The University of the State of New York

The State Education Department
State Review Officer
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No. 11-130

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, G. Christopher Harriss, Esq., of counsel

Stroock & Stroock & Lavan LLP, attorneys for respondent, Kevin J. Curnin, Esq. and David V. Simunovich, 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 respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Seton Foundation for Learning (Seton) for the 2008-09, 2009-10, and 2010-11 school years. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Seton, which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an intellectual disability is not in dispute in this proceeding (Tr. p. 81; see 34 C.F.R. § 300.8 [c][6]; 8 NYCRR 200.1[zz][7]).[1]

[1] I note that the student was classified as a student with mental retardation on a prior individualized education program (IEP), a term no longer used as of the October 2011 change in State Regulations (8 NYCRR 200.1[zz][7]; see Dist. Ex. 5 at p. 1).

Background

According to the parent, the student received a diagnosis of Down Syndrome at five months of age (Tr. p. 656). The parent reported that the student received services through the Early Intervention Program (EIP), received special education services as a preschool student with a disability, and attended a district school in kindergarten where she received special education services (Tr. pp. 562, 656-57). The hearing record indicates that the student attended public school through first grade (2007-08) (Dist. Ex. 1 at p. 2; Parent Ex. Z).

On May 27, 2008, the parent filed a due process complaint notice (Tr. p. 564; Parent Ex. Z; see Parent Ex. AA at p. 2). The parent alleged, among other things, that the student's educational needs had been neglected since entering the district's schools, that the student's individualized education programs (IEPs) had not provided her with appropriate educational goals and the individualized academic support necessary for the student to make progress, and that the student's skill levels were regressing (id. at p. 1). The parent requested that the district provide funding for the student to attend Seton and continue to provide the student with 12-month related services and special transportation (id. at p. 2).

The parties engaged in a resolution meeting on June 16, 2008 and signed a resolution agreement stating that the student would be placed at Seton as of September 2008 and that the parent's due process complaint notice would be withdrawn due to the parties reaching a "full agreement" (Parent Ex. AA).[2]

The parent sent the district a letter dated June 26, 2008, stating that she was declining the district's recommended placement for summer 2008, but that she wanted the student to continue to receive all related services (Dist. Ex. 7).

On June 27, 2008, the Committee on Special Education (CSE) met and developed an IEP for the 2008-09 school year (Dist. Ex. 3). The CSE recommended that the student attend an 8:1+1 special class in a special school as of September 2008 (id. at p. 1). It also recommended 12-month services, stating that the student was "decertified with related services only for summer of 2008" (id.). The CSE further recommended related services of a 1:1 behavior management paraprofessional, occupational therapy (OT), physical therapy (PT), and speech-language therapy; adapted physical education; and special education transportation of an air conditioned minibus with limited travel time and a paraprofessional (id. at pp. 1, 6, 13, 15). The parent enrolled the student at Seton in September 2008 for the 2008-09 school year (Dist. Ex. 1 at p. 1).

The district sent the parent a final notice of recommendation (FNR) dated September 11, 2008, reiterating the June 2008 CSE's recommendations and informing the parent of the particular school to which the district assigned the student (Dist. Ex. 6). The parent signed and returned the FNR with a note that she was placing the student at Seton and that she accepted the district's recommended related services but not the assigned school (id.).

[2] The district concedes that it agreed to pay for the student's tuition at Seton for the 2008-09 school year; although I note that as of the date of the petition on appeal, the district had not yet paid the student's tuition for that school year (Pet. ¶ 9).

On June 5, 2009, the CSE met and developed an individualized education services program (IESP) for the 2009-10 school year beginning in September 2009 (Dist. Ex. 4).[3] The IESP stated that the student was parentally placed at Seton, and the CSE recommended special education teacher support services (SETSS) for the student (id. at p. 1). The CSE again recommended 12-month school year services; related services of a 1:1 behavior management paraprofessional, OT, PT, and speech-language therapy; adapted physical education; and special education transportation with a paraprofessional (id. at pp. 1, 3, 5, 6, 15, 17).

The June 2009 CSE also developed an IEP for the student for summer 2009 (Dist. Ex. 5). The CSE recommended an 8:1 special class in a special school and related services during the months of July and August (id. at p. 1). The CSE again recommended related services of a 1:1 behavior management paraprofessional, OT, PT, and speech-language therapy; adapted physical education; and special education transportation with a paraprofessional (id. at pp. 1, 3, 9).

The hearing record contains meeting minutes from the June 5, 2009 CSE meeting which stated, among other things, that the parent "was made aware of the IESP program [and] voiced that she is electing to keep [the student] at the Seton Foundation" (Dist. Ex. 9).[4] The hearing record also contains an unsigned FNR with the same date stating that the student was parentally placed (Dist. Ex. 10).

