A review of the hearing record shows that the district failed to include the student in school programs with nondisabled students to the maximum extent appropriate.

While the district special education teacher testified that the student's progress reports were the "significant" documents reviewed at the March 2012 CSE meeting, the March 2012 CSE had a number of additional documents available which provided recommendations for the student's participation in programs with typically developing peers (Tr. p. 27; see Dist. Exs. 7-8). In an April 2010 speech and language progress note, the speech-language pathologist recommended that the student be given opportunities to interact with typically developing peers (Dist. Ex. 7 at p. 2).

[5] At the time of the March 2012 CSE meeting the student was in a classroom of 12 students (Tr. pp. 418-19).

He stated that as the student developed more language, became more receptive to the language of others, and utilized language more appropriately and at a higher level, peer interactions would become a critical part of his learning (id.). Further, the speech-language pathologist stated that the student's opportunities to interact with typical peers should be incorporated into ongoing strategies in an environment where teachers and therapists were trained to facilitate such interactions with clear goals and objectives (id.). An independent evaluator, who conducted a June 2010 neurodevelopmental evaluation, recommended that the student attend a special education program embedded in a mainstream facility so that the student would be surrounded by typical role models and receive access to structured learning opportunities with peer models (Dist. Ex. 8 at p. 7).

At the March 2012 CSE meeting, the parents and Cooke staff emphasized the student's social needs (see Tr. pp. 85-86, 226-27; Dist. Exs. 3 at pp. 1, 12; 4 at p. 1). The district special education teacher stated that the parents and the Cooke representative discussed the student's need for appropriate peer models at the March 2012 CSE meeting (Tr. pp. 85-86). Parental input—which was included in the March 2012 IEP—described the student as a social child who needed to interact with his peers (Dist. Ex. 3 at p. 12; see also Dist. Ex. 4 at p. 1). The March 2012 IEP also indicated that the parents felt that the student needed a program which would focus on extending conversations, turn taking, social cues, and "understanding appropriate conversations for friends and strangers" (Dist. Ex. 3 at p. 1). According to testimony from a Cooke representative who attended the March 2012 CSE meeting, both the parents and the student's teacher at Cooke were concerned that there were not enough students in a 6:1+1 special class with whom the student could socialize; the teacher was specifically concerned that there would not be enough appropriate role models for the student (Tr. pp. 226-27; see Dist. Exs. 3 at p. 12; 4 at p. 1).

A March 2012 Cooke progress report, under the title "Inclusive Opportunities," reported that during the first trimester of the 2011-12 school year, the student participated weekly in art, lunch, recess, assemblies, plays, gym and library with "general education students" (Dist. Ex. 9 at p. 1).[6, 7] The March 2012 progress report indicated generally that, during the 2011-12 school year, the student showed growth in his ability to initiate social interactions and articulate his needs and feelings (id. at p. 2).

Notwithstanding the evaluative information detailed above, the March 2012 CSE recommended a 6:1+1 special class placement in a specialized school (Dist. Exs. 3 at pp. 7-8, 11; 4 at p. 2). The special education teacher testified that the March 2012 CSE did not discuss the information in the March 2012 Cooke progress report which indicated that the student participated with general education students in art, lunch, recess, assemblies, plays, gym, and library on a weekly basis (Tr. p. 85). The special education teacher who served on the March 2013 CSE testified that the student would not have mainstreaming opportunities at a specialized school (Tr. p. 86). In addition, the district school psychologist testified that the opportunities for

[6] A Cooke program description further explains that students were afforded "opportunities for meaningful inclusion in activities with typically developing peers," including activities with general education schools in the community (Parent Ex. G at p. 1).

