



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-095

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, John Tseng, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Sonia Mendez-Castro, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending kindergarten at the Aaron School (Tr. p. 315). The Commissioner of Education has not approved the Aaron School as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; Dist. Ex. 6 at p. 1).

Background

With regard to the student's educational history, the student had speech-language delays first identified at age two, and motor planning difficulties for which he received services through Early Intervention (EI) and the Committee on Preschool Special Education (CPSE) (Dist. Exs. 23 at p. 1; 24 at p. 1).

An undated speech-language therapy progress report written by the student's speech-language pathologist in anticipation of a CPSE review, discussed the student's progress for the period from February 2009 to November 2009 (Dist. Ex. 28 at p. 1). The report indicated that the assessment of the student's speech-language functioning levels was based on observations, review of past reports, and data taken from recent therapy sessions (id.). Overall, the speech-language progress report indicated that the student presented with moderate receptive and expressive language delays and disordered social pragmatic skills (id. at p. 3). The student's articulation appeared within normal limits for his age, and voice and fluency were within normal limits for daily communication (id.). The report described the student's attention and compliance as "variable" (id.). The speech-language pathologist recommended that the student continue to receive speech-language therapy individually, three times per week for 30 minute sessions (id.).

A December 17, 2009 occupational therapy (OT) progress report written by the student's occupational therapist indicated that the student received individual OT one time per week for 45 minutes and "additional OT services at a sensory gym" (Dist. Ex. 30 at p. 1). The progress report reflects that based on administration of formal testing, the student displayed "considerable delays in his fine motor skills (id. at pp. 1-3). A variety of assessments conducted by the occupational therapist revealed in part, that the student displayed decreased muscle strength in his arms, legs, and trunk, and had significant difficulty regulating his sensory system, difficulty in transitioning between activities, and difficulty tolerating changes in routines or expectations (id.). The student required increased support when upset or frustrated, and displayed difficulty attending to adult-directed activities (id. at p. 2). According to the occupational therapist the student benefited from wearing a weighted backpack to increase his attention at school (id.). The occupational therapist recommended that the student continue to receive OT services to address his areas of difficulty (id. at p. 3).

A January 1, 2010 educational progress report written by the student's special education itinerant teacher (SEIT) for the 2009-10 school year, indicated that the SEIT assessed the student through observation, parent/teacher interviews, and use of the Developmental Assessment of Young Children (DAYC)—an assessment tool that addresses cognitive, social/emotional, language, motor skills development, and self-help skills in young children (Dist. Ex. 27 at p. 1).¹ According to the report, the student's performance per administration of the DAYC was rated "low" for cognitive development and physical development, "low average" for communication,

¹ The January 2010 progress report written by the student's SEIT indicated the format of the DAYC is a checklist where the examiner checks off skills he/she has observed in the child (Dist. Ex. 27 at p. 1). The DAYC provides the examiner with results in raw scores, scaled scores, percentile ranks, and age equivalents (id.). Review of the progress report revealed that the examiner reported the student's performance on the cognitive development, communication, social/emotional, physical development, and adaptive behavior domains of the DAYC descriptively and by a rating classification of test results (see id. at pp. 2-5).

and "average" for social/emotional and adaptive behavior domains (id. at pp. 2-3).² The progress report indicated the student had made social and academic progress since the beginning of the 2009-10 school year, but continued to perform below age expectations in specific areas (id. at p. 5). The progress report also noted that the student needed "intensive support" to develop speech-language skills; improve body awareness, regulation, social/emotional needs, and comprehension; as well as help in his ability to focus his attention, decrease distractibility, and increase ability to remain on topic to sequence and organize thoughts (id.).