The CSE met on December 18, 2009 and developed an IESP to modify the student's services to initiate assistive technology and an FM unit (Dist. Ex. 13 at pp. 1-2, 5). The IESP stated that the student was parentally placed at Seton and the CSE again recommended SETSS; 12-month school year services; related services of a behavior management paraprofessional, OT, PT, and speech-language therapy; adapted physical education; and special education transportation with a paraprofessional (id. at pp. 1, 3, 4, 5, 17). The CSE also recommended hearing education services (HES) for the student (id. at p. 17). The hearing record contains meeting minutes from the December 2009 CSE meeting which stated, among other things, that the student would continue to attend Seton (Dist. Ex. 15). The hearing record also contains an unsigned FNR bearing the same date, which stated that the student was parentally placed (Dist. Ex. 16).

The parent received a letter from Seton dated June 4, 2010, stating that the school would be referring the student back to the CSE for educational placement for September 2010 based on

[3] Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities, such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs (Educ. Law §§ 3602-c[2][a], [2][b][1] as amended by L.2007, c. 378, § 27, subd. d; L.2005, c. 352, § 22). The CSE is also required to assure that special education programs and services are made available to students with disabilities with IESPs attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).

[4] The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

the parent's lack of participation in the "Parent Guild," and the failure of the parent to pay tuition for the prior two years (Parent Ex. L). The parent reportedly negotiated an agreement with Seton whereby Seton would allow the student to return for the 2010-11 school year provided the parent pursued claims against the district for its alleged failure to pay for the student's tuition (Dist. Ex. 1 at p. 4).

The hearing record reflects that the student attended Seton during the 2010-11 school year (Dist. Ex. 1 at pp. 2, 4; Parent Ex. S). The hearing record contains unsigned tuition agreements for the student's 10-month enrollment at Seton for the 2008-09, 2009-10, and 2010-11 school years (Parent Exs. P; Q; R). It also contains tuition affidavits for all three years reflecting payments made to Seton from a "Loan Account" (Parent Exs. M; N; O).

By letter to the district dated December 6, 2010, the parent requested that a previously scheduled December 20, 2010 CSE meeting be adjourned because the parent was having the student privately evaluated (Dist. Ex. 18 at p. 2). The parent also stated that there had been a number of procedural and substantive violations of the student's right to a free appropriate public education (FAPE) "over the past several years" (id. at p. 2). The parent requested that the district call her attorney to discuss a new date for the CSE to convene (id. at p. 3). The hearing record reflects that the CSE meeting was rescheduled for February 3, 2011 and that the parent again requested that the meeting be adjourned because "testing was still pending" for the student (Dist. Ex. 19).

The CSE met on March 3, 2011, and developed an IEP that contained recommendations for 12-month services in a 12:1+1 special class in a special school, and related services of a 1:1 behavior management paraprofessional, OT, PT, speech-language therapy, and HES; adapted physical education; assistive technology; and special education transportation with a paraprofessional (Dist. Ex. 20 at pp. 1, 3, 5, 6, 18, 20; see Dist. Ex. 22). The IEP stated that the recommended program was a "change from parentally placed" to a 12:1+1 special class in a special school (Dist. Exs. 20 at p. 2; 22).

Due Process Complaint Notice

The parent filed a due process complaint notice dated March 23, 2011, relating to the student's 2008-09, 2009-10, and 2010-11 school years (Dist. Ex. 1). The parent alleged that the parties executed an agreement as a result of a June 16, 2008 resolution session in which the district agreed to the student's placement at Seton effective September 2008 and agreed to pay the student's tuition (id. at p. 2). The parent further alleged that the district did not explain the tuition reimbursement process and that she understood the agreement to mean that the district would pay for the student's tuition at Seton as long as the student attended that school (id.).

Regarding the 2009-10 school year, the parent alleged that the CSE met in June 2009 for an annual review and changed the student's IEP to an IESP without explaining the difference to her (Dist. Ex. 1 at p. 3). The parent alleged that the IESP stated that the student would be "'parentally placed'" at Seton for the 2009-10 school year, and that the statement was not explained to her and was misleading (id.). The parent alleged that the district violated her due process rights by "failing to explain the meaning of an [IESP] or parental placement," and did not obtain her "knowing consent" for either recommendation (id.). The parent further alleged that by offering an

IESP that provided only for related services, the district violated the student's right to receive services and a placement (id.). The parent also alleged that the CSE did not offer the student a district placement for the 2009-10 school year and that she was prepared to consider a district placement (id.). The parent stated that she returned the student to Seton in September 2009 for the duration of the school year and that the district never offered her an alternative placement or notified her that it would not pay for the student's tuition (id. at p. 4).