[7] The relevance of the statement is admittedly limited; it does not shed light on the extent to which the student had access to, or participated in, these classes at the time of the March 2012 CSE meeting (see Dist. Ex. 9 at pp. 1-2). Moreover, the report does not provide any information relevant to an LRE analysis for those classes in which the student participated with general education students (see Dist. Ex. 9 at pp. 17-19).

mainstreaming "would happen at the school level," and agreed with counsel for the parents' statement that it was not something that would be included in the March 2012 IEP (Tr. p. 499; Dist. Ex. 3 at p. 10).

The hearing record reveals the March 2012 CSE did not engage in a discussion regarding LRE as much as it engaged in a discussion regarding the "restrictiveness" of the class ratio options available to the student, that is the ratio of disabled students to classroom personnel (Tr. pp. 61-63; Parent Ex. B at p. 2). The March 2012 IEP meeting notes prepared by the Cooke representative noted that the parents felt a 6:1+1 special class placement was too "restrictive," but that a 12:1+1 special class "in the public schools" would not provide enough support (Parent Ex. B at p. 2). The special education teacher testified that the March 2012 CSE considered the student's sensory-seeking tendencies and his need for breaks and concluded that there would be too many students within the 12:1+1 special class, that the student would need more support, and that he would benefit from a class with fewer students in which the teacher could focus on the student (Tr. pp. 61, 63). In addition, the special education teacher stated that considering the student's difficulties with transitions, he would need more support than what was available in a 12:1+1 special class (Tr. p. 61). The March 2012 IEP indicated that the March 2012 CSE considered a 12:1+1 special class placement in a specialized school, but rejected it because they felt that such a program would not meet the student's needs at the time (Dist. Ex. 3 at p. 12). According to the Cooke representative's testimony and meeting notes, a member of the March 2012 CSE proposed a 12:1+1 placement with the addition of an individual health management paraprofessional for the student, but the CSE decided against it and acknowledged that this type of assistance (i.e., paraprofessional support) was not what the student needed (Tr. pp. 210-11; Parent Ex. B. at pp. 2-3). The March 2012 IEP also indicated that the March 2012 CSE considered a special class in a community school, but there is no evidence in the IEP or the hearing record as to why the CSE rejected this placement (Dist. Ex. 3 at p. 12; see also Tr. p. 60).

Although the district provided an explanation for why it recommended a 6:1+1 special class ratio (see Tr. pp. 61-63; Dist. Exs. 3 at p. 12; 4 at pp. 1-2), it provided no explanation in the record as to why the student could not be educated in a community school environment which would afford him access to his nondisabled peers other than the 12-month school year services rationale discussed further below (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d at 1215; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis, 839 F. Supp. at 982). While the district is correct that class size and the level of adult support was discussed at the March 2012 CSE meeting, these characteristics are unrelated to the IDEA's LRE requirement (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015][stating that "[t]he requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement"; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]).

The evidence in the hearing record shows the district's sole rationale for recommending a placement in a specialized school, which would not include access to general education students, was the student's need for access to summer programming. In response to the parents' concerns

regarding opportunities for interacting with peers in a 6:1+1 special class and the student's need for services on a 12-month basis, the special education teacher stated that the district could only offer programs which it operated (Tr. pp. 68-69). According to the Cooke representative, the March 2012 CSE agreed that a specialized school was not the best place for the student in terms of role models, but it was selected because it was the only way the student could receive services during the summer (Tr. pp. 210-12; see Parent B at p. 3). The March 2012 CSE meeting notes indicated that the district school psychologist thought the student would regress in a "D75" program, but that he needed the summer services, because without 12-month services he would regress substantially (Parent Ex. B at p. 3).[8] In addition, when asked what programs are available for students with the classification of autism who require 12-month programming, the special education teacher indicated that the recommendation would be for a specialized school or deferment to the CBST (Tr. pp. 87-88).[9]