Another occupational therapist wrote an OT progress report in January 2010 which indicated that the student had been receiving OT two times per week for 45 minutes to address improving sensory processing skills, body awareness, strength and tone for coordination and stability; grasp patterns for graphomotor skills; and gross motor skills for balance, endurance, and strength (Dist. Ex. 31 at p. 1). The report indicated that all of the aforementioned areas addressed areas related to increasing the student's independence in daily routines and improving social/emotional skills in school and at home (id.). Consistent with the December 2009 OT progress report in relation to sensory processing, gross motor, motor coordination, self-help skills, fine motor, and visual perceptual skills, the January 2010 OT progress report indicated that although the student had shown some progress he continued to display "significant delays" (id. at pp. 1-2). The occupational therapist recommended that the student continue to receive his current mandate of OT three times per week for 45 minutes (id. at p. 2).

On January 6, 2010, the CPSE met and determined that the student continued to be eligible for preschool special education services as a preschooler with a disability, and recommended that he receive eight hours of SEIT services per week and related services of three individual 30-minute sessions of speech-language therapy, three individual 45-minute sessions of OT, and two individual 60-minute sessions of counseling per week effective immediately and lasting through August 2010 (Dist. Ex. 14 at pp. 1-2, 19).³

On February 22, 2010, the district's school psychologist conducted an observation of the student at his preschool as part of a reevaluation while transitioning from the preschool to elementary school setting (Dist. Ex. 10 at pp. 1-2; see Tr. p. 53). The classroom observation portion of the evaluation report indicated that the observation was conducted at the beginning of the school day following a week long vacation from school (Dist. Ex. 10 at p. 1). The observation report described the student's performance associated with play activities (id.). The observation

² The January 2010 progress report written by the student's SEIT included modifications the student required within each domain (Dist. Ex. 27 at pp. 3-5). Cognitively, the student required use of a weighted backpack, "theraputty," cushion, chair, sensory tools, redirection, prompting, cueing, and a quiet area (id. at p. 3). For receptive and expressive language and communication development, the student needed modifications of adult modeling, cueing and prompting, redirection, visuals, and speech-language therapy (id.). For social/emotional development, the student needed adult modeling, feelings stories, and cueing paired with facial expressions (id. at p. 4). For gross/fine motor development, the student needed modifications of sensory tools, modeling by adults, and OT (id.). For self-help skills development, the student needed modifications of encourage independence, and modeling by adults and peers (id. at p. 5).

³ The hearing record indicates the student attended a mainstream nursery school during the 2009-10 school year where he was accompanied by the SEIT for eight hours per week (Dist. Ex. 23 at p. 1).

report indicated that the student appeared to engage in parallel play but that his own play was "not generally productive in quality;" for example, when attempting to build a structure, the student loosely formed a square with blocks (id.). During the classroom observation, the psychologist noted that the student became "slightly alarmed" upon seeing a classmate wearing a mask and cape, as he required assurance from staff that it was actually a classmate and that the student knew his name (id.). The student was thereafter observed following a therapist's suggestion to put on and wear a weighted knapsack for a portion of the observation (id.). In preparation for the morning meeting, the student took his seat on a padded chair, as did several other students (id.). The student inconsistently participated in a singing activity, but was described as attentive as the days of the week were reviewed and the teacher asked the students to identify the present date (id. at pp. 1-2). When called upon, the student was not able to verbally produce the answer but with support he walked to the front of the room and placed the correct date on the calendar (id. at p. 2). The observation report further indicated that the student's teachers provided him with prompting until he was able to appropriately follow their instruction to return a toy to a peer (id.). The psychologist also indicated that there were short periods of time in which the student appeared to stop his own activity and carefully observe classmates (id.).

In addition to the classroom observation, the psychologist's evaluation report indicated that the school psychologist also administered the Preschool Evaluation Scale-School Version (PES-SV) in an interview format with the student's classroom teacher as informant, and the report included the results of that assessment (Dist. Ex. 10 at p. 2). The evaluation report indicated that according to the technical manual of the PES-SV, six subscales of the PES-SV encompass large muscle skills, small muscle skills, cognitive thinking, language skills, social/emotional skills, and self-help skills (id. at pp. 2-3). Results of administration of the PES-SV revealed that overall the student's general development quotient as compared to same-aged peers was within the low average range (id. at pp. 3-4). The evaluation report also indicated that the student's large muscle skills, social/emotional functioning, and self-help skills were within the average range, but that his cognitive thinking and expressive language skills were "below par and within the low average range" (id. at p. 4).

In preparation for the student's transition from the CPSE to the Committee on Special Education (CSE), the CSE met on March 18, 2010, to review the student's educational program (Tr. pp. 48-49; Dist Ex. 6 at pp. 1-2). The meeting was attended by a district school psychologist, a district representative who also acted as the special education teacher, a district regular education teacher, a district social worker, the student's mother, an additional parent member, the student's SEIT, and by telephone, the student's nursery school teacher (Dist. Ex. 6 at p. 2). According to the school psychologist who attended the March 2010 CSE meeting, the CSE considered the February 2010 classroom observation of the student, the results of administration of the PES-SV, the

student's entire file which included a November 2008 psychological evaluation report,⁴ and teacher and related service provider progress reports (Tr. pp. 25-27, 49, 51-52; Dist. Exs. 9 at pp. 1-6; 10 at pp. 1-3).⁵ The CSE determined that the student was eligible to receive special education programs and services as a student with a speech or language impairment, and recommended he attend kindergarten in a 10-month 12:1+1 special class with related services (Dist. Ex. 6 at p. 1). The CSE recommended modifying the student's related services to include one individual 30-minute speech-language therapy session, two 30-minute small group (3:1) speech-language therapy sessions, one individual 30-minute OT session, two 30-minute small group (4:1) OT sessions, and one small group (3:1) counseling session per week (id. at pp. 1-2, 14). The resultant individualized education program (IEP) indicated it would be in effect for one year commencing September 2010 (id. at p. 2).

In a final notice of recommendation (FNR) dated June 15, 2010, the district summarized the CSE's recommendations in the March 2010 IEP and identified the specific school to which the district assigned the student (Dist. Ex. 35). Although the FNR noted that an IEP was attached to the letter, the student's mother indicated that she did not receive a copy of the student's March 2010 IEP until October or November 2010, after the start of the 2010-11 school year (Tr. pp. 324-25; Dist. Ex. 35). On June 21, 2010 the student's mother visited the assigned school (Tr. p. 332; see Dist. Ex. 36).

In an August 24, 2010 letter, the parents detailed their concerns with the March 2010 IEP, their rejection of the assigned school for the student's 2010-11 school year, their intent to unilaterally place the student at the Aaron School for the 2010-11 school year, and their intent to seek tuition reimbursement (Parent Ex. B at p. 1). Additionally, the letter indicated that the parents had previously written the district expressing their concerns and requesting additional information, but had received no response, and that the parents had not yet received a copy of the student's March 2010 IEP (id.). The parents also requested bussing for the student as of the first day of school (id.).

Thereafter, the student entered the Aaron School's kindergarten program for the 2010-11 school year (see Parent Exs. D at pp. 1-7; E; F at pp. 1-2).

Due Process Complaint Notice

In a due process complaint notice dated October 19, 2010, the parents alleged, among other things, that: (1) the composition of the CSE was flawed in that the person attending as a regular

⁴ The November 2008 psychological evaluation report indicated that results of administration of the Bayley Scales of Infant Development-Third Edition revealed the student's cognitive development functioning level was in the borderline range and his fine motor development functioning level was in the low average range (Dist. Ex. 9 at pp. 1, 3-6). Results of administration of the Vineland-II Parent/Caregiver Rating Form of the Vineland Adaptive Behavior Scales, Second Edition, with the student's mother as informant revealed that the student's general adaptive functioning was moderately low and he scored higher than six percent of similarly aged individuals (id. at pp. 1, 4-5).

⁵ The hearing record includes evaluation and progress reports specific to the student ranging in time from November 2008 to February 2010 (Dist. Exs. 8-13; 22-31).

education teacher was not qualified because she was not teaching in a classroom at that time and the CSE contemplated a general education placement; (2) the CSE failed to rely on necessary evaluations to properly gauge the student's current skill levels because no classroom observation was conducted and only teacher estimates were used to determine skill levels; (3) the annual goals and short-term objectives on the student's IEP were "ambiguous" and "unquantifiable" and did not provide a baseline from which to measure progress or a method of measuring progress; additionally, many of the goals were continued from the student's previous IEP; (4) the student's related services were changed solely because the student was transitioning from the CPSE to the CSE, without any new evaluative information supporting the changes; (5) the student was not suitably grouped for social/emotional purposes in the assigned class; and (6) the parents' unilateral placement of the student at the Aaron School was appropriate and there were no equitable considerations barring tuition reimbursement (Parent Ex. A at pp. 2-4).

The district submitted a response to the parents' due process complaint notice dated October 27, 2010, and two subsequent amended responses dated January 24 and March 17, 2011, which collectively contended that the district offered the student a free appropriate public education (FAPE) for the 2010-11 school year, that the parents' unilateral placement was not appropriate, and that equitable considerations weighed against an award of tuition reimbursement for the parents (Dist. Exs. 2-4).

Impartial Hearing Officer Decision

On March 25, 2011, the parties proceeded to an impartial hearing, which concluded on May 19, 2011, after three days of proceedings (Tr. pp. 1, 98, 157).⁶

⁶ I note that there is nothing in the hearing record that indicates a reason for the inordinate delay between the filing of the due process complaint notice on October 19, 2010 and the first hearing date on March 25, 2011 (Dist. Ex. 1 at p. 1; Tr. p. 1). Additionally, the hearing record shows that at the close of each hearing date, the impartial hearing officer solicited requests for extension of the compliance date from both parties (Tr. pp. 94, 152-53, 367-68). Such solicitations on the part of the impartial hearing officer violate federal and State regulations governing impartial hearings, which provide that requests for extensions be initiated by a party, and that the impartial hearing officer's written response regarding each extension request be included in the hearing record, even if granted orally (34 C.F.R. § 300.515; 8 NYCRR 200.5[j][5]). While the parties may not complain or may even agree that an extension of time is warranted, such agreements are not a basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in the federal and State regulations (see 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]) and regulatory provisions dictating that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and that she must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5]). The impartial hearing officer is reminded that it is her obligation, regardless of the parties' positions, to ensure compliance with the 45-day timeline for issuing a decision (see Application of the Dep't of Educ., Appeal No. 11-037; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-064). Additionally, I note that the parties agreed at the final hearing date on May 19, 2011, to submit written closing briefs to the impartial hearing officer on or before June 13, 2011, and that the impartial hearing officer did not issue her decision until July 5, 2011 (Tr. pp. 351-52, 367; IHO Decision at p. 10). State regulations require that in cases where extensions of time to render a decision have been granted, the decision must be rendered no later than 14 days from the date of the record closure (8 NYCRR 200.5[j][5]; see Office of Special Education guidance memorandum dated August 2011 titled "Changes in the Impartial Hearing Reporting System" available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf>).

On July 5, 2011, the impartial hearing officer issued a decision, finding that the district failed to offer the student FAPE for the 2010-11 school year, that the parents met their burden of proving that the Aaron School was an appropriate placement for the student, and that equitable considerations supported the parents' reimbursement claim (IHO Decision at pp. 3-10).

The hearing officer concluded that the student's IEP was inappropriate because there were deficiencies in the evaluative information, improper annual goals, and it failed to address the student's interfering behaviors. Furthermore, the impartial hearing officer found a denial of FAPE because the parents were denied a meaningful opportunity to participate in the development of the student's program because, among other things, the student's special education teacher participated for only a portion of the meeting, did not participate in the discussion concerning the proposed related services, and was not provided with any of the evaluative material to be reviewed by the March 2010 CSE before or during the meeting (IHO Decision at p. 6; see IHO Decision at pp. 4-6). The impartial hearing officer also determined that the CSE advised the parents at the meeting that it was "standard practice" to change a student's services when entering the public school and that the student's services "needed to be reduced" (id.). The IHO next found that the unilateral placement of the student at the Aaron School was appropriate because the program met the student's special education needs, the student progressed in the program, and the program was not overly restrictive (id. at p. 7-8). Lastly, the impartial hearing officer found that nothing in the hearing record precluded an award of full tuition reimbursement based on equitable considerations (id. at pp. 8-10).

Appeal for State-level Review

On appeal, the district argues that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE because the CSE obtained and considered sufficient evaluations, the March 2010 IEP included appropriate academic and related services goals, there was an adequate basis for reducing the amount of related services for the student, and a behavioral intervention plan was not required for the student. Additionally, the district alleges that the assigned class and school would have met the student's special education, social/emotional and language needs. The district also contends that the parents' unilateral placement of the student at the Aaron School was inappropriate because the school did not provide adequate mainstreaming opportunities for the student. Next, the district contends that the equities favor the district because the hearing record shows that the parents never intended to accept a public school placement for the student. Lastly, the district contends that an award of tuition reimbursement for the Aaron School is not permitted under the Individuals with Disabilities Education Act (IDEA) because the school is a for-profit entity. The district requests that the impartial hearing officer's decision be overturned in its entirety.

Although the impartial hearing officer failed to indicate the date the record closed in her decision (see 8 NYCRR 200.5[j][5]), assuming the parties submitted written closing briefs as directed, the record closure date was June 13, 2011 and a decision should have been rendered no more than 14 days from that date (id.). Lastly, the impartial hearing officer appears to have relied upon the written closing briefs the parties agreed to submit in making her determinations (see IHO Decision pp. 1-3, 4), but has failed to enter these documents into the hearing record as required by (8 NYCRR 200.5[j][5][v]).

In their answer, the parents contend that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE for the 2010-11 school year, that the impartial hearing officer properly determined that the unilateral placement of the student at the Aaron School was appropriate, that equitable considerations favored the parents, and that the Aaron School's for-profit status is not a bar to reimbursement. The parents request that the impartial hearing officer's decision and order be affirmed.

Scope of Review

Initially, I note that the district has acknowledged the impartial hearing officer's adverse determination regarding the parents' participation in the formulation of the student's IEP; however, the district did not challenge the impartial hearing officer's finding that the student did not receive a FAPE because the district significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (IHO Decision at p. 6). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, the impartial hearing officer's determination that the student was not offered a FAPE for the 2010-11 school year because the parents were denied meaningful participation in the development of the IEP has become final. In light of the district's failure to explain why the impartial hearing officer erred in finding that the parents were not afforded an opportunity to participate in the development of the student's IEP, the remaining issues that are determinative of the parent's tuition reimbursement claim are whether the parents established the appropriateness of the student's unilateral placement at the Aaron School and if so, whether equitable considerations favor the parents.

Applicable Standards—Unilateral Placement

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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a

bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"])). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

The Parents' Unilateral Placement

Turning next to the district's contention that the parents failed to establish that the Aaron School satisfies least restrictive environment (LRE) requirements, I have reviewed the all of the evidence in the hearing record relevant to the Aaron School, including the aforementioned SEIT, speech-language, and OT reports, and the student's identified needs as reflected in the March 2010 IEP as background (see Dist. Exs. 6; 27; 28; 30; 31). However, I note that the district has not challenged the impartial hearing officer's determination that Aaron School offered the student specially designed instruction to address the student's unique needs during the 2010-11 school year and, therefore, I express no opinion on this issue and note only that this determination has also become final and binding upon the parties.

The student's special education kindergarten teacher from the Aaron School testified that she holds State certification in early childhood general and special education, and that her responsibilities at the Aaron School involved planning and implementing lessons that meet the individualized needs of each student in her class (Tr. pp. 226, 228-29, 231). In addition, the teacher testified that she teaches smaller reading, math, and handwriting groups at the school, and writes three reports per year that detail the progress each student in her class is making and the individual supports each student needs (Tr. pp. 229-30). The teacher participates in weekly team meetings with the classroom team to discuss each student's progress in the classroom and as necessary, to create behavior plans or change an already existing behavior plan (Tr. p. 230). The teacher also communicates with parents through e-mail, telephone and conference meetings (id.).

The student's special education kindergarten teacher testified that her class consisted of 12 students, herself as head teacher, and two assistant teachers that are in the classroom for the entire day (Tr. pp. 230-31). She indicated that the students in the class were either five or six years old and were classified as students with autism, a speech or language impairment, an other health-impairment, or "pre-k disabilities" (Tr. p. 231; Dist. Ex. 37).⁷ The teacher opined that the staffing ratio in the class was appropriate for the student because it allowed him to independently participate in the classroom and make transitions, while receiving support for his individualized needs as necessary (Tr. p. 232). The student's teacher further referenced a November 2010 Aaron School fall report that listed the student's teachers, counselors and related service providers and noted that the student attended a small reading group consisting of four students that used the

⁷ An Aaron School class profile for the student's 2010-11 school year class reflects that four students had no IEP on file at the school (Tr. pp. 295-96; Dist. Ex. 37).

Wilson Foundations Reading Program, as well as a program called "Sounds in Motion" to address the student's reading needs in a multisensory manner (Tr. pp. 237-38, 240, 310; Parent Ex. D at p. 1). The November 2010 fall report and the special education teacher's testimony also indicated that the student received math instruction in a small group of four students (Tr. pp. 242, 301; Parent Ex. D at p. 2).

At the time of the impartial hearing, the student's reading instructional level was at a mid-kindergarten level, similar to the levels of his peers in the class who all had reading instructional levels at the beginning to mid-kindergarten level at the start of the 2010-11 school year (Tr. pp. 232, 242). Also at the time of the impartial hearing, the student's math instructional level was at a mid-kindergarten level, similar to the levels of his peers in the class who all had math instructional levels within the kindergarten range at the start of the school year (Tr. pp. 233, 242).

The special education teacher testified that she has discussed the student's progress in reading with his reading teacher and that the student has made progress since the beginning of the school year (Tr. p. 241). Although the student was not able to identify all letters automatically, he was identifying all letters more consistently than previously and responded positively to the movement component incorporated into instruction (*id.*). In regard to the area of handwriting, instruction occurred in small groups and the special education teacher used the Handwriting Without Tears program (Tr. pp. 242-43, 301; Parent Ex. D at p. 2). The teacher indicated that the student was responding well to the program in that he enjoyed the different materials used to make the letters, he had become more confident and appeared proud of himself, he worked longer before he fatigued, and he was more consistent in following a sequence of steps in order to form letters (Tr. pp. 243-44).

The special education teacher further testified that the student received instruction in language arts in a group of 12, with three teachers in the classroom through shared reading and different literature (Tr. pp. 245-46). The teacher further indicated that the student made progress in language arts; for example, he initially had a difficult time attending to a read aloud, but at the time of the impartial hearing, he had progressed to sitting throughout the entire read aloud and was able to answer simple questions, make predictions, and sequence the story with visuals (Tr. p. 246).

In order to address the student's difficulty with attention and impulsivity in the classroom, the special education teacher from the Aaron School testified that the occupational therapist at Aaron school provided the student with a variety of adapted seats to use during instructional times (Tr. pp. 246-47). The teacher indicated that at times the student would sit in a chair with a vibrating cushion, or in a "bouncy ball" chair to help the student regulate his body while receiving movement, yet remain in his seat and stay with the group (Tr. p. 247). To address the student's attention, a timer was used with the student that would go off periodically whereby the student could earn a break, and staff employed a school-wide behavior system that was individualized for the student by targeting specific behaviors and allowing the student to earn something that was highly motivating to him (Tr. pp. 247, 303-04). The teacher also testified that as the school year progressed, the student's attention to instruction increased from seven minutes to up to 25 minutes of instructional time before needing a break (Tr. pp. 247-48). Additional testimony by the teacher

consistent with the November 2010 fall report indicated that the student received social studies and science instruction that was multisensory and hands-on in nature, and curricular themes addressed through books and other materials were incorporated into the student's pretend play (Tr. pp. 249-50; Parent Ex. D at pp. 2-3). To address the student's difficulty processing language throughout the day, the special education teacher used pictures, graphic supports, and role play per the student's needs in all areas of instruction (Tr. pp. 251-53).

In regard to the student's social/emotional functioning, the special education teacher indicated that at the beginning of the school year although the student was interested in his peers and wanted to interact with them, he tended to get over excited, over-stimulated or silly when trying to interact with them, and needed a lot of support (Tr. p. 253). The teacher noted that by the time of the impartial hearing, the student's ability to initiate conversation with peers without teacher support had improved and he was able to ask a peer to join him in play (Tr. pp. 253-54). In addition, when interacting with his peers, the student used words rather than being silly in order to get his friends' attention (Tr. p. 254). At the beginning of the school year, the student needed support in being able to engage in pretend play activities; he tended to display a lot of attention seeking behavior throughout the school day, such as getting out of his seat when he was not supposed to, pulling his shirt over his head, touching another peer, calling out, and talking out of turn (Tr. pp. 254-55). The teacher indicated that the team provided the student with sensory breaks as necessary, as well as positive feedback when he was sitting in his chair, raising his hand, or staying in his own space (Tr. p. 255). According to the teacher, the student responded well to positive reinforcement, and frequent repetition and review (Tr. pp. 255, 287).

Consistent with the student's needs identified in the various reports discussed above, the hearing record reflects that the student received related services of speech-language therapy and OT during the 2010-11 school year at the Aaron School in both individual and group settings (Parent Exs. E; F). The student received speech-language therapy one time per week individually, one time per week with a peer, and one time per week in a social skills group within the classroom, all for 30-minute sessions (Tr. p. 281; Parent Ex. E). The hearing record also includes an October 2010 OT plan report that indicated the student received OT one time per week individually and one time per week with a peer, each session for 30 minutes (Parent Ex. F at p. 1).

The student's special education teacher at the Aaron School also testified that the student became more confident in his ability to be in a classroom setting and to participate in academics, to raise his hand and stay seated, and to follow teacher directions (Tr. pp. 274-75). The teacher noted that through multisensory instruction and the support provided at the beginning of the school year, the student learned to function on a more independent level (Tr. p. 275). Furthermore, the teacher indicated the student compared very similarly to the other students in his class, that he enjoyed socially interacting with them, and that he was able to be placed in reading and math groups with peers that were on similar instructional levels in order to work on fundamental academic skills (Tr. pp. 275, 308).

The student's kindergarten special education teacher also testified that socially, the student has peers in school that engage in cooperative play and interact with him during social periods (Tr. p. 276). The student eats lunch in the classroom with his peers in a quiet environment that

encourages the student to regulate his body while he eats his lunch and have conversations with his peers (Tr. p. 278). The class also has park time, when they go to a local playground near the school and have the opportunity to engage in sharing of toys, in pretend play, and in developing play themes consistent with stories read in class and with social studies concepts such as community helpers (Tr. pp. 279-80).

While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at *19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; Application of the Dep't of Educ., Appeal No. 10-049; Application of the Dep't of Educ., Appeal No. 10-042; Application of a Child with a Disability, Appeal No. 99-083). The evidence in this case described above supports the conclusion that the student should be placed in a special class setting, a setting that is offered by the Aaron school. The hearing record also supports the conclusion that the student could be educated appropriately with some exposure to non disabled peers, however, LRE considerations, in this instance, do not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at the Aaron School for the 2010-11 school year was appropriate.

Under the circumstances presented above, the parents have established that the Aaron School offered educational instruction specially designed to meet his unique needs, supported by services necessary for him to benefit from instruction. While the Aaron School may not maximize the student's interaction with nondisabled peers, that factor does not preclude the determination that the Aaron School is appropriate in this instance (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

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; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y.

2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Before addressing the relevant equitable considerations, the district argues that the IDEA categorically prohibits relief in the form of reimbursement for tuition costs incurred at a for-profit school. The district has raised this argument before District Courts and State Review Officers and acknowledges that it has not previously been successful. I decline to reconsider those previous holdings in the absence of any persuasive argument for departing from their reasoning (see A.D. v. Bd. of Educ. of City School Dist. of City of New York, 690 F. Supp. 2d 193, 214 n.16 [S.D.N.Y. 2010]; Application of the Dep't of Educ., Appeal No. 11-049; Application of the Bd. of Educ., Appeal No. 10-104; Application of a Student with a Disability, Appeal No. 09-085; Application of a Student with a Disability, Appeal No. 09-080; see also A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 215 n.16 [S.D.N.Y. 2010]).⁸

Turning to equitable considerations and the district contention that the parents never seriously considered placing the student in a public school, the student's mother testified that in preparation for the student's transition from preschool to a kindergarten placement, she investigated several public schools in her neighborhood and also applied to two State approved private schools, but the student was not accepted at the State-approved schools (Tr. pp. 316-17). The parents attended the March 2010 CSE meeting and participated in the discussion regarding the student's classification, recommended program, and related services (Tr. pp. 317-20). The hearing record reflects the parents and the Aaron School effectuated an enrollment contract agreement, which they signed on April 14, 2010 for the student's attendance at the Aaron School for the 2010-11 school year (Dist. Ex. 40 at pp. 1-2). While the contract was executed before the

⁸ In particular, I disagree with the district's narrow interpretation of the IDEA's remedial provisions and its argument that Forest Grove is inapplicable or has been misread (see Forest Grove, 129 S. Ct. 2484).

parents received notice of the district's assigned school, execution occurred well after the March 18, 2010 CSE meeting that determined the student's recommended program (Dist. Exs. 6 at p. 1; 40 at pp. 1-2). Moreover, the student's mother testified at the impartial hearing that she remained open to a public school placement if an appropriate one had been offered and availed herself of the opportunity provided by the district to visit the assigned school (Tr. pp. 330-36, 342-43).

Lastly, in an August 24, 2010 letter to the CSE, the parents stated their concerns surrounding the proposed program in the IEP and provided the district with appropriate and timely notice of their intention to enroll the student in the Aaron School and seek reimbursement from the district (Parent Ex. B at pp. 1-2). I further note, that the hearing record does not otherwise suggest that the parents failed to cooperate with the district in developing an appropriate program for the student. Accordingly, the parents' actions in this case are clearly distinguishable from cases in which tuition reimbursement should be denied due to a delay in notifying the CSE of rejection of a district's IEP or due to misconduct, obfuscation or a lack of cooperation in identifying an appropriate public school placement warranting a limitation or denial of relief (see S.W., 646 F. Supp. 2d at 364; Carmel, 373 F. Supp. 2d at 417-18) and I find no basis in the hearing record to reasonably infer that the parents would not have considered placing the student in a public school program. Therefore, I will not disturb the impartial hearing officer's findings with regard to equitable considerations on the bases raised by the district.

Conclusion

Having concluded that the parents' unilateral placement at the Aaron School was appropriate, and that equitable considerations favored the parents, I will not disturb the impartial hearing officer's decision and direct that the district reimburse the parents for tuition payments made to the Aaron School for the 2010-11 school year.

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of the determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 6, 2011**

**JUSTYN P. BATES
STATE REVIEW OFFICER**