Regarding the 2010-11 school year, the parent alleged that the district violated the student's rights by failing to hold a CSE meeting until March 3, 2011 (Dist. Ex. 1 at p. 4). The parent stated that the CSE meeting was originally scheduled for December 20, 2010, but that she requested the meeting be adjourned so that she could obtain an "independent triennial evaluation" of the student (id.). The parent alleged that the district failed to timely conduct the evaluations and that she requested the earliest possible date for the CSE meeting after receiving the private evaluation report (id.). The parent contended that the district again failed to offer the student a district placement and that she was still willing to consider such a placement (id.). The parent also stated that Seton informed her on June 4, 2010 that the district had not paid for the student's tuition for the 2008-09 or 2009-10 school years (id.). The parent alleged that Seton permitted her to enroll the student for the 2010-11 school year provided she pursued claims against the district for the outstanding tuition (id.).

In summary, the parent claimed that the district failed to: (1) offer a district placement since the 2007-08 school year; (2) honor the June 16, 2008 resolution agreement; (3) convene a properly constituted CSE meeting "on at least two occasions;" and (4) "offer the student an educational program since 2009" (Dist. Ex. 1 at p. 6). The parent alleged that Seton was an appropriate placement for the student and that equitable considerations supported her claims for reimbursement (id. at pp. 5-6).

For relief, the parent requested that the district directly pay Seton the costs of the student's tuition for all three school years, alleging that the requested remedy was appropriate because the district failed to provide the student with a FAPE (Dist. Ex. 1 at pp. 5, 7).

Impartial Hearing Officer Decision

An impartial hearing convened on May 5, 2011 and concluded on July 12, 2011, after five days of proceedings (Tr. pp. 1-662). In a decision dated September 8, 2011, an impartial hearing officer determined that the parent was entitled to tuition reimbursement for the student's placement at Seton for the 2008-09, 2009-10, and 2010-11 school years (IHO Decision at pp. 13, 19). Regarding the 2008-09 school year, the impartial hearing officer noted that the district conceded that it failed to offer a FAPE to the student for that year, and further found that the district "willfully failed to fulfill its contractual obligation" to pay the student's tuition pursuant to the June 16, 2008 resolution agreement (id. at p. 16).

Regarding the 2009-10 school year, the impartial hearing officer stated that he did not credit the testimony of the district's witnesses that the district had explained the financial implications of parental placement to the parent at the June 2009 CSE meeting (IHO Decision at p. 16). He determined that the district witnesses testified to their "usual practice" rather than the actual events that occurred in this matter and that such testimony was "vague and contradictory"

as to which of the two witnesses allegedly explained the implications to the parent and what was explained (id.). The impartial hearing officer next determined that the documents in the hearing record at the time of the June 2009 CSE meeting did not reflect any explanation to the parent and he noted that the district was unable to produce a copy of a form letter referenced by the district in testimony that is sent to parents of parentally placed students (id.). The impartial hearing officer "fully credited" the parent's testimony that she believed the district had agreed to maintain the student at Seton at district expense (id. at pp. 16-17). Further, the impartial hearing officer found that the student's IESP "lacked meaningful, individualized goals" and was substantively deficient to support the student in a public placement (id. at p. 17).

Regarding the 2010-11 school year, the impartial hearing officer noted that the district argued that the December 2009 IESP was the operative IESP for the 2010-11 school year (IHO Decision at p. 17). He determined that the implications of parental placement were not explained to the parent at the December 2009 CSE meeting, nor did the district's witnesses claim that they were, and the witnesses instead confirmed that the meeting was held solely to add assistive technology services to the student's program (id.). The impartial hearing officer found that the parent acted in good faith in believing that the student would continue at Seton at district expense (id.). He further determined that the December 2009 IESP was the result of a brief meeting convened solely for the purpose of adding HES and assistive technology services to the student's program, and that it was "procedurally and substantively deficient to constitute an [IEP]" (id.). The impartial hearing officer determined that the CSE did not conduct the required triennial evaluation of the student, declining to credit the testimony of a district witness that such an evaluation was done because there was no documentation in the hearing record to corroborate the witnesses' testimony and no record of the evaluation occurring (id. at pp. 17-18). He also did not credit the testimony of the same district witness that a triennial evaluation was not necessary because the student had progressed, finding that the testimony was "vague, contradictory, evasive, not corroborated by any documents . . . a misstatement of legal and educational requirements," and "was to a large extent fabricated" (id. at p. 18). Further, the impartial hearing officer determined that the December 2009 CSE did not have the required members, that the members did not have sufficient knowledge of the student to draft an appropriate IEP, and that the IESP created did not contain any meaningful goals and was "procedurally and substantively deficient" (id.).