To the extent that this rationale implies that a 12-month school year program was not available in a community school, this constitutes a placement decision impermissibly based on the availability of services in the district, rather than the student's unique needs as reflected in the IEP (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014] [finding that the IDEA's LRE requirement is not limited, in the extended school year (ESY) context, by what programs the school district already offers, but rather must be based on the student's needs]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[,] [i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]). Thus, to the extent that a community school could have addressed the student's needs based on the nature of his disabilities during the school year, such a placement should have been considered by the district. The student's need for 12-month services, in other words, cannot be the only rationale for recommending a specialized school. Furthermore, even if it was a permissible rationale for sending the student to a more restrictive placement for just the summer portion of the school year (July and August), a dubious notion at best, the district provided no rationale explaining why the student could not then transition to a 6:+1 special class setting in a community school during the remaining 10-month portion of school year (September to June),

[8] "D75" presumably refers to District 75, which is used interchangeably with the term specialized school throughout the hearing record (see Tr. pp. 60-61, 86; see also T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *1 n.1 [S.D.N.Y. Sept. 23, 2015] ["[a] District 75 school provides educational and behavior support programs for students who are on the autism spectrum, have significant cognitive delays, are severely emotionally challenged, sensory impaired and/or disabled"] quoting M.H., 685 F.3d at 234 n.9).

[9] Although not defined in the hearing record in this case, CBST likely refers to the district's central based support team, an entity which facilitates placement in nonpublic schools (see, e.g., Application of a Student with a Disability, Appeal No. 15-054; Application of a Student with a Disability, Appeal No. 15-051).

wherein he would presumably be able to benefit from more interactions with and greater access to role models in the form of non-disabled peers.

Given the recommendations that the student would benefit from inclusion in programs with nondisabled peers and evidence in the Cooke progress report that he had participated in classes and activities with general education students while at Cooke, the hearing record shows that for the 2012-13 school year the district failed to include the student in school programs with nondisabled students to the maximum extent appropriate (see Dist. Exs. 7 at p. 2; 8 at p. 7; 9 at pp. 1-2; cf. L.G., 486 Fed. App'x at 974 [finding that the evidence supported the administrative law judge's conclusion that the student would not have benefited from a less restrictive environment because she would not notice her peers and therefore would not gain from their modeling appropriate behavior]). The district's failure to include the student in school programs with nondisabled students to the maximum extent appropriate constitutes a violation of the district's LRE obligation under the IDEA.[10]

It is not clear, however, whether tuition reimbursement is available solely on the basis of a LRE violation within the Second Circuit (see T.M., 752 F.3d at 166-68). As the District Court recognized in the decision which resulted in this order of remand, LRE and FAPE are separate obligations under the IDEA (J.F., 2016 WL 1274579, at *11 ["[w]hether a student's recommended placement is in the LRE is a substantive question …"]; accord T.M., 752 F.3d at 166-68; R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1012 [5th Cir. 2010]; L.B. v. Nebo Sch. Dist., 379 F.3d 966, 975 [10th Cir. 2004] ["Because [our] conclusion establishes a violation of the IDEA's substantive LRE provision, this court need not address whether [the district] provided [the student] with a FAPE"]; S.H. v. State-Operated Sch. Dist. of City of Newark, 336 F.3d 260, 272 [3d Cir. 2003] [noting that parties "cannot bootstrap the meaningful educational benefit with the LRE requirement"]; G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 582 n.27 [S.D.N.Y. 2010], aff'd sub nom. G.B. v. Tuxedo Union Free Sch. Dist., 486 Fed. App'x 954 [2d Cir. 2012]). There are significant differences between a district's FAPE and LRE obligations. Most notably, a district's FAPE obligation is a non-negotiable absolute, while its LRE obligation represents a "strong preference" that, in certain circumstances, must yield to a student's needs (T.M., 752 F.3d at 161; quoting Walczak, 142 F.3d at 122; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 146 [2d Cir. 2013] ["we weigh the benefits of a less-restrictive environment against the backdrop of the educational benefits a child can receive in such an environment"]). Some district courts in the Second Circuit have, without elaboration, analyzed cases only involving LRE violations under the Burlington/Carter framework (J.G. v. Kiryas Joel

[10] The hearing record contains testimony from a district administrator at the assigned public school site regarding mainstream opportunities at the assigned public school site (Tr. pp. 177-78). This retrospective testimony cannot be used to rehabilitate the March 2012 IEP (see R.E., 694 F.3d at 186). But even if it were permissible, it would not help the district's case. The district administrator explained that students with disabilities have no interaction with mainstream children unless their IEPs require participation in an inclusion program (Tr. pp. 177-78, 191). The student's IEP did not mention inclusion programs or mainstreaming activities and, thus, according to this testimony, he would not have been provided the opportunity to participate in the inclusion program at the assigned public school site (Dist. Ex. 3 at pp. 1-13). Moreover, when coupled with the testimony of the district school psychologist that mainstreaming "would happen at the school level," it portrays a circular arrangement whereby the CSE delegates its LRE responsibility to the public school, but the assigned public school will not offer mainstreaming opportunities unless it is on a student's IEP (Tr. pp. 177-78, 191, 499; cf. Application of a Student with a Disability, Appeal No. 15-099).

Union Free Sch. Dist., 777 F. Supp. 2d 606, 654-59 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d 552; Jennifer D. v New York City Dep't of Educ., 550 F. Supp. 2d 420, 432-37 [S.D.N.Y. 2008]).[11]

The IDEA indicates that a court or hearing officer may award tuition reimbursement only "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment" (20 U.S.C. § 1412[a][10][C][ii] [emphasis added]; see also 34 CFR 300.148[c]).[12] Thus, while the plain language of the IDEA authorizes tuition reimbursement for FAPE violations, it is not clear whether this remedy is available if a district violates its separate obligation of placement in the LRE when no violation of FAPE is present (see Deptford Twp. Sch. Dist. v. H.B., Civ. No. 01-0784-JBS No. 138 [D.N.J. Sept. 29, 2004] [declining to award reimbursement for unilaterally obtained services where district offered a FAPE but committed an LRE violation with exception of a limited period of time where parents acted upon an administrative law judge's favorable holding; observing that parents "made no showing that [the student] suffered any harm from [the district's] failure to construct an IEP that offered a FAPE in the least restrictive environment"]).[13]

While a court retains equitable authority to "grant such relief as [it] determines is appropriate," I decline to award tuition reimbursement solely based on an LRE violation in the absence of binding Second Circuit authority (see T.M., 752 F.3d at 166-68 [finding that the district failed to consider an appropriate continuum of alternative 12-month placements and place the student in his least restrictive environment; remanding case and noting that "[i]f the district court finds that reimbursement is warranted, it should then fashion an appropriate reimbursement award . . ."]; see generally J.G., 777 F. Supp. 2d 606, 654-59 [S.D.N.Y. 2011] [finding that by not providing for any social inclusion with children without disabilities in the student's IEP, the district failed to mainstream the student to the maximum extent appropriate but nonetheless denying the parents' request for tuition reimbursement because the unilateral placement was not appropriate]; but see Jennifer D. v New York City Dep't of Educ., 550 F. Supp. 2d 420, 432-37 [S.D.N.Y. 2008] [pre-Newington case awarding tuition reimbursement for district's failure to mainstream the student to the maximum extent appropriate by recommending a specialized school instead of a community school]). However, given the unsettled nature of the tuition reimbursement issue in this Circuit with respect to LRE violations, I nonetheless have analyzed, upon my independent

[11] The Seventh Circuit, similarly without any explanation or reasoning, affirmed an award of tuition reimbursement based solely on an LRE violation in Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ. (184 F.3d 912 [7th Cir. 1999]).

[12] To the extent the Supreme Court's decision in Carter contemplated a tuition remedy where a district "violated IDEA," this was superseded by Congress's 1997 amendments to the IDEA which created a statutory source for the tuition reimbursement remedy (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483 n.6 [2d Cir. 2002]) and defined the circumstances under which it was available (see Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 157 [1st Cir. 2004] [describing limitation on tuition reimbursement; ultimate holding abrogated by Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 [2009]).

[13] This holding was recited in a subsequent (unpublished) decision of the Court (see Deptford Twp. Sch. Dist. v. H.B., 2006 WL 891175, at *5 [D.N.J. Mar. 31, 2006], rev'd and remanded sub nom. Deptford Twp. Sch. Dist. v. H.B., 279 Fed. App'x 122 [3d Cir. 2008], and rev'd and remanded sub nom. Deptford Twp. Sch. Dist. v. H.B., 279 Fed. App'x 122 [3d Cir. 2008]).

review of the record, the student's unilateral placement at Cooke, and related equitable considerations, as further explained below.

B. Unilateral Placement

The parents argue that Cooke provides educational and social-emotional support to the student and the student made clear progress at Cooke. The district argues the student's 12:1+1 special class at Cooke was too large, overwhelming, and did not provide the student with the individualized attention and instruction he needed.

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 offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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 [citing 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 v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; 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, *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; see Frank G., 459 F.3d at 364-65).

1. Student's Needs

In determining the student's needs for the 2012-13 school year the student's teacher stated that she reviewed the student's file and spoke with the teachers who worked with the student during the previous school year (Tr. pp. 295-96, 335). The teacher stated that during the 2012-13 school year the student was functioning at a second grade level in reading, writing, and math (Tr. pp. 302-03). The March 2012 Cooke progress report indicated that the student required support in summarizing the plot of a story, in answering appropriate questions, and that he had difficulty in answering what, when, why, and how questions (Dist. Ex. 9 at p. 4). The teacher added that the student needed one-to-one instruction every five minutes, redirection, assistance in regulating his sensory needs, and prompting to take sensory breaks (Tr. p. 310). The teacher described the student as a visual learner and stated that he was successful when music or technology was incorporated into lessons (Tr. pp. 303-04). The March 2012 Cooke progress report indicated that the student's sensory processing difficulties often impeded his ability to remain focused for classroom activities, that he sometimes needed support during transitional periods, and that he had difficulty with flexibility and changes in routine (Dist. Ex. 9 at p. 2). Meeting notes prepared during the March 2012 CSE meeting also included the parents' concern that language processing was the student's biggest deficit and got in the way of his understanding of the world (Parent Ex. B at p. 1).

Regarding social development the parents expressed concern about the student's need for a program which would focus on extending conversations, turn taking, identifying social cues, and understanding appropriate conversations for friends and strangers (Dist. Ex. 3 at p. 1). The teacher stated that spontaneous conversation was challenging for the student (Tr. p. 300). Moreover the teacher identified expressive language as the student's greatest difficulty (Tr. pp. 295, 297). She further explained that it was helpful to provide the student with opportunities to illustrate, since it was one of his biggest strengths, and that it was an outlet for him to express his feelings when he could not find the words (Tr. p. 297). The teacher identified that the student had "a lot" of "out loud" internal conversations and that he repeated certain phrases to the point where it interfered with his instruction time in the classroom and he would need a sensory break to help quiet his voice and get him back on track (Tr. p. 298). The teacher stated that the student would also become very frustrated and scream loudly when presented with a difficult situation or a change in routine (Tr. pp. 298-99). The March 2012 Cooke progress report further noted that at times the student

would scream, bang his head, and stomp his feet, yet also stated that the behaviors were occurring with less frequency and that the student could be redirected (Dist. Ex. 9 at p. 2).

With respect to physical development the March 2012 Cooke progress report stated that the student continued to need support for sensory processing and visual and fine motor skill development, and that he continued to benefit from a daily sensory diet (Dist. Ex. 9 at p. 16). The March 2012 Cooke progress report indicated that the student used various sensory strategies (i.e. chewing gum, using a Theraband, participating in brain gym exercises, and calming breaks in the OT room) (id.).

2. Specially Designed Instruction

As noted above, to qualify for reimbursement under the IDEA, a parent must demonstrate that the unilateral placement provided educational instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). State regulation defines specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]).

The parents executed an enrollment contract with Cooke for summer 2012 and for the 2012-13 school year (Parent Exs. D at pp. 1-2; E at pp. 1-2; see Tr. p. 440). The Cooke head of school described the program as a kindergarten through eighth grade program with approximately 104 students that focused on functional and fundamental academics, adaptive daily living skills, and social emotional development (Tr. pp. 241-42). He explained that the program had a large clinical population and that the school provided occupational therapy (OT) and physical therapy (PT) and had speech-language providers, school psychologists, and counselors (Tr. p. 242). He also stated that students followed a typical K through eighth grade program in which the content material was taken from the State standards with a lot of intense modification and multi-curricular development (Tr. p. 242).

The Cooke head of school described the summer program as more focused and included direct instruction in academic and clinical areas (Tr. p. 254). The Cooke summer program description indicated that students engaged in academic instruction focused on decoding, word study, reading comprehension, writing workshop, thematic content study, and mathematical problem solving (Parent Ex. F at p. 1). In the afternoons at the Cooke summer program, students participated in social skills groups and physical activities such as the pool or gym (Tr. p. 254; Parent Ex. F at p. 2). Cooke progress reports indicated that during summer 2012 to address the student's needs in the areas of literacy and thematic content, the student worked on identifying fact and opinion, sequencing information, comparing and contrasting, describing an image or event using accurate language, determining the main idea, and making inferences (Parent Ex. I at p. 1). With respect to the student's needs in mathematics and problem solving, the summer 2012 progress report indicated that the student worked on applying problem solving strategies, and using computational strategies to solve mathematical problems at his instructional level (id.). The summer 2012 progress report also indicated that the student was provided with related services in OT, PT, counseling and speech-language therapy (id. at pp. 2-4).

The Cooke head of school and the student's teacher during the 2012-13 school year provided information regarding the student's program at the impartial hearing (Tr. p. 258; see Tr. pp. 249-51, 269, 291-94, 297-301, 304-09, 325-26, 329-30, 334, 338-40). To address the student's need for frequent one-to-one instruction and redirection, the student received small group instruction in math (up to seven students), reading (five or six students) and writing (Tr. pp. 292-94). The teacher stated that for math instruction she followed a hands-on investigative approach, which consisted of repetition, a consistent structure, and games and activities to reinforce learning concepts (Tr. p. 291). For reading instruction the teacher stated that she used a literacy intervention program and involved the student in guided reading, comprehension, making connections to text, and group discussions (Tr. pp. 292, 305-06, 338-39). The teacher also stated that she gave the student opportunities to use illustration, which was one of his strengths, to demonstrate comprehension (Tr. pp. 297, 306). The student participated in word study, which the teacher described as being a systematic, hands-on, multisensory approach to teaching phonemic awareness; it included a structured approach, repetition, sky writing, re-learning sounds, painting letters, movement, brain-storming words that contain the sound being taught, making sentences with the words, and including the words in a word study journal (Tr. pp. 306-07). In social studies, instruction delivered to the student included providing small group work, using videos and technology, and making crafts to accommodate his visual learning style and interest in technology (Tr. pp. 308-09).

To address the student's needs in developing spontaneous conversation skills, turn taking, reading social cues, and understanding appropriate conversations for friends and strangers, the teacher stated that the student was working on his expressive, receptive, and pragmatic language skills through models and prompting (Tr. pp. 325-26). The teacher stated that to further address the student's spontaneous conversation challenges the staff was teaching the student ways to start a conversation with someone that he liked (Tr. p. 301). In addition the student was working on ways to initiate and stay in a conversation during speech-language therapy sessions (Tr. pp. 339-40). The teacher also noted that the morning meeting included a time to share and that, recently, the student showed a new willingness to share a personal story (Tr. p. 305). Additionally, to address the student's social needs, the school offered social skills classes led by the therapists that promoted interactive skills with peers (Tr. p. 251).

To address the student's screaming in class, the teacher stated that the student was provided with the opportunity to leave the classroom to calm down, discuss and even illustrate what the problem was, and that they attempted to solve the problem together (Tr. p. 299). The teacher stated that this strategy had worked and that the student's screaming behavior had decreased (id.). In addition, the teacher stated that she and the student's counselor developed a daily behavior plan for the student to earn time on the iPad (Tr. p. 300). The teacher stated that the plan regulated the student's behavior and that he was trying to use his words more instead of screaming (Tr. p. 300). She further explained that it was helpful to provide the student with opportunities to illustrate, since it was one of his biggest strengths, and that it was an outlet for him to express his feelings when he could not find the words (Tr. p. 297).

To address the student's need for support in sensory processing and self-regulation, the teacher explained that the physical therapist took the student for a sensory break as soon as he got off the bus in the morning (Tr. pp. 304, 334). She explained that this really helped the student get "oriented" for the day (Tr. p. 304). The teacher stated that the student also had a sensory break

after lunch (Tr. pp. 309, 334). The head of school stated that the student's sensory issues were addressed through the use of sensory breaks which could include deep compression activities or "brain gym" work (Tr. pp. 249-50). He explained that the brain gym exercise was used for "refocusing" and for "simple adjustments" (Tr. p. 269). The Cooke staff also noted that a minor adjustment like chewing gum helped the student focus, relax, and rejoin the classroom (Tr. pp. 269, 329-30). To address the student's difficulty with flexibility and changes in routine, the morning meeting included time to discuss the day's schedule and any possible changes and included opportunities for questions, which the teacher noted was "really important" for the student (Tr. p. 305). The head of school also explained that gross motor activities such as work on the treadmill, stationary bike, or on a climbing wall were also utilized (Tr. p. 250).

In addition to the program described above, the student received the following related services during the 2012-13 school year at Cooke; one session of individual speech-language therapy per week, two sessions of group speech-language therapy per week, one session of individual counseling per week, one session of group counseling per week, one session of individual OT per week, two sessions of group OT per week, and two sessions of PT in a small group per week (Tr. pp. 252, 310). The teacher stated that once per week she met formally with the student's related service providers and informally met twice per week to discuss strategies to help the student (Tr. pp. 310-11).

Based upon the foregoing, a review of the hearing record does not support the district's assertion that the student's 12:1+1 special class at Cooke was too large, overwhelming, and did not provide the student with the individualized attention and instruction he needed. Rather, the evidence in the hearing record considered in its totality establishes that, relative to the 2012-13 school year, Cooke identified the student's academic, social/emotional and physical needs and developed a special education program that provided educational instruction specially designed to meet the unique needs of the student, supported by such services as were necessary to permit the student to benefit from instruction (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

3. Progress

Moreover, there is some evidence in the record that the student made progress at Cooke during the first portion of the 2012-13 school year. A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed App'x 80, 82 [2d Cir. Dec. 26, 2012]; Frank G., 459 F.3d at 364). 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, the available evidence in the hearing record shows that the student was making progress at Cooke during the 2012-13 school year.

The Cooke head of school noted that although at the time of the hearing in November 2012 the student's 2012-13 progress reports had not yet been issued, the student was doing well and that the student made great progress in academic areas when "under the right conditions" (Tr. p. 258). The student's teacher stated that she had seen a big improvement in the student's journal writing as he was independently reading and recording the journal prompt and was writing sentences at the

time of the hearing; at the start of the year, he could only write lists (Tr. pp. 304-05). The parent stated that she participated in a parent-teacher meeting in the middle of November and that it was reported that the student's reading comprehension was "really stepping up," that his sentence structure was more complex, that his math and understanding of multiplication was progressing, and that he had reduced his use of echolaic language (Tr. pp. 442-43). The teacher further noted that in September the student was not able to sit in a small guided reading group the whole period, yet at the time of the hearing the student could sit through the whole period almost every time (Tr. pp. 311-13). Also, she noted that transitioning used to be a "huge problem" for the student, but that he was now doing well, and "thriving on the structure of the classroom and the high expectations" placed upon him (Tr. p. 313).

The student's teacher further stated that the student had made progress in becoming a social member of the classroom (Tr. pp. 311-12, 336). Where the student used to have meltdowns and refuse to leave the classroom at the beginning of the year, the teacher stated that the student was now able to be redirected to go outside, use strategies to relax, and use a calm voice to share what was bothering him (Tr. pp. 311-12). The teacher also explained that when the student did have meltdowns and outbursts, he went to an area such as the sensory gym to relax and was out of his program for only a short period of time (Tr. pp. 329-30, 336-37). The teacher further noted that the student's screaming had significantly reduced (Tr. pp. 311-12, 336-37). This evidence demonstrates that the student was making progress at Cooke for the portion of the 2012-13 school year for which there are records and testimony in the hearing record.

C. Equitable Considerations

With regard to equitable considerations, the parents argue that equitable considerations do not bar reimbursement because they cooperated with the district during the CSE meeting, duly visited the assigned public school site, and gave the district adequate notice of their concerns. The district argues that the hearing record demonstrates that the parents had no intention of enrolling the student in the recommended placement and thus the parents are not entitled to direct funding.

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; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, fail to provide adequate notice of the student's removal from the public school system, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at *12 [E.D.N.Y. Jan. 13, 2011]; 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 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The district's argument that equitable considerations do not support the parents' requested relief because they did not intend to send the student to a public school is without merit. Based on Second Circuit precedent, so long as the parents cooperate with the district, and do not impede the district's efforts to offer a FAPE, the pursuit of a private placement does not provide a basis in equity to deny tuition reimbursement—even if the parents never intended to enroll the student in a public school (C.L., 744 F.3d at 840). The record reflects that the parents fully participated in the March 2012 CSE meeting, visited the assigned public school site, and did not impede the district in any way from offering the student a FAPE (Tr. pp. 24-25, 34, 64, 68-69, 74, 85, 171-72, 226, 369-70, 415, 416-21,424, 426-27; Dist. Exs. 3 at pp. 1, 12-13; 4 at pp. 1-3; Parent Ex. B at pp. 1-3). Therefore, equitable considerations would not bar an award of tuition reimbursement if such a remedy is available for the LRE violation at issue in this case.

As a result of the above determinations, if I were to reach the issue of tuition reimbursement in this case, I would find that Cooke was an appropriate unilateral placement for the student and that the parents were entitled to tuition reimbursement for Cooke.

VII. Conclusion

The district provided no explanation in the hearing record as to why the nature of the student's disability was such that he could not be afforded opportunities to participate in programs and activities with nondisabled peers and, indeed, evidence in the record supports a finding that mainstreaming opportunities were recommended for the student and had been provided for the student at Cooke, as evidenced by the March 2012 Cooke progress report. Rather, the only conclusion that can be drawn from the record before me is that the CSE recommended a specialized school for the student, with no opportunities for mainstreaming, solely based upon the availability of 12-month school year programming at that site. The district's failure to include the student in school programs with nondisabled students to the maximum extent appropriate constitutes a violation of the district's LRE obligation under the IDEA. However, in the absence of binding Second Circuit authority, I decline to award tuition reimbursement solely based on such an LRE violation. Were this remedy available, the evidence in the hearing record demonstrates that Cooke offered specially designed instruction aligned with the student's needs, and no equitable considerations would diminish or preclude an award of tuition reimbursement to the parents.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 27, 2016

CAROL H. HAUGE
STATE REVIEW OFFICER