



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-063

**Application of the BOARD OF EDUCATION OF THE  
MANHASSET UNION FREE SCHOOL DISTRICT for review  
of a determination of a hearing officer relating to the provision  
of educational services to a student with a disability**

**Appearances:**

Frazer & Feldman, LLP, attorneys for petitioner, Jacob S. Feldman, Esq., of counsel

Pamela Anne Tucker, PC, attorneys for respondents, Pamela Anne Tucker, Esq., of counsel

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to reimburse the respondents (the parents) for a portion of their son's tuition costs at the Chamberlain International School (Chamberlain) for the 2015-16 school year. The parents cross-appeal from that part of the IHO's determination which denied their request for full reimbursement of the costs of the student's attendance at Chamberlain. The appeal must be dismissed. The cross-appeal must be sustained.

#### II. Overview—Administrative Procedures

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

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

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

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

### **III. Facts and Procedural History**

The hearing record indicates that the student has a history of behavioral dysregulation and accompanying academic and social challenges that initially surfaced during early childhood and which resulted in the student receiving pharmacological treatment at age four and individual psychotherapy at age five (Parent Ex. P at p. 1). The student has received diagnoses of unspecified bipolar disorder, unspecified anxiety disorder, oppositional defiant disorder (ODD), unspecified attention deficit/hyperactivity disorder, and unspecified disruptive, impulse-control and conduct disorder (id. at pp. 2, 16).

The student has received special education and related services throughout his life, beginning with early intervention services (Tr. pp. 551-52). By parent report, the student was placed in a general education classroom for kindergarten, but in subsequent years was placed in a self-contained class, a State-approved non-public special education day school and State-approved non-public residential school (Tr. pp. 554-58). The student was parentally placed at the Gersh Academy (Gersh), a nonpublic special day school, for the end of the 2010-11 school year, as well as for the 2011-12, 2012-13, 2013-14, and 2014-15 school years (Tr. pp. 80-81; Dist. Exs. 8; 9 at p. 2).

The hearing record reflects that the parents and the district entered into stipulations of settlement for the 2011-12, 2012-13, 2013-14, and 2014-15 school years, under which the district agreed to partially fund the costs associated with the student's attendance at Gersh (Tr. pp. 55-58; Dist. Ex. 3 at pp. 1-10). A CSE convened in May 2015 for a reevaluation review and determined that the student had earned a high school diploma from Gersh, and the CSE did not develop an IEP for the student for the 2015-16 school year (Tr. p. 124; Dist. Ex. 11 at pp. 1-19).

The student was hospitalized for one week in July 2015 (Tr. pp. 578-79). In August 2015, the student was parentally placed as a residential student at Chamberlain International School (Chamberlain), an out-of-State nonpublic residential and day school (Tr. pp. 579-80, 582).<sup>1</sup>

#### **A. Due Process Complaint Notice**

By amended due process complaint notice dated August 2015, the parents alleged that the district failed to offer the student a FAPE for the 2015-16 school year (IHO Ex. CC).<sup>2</sup> In particular, the parents asserted that the April 2015 CSE improperly determined that the student would graduate in June 2015 and failed to develop an IEP for the 2015-16 school year (*id.* at p. 3). The parents also argued that Chamberlain was an appropriate placement for the student and equitable considerations favored them (*id.* at pp. 3-4). As relevant here, for relief the parents requested reimbursement for the costs of the student's attendance at Chamberlain for the 2015-16 school year (*id.* at p. 4).

#### **B. Impartial Hearing Officer Decision**

A prehearing conference was held on October 21, 2015 (Pre-Hr'g Tr. pp. 1-22). The parties then proceeded to an impartial hearing on November 19, 2015, which concluded on April 13, 2016,

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<sup>1</sup> Chamberlain has been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

<sup>2</sup> The parents originally submitted a due process complaint notice dated June 15, 2015 (IHO Ex. AA). While the IHO indicated during the impartial hearing that the amended due process complaint notice was filed with the district on August 28, 2015, and the IHO's decision indicates that the amended complaint was dated August 9, 2015, the copy of the amended due process complaint notice included in the hearing record does not include a date (IHO Decision at p. 78; Pre-Hr'g Tr. pp. 3-4; IHO Ex. CC; see IHO Ex. DD). In addition, the copies of both the original and amended due process complaint notices submitted to the Office of State Review contain annotations that do not appear to be original to the documents (IHO Exs. AA; CC). The district is cautioned to ensure that the hearing record submitted to the Office of State Review contains true and complete copies of the exhibits as entered into evidence at the impartial hearing (8 NYCRR 279.9[a]).

after eight nonconsecutive days of proceedings (see Tr. pp. 1-901; Mar. 30, 2016 Tr. pp. 902-1,010; Apr. 13, 2016 Tr. pp. 902-974).<sup>3</sup> In a decision dated August 8, 2016, the IHO determined that the student had not met graduation requirements and remained eligible for special education services during the 2015-16 school year, and the district failed to offer the student a FAPE because it failed to develop an IEP for the student (IHO Decision at pp. 45-49). The IHO then, after reviewing the student's needs and the services provided him by Chamberlain, determined that the student's placement at Chamberlain was appropriate (*id.* at pp. 50-66). In particular, the IHO found that although Chamberlain did not provide the student with formal academic instruction, it provided appropriate psychiatric and psychological support to address the student's social/emotional needs, as well as vocational instruction to address independent living skills needs, and that the student had made progress at Chamberlain (*id.* at pp. 55-62, 65-66). The IHO also found that Chamberlain was the least restrictive environment in which the student could receive educational benefits (*id.* at pp. 62-64). Further, the IHO determined that the lack of speech-language therapy, occupational therapy, and certified counseling providers at Chamberlain did not make it an inappropriate placement for the student (*id.* at pp. 64-65). The IHO next found that equitable considerations warranted a reduction in the award of tuition reimbursement, based on the parents' actions in not informing the district that the student would not be eligible to graduate at the end of the 2014-15 school year, withholding privately-obtained evaluations, and not providing timely notice of their intention to enroll the student at Chamberlain at public expense (*id.* at pp. 66-71). The IHO ordered that the district reimburse the parents—upon receipt of copies of the enrollment contract, invoices, and proof of payment—for the amount of the student's tuition at Gersh that the district had paid pursuant to the parties' stipulation (*id.* at pp. 72-73). The IHO further ordered the district to reconvene the CSE to develop an IEP for the 2016-17 school year (*id.* at p. 73).

#### **IV. Appeal for State-Level Review**

The district appeals, alleging that the IHO erred in finding that the parents' unilateral placement for the student was appropriate and that equitable considerations partially favored the parents. Initially, the district asserts that the IHO erred in finding that Chamberlain was appropriate to meet the student's needs because it did not provide him with academic instruction. Further, the district contends that the student refused to engage in the vocational program into which he was next placed, and that the vocational program did not address the student's needs as reflected in the treatment plan developed by Chamberlain. The district also contends that the IHO erred in finding that the student received functional occupational therapy and math instruction at his vocational placements. In addition, the district asserts that the IHO erred in finding that Chamberlain provided the student with sufficient individualized counseling services to meet the student's social/emotional needs. The district also argues that the IHO erred in finding that a residential placement was appropriate for the student. With respect to equitable considerations, the district asserts that the IHO erred in finding the parents were entitled to reimbursement because they failed to share information with the district or provide adequate notice of their intention to

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<sup>3</sup> The transcripts of the impartial hearing repeat page numbers on several occasions (see Nov. 19, 2015 Tr. pp. 176-77; Dec. 21, 2015 Tr. pp. 176-77, 307-08; Jan. 19, 2016 Tr. pp. 307-08; Mar. 30, 2016 Tr. pp. 902-74; Apr. 13, 2016 Tr. pp. 902-74). For purposes of clarity, when citing to a transcript page number that appears more than once in the hearing record, the date of the transcript will be included in the citation.

unilaterally place the student at Chamberlain. The district also alleges that the IHO failed to consider the reasonableness of the cost of the student's attendance at Chamberlain when weighing equitable considerations.<sup>4</sup>

In an answer, the parents respond to the district's allegations with admissions and denials and assert that Chamberlain was appropriate to meet the student's needs. The parents also cross-appeal the IHO's award of partial reimbursement, contending that equitable considerations warrant full reimbursement of the student's tuition costs at Chamberlain.<sup>5</sup>

## 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

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<sup>4</sup> The district does not appeal the IHO's finding that it failed to offer the student a FAPE for the 2015-16 school year and as a result, that determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

<sup>5</sup> In a reply, the district asserts that the parents' answer and cross-appeal does not cite to the hearing record and was not properly verified in accordance with State regulations and requests that the parents' answer and cross-appeal be dismissed. In response, the parents submitted a verification of the answer and cross-appeal. In general, the failure to comply with the regulations governing practice before the Office of State Review may result in rejection of pleadings at the discretion of an SRO (8 NYCRR 279.8[a]). Given that the parents corrected the initial defect in their pleading, the district was able to respond to the allegations raised in the cross-appeal, and there is no indication that the district suffered any prejudice in its ability to respond to the parents' pleading as a result, I exercise my discretion and decline to dismiss the parents' answer and cross-appeal on this ground (Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058; see J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at \*4-\*6 [S.D.N.Y. Aug. 17, 2015] [noting that "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored"]).

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]). 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 [2d Cir. Aug. 16, 2010]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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]).

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. Appropriateness of Unilateral Placement**

As noted above, the district does not appeal the IHO's determination that it did not offer the student a FAPE for the 2015-16 school year. The district challenges the IHO's determinations that the parents' unilateral placement was appropriate and that equitable considerations favored partial reimbursement. Upon review, the hearing record supports the IHO's determination that the parents' unilateral placement at Chamberlain was appropriate for the student.

A private placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the placement must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). The private school need not employ certified special education teachers or develop an IEP for the student (Carter, 510 U.S. at 13-14). 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 appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][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; see Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]).

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).

A review of the hearing record reveals that the parents adequately established that the educational services at Chamberlain were sufficiently designed to meet the student's needs.

### **1. The Student's Needs**

The hearing record shows that the student has deficits in academic achievement, receptive and expressive language, visual motor integration and adaptive functioning, that he demonstrates weaknesses in executive functioning, and that he struggles to engage in appropriate social interactions and behavior. Assessments completed by Gersh Academy, coupled with the results of a private neuropsychological evaluation, highlight the student's needs as they existed in spring 2015 (see Parent Exs. I; K; P).<sup>6</sup>

In February 2015, the student was evaluated by a Gersh special education teacher as part of a "[t]hree-year evaluation" (Parent Ex. I at p. 1). At the time of the assessment, the student was attending an 8:1+1 special class and receiving speech-language therapy, occupational therapy and counseling (id.). The special education teacher reported that the student was tested over a period of three sessions (id. at p. 2). Although testing was conducted when the student was "in a positive mood," the special education teacher observed that the student would become agitated when he believed he had made a mistake or done poorly (id.). According to the special education teacher, the student was provided with breaks and prompts to remain focused (id.). During subsections on

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<sup>6</sup> The hearing record indicates that the May 2015 CSE reviewed numerous documents that were not part of the hearing record (Dist. Ex. 11 at p. 2).



which the student was aware he was making mistakes, he accelerated his pace or tried to give up, due to anxiety, which resulted in additional mistakes (id.). The special education teacher therefore advised that the test results should be interpreted with caution, as they may not accurately reflect the student's achievement (id.).

Administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) yielded the following standard scores (and percentile ranks): oral language 100 (50), total reading 72 (3), basic reading 70 (2), reading comprehension and fluency 74 (4), written expression 66 (1), mathematics 75 (5), math fluency 70 (2), and total achievement 73 (4) (Parent Ex. I at p. 3). With respect to oral language, the special education teacher reported that the student was able to answer questions successfully after hearing recorded passages, find synonyms for given words, name 32 animals in a minute, and name 20 colors in a minute (id. at p. 3). The student was also able to repeat sentences and passages word for word, although he had difficulty with some of the longer passages (id.).

With respect to reading, the special education teacher reported that the student read multi-syllable words and passages, and was able to answer most questions by referring back to the text, but had difficulty with words that were long, had strings of vowels, or had unusual digraphs (Parent Ex. I at p. 3). The special education teacher indicated that reading materials were usually modified for the student and he benefitted from the use of pre-reading and post-reading strategies including previewing, discussing prior knowledge, questioning the author's purpose, reviewing vocabulary, and summarizing (id. at pp. 4-5). The special education teacher reported that the student was able to decode single syllable pseudowords, but had difficulty applying digraph knowledge to unfamiliar sounding words (id. at pp. 3-4). The special education teacher reported that the student made frequent pronunciation errors when reading passages aloud (id. at p. 4). According to the special education teacher, the student's test results corresponded with classroom observation (id.). Notably, the student required support when reading to decode words and process information (id.).

On tasks of written expression, the student had difficulty using given words to compose well-structured sentences, and when combining sentences the student had difficulty creating coherent sentences using proper sentence structure (Parent Ex. I at p. 4). The special education teacher reported that when composing an essay, the student was able to generate a topic sentence but had difficulty with punctuation, transitions, paragraph structure and supporting his topic sentence (id.). The special education teacher further noted that the student had difficulty representing some sounds with proper graphemes, omitted letters and had some words with the correct letters in the wrong order (id.). The special education teacher indicated that the student's test results in writing generally corresponded with classroom observation (id. at p. 5). The special education teacher explained that the student enjoyed writing about topics of interest and would brainstorm to generate ideas (id.). The student required support to organize and develop ideas and often used graphic organizers (id.). The special education teacher stated that the student had difficulty using punctuation and creating well-structured sentences (id.).

According to the special education teacher, in mathematics, the student was able to mentally calculate elapsed time, order fractions, and identify whole number place values (Parent Ex. I at p. 4). The student was also able to add and subtract numbers using regrouping, multiply single digit numbers, add negative integers, and correctly use the order of operations with multiplication and addition to evaluate an expression (id.). In contrast, the special education

teacher reported that the student had difficulty solving multistep problems, calculating an average, identifying the next number in a sequence, using division, working with fractions and solving an equation for a variable (id.). According to the special education teacher, the student's test scores in mathematics generally corresponded with classroom observation (id. at p. 5). The student knew addition and subtraction math facts and how to use regrouping when calculating; however, the student had difficulty with multiplication and division and identifying and ordering steps in multistep word problems (id.). The special education teacher reported that the student often used a calculator when solving problems and had been working on mathematics for the workplace and life situations (id.).

The special education teacher reported that in the classroom the student enjoyed learning about preferred topics and could be successful when motivated (Parent Ex. I at p. 4). The teacher also reported that the student required constant prompting to stay on task and to complete assignments (id.). According to the special education teacher, when material appeared challenging the student would often display signs of anxiety which included rushing through work, giving up, making inappropriate comments and becoming disruptive to peers (id.). The special education teacher reported that the student benefitted from the use of collaborative problem solving and close support from staff to help him identify triggers for his behavior and maintain focus on positive solutions (id.).

The special education teacher concluded that the student continued to require a structured, nontraditional, educational environment where he could receive constant prompting and redirection to help him stay on task and that the student would benefit from the continued implementation of the collaborative problem solving model in order to strengthen the use of strategies to reduce distractibility, manage time, and maintain positive peer relationships (Parent Ex. I at p. 5). The special education teacher recommended that the student continue to receive the services of a 1:1 aide to assist with the application of coping skills and redirection when dealing with frustration, completing academic assignments, and staying engaged in classwork (id.). The special education teacher also recommended various program modifications and testing accommodations, as well as that the student continue in an 8:1+1 program at Gersh (id. at pp. 1, 6).

In April 2015, a social worker from Gersh completed a social/emotional annual review of the student that detailed the student's social/emotional needs (Parent Ex. K). At the time of the review, the student was receiving three 30-minute sessions of individual counseling per week and two 30-minute sessions of group counseling per week (id. at p. 1).

In her behavior observation, the social worker described the student as friendly and willing to attend sessions (Parent Ex. K at p. 1). She noted that it was "imperative" to develop a trusting relationship with the student as he could become guarded or paranoid if he felt that those around him did not believe in him (id.). The social worker reported that although the student preferred to interact with adults, his peer relations had improved considerably (id.). She noted that while the student could be personable and witty, he also dominated conversations with topics of preferred interest and required redirection to engage in reciprocal conversation (id.). According to the social worker, the student often got stuck on an idea or topic and when this occurred he was extremely difficult to redirect, which could ultimately affect his peer relations and classroom performance (id.).

The social worker reported that the student was motivated to become more independent, but lacked the skills and insight to do so successfully (Parent Ex. K at p. 1). She characterized the student as highly dependent on staff's guidance for decision-making, reading social cues and navigating familiar environments (id.).

The social worker reported that at the time of her review, the student was working on making positive statements to indicate acceptance of other people's individual differences; differentiating between positive and negative methods of gaining the attention of others, and recognizing the affect this had on developing relationships; and recognizing when he was being impulsive and identifying acceptable alternative behaviors (Parent Ex. K at pp. 1-2). According to the social worker, the student required redirection and support regarding the affect his comments had on others and constant staff supervision due to his poor impulse control (id. at p. 2). The social worker reported the student's mood and perseverative thinking greatly impacted his self-control and the student continued to struggle with impulse control (id.). She stated that the student required moderate to maximum redirection and support to help him identify and demonstrate alternative behaviors needed to problem solve and maintain positive relationships (id. at p. 1). The social worker recommended that the student continue to receive counseling services, although at a reduced frequency (id. at p. 2).

A May 2015 neuropsychological evaluation obtained by the parent also helps to identify the student's needs at the time he was parentally placed (see Parent Ex. P). For purposes of the neuropsychological evaluation, the student completed testing over three sessions while on his prescribed psychotropic medication (id. at p. 4). The evaluation report reflected that the student made frequent attempts to impress the evaluator with his knowledge, and also that the student perseverated on his appearance, wealth, prestige, and materialistic possessions (id.). According to the report, early in the evaluation process, the student became "defended and skeptical" of the evaluator's motives; and throughout the evaluation, the student exhibited "pressured speech coupled with an expansive mood and grandiose thoughts" (id.). The neuropsychological report indicated that an administration of the Stanford-Binet Intelligence Scales–Fifth Edition (SB-5), yielded a full-scale IQ of 72 which fell in the borderline range of general cognitive ability with "largely commensurate verbal and nonverbal intellectual abilities" (id. at pp. 5, 15-16). The evaluator noted that compared with the student's previous evaluation, the student had made "modest gains in overall abilities," "significant improvements" in nonverbal working memory, and "declines" in the nonverbal modality of quantitative reasoning (id. at pp. 6-7, 16).

With respect to academic functioning, an administration of the Kaufman Test of Educational Achievement–Third Edition (KTEA-3) and the Oral and Written Language Scales (OWLS) to the student revealed that he "exhibited a relatively global pattern of compromise, with performance in individual content areas ranging from 1st to 5th grade proficiency" (Parent Ex. P at pp. 7-8, 16). The report indicated that the student struggled on measures of phonological processing, decoding, and mathematical skills (id. at p. 16). Specifically, the student's particular weakness in phonological decoding "together with limited reasoning and problem-solving abilities, constrain[ed] his ability to derive meaning from literary material" (id. at p. 8). While the student's writing fluency standard score was 79, when called upon to produce information in written form, the student narrated the information he intended to record, but was unable to keep up with his own rapid, pressured speech (id. at pp. 7-8). The result was "highly fragmented and semantically disjointed written output" (id. at p. 8).

With respect to attention and concentration, the Conners' Continuous Performance Test—Second Edition (CPT-II) was administered and the student demonstrated a "largely unremarkable profile of attention/concentration" except where the student's "pressured speech and grandiosity resulted in frequent derailments from portions of the assessment and a need for examiner redirection" (Parent Ex. P at p. 8). The student's performance on the sustained attention portion of the test was "markedly atypical" (*id.*). With respect to formal measures of executive functioning, the student's profile was varied, ranging from an impaired to average performance (*id.* at pp. 9-10). Observed areas of weakness included planning and verbal set-shifting; and the student's parents and teachers reported significant weaknesses in "deployment of executive skills in everyday situations/contexts" (*id.* at p. 10). With respect to speech and language abilities, the student experienced difficulty with higher order comprehension, and due to pressured speech and his verbose manner, the student struggled to adhere to rules of syntax when required to formulate ideas (*id.*). The student performed in the "impaired range" on a measure of visual-motor integration (*id.* at pp. 10-11).

To assess the student's behavioral and social/emotional functioning, the evaluator interpreted results from the Behavioral Assessment System for Children—Second Edition (BASC-2) (Parent Ex. P at pp. 12-14). The student's parents and teachers reported "behavioral and social-emotional challenges" including anxiety, depressive symptoms, hyperactivity, defiance/aggression, conduct problems, patterns of atypicality, social withdrawal, and attentional difficulties (*id.* at pp. 15-16). The evaluator opined that the student demonstrated an "impulsive, brash, and grandiose exterior" that masked insecurities about his self-worth, and as a means of overcoming this ambivalence engaged in "tactics to intimidate and/or degrade" others (*id.* at p. 16).

With respect to adaptive functioning, as measured by the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), the student demonstrated overall communication skills, daily living skills, and socialization skills in the low range (Parent Ex. P at pp. 14-15). Specifically, the student's expressive communication skills were marginally stronger (moderately low range) than his receptive skills, yet still "objectively impoverished" (*id.* at p. 14). With respect to daily living skills, the report indicated that while the student could carry money safely, tell time on an analog clock, and demonstrate the computer skills needed to carry out complex tasks, the student was unable to travel independently to a familiar destination or count his change following a purchase (*id.*). With respect to socialization skills, the report indicated that the student did not meet friends with any regularity, was not routinely careful about discussing personal matters, did not show good sportsmanship, or go places without adult supervision (*id.* at pp. 14-15). Further, the report noted that the student may not be able to control his anger when he does not get his way, to consistently communicate his ideas without being rude, or to accept helpful solutions from others (*id.* at p. 15). The evaluator noted that the student exhibited clinically significant levels of maladaptive behaviors including excessive dependency, sleep difficulty, anxiety/nervousness, impulsivity, insensitivity, attention problems, and restlessness (*id.*).

To assess the student's personality, the evaluator administered the Millon Adolescent Personality Inventory (MAPI), and opined that the student's "impulsivity, voiced pride in assertiveness, boldness, and hard-boiled masculinity mask a deep insecurity about his self-worth"; and that the student may view others as antagonistic, which he felt justified his defensive posture (Parent Ex. P at p. 15). The evaluator reported that the student was "touchy and jealous"; and that

the student "may be inclined to brood, harbor grudges, and ascribe malicious tendencies to others" (id.). According to the report, the Thematic Apperception Test (TAT) was administered, which evaluated thought content and process, and aspects of emotional functioning (id.). The evaluator noted that the student "enthusiastically formulated stories that were fraught with creativity and fantasy but, owing to his attention-seeking sensationalism, often lacked coherence" (id.).

To address the student's needs identified as a result of the May 2015 neuropsychological report, the psychologist delineated a significant number of recommendations (Parent Ex. P at pp. 17-20). To address the student's management needs, the report included strategies and accommodations such as abundant opportunity for repetition and rehearsal; modeling and visual demonstrations; learning prompts; graphic organizers; reinforcement and shaping; provision of classroom notes; preferential seating; extended time and separate location for classroom and standardized tests; test questions read to student; repetition of instructions and directions; break periods; refocusing; end of day "check-ins" with school personnel; chunking material; and submission of "first drafts" or outlines for written assignments (id. at pp. 17-19). To address the student's behavioral, social/emotional, and academic needs, the report included a recommendation for placement in a therapeutic academic setting with a ratio of six to eight students with one special education teacher and one assistant teacher (id. at p. 17). Further, to address the student's academic and adaptive needs the report included recommendations for a 12-month program that employed evidenced-based scholastic tools and approached education in a multisensory fashion, and an educational milieu that was structured, yet nurturing and slowly paced (id.). The report also recommended that the academic placement emphasize the development of life and adaptive skills (id. at p. 18). Additionally, to address the student's vocational needs, the report included recommendations such as an applied, practical, hands-on curriculum, along with regularly scheduled vocational opportunities with an on-site job coach in community settings that allowed for the student's processing inefficiencies, and included concepts introduced at school and applied in real world situations (id. at p. 17).

To address the student's social/emotional and behavioral needs, the report included recommendations such as placing the student with a well-matched peer group, and developing a behavior intervention plan (BIP) that incorporated collaborative problem solving techniques; psychopharmacological treatment; ongoing counseling; narrating social interactions for the student and providing him with a clear statement of explicit and implicit social rules; consistency in teaching and predictability of routine and environment; visual organizers; review of daily schedule; and explicit social skill building techniques (Parent Ex. P at pp. 17-20).

To further address the student's communication, behavioral, social/emotional, and visual-motor needs, the report included recommendations for related services including speech-language therapy, OT, and individual and group counseling (Parent Ex. P at p. 18).

Finally, the student's May 2015 IEP provided additional insight into the student's speech-language and motor needs (Dist. Ex. 11). With respect to the student's speech-language skills, the IEP indicated that the student often interrupted his partner during conversational exchanges and had demonstrated minimal progress in allowing his partner to comment and question during conversation (id. at p. 7). However, the IEP noted that when given prompts, the student was able to pause and allow his partner to comment before stating his own opinion (id.). With respect to the student's physical needs, the IEP indicated that the student needed to improve his bilateral hand

skills, motor planning, eye-hand coordination, fine motor skills, safety awareness, and sensory processing skills (id. at p. 9).

## 2. Specially Designed Instruction

The district argues that the student did not receive formal academic instruction while attending Chamberlain, nor did he receive any related services. The district argues that the IHO incorrectly determined that Chamberlain was appropriate and erred by finding that the student received vocational instruction and behavior supports through psychiatric and psychological services, counseling, social skills training, and positive reinforcement.

Contrary to the district's assertions, the hearing record contains sufficient evidence describing how the educational program at Chamberlain 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]).

Although the May 2015 CSE determined that the student had earned enough credits to receive a high school diploma and therefore after June 2015 would no longer be eligible for special education or related services, the parents disagreed and requested that the CSE develop an IEP for the student for the 2015-16 school year (Dist. Ex. 11 at p. 2). Following the district's refusal, the parents began to look for an alternative placement for the student.<sup>7</sup>

The student's father testified that he found Chamberlain through personal conversations with friends who had children with disabilities, internet research, and the help of an educational consultant (Tr. p. 580). He reported that he visited the school in the second or third week of July 2015 and that when he visited he observed "high functioning kids who had learning disabilities and who were emotionally disturbed, all in [the student's] age range" (Tr. pp. 581-82). The student's father opined that the students at Chamberlain seemed happy and well taken care of and the facility looked nice (Tr. p. 582). He noted that Chamberlain had a "small staff to student ratio" in the classroom and housing facilities (id.). The student's father explained that "seeing that they were able to make progress with some of the kids, and that the kids were well taken care of" made him feel comfortable having Chamberlain take care of the student (id.).

The student was parentally placed at Chamberlain in August 2015 for the 2015-16 school year (Tr. pp. 579-80, 608-09). According to the Chamberlain education supervisor (supervisor), Chamberlain is approved by the State of Massachusetts to provide education to special needs students (Tr. p. 607). At the time of the impartial hearing, the supervisor testified that there were 107 students attending Chamberlain, 18 as day students and the remainder as residential students (id.). The supervisor reported that Chamberlain employed six special education teachers, twelve

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<sup>7</sup> The student's father reported that in the beginning of July 2015, the student was hospitalized for approximately one week due to a manic episode secondary to medication (Tr. pp. 578-79). According to the student's father, the student's behavior was "a little bit better" following his discharge; however, the student still engaged in inappropriate outbursts (Tr. p. 579).

content area teachers, and 14 associate teachers (Tr. pp. 606-09). Additionally, the supervisor testified that Chamberlain utilized a collaborative problem solving approach, and was a highly structured program due to its 4:1 student to staff "ratios in any activity or any building," as well as its set routines, schedules and supervision (Tr. pp. 631-32). The supervisor explained that for students new to the school, Chamberlain held an initial service plan meeting six weeks from the date of enrollment; and that during that intervening time, Chamberlain staff "try to assess where the student stands and develop a plan" (Tr. p. 616). The student team manager at Chamberlain testified that the primary focus of the school was "to provide care, therapeutic support to help people grow and learn, how to manage . . . whatever their disabilities may be" (Mar. 30, 2016 Tr. p. 915).

Following the student's enrollment at Chamberlain, the school developed a treatment plan for the student that included the student's referral behaviors, current level of functioning and behavior management overview, student strengths, individual and group therapy services, program treatment goals—including objectives, interventions and responsible parties—progress, family centered goals, an academic section detailing the student's grade level and academic courses, and a health/medical record (Parent Ex. L). The student's treatment plan, reporting on the period from August 10, 2015 to October 20, 2015, indicated that the student's referral behaviors included a history of aggressive behaviors, perseveration on topics such as weight gain, and difficulties with focusing on one task or topic at a time, as well as emotional regulation challenges, all of which impeded the student's social interactions and academic success (*id.* at p. 1).<sup>8</sup> The treatment plan stated that since his enrollment, the student at times struggled with remaining on task in both the classroom and residence, but had been able to carry out tasks with extra staff support (*id.*). The treatment plan stated that "in session" the student continued to jump from one target to another but was able to refocus with extra support from the counselor (*id.*). The treatment plan noted that the student had experienced several positive peer interactions since his enrollment, but also that there had been a few occasions when the student became agitated during peer interactions and had difficulty tolerating his emotions and misinterpreted social situations (*id.*). According to the treatment plan, the student was "very anxious about his body image" and hyper-focused on diet and exercise (*id.*). The treatment plan noted that the student was very conscious of the majority of his struggles and seemed motivated toward working on his struggles while at Chamberlain (*id.*).

With respect to student strengths, the treatment plan indicated that the student was caring and smart and enjoyed socializing with others, playing sports, and working out (Parent Ex. L at p. 2). According to the treatment plan, the student had received 45-minute individual therapy sessions weekly, the initial focus of which was building a therapeutic alliance while addressing the student's anxiety related to body image (*id.*). A change in therapists resulted in a change in focus to interpersonal skill building, impulse control, self-advocacy, and transition planning (*id.*). With respect to group therapy, the treatment plan indicated that a weekly, 45-minute residence support group, in which a clinician offered support and check-ins as needed, had been provided to the student (*id.*).

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<sup>8</sup> The treatment plan referenced a September 2009 hospitalization for long term agitation, but not the student's July 2015 hospitalization (Parent Ex. L at p. 1).

The student's treatment plan included two program treatment goals; the first goal targeted the student's interpersonal skill building and emotional regulation, and the second goal targeted the student's vocational skill building and transition planning (Parent Ex. L at pp. 3-6). Among other things, the first goal included objectives related to the student's ability to develop insight into how his comments/behaviors impacted his daily interactions, as well as his ability to reciprocate in daily interactions, and identify triggers and socially acceptable responses to them (id. at p. 3). The objectives also focused on the student's ability to improve his emotional boundaries and manage his frustration (id.). The related interventions detailed by the treatment plan included attending weekly individual therapy, weekly psychoeducational groups, and monitoring and feedback from staff (id. at p. 4). The treatment plan stated that since enrolling in Chamberlain, the student's ability to use appropriate social skills and engage in positive peer interactions had been inconsistent (id.). According to the treatment plan, the student was eager to interact with peers but struggled with understanding how his comments and behavior impacted the quality of his interactions (id.). The treatment plan indicated that when the student was frustrated or discouraged, he had significant difficulty regulating his emotions and became rude and defiant with both staff and peers (id.). However, the plan also indicated that when calm and in a positive state of mind, the student served as a helpful role model to others (id.).

The second treatment goal included objectives which targeted, among other things, the student's ability to identify strengths and weaknesses that would impact his community-based success; learning to sustain participation in community service opportunities; attaining an off-campus internship, followed by an off-campus job; and enhancing his understanding of independent living and what it entailed (Parent Ex. L at p. 5). The related interventions detailed by the treatment plan included individual therapy, assistance and encouragement from the treatment team and faculty monitoring and support (id. at p. 6). With respect to the student's progress to date (October 2015), the treatment plan indicated that since enrolling at Chamberlain the student had volunteered in an off-campus "local kitchen"; however, due to difficulties with the manager the student refused to return, despite staff encouragement (id.). According to the treatment plan, the student often shared goals and interests regarding career options but "had difficulty identifying more realistic and feasible options" (id.). The treatment plan stated that the student completed his activities of daily living in the residence with minimal to no prompting and that he had a basic understanding of independent living (id.).

The student's treatment plan also included family centered goals related to the treatment team maintaining weekly contact with the student's family, the student's family implementing necessary structure and boundaries during home visits and the student, and his family working collaboratively to build trust and communication (Parent Ex. L at p. 6). In terms of progress, the treatment plan indicated that the student had only had one home visit, which he reported went well, and that the student was eager to earn more home visits in the future (id.).

The academic section of the student's treatment plan indicated that specific academic goals were included in the student's IEP, but the student did not have an IEP at the time the treatment plan was created, and the treatment plan did not otherwise include academic goals (Parent Ex. L at p. 7). The treatment plan further indicated that the student's then-current grade level was "12+" and listed the following academic courses for the student: consumer math, social studies (economics), health and nutrition, American literature, physical education, fine arts, enrichment courses, and community experiences (id.). With respect to academic strength and needs, the



student's treatment plan indicated that, at the time it was developed, the student was placed in a "partially self-contained Life Skills class" in order to progress in vocational and life skills for post-school transition (*id.*). According to the treatment plan, although the student was placed in the "Life Skills" classroom, he spent the majority of his time exploring community based internship placements (*id.*). The treatment plan indicated that the student was capable of task completion at his internship, but had difficulty maintaining appropriate interactions with staff (*id.*). With respect to the student's academic performance and progress, the treatment plan indicated that the student had made inconsistent progress in terms of stabilization of his frustration tolerance and overall behavior control (*id.*). The treatment plan indicated that when the student was in a "negative space" he would ask to speak with preferred staff, rather than make off-color comments to peers, as he had in the past (*id.*). According to the treatment plan, the student preferred verbal participation in his life skills-centered academic assignments within the classroom setting (*id.*). The student's internship tasks included meal planning, grocery shopping, meal preparation, customer service and clean-up (*id.*).

Although the student's father believed that the student received academic instruction at Chamberlain, and the student's treatment plan indicated that he was enrolled in numerous academic classes, the hearing record shows that the student did not receive formal academic instruction at the school. The student's father testified that Chamberlain was providing the student with academic instruction, including instruction in basic math (with personal money management) and reading (with basic English instruction), and social studies (Tr. pp. 582-83).<sup>9</sup>

However, according to the hearing record the student spent the majority of his time, from August 2015 through the time of the hearing, in community-based settings with an emphasis on vocational, life, and social skills (Tr. pp. 609-12, 614, 638, 709-10, 749-51, 877, 882-84, 891-92; Mar. 30, 2016 Tr. pp. 915-16, 950-51; Parent Ex. L at p. 7). The student was placed with seven other students, 18 to 21 years of age, in a "transition/life skills class" staffed by two special education teachers (Tr. pp. 877-78, 882; Mar. 30, 2016 Tr. pp. 947, 949; Parent Ex. L at p. 7). The Chamberlain supervisor testified that the students in the life skills class spent 80 percent of their week at volunteer internship locations, and that the time the students spent in the classroom was scheduled with therapy sessions, group sessions, and "some classroom-based activities focusing on pre-vocational skills" (Tr. p. 612). The student's typical weekday schedule included approximately 16 hours of an off-site "work situation" per week, and was as follows: transition from the residence to school at 8:00 a.m.; from school to community location by 9:00 a.m.; back to campus for lunch at 12:15 p.m.; to another community location (such a volunteer job opportunity, library, or YMCA) until 3:00 p.m.; and then back to the residence (Tr. pp. 628-30, 882-85). One morning per week for 90 minutes, the student attended an enrichment class on campus in current events; and some afternoons, the student attended "therapies" (Tr. pp. 884-85; Mar. 30, 2016 Tr. pp. 963, 1005).

The education supervisor at Chamberlain testified that the student came to the school seeking a high school diploma (Tr. pp. 638-39). The supervisor reported that he initially placed the student in a class that "was on a more academic track", but that the class "did not work out"

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<sup>9</sup> The student's father also reported that the student was attending classes at Chamberlain and suggested that the student was "able to sit in classes probably significantly longer than he was able to do at Gersh" (Tr. p. 587).

academically or socially for the student (Tr. p. 609). The supervisor described the student's initial placement as a "very classroom-based class" where the student would have all four of his core academic subjects in one day (Tr. p. 611). He reported that the academics were "too much" for the student, even with "a pretty high level of support" and the student was not "around similar peers socially" (Tr. pp. 614-15). The student was shifted to "more of a transitional track" that focused on the development of vocational and independent living skills, as well as functional academics (Tr. pp. 609-11, 614). However, the supervisor testified that there were times where he needed to intervene and remove the student from the life-skills based class for short periods of time due to behavioral difficulties on campus and in the community (Tr. pp. 610-11).<sup>10</sup>

According to the supervisor, the students in the life-skills class had typically completed or were near completing credit requirements toward graduation, but had not acquired the skills to transition to independent living or a vocational training setting (Tr. pp. 615-16). He noted that most of the students in the class had been in residential care for "a period of time," and that Chamberlain was trying to place the students in community settings with support to see how they would respond (Tr. p. 616).

The student's life skills special education teacher at Chamberlain testified that the student did not receive consumer math instruction "per se," but that he received math that was incorporated into his daily schedule (Tr. p. 976). For example, math was built into community shopping trips where the student would be responsible for working with a budget (Tr. pp. 976-77). The special education teacher confirmed that the student did not receive instruction in social studies, literature, or fine arts, classes listed in the academic section of the student's treatment plan (Tr. pp. 975-78). However, the special education teacher reported that the student received science, health, and nutrition instruction via a conditioning program at the YMCA that he participated in three times per week (Tr. p. 977). The special education teacher acknowledged that there was no set curriculum for nutrition, that the instruction took place in a workout room at the YMCA and that the teachers followed a curriculum they had developed (Tr. p. 978).

The student's second life skills special education teacher (co-teacher) testified that the class focused on social and vocation skills, noting that the teachers were trying to prepare the students for life outside of a school environment (Tr. p. 877). He reported that there was not an academic component to the program "in a classical sense", nor was there an emphasis on reading or math (Tr. p. 878). He explained that in "the general sense" there was math instruction in the vocational programs in that the teachers looked for the opportunity to show students the value of money and what things cost, but that the teachers did not give the student's assignments and they were not graded on math (Tr. p. 878). As noted above, the student attended an enrichment class of his own choosing for 90 minutes per week (Tr. pp. 884-85; Mar. 30, 2016 Tr. pp. 963, 1005).

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<sup>10</sup> The hearing record shows that in or around December 2015, the student's behavior deteriorated and he was moved from the life skills class back to an academic class for a period of approximately two to three weeks (Tr. pp. 731-33, 751, 891-92, 916, 940-41). The student also experienced difficulty in his residence during this time (Tr. pp. 696, 702-06; Parent Exs. N, O). Chamberlain staff testified that these incidents coincided with a change in the student's medication (Tr. p. 695, 705). As a result, the new medication was discontinued (Tr. pp. 694-95, 731-33, 941).

In regards to vocational and life skills, the student's co- teacher testified that the life skills teachers took the student to a variety of volunteer job opportunities at food pantries or the Salvation Army (Tr. p. 877). As part of his volunteer internships the student inventoried food at a community food pantry, hung up clothes and put them in their proper location at a Salvation Army store and served meals to homeless people at a church mission center (Tr. pp. 621, 658-60, 886-87). Upon reviewing the student's treatment plan, the special education teacher testified that in order for the student to meet objectives related to community based vocational activities he, the teacher, "process[ed] a lot with [the student]" and engaged in "a lot of one-on-one conversations" with him (Tr. p. 969). In terms of the treatment plan objective that required the student to identify his strengths, the special education teacher testified that the class would do "role playing, talk about it, process it as a group and that's basically how we handle the objectives" (Tr. p. 969-70). The special education teacher reported that the student continued to sustain participation in three to five community service opportunities, as delineated in his treatment plan (Tr. p. 970). With respect to the objective of attaining an off-campus internship and job, the special education teacher reported that "we are using a lot of structure and routine to meet that goal"; however he cautioned that it was going to take more time and a lot of patience and repetition for the student to get an off-campus job (Tr. p. 971). He explained that the teachers were using the student's current internships to build the skill sets that he needed to function independently (*id.*). According to the special education teacher, the student's life skills teachers were also helping the student navigate on-the-job frustrations by having him seek out a teacher who could provide him the support needed to get back to task, rather than leaving (Tr. p. 972). He reported that the teachers worked on this skill informally, through role playing, and also provided the student with nurturing, tried to keep the student on task and worked with the student on building confidence and motivation (*id.*). The special education teacher testified that he had talked with the student about his postsecondary goals, filled out mock applications, and created a resume (Tr. p. 973). The special education teacher also reported that he had worked on self-advocacy skills with the student so that he could problem solve work challenges with the on-site supervisor (not associated with Chamberlain) (Tr. p. 974).

With respect to the student's related services needs, there is no evidence in the hearing record that the student received speech-language or occupational therapy while attending Chamberlain (Tr. p. 735; Mar. 30, 2016 Tr. pp. 976-78; Apr. 13, 2016 Tr. pp. 935-36; *see* Parent Ex. L). However, the failure to provide related services will not render a unilateral placement inappropriate if the placement as a whole is reasonably calculated to enable the student to receive educational benefits (*T.K. v. New York City Dep't of Educ.*, 810 F.3d 869, 878 [2d Cir. 2016]; *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 838-39 [2d Cir. 2014]).

In addition to a lack of academic instruction, there is minimal evidence of the student's teachers or Chamberlain residential staff attempting to formally teach the student independent living skills. Although the student's treatment plan also included a goal that targeted independent living and the development of a transition plan, his co-teacher testified that he and the special education teacher did not use a written curriculum for life skills, rather they taught life skills as they pertained to vocational skills (Tr. p. 879). The student's father testified that although Chamberlain provided the student with jobs, it did not provide "true transitional services where [students] learn to live on their own in the community" (Tr. p. 588).

In terms of the student's vocational needs, as noted above, the Chamberlain treatment plan included a goal and several objectives that targeted the student's participation in community based vocational opportunities, and the majority of the student's time was spent exploring community based internship placements (Parent Ex. L at pp. 5-7). The student was supported by his teachers in these placements (Tr. pp. 958, 969-74, 987).

However, there is also minimal evidence in the hearing record that Chamberlain provided the student with academic instruction or attempted to teach him functional academic skills in a classroom setting. The student's father confirmed that according to the private neuropsychologist the student should continue to be provided with academic and therapeutic services through age 21, and that the educational consultant he ultimately employed recommended that the student continue with academic support in a residential-type setting (Tr. pp. 789, 838-39; see Tr. p. 580, Parent Ex. P at p. 17). He testified that he placed the student at Chamberlain for among other things, the academic program and moreover, reported that the student was receiving academic instruction in math, reading and English at the school (Tr. pp. 582-83, 789). However, the hearing record shows, and the IHO found, that the student did not receive formal academic instruction at Chamberlain (IHO Decision at p. 55). As noted above, the Chamberlain education supervisor testified that the student came to the school for a high school diploma (Tr. p. 639).<sup>11</sup> Although the student was initially placed in a program that focused on academics, the class he was placed in "did not work out" because the student was unable to perform academically at the level of the class and it was not a good fit for the student socially (Tr. pp. 609, 638, 647-48).<sup>12</sup> While the Chamberlain supervisor confirmed that the school had another, more academically appropriate class for the student, he declined to place the student in that class (Tr. p. 649). The student's co-teacher testified that he could not answer why the student was not in an academic program (Tr. p. 891). The student's treatment plan did not include any academic goals or objectives and, with the exception of "enrichment," the student did not attend any academic classes listed on his treatment plan (Tr. pp. 878-79; Mar. 30, 2016 Tr. pp. 963, 975-78, 1005; see Parent Ex. L). Furthermore, the treatment plan indicated that the student "prefer[red] verbal participation in his Life Skills centered academic assignments with the classroom setting" (Parent Ex. L at p. 7).

While the student's teachers reported that the student received consumer math within the context of his vocational program and health and nutrition instruction within the context of community outings to the YMCA, this instruction appears to have been provided on an ad hoc basis with no curriculum to guide instruction nor any articulated goals (Tr. pp. 878-79, 976-78). While the student was transferred back to an academic classroom for a short period of time in December 2015-January 2016, the hearing record does not describe the class in which the student was placed and it appears that the student was moved in response to escalating behaviors and a

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<sup>11</sup> The supervisor testified that based on the program the student was placed in that he would be working toward a Chamberlain diploma (Tr. p. 639). According to the supervisor, the student would earn a Chamberlain diploma if he mastered the goals/objectives identified in his treatment plan or if he aged out of special education (Tr. pp. 639-40). The supervisor stated that it was hard to determine if the student would earn a Chamberlain diploma if he aged out of special education but did not master his treatment plan objectives (Tr. p. 40).

<sup>12</sup> The supervisor reported that the student was initially placed with a group of 12th grade students on a "general studies track" (Tr. p. 647). He explained that students on this track may go on to community college or get a job and that the level of academics was " a little lower than our college preparatory track" (Tr. p. 647).

refusal to attend vocational assignments, rather than an assessment of his academic needs (Tr. pp. 750-51, 891-92, 916, 940-42).

With respect to the student's social/emotional needs, the hearing record shows that, according to the student's Chamberlain counselor, Chamberlain employed seven clinicians, along with five or six clinical interns (Tr. pp. 683-84). According to the counselor, all of the students at Chamberlain received counseling, and all students received the same amount of counseling; however, students who were having difficulties were assigned to a clinical intern for additional support (Tr. p. 685). The minimum required counseling for each student was one 45-50 minute session per week (Tr. pp. 685-86). In addition, all students attend two therapy groups—a classroom-based group and a house (dorm) meeting (Tr. p. 686).

The student's counselor testified that he provided individual therapy to the student as well as to his classroom group and dorm group (Tr. p. 687). The counselor reviewed the student's August 2015 treatment plan and stated that he agreed with the description of the student's strengths contained in the plan (Tr. p. 689). He reported that the student enjoyed socializing with others, but that the quality of his interactions varied (*id.*). He further reported that at times the student mentioned going to college but that the clinician believed that college would be very difficult for the student and that he would have difficulty functioning in a college environment (Tr. pp. 689-90). The counselor testified that the student had difficulty building interpersonal skills and demonstrating impulse control (Tr. p. 690). The counselor detailed the skills that he was currently working on with the student, including building interpersonal skills; active listening, including taking another person's perspective; being able to reciprocate in an interaction; disagreeing with another person's opinion without offending the person; communication enhancement; and impulse control (Tr. p. 692). The counselor reported that the student struggled with his impulses, mainly making inappropriate comments (Tr. p. 693).

The counselor described the dorm therapy session as a "drop in," where the clinicians had an opportunity to interact with students and students were invited to talk about any issues they were having related to school, the residence, or their family (Tr. p. 687). He characterized the group session as an opportunity for students to interact with each other and the clinician, and to "become closer as a dorm and as roommates" (Tr. pp. 687-88). The counselor testified that the student's participation in the dorm group varied, depending on his mood (Tr. p. 687). He noted that there were times when the student joined the group and other times when he walked away or chose not to participate (Tr. p. 688). According to the counselor, there were other students at Chamberlain who behaved in a similar manner, but not to the same degree as the student (*id.*).

In addition to seeing the student one time per week for individual therapy and one time per week in his residence, the therapist reported that he saw the student on Fridays at the food pantry where the student's vocational class volunteered (Tr. p. 711). With respect to the student's ability to function in a vocational setting, the therapist reported that it varied because although the student was motivated, he was easily distracted by external events, often as a result of interacting with his peers, and that it was easy for the student to get off task (Tr. pp. 711-12).

The counselor reported that Chamberlain had two consulting psychiatrists who saw students one time per month and monitored their medications (Tr. p. 688). He confirmed that the student saw a psychiatrist once a month (*id.*).

In addition to the counseling services and medication management, the student's teachers reported that they used a variety of means to address the student's impulsive and socially inappropriate behaviors. Specifically, the student's teachers testified that they employed redirection, "threaten[ing]" the student with not being able to "go to the gym," removing the student from class, one to one conversations, role playing, repetition, routine, structure, and "processing" of behaviors to address the student's anger and insulting behavior (Tr. pp. 890-92; Mar. 30, 2016 Tr. pp. 969-71).

With respect to the residential portion of the student's program, the Chamberlain "student team manager" testified that from the student's enrollment in August 2015 through a March 17, 2016 meeting, the student had been in three different residences and was initially moved from the first residence due to challenges with a peer (Mar. 30, 2016 Tr. pp. 938-40; see Tr. pp. 737-39). According to the student team manager, when the student was having behavioral difficulties in the residence, the student team manager provided support and guidance for the staff with respect to how to handle and process the situation, and that the staff reached out to him for "the best way to kind of manage [the student's] behavior" (Mar. 30, 2016 Tr. pp. 920-21, 929). Further, the student team manager testified that he "saw" the student at least three to four times per week—on campus, in his residence or when the student came by his office (Mar. 30, 2016 Tr. pp. 923-24). Although the student team manager testified that he did not provide any direct services, he reported that helped the student process challenging situations and made suggestions about how the student could behave differently two to three times per month (Tr. pp. 911, 927-28).

According to the hearing record, there was regular communication between the student's teachers and his counselor and residential staff (Tr. pp. 694, 914-15, 921, 955-56, 959, 961-62, 963-64).

With respect to the student's social/emotional needs, the Chamberlain treatment plan included a goal that targeted the student's ability to enhance his interpersonal and communication skills in order to engage in positive peer interactions and build health peer relationships, and to manage his emotions in healthy and positive ways (Parent Ex. L at p. 3). The plan also included objectives that, among other things, highlighted the student's need to develop insight into how his comments and behaviors impacted his daily interactions, improve his ability to reciprocate in daily interactions, identify personal triggers in social situations, identify socially responsible responses to the triggers, improve emotional boundaries and manage frustration (Parent Ex. Lat p. 3). Chamberlain staff implemented this portion of the treatment plan by providing the student with individual and group counseling and through engaging the student in collaborative problem solving in his life skills program and residence (Tr. pp. 687, 914, 957-58). With respect to the student's maladaptive behaviors, the student's co-teacher reported that he responded to the student's verbal aggression by redirecting the student (Tr. pp. 890-91). However, he also stated that he would threaten to take away the student's gym privileges, a strategy that did not appear to be systematically applied or part of a larger behavior plan (see Tr. pp. 890-91, 896-97). Accordingly, the hearing record supports that, on balance, Chamberlain developed and implemented a program that appropriately addressed the student's social/emotional and vocational needs. As a result, although Chamberlain's program addressed the student's social/emotional and vocational needs to a demonstrably greater degree than his academic and life skills needs, the hearing record supports

the IHO's determination that Chamberlain was appropriate to meet the student's educational needs overall.<sup>13</sup>

### 3. Progress

The district also alleges that the IHO erred by finding that the student demonstrated modest improvement and that the student received functional academics through an internship and community activities. The evidence in the hearing record supporting the IHO's conclusion that the student made progress at Chamberlain is generally based on the testimony of Chamberlain staff and the student's father. The only documentary evidence of progress in the hearing record is contained in the treatment plan, which evidences limited progress between August and October 2015 (Parent Ex. L). The treatment plan indicated that the student's ability to engage in positive peer interactions, control his behaviors, tolerate frustration, and use appropriate social skills was varied (*id.* at pp. 4, 7). However, the treatment plan indicated that the student had improved with respect to requesting to speak to preferred staff when he was "in negative space" (*id.* at pp. 1, 7). The student's father testified that the student demonstrated progress by making friends, being better able to take direction, and control himself and refocus when he became agitated (Tr. p. 584). The student's father further testified that the student "seem[ed] to be less hyperactive and able to focus better in general" (*id.*). In addition, the student's father reported that during a home visit, the student exhibited some hyperactivity and difficulty focusing, "but his explosive behaviors were much less" (Tr. p. 586). The Chamberlain education supervisor testified that the student had improved "[i]n terms of being able to process some of his difficulties" with staff (Tr. p. 672). The supervisor further indicated that the student had become more responsive to redirection, and his ability to remain on task had improved "very slightly," but he required a significant amount of prompting and redirection to engage in non-preferred tasks (Tr. pp. 711-12). The student team manager testified that the student was better able to handle interactions with peers and receive direction from teachers, which had resulted in a decrease in behavioral outbursts (Mar. 30, 2016 Tr. p. 943). The student's co-teacher testified that after some difficulties, the student's behavior had improved, he got along better with classmates, and that he worked harder in his vocational program (Tr. pp. 891-92). The student's special education teacher testified that the student had shown improvements in his language and in his ability to stay focused, and exhibited decreased anxiety when presented with tasks with which he was not comfortable (Mar. 30, 2016 Tr. p. 952). The special education teacher further testified that the student had made progress toward objectives in his treatment plan with support in a structured environment (Mar. 30, 2016 Tr. pp. 968-73). The special education teacher also reported that the student had improved in his ability to self-advocate to a supervisor (Mar. 30, 2016 Tr. p. 974). However, the special education teacher conceded that no data had been collected to document the student's progress, and therefore, reports of progress were "informal anecdotal" (Mar. 30, 2016 Tr. pp. 979-80, 984-86; *see* Tr. pp. 693, 718-23).

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<sup>13</sup> To the extent the district asserts that a residential placement was not appropriate for the student, the district does not contend that the student could not receive educational benefit because of the residential nature of his unilateral placement at Chamberlain. Furthermore, the Second Circuit has been clear that parents will not be held to the same least restrictive environment considerations as a school district that has failed to offer their child a FAPE, necessitating the resort to a private school educating solely disabled children (*C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 837 [2d Cir. 2014]). To the extent this argument can be considered a request for diminution of a reimbursement award, it is discussed below.

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 to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115). Likewise, the parents' unilateral placement cannot be found to be appropriate when based solely on anecdotal reports of the student's progress (see Hardison, 773 F.3d at 387-88 [noting the difficulty of assessing a student's progress "when the record does not contain specific evidence of what services were actually provided to the student to address the disability that the private placement is intended to ameliorate"]; 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"]; John M. v. Brentwood Union Free Sch. Dist., 2015 WL 5695648, at \*10 [E.D.N.Y. Sept. 28, 2015] ["while evidence of progress is helpful in determining the appropriateness of a placement, it is not determinative, since the focus must remain on whether there existed a program specifically designed for [the student's] unique needs"]).

Nevertheless, the totality of the evidence in the hearing record supports a finding that the parents' unilateral placement was appropriate. Given the student's age, academic profile and well-documented intensive social/emotional and transitional needs, the student's parents met their burden by demonstrating that Chamberlain provided the student with an appropriate program. The hearing record does not reflect—and the parents were not required to demonstrate—that Chamberlain provided specially designed instruction to address every one of the student's needs. Further, the lack of objective evidence regarding the student's progress while enrolled at Chamberlain is not dispositive given the information available to the parent at the time of the student's unilateral placement and the district's failure to develop any program for the student. Therefore, the IHO's determination that Chamberlain was an appropriate unilateral placement for the student for the 2015-16 school year will not be disturbed (Gagliardo, 489 F.3d at 115; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451-52 [2d Cir. 2015] [affirming the determination that small class size and modified grading, alone, did not constitute special education where the record did not indicate how curriculum was modified to meet the student's needs]; Hardison v. Bd. of Educ., 773 F.3d 372, 387-88 [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"]; C.L., 744 F.3d at 838-40).

## **B. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation



by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if the parents did not provide notice, either to the CSE at the most recent CSE meeting prior to their removal of the student from public school or in writing to the public agency ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).

The IHO found that the parents were entitled to partial reimbursement for the costs of the student's tuition at Chamberlain, determining that equitable considerations did not fully favor the parents' request because they did not cooperate with the district (IHO Decision at pp. 66-71). I disagree, and find that the hearing record presents no basis on which to reduce or deny the parents' request for reimbursement.

The district concedes on appeal that the student did not graduate from Gersh with a high school diploma, and thus remained eligible for special education and related services. The district argues that the parents impeded the district's ability to offer the student a FAPE because they did not disclose, prior to the May 2015 CSE meeting, that the student was no longer expected to timely graduate from Gersh with a high school diploma. However, the hearing record reflects that, even after the parents requested at the May 2015 CSE meeting that the district develop a program for the student for the 2015-16 school year, the district maintained its position that the student had accrued sufficient credits to graduate at the end of the 2014-15 school year (Dist. Exs. 11 at p. 2; 21 at pp. 1-2). While a parent is expected to cooperate with a district's "efforts to meet its obligations under the IDEA" (C.L., 744 F.3d at 840), where, as here, the district decided not to develop a program for the student under its now-acknowledged incorrect assumption that the student was no longer eligible for special education programs and services, it would undermine the purposes of the IDEA to deny the parents' request for relief on this basis. The district also notes that the parents did not share the privately-obtained May 2015 neuropsychological evaluation report with it. However, as the parents were not in possession of the report until after the May 2015 CSE meeting, the parents' failure to share the report with the district came after the district had already determined not to develop an IEP for the student for the 2015-16 school year and did not impede the district's ability to develop an appropriate program for the student. In particular, the evaluation report provided no basis for the student's eligibility not already known to the district, which determined that the student was no longer eligible for services not on the

basis of his needs, but under the mistaken belief that he had earned a high school diploma from Gersh.<sup>14</sup>

Similarly, the parents' failure to provide adequate notice (i.e., at the May 2015 CSE meeting or 10 business days before they removed the student from the district) of their intention to unilaterally place the student at public expense provides a basis on which I may exercise my discretion to reduce or deny an award of tuition reimbursement; however, such a reduction is not warranted under the circumstances of this case. Initially, the district's argument that the parents did not reject an IEP at the time of the May 2015 CSE meeting is disingenuous, as the IEP developed at that meeting expired at the conclusion of the 2014-15 school year, and the record reflects that the parents requested that the district develop an IEP for the 2015-16 school year (Dist. Ex. 11 at pp. 1-3). The hearing record also reflects that the parents filed their initial due process complaint on June 15, 2015, and the parties convened a resolution session in July 2015, prior to the filing of the amended due process complaint notice (Tr. p. 966; IHO Ex. AA). However, the hearing record contains no indication that the district offered to resolve the parents' concerns at that time, leaving the parents with no option other than to find a placement on their own initiative. Accordingly, the purpose of the ten-day notice, to permit the district to resolve the parents' concerns, is not implicated in this instance, where the district was given the opportunity to resolve the parents' concerns with respect to the initial due process complaint notice and the hearing record contains no evidence of its attempts to do so. That the parents requested additional relief after the district failed to resolve their concerns is hardly unexpected, and the district will not now be heard to claim that the parents' failure to provide notice at some unspecified earlier date should preclude reimbursement for the costs of a unilateral placement the parents were compelled to make in response to the district's failure to fulfill its responsibilities to the student.

The district further asserts that the student did not require a residential placement and that the parents' failure to develop a record regarding the student's tuition at Chamberlain deprived it of the opportunity to challenge the reasonableness of such costs. However, the district made no attempt to refute the father's testimony that the student's tuition costs at Chamberlain were approximately \$12,000 per month (Tr. pp. 585-86). Additionally, the district has not "identified . . . particular services provided by [Chamberlain] that the district considered unnecessary to the provision of a FAPE (and for which reimbursement was therefore not required) or . . . otherwise shown that only a portion of [the student's] tuition cost should be reimbursed" (M.H., 685 F.3d at 254-55 n.12). Accordingly, the parents' cross-appeal is granted, and the district is ordered, upon submission of satisfactory proof of payment, to reimburse the parents for the costs of the student's tuition at Chamberlain for the 2015-16 school year.

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<sup>14</sup> The district focuses on the parents' actions in withholding information from the district, and the hearing record demonstrates that the parents were not entirely forthcoming with the district. However, the record demonstrates that the parents specifically requested that the district develop an IEP for the 2015-16 school year, and that the district admits that it erred in finding the student to be no longer eligible for services under the IDEA (C.L., 744 F.3d at 840 [holding that "[w]hen the District determined—incorrectly—that [the student] was not entitled to special services under the IDEA, it was appropriate for the parents to turn to a private placement"]).

## **VII. Conclusion**

In summary, the IHO erred in reducing the award of tuition reimbursement on the basis that the parents did not cooperate with the district. I have considered the parties' remaining contentions and find them to be without merit or that I need not address them in light of the determinations made herein.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated August 8, 2016, is modified, by reversing that portion of the decision which determined that the parents were not entitled to full reimbursement of the costs of their unilateral placement of the student at Chamberlain for the 2015-16 school year; and.

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for the costs of the student's tuition at Chamberlain for the 2015-16 school year upon submission of satisfactory proof of payment.

**Dated:**           **Albany, New York**  
                      **November 25, 2016**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**