The impartial hearing officer next found that Seton was an appropriate placement for the student for all three school years at issue (IHO Decision at pp. 16-19). Specifically, he found that the program offered the student a supportive, small class environment with intensive instruction, modifications, and supports that the student needed to make progress (id. at pp. 18-19). He determined that there was a low student-to-teacher ratio at Seton and that the staff developed an IEP for each student, regularly monitored students' progress, and modified their programs to meet the students' needs (id. at p. 18). The impartial hearing officer found that Seton used specially developed reading and math programs; teachers used multisensory methods and materials; other students in this student's class had similar functioning levels and needs; students were put into small groups for instruction; the program addressed the student's academic skills, social skills, and behavior; related services were available "on site;" and the program included exposure to general education students in the same building, on field trips, and in community activities (id.). The impartial hearing officer determined that the student had made "slow, steady progress" in the three years she attended Seton and that the program seemed reasonably calculated to ensure that the student benefitted educationally and made academic, social, and behavioral progress (id.).

The impartial hearing officer also determined that equitable considerations favored the parent for all three years at issue (IHO Decision at pp. 16-18). For the 2008-09 school year, the impartial hearing officer found that the district "deliberately misled" the parent into believing that it had paid the student's tuition at Seton (id. at p. 16). For the 2009-10 school year, the impartial hearing officer found that the district continued to mislead the parent into believing that the student was placed at Seton with district approval and at district expense (id. at p. 17). For the 2010-11 school year, the impartial hearing officer found that the parent continued to believe that the district approved of and paid for the student's placement at Seton, and noted that when the parent discovered that the tuition had not been paid, she retained counsel and initiated the impartial hearing (id. at p. 18). Regarding the parent's request for direct payment of the student's tuition to Seton, the impartial hearing officer credited the parent's testimony that she was unable to afford the student's tuition at Seton and ordered that the district to pay the student's tuition for the 2008-09, 2009-10, and 2010-11 school years (id. at p. 19).

Appeal for State-Level Review

This appeal by the district ensued. The district alleges that the impartial hearing officer erred in his determinations because the student was parentally placed at Seton for the 2009-10 and 2010-11 school years, therefore, it was not required to offer the student a public school placement for those years. The district does not appeal the impartial hearing officer's determination that it is responsible for the student's tuition at Seton for the 2008-09 school year; however, it does appeal the impartial hearing officer's finding that it misled the parent regarding the 2008-09 school year.[5] Specifically, the district alleges that the student was parentally placed at Seton for the 2009-10 and 2010-11 school years, that the district explained to the parent the implications of the student being parentally placed, and that the parent did not request a public school program for the student until March 2011. It further alleges that under Education Law § 3602-c, it prepared appropriate IESPs to provide the student with equitable services for those years and that it met its obligation to provide the student with special education services on an equitable basis in connection with the student's attendance at Seton. Furthermore, the district alleges that the impartial hearing officer's conclusion that the district misled the student for all three years was conclusory and factually unsupported by the hearing record.

The district also alleges that even if the student was not deemed parentally placed at Seton for the 2009-10 and 2010-11 school years, the parent did not meet her burden of demonstrating that Seton was appropriate for the student. Specifically, the district alleges that Seton could not provide the student with necessary related services including speech-language therapy, OT, PT, HES, and a full-time paraprofessional, and that Seton had to rely on the district to provide those services, which were provided to the student at Seton by district contracted personnel. The district also alleges that the student had only minimal exposure to typically developing peers at Seton, and that the student needed a 12-month educational program and Seton only provided educational programming on a ten-month basis.

[5] To the extent that the district does not appeal the impartial hearing officer's determination that it is responsible for the student's tuition for the 2008-09 school year, that determination will not be reviewed on appeal because it is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The district further alleges that equitable considerations preclude an award of direct payment for tuition at Seton. Specifically, the district alleges, among other things, it cannot be compelled to pay for the student's tuition costs at Seton for the 2009-10 and 2010-11 school years because the parent never signed a tuition contract with Seton or otherwise obligated herself to pay the student's tuition, and the parent did not meet her burden of demonstrating that she was eligible for direct tuition payment as the only evidence of her inability to pay was her own testimony. The district requests annulment the portions of the impartial hearing officer's decision that determined the student was not parentally placed, that the district misled the parent, that district witnesses did not testify credibly, that the district failed to offer the student a FAPE for the 2009-10 and 2010-11 school years, that the parent met her burden to demonstrate that Seton was an appropriate placement for the student, that equitable considerations favor the parent, that the parent met her burden of demonstrating that she was incapable of paying the tuition purportedly owed to Seton, and that the district was responsible for the student's 2009-10 and 2010-11 school year tuition costs at Seton. The district also requests a finding that the impartial hearing officer erred in accepting the June 2008 resolution agreement into evidence.

The parent submitted an answer, denying many of the district's allegations and referring to an accompanying memorandum of law in response to the district's conclusions of law. Specifically, the parent contends that there is no evidence in the hearing record that the parent agreed to assume responsibility for the student's tuition at Seton. The parent also contends that the impartial hearing officer found the testimony of the district's witnesses "'vague and contradictory,'" that the district's witnesses relied on a document that the district could not produce, and that their testimony was unsupported by the documents in evidence. The parent also alleges that her lack of a signature on the Seton tuition agreements is irrelevant and that the parent reasonably relied on the district's explanation of the terms of the June 2008 resolution agreement. The parent requests affirmance of the impartial hearing officer's decision and order that the district pay the student's tuition at Seton for the 2008-09, 2009-10, and 2010-11 school years.

Applicable Standards

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

A 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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; 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]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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, 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 C.F.R. § 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Admissibility of Evidence at Impartial Hearing

Initially, I will consider the district's argument that the impartial hearing officer erred by admitting the June 2008 resolution agreement into evidence (Parent Ex. AA). Relevant information regarding the resolution process may be admissible in an impartial hearing (see Friendship Edison Public Charter Sch. Chamberlain Campus v. Smith, 561 F. Supp. 2d 74, 81 [D.D.C. 2008]; Application of a Child with a Disability, Appeal No. 06-109). Impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 C.F.R. § 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]). Although it is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious, I have reviewed the resolution agreement and find that the impartial hearing officer did not err by admitting it into evidence insofar as it has relevance regarding, among other things, the determination as to whether the student was parentally placed for years at issue in the due process complaint notice (see 8 NYCRR 200.5[j][3][xii][c]).[6]

Dual Enrollment—2009-10 and 2010-11 School Years

I now turn to the district's argument that the student was parentally placed at Seton for the 2009-10 and 2010-11 school years and that it was therefore not required to offer the student a public school placement or a FAPE for those years. Specifically, the district alleges that the parent voluntarily elected to keep the student at Seton for the 2009-10 and 2010-11 school years, that it explained to the parent the implications of the student being parentally placed, and that the parent did not request a public school program for the student until March 2011. The district further alleges, in consideration of the foregoing, that it met its obligations to prepare appropriate IESPs

[6] I note that the resolution agreement would not have been properly admitted into evidence for the purpose of enforcing the parties' agreement, as State regulations provide that if during the resolution process, the parties reach an agreement to resolve the due process complaint notice, the parties shall execute a legally binding agreement that "shall be enforceable in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5[j][2][iv]), and the regulations do not confer jurisdiction to enforce settlement agreements upon impartial hearing officers.

to provide the student with appropriate equitable services for those years and to provide the student with special education services on an equitable basis in connection with the student's attendance at Seton. However, upon a thorough review of the hearing record, I find, as further described below, that the evidence indicates that the student was not parentally placed for the 2009-10 and 2010-11 school years and the district was obligated to offer the student a FAPE for those school years.

In 2007, New York State amended Education Law § 3602-c to comply with the reauthorization of 20 U.S.C. § 1412(a)(10) ("Children in Private Schools") and its implementing regulations, 34 C.F.R. §§ 300.130-300.147 (see Educ. Law § 3602-c as amended by Ch. 378 of the Laws of 2007). In September 2007, the State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum—"Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c"—to "inform school districts of their responsibilities to provide special education services to students with disabilities who are enrolled in nonpublic elementary or secondary schools by their parents."[7] Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). The district of location's CSE must review the request for services and develop an individualized education service program (IESP) based upon the student's individual needs and "in the same manner and with the same contents" as an IEP (Educ. Law § 3602-c[2][b][1]). In addition, the district of location's CSE "shall assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).

The following question and answer in the Office of Special Education guidance memorandum is relevant to the issue on appeal:

> 12. Must the district of residence develop an IEP for a student who is parentally placed and conduct annual reviews of this IEP?

[7] Available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf. United States Education Department guidance can be found in the Federal Register at: Child Find for Parentally-Placed Private School Children with Disabilities (§ 300.131) 71 Fed. Reg. 46593 (August 14, 2006): "If a determination is made by the LEA [local educational agency] where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private [school] located in another LEA, the LEA where the child resides need not make FAPE available to the child" (See Maine School Administrative District #40, 108 LRP 40513 [ME SEA, Oct. 23, 2007] [interpreting and applying the federal guidance and concluding that a district of location was not required to create an IEP for a student given the parent's intention to keep a student in a private boarding school]).

> U[nited] S[tates] E[ducation] D[epartment] has provided guidance that states: "If a determination is made through the child find process by the LEA (local educational agency) where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private . . . school located in another LEA, the LEA where the child resides need not make FAPE available to the child." Therefore, if the parents make clear their intention to keep their child enrolled in the nonpublic . . . school, the district of residence need not develop or annually review an IEP for the student.

(Office of Special Education guidance memorandum dated September 2007 titled "Chapter 378 of the Laws of 2007 - Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State Education Law Section 3602-c").

Upon review of the hearing record, there is no evidence that the parent attempted to dually enroll the student pursuant to Education Law § 3602-c, or that the parent was requesting special education services on an equitable basis from the district. The evidence shows that the parent participated in the CSE process with the district to develop the student's educational program and services for the school years at issue.

With respect to whether the district was required to develop an IEP and offer a publicly funded placement rather than an IESP, noticeably absent from the evidence is a written request, made by the parent prior to June 1 preceding each school year at issue, and the parties do not assert that any exceptions to the deadline are applicable to this case (see Educ. Law § 3602-c[2]). The form submitted by the district was a blank, sample form that does not suffice to establish that the parent was eligible for services pursuant to the dual enrollment statute. The district may not presume that a student is a dually enrolled student in the absence of a parent's written request. Consequently, the documentary evidence does not support the district's argument that the student was eligible for services pursuant to an IESP under the dual enrollment statute.

Nor is there any evidence that the parent opted not to pursue dual enrollment and voluntarily placed the student in a private school with the intent of relying on a services plan called for by federal law. The IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools. Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 C.F.R. §§ 300.134, 300.137[a], [c], 300.138[b]; Application of the Bd. of Educ., Appeal No. 03-059). If the parent had voluntarily enrolled the student in a nonpublic school, there should be at least some

minimal evidence of this fact maintained within the student's records, if only to assure compliance with the compulsory education law (Educ. Law § 3205[1][a]).[8]

Additionally, the district has not overcome the impartial hearing officer's credibility determinations on this issue. Regarding the 2009-10 school year, the impartial hearing officer "fully credited" the testimony of the parent that she believed that the district had placed the student at Seton at its own expense and that it was responsible for the student's tuition (IHO Decision at pp. 16-17). The impartial hearing officer also declined to credit the testimony of the district's witnesses that the financial implications of parental placement were explained to the parent at the June 2009 CSE meeting, and determined their testimony to be vague and contradictory and related to their usual practice rather than the actual events in this matter (id. at p. 16). Regarding the 2010-11 school year, the impartial hearing officer again credited the testimony of the parent in finding that she believed in good faith that the student was continuing at Seton with district approval and at district expense (id. at p. 17). He also declined to credit the testimony of one of the district witnesses, stating that her testimony was "vague, contradictory, evasive, not corroborated by any documents . . ., a misstatement of legal and educational requirements," and "was to a large extent fabricated to justify a conclusion made without any factual basis" (id.). Aside from referring to the content of the CSE meeting minutes, the special education teacher did not testify specifically about what was said to the parent at the CSE meeting, and instead testified that he could not recall whether "there was a need for further explanation as to what the IESP program was about" or whether the parent had any questions about it (Tr. pp. 219, 295-98). The special education teacher also testified in general terms that a letter is sent to parents prior to CSE meetings that specifically explains the meaning of parentally placed, but that the student's file did not contain a copy of the letter that he alleged was sent to the parent in this matter and he had no actual knowledge as to whether one was sent (Tr. pp. 220, 244-46, 291-94, 298-302; see Dist. Ex. 40). He also testified that he did not recall what was said to the parent, if anything, regarding responsibility for tuition payments at Seton (Tr. p. 302). The school psychologist also testified that she did not recall the term "parental placement" being used at the December 2009 CSE meeting (Tr. p. 462). Similar to the special education teacher, the school psychologist testified that she was "aware" of a letter that is sent to parents of parentally placed students, and she did not recall seeing a letter regarding parental placement in the student's file (Tr. pp. 455-56). I further note that the impartial hearing officer credited the parent's testimony that she was unable to afford the tuition at Seton (IHO Decision at p. 19; see Tr. pp. 572, 590, 599), and I find it highly unlikely from reviewing the hearing record that the parent was willing to personally take on the financial responsibility for the student's tuition at Seton.[9] A State Review Officer gives due deference to the credibility findings

[8] I note that New York State Education Law requires that "[i]n each school district of the state, each minor from six to sixteen years of age shall attend upon full time instruction" (Educ. Law § 3205[1][a]). Although the district asserts that it believed the student was parentally placed at Seton, there is no evidence in the hearing record indicating that the district made any attempts to contact the parent prior to the start of the 2009-10 or 2010-11 school year to ascertain whether the student was enrolled in school consistent with New York State compulsory education law. The parties do not raise an argument that the student was to be educated pursuant to a services plan.

[9] The parent testified that she earns $31,000 a year, has three children, is separated from her husband (the student's father) and does not receive any support from him, and rents her home (Tr. pp. 559-61, 621, 654). The hearing record reflects that the student's tuition at Seton is $20,000 per 10-month school year for the 2009-10 and 2010-11 school years (Parent Exs. N; O; Q; R).

of the impartial hearing officer, unless the hearing record read in its entirety would compel a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Application of a Student with a Disability, Appeal No. 11-074; Application of a Student with a Disability, Appeal No. 11-064; Application of a Student with a Disability, Appeal No. 10-018; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Bd. of Educ., Appeal No. 08-074; Application of the Dep't of Educ., Appeal No. 08-037). Here, a review of the hearing record as a whole, including the testimony reviewed above, does not compel a contrary conclusion and I therefore will give due deference to the impartial hearing officer's credibility determinations.

Under the facts of this case, I find that the evidence does not support the district's argument that the parent sought to dually enroll the student in a voluntary private placement with special education services provided by the district pursuant to an IESP. The impartial hearing officer correctly concluded that the district retained the obligation to develop an IEP for the student for the 2009-10 and 2010-11 school years and offer the student a publicly funded placement, and I find that the district's failure to develop IEPs consistent with its responsibilities denied the student a FAPE for those years (see Application of a Student with a Disability, Appeal No. 11-020; Application of a Student with a Disability, Appeal No. 11-011; Application of the Bd. of Educ., Appeal No. 10-049).[10]

Unilateral Placement - Applicable Standards

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary

[10] In addition, OSEP has opined that under child find duties, a district that is responsible for offering a student a FAPE must not decline a parent's request to conduct an eligibility evaluation of the student even if the student is attending a private school located in another district (Letter to Eig, 52 IDELR 136 [OSEP 2009]; see Application of the Bd. of Educ., Appeal No. 09-067; see also Application of a Student with a Disability, Appeal No. 10-049).

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

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

Appropriateness of Seton

The district argues that Seton was not an appropriate placement for the student for the 2009-10 and 2010-11 school years because the school could not provide the student with necessary related services, which the district provided by contracting with related service providers, and because Seton did not provide a 12-month program to the student.

Information contained in the hearing record indicates that at the time of the June 2009 CSE meeting, the student exhibited global developmental delays related to her diagnosis of Down Syndrome, including delays in sensory processing, gross motor, fine motor, oral motor, language, and self-care skills (Dist. Exs. 23; 24; 26; 28). Assessments of the student's cognitive skills yielded scores "within the moderate range of mental deficiency" (Dist. Exs. 23 at p. 3; 24 at p. 4). The student exhibited impulsive behaviors and a lack of safety awareness (Dist. Ex. 23 at pp. 2-4). She also has a history of a hearing loss (id. at p. 2).

The director of Seton testified that the elementary school the student attended serves students from ages 5 through 15 who typically have IEPs recommending 12:1+1 special class placements in a 10-month program and who are "functioning in the mentally retarded range" (Tr. pp. 480-83). During the 2009-10 and 2010-11 school years, Seton assigned the student to a 12:1+1 classroom consisting of nine students with special education needs ages 7 to 11 years old (Tr. pp. 98-99, 117, 154-55). The academic achievement skills of the students in the class during both school years ranged from a kindergarten to first grade level of instruction for both reading and math (Tr. pp. 156-58). The student was instructed by the same teacher during both school years, who testified that the student's performance was "average" as compared to the other students in the class (Tr. pp. 103, 117-18). The student's teacher also testified that at the beginning of each school year she assessed each student to determine present levels of performance and then, for instructional purposes, broke the class into small groups according to their abilities (Tr. pp. 100-02, 118). For reading, the student was grouped with other students who functioned at a first grade level, and for math she was grouped with students whose skills were at a kindergarten to first grade level (Tr. p. 118; Parent Ex. E). During both school years, students in the class received instruction in subjects including reading, phonics, spelling, mathematics, activities of daily living, computer, science, social studies, writing, fine-motor, art, physical education, and music (Tr. pp. 107, 120-23; Parent Ex. T at pp. 2-3). Multisensory techniques for instruction used in the class included sign language, index cards for spelling sight words and sequencing sentences, beaded number lines for math computation, and flash cards (Tr. pp. 104-05, 110-11, 113-14).

The student's teacher, in conjunction with the parent, developed individualized education plans for the student at Seton for the 2009-10 and 2010-11 school years (Tr. pp. 125, 128, 506-07; Parent Exs. X; Y). The student's teacher testified that following the September 2009 and 2010 assessments, she prepared the present levels of performance contained in the education plans and determined the student's goals for the remainder of the school year (Tr. pp. 125-30, 133-34). A review of the Seton education plans indicates that they included present levels of performance and academic goals consistent with the teacher's testimony regarding the student's academic skill levels (Tr. pp. 125-30, 133-34; Parent Exs. X at pp. 2-7; Y at pp. 2-6; see Tr. pp. 593-94).

Related Services

In May and June 2009, in preparation for the 2009-10 school year, the student's physical therapist reported that the student exhibited moderate improvement in skills including stair navigation, balance and coordination, muscle strength, and stability; and also in her difficulty with impulsivity and sustaining attention (Dist. Exs. 26; 29). The student's June 2009 and December 2009 IESPs developed by the district related similar information and included annual goals and short-term objectives prepared to address those needs (Dist. Exs. 4 at pp. 7, 9; 13 at pp. 6, 10). In May 2009, also in preparation for the 2009-10 school year, the student's speech therapist reported that the student exhibited moderate deficits in her receptive language skills, and severe delays in her expressive language skills in part because of decreased speech intelligibility due to a severe articulation disorder (Dist. Ex. 28 at p. 1). The therapist noted that the student's speech and language difficulties may be affected by her hearing loss (id.). Present levels of performance relating to the student's speech-language skills and needs contained in the June 2009 and December 2009 IESPs were commensurate with the therapist's May 2009 report, and the IESPs included annual goals developed to address the deficits identified (Dist. Exs. 4 at p. 4; 13 at pp. 11-13; 28). The hearing record reflects that the student's visual motor and graphomotor skills were

significantly delayed, and the June 2009 and December 2009 IESPs provided an annual goal to improve the student's graphomotor skills (Dist. Exs. 4 at p. 12; 13 at p. 14; 23 at pp. 4-5; see Parent Ex. I). Additionally, fall 2009 recommendations for the student's use of an augmentative communication system and an FM system were included in the December 2009 IESP (Dist. Exs. 13 at p. 2; 30; 31 at pp. 3-4; see Dist. Ex. 28 at p. 2).

The student's June 2009 and December 2009 IESPs contained the CSEs' recommendation that the student receive three sessions per week of individual OT, two sessions per week of individual PT, five sessions per week of individual speech-language therapy, and full-time individual paraprofessional services (Dist. Exs. 4 at p. 17; 13 at p. 19). The director at Seton testified in general terms that although Seton does not employ its own related service providers, students at the elementary school receive related services at the school provided by agencies with which the public school district contracts (Tr. p. 494). Related services available to be provided at Seton by district-contracted providers include OT, PT, speech-language therapy, and the services of a "hearing ed teacher" (Tr. pp. 494-95). The student's mother testified that her daughter received OT, PT, speech-language therapy, and SETSS during the 2009-10 school year (Tr. pp. 594-95; see Dist. Exs. 15; 39). However, she further testified that at her request, only the student's PT services were provided at Seton due to her concern about pulling the student from the classroom for the provision of all her related services (Tr. p. 595). The parent testified that she was aware that all of the related services could have been provided to the student at Seton (Tr. pp. 595-96).

The hearing record lacks support for a finding that the student's program at Seton was specially designed to meet her needs in the areas addressed by the student's related services. The student's teacher testified that she was pulled out of class for related services; however, she did not know the frequency or duration of sessions during either the 2009-10 or 2010-11 school years, and her testimony did not indicate for which related services the student was removed from the class (Tr. pp. 151-153). Seton's teacher evaluation report prepared during the 2010-11 school year does not provide any information about the student's gross motor, fine motor or speech-language needs, nor do the student's 2009-10 or 2010-11 education plans developed by Seton (Dist. Exs. 34; 36; Parent Exs. E; X; Y). The Seton director testified that during the 2009-10 and 2010-11 school years she did not know whether the student required OT, PT, and speech-language therapy services (Tr. p. 531). The hearing record is also devoid of information from the 2009-10 and 2010-11 school years showing that there existed any communication between the related service providers and Seton staff. Under the IDEA, related services are the supportive services required to assist a student with a disability to benefit from the special education services (20 U.S.C. § 1401[26]; see 34 C.F.R. § 300.34). Based on the foregoing, the hearing record does not show how the student's related services supported her educational program at Seton.

12-month Services

In June 2009, the district determined that the student was eligible for 12-month services and offered the student an 8:1+1 special class in a specialized school with related services (Dist. Ex. 5; see 8 NYCRR 200.1[eee], 200.4[d][2][x]; see 34 C.F.R. § 300.106[a][1], [a][2] [requiring districts to "ensure that extended school year services are available as necessary to provide FAPE," and further requiring that extended school year services "must be provided" to a student if the CSE determines "that the services are necessary for the provision of a FAPE"], 34 C.F.R. § 300.106[b] [defining extended school year services as both "special education and related services" that are

provided to a student with a disability beyond the "normal school year," in accordance with the student's IEP, and at no cost to the parents]). The student's mother testified that the June 2009 CSE did not inform or explain to her that the student had been recommended to receive 12-month services including special class placement and SETSS (Tr. pp. 633-35; see Tr. pp. 635-36). Although the parent asserted that she lacked knowledge of the CSE's 12-month service recommendations, the hearing record shows that the student in fact received some related services in the summer in order to prevent regression (Tr. pp. 633-35; see Tr. pp. 635-36; Dist. Ex. 7 at p. 2). Upon review of the hearing record, I find that the evidence contained therein does not support that the parent sustained her burden to establish that Seton provided or that the student otherwise received instruction specially designed to meet the unique needs of the student. Specifically, Seton does not provide 12-month services, the necessity of which for this student is not contested by the parties (Tr. p. 483; Parent Exs. P; Q; R).[11] Additionally, the hearing record is devoid of information regarding the provision of the student's 12-month related services and how those services provided her with specially designed instruction to meet her unique needs.[12] Not unlike a district and its IEP, the services obtained by a parent should be designed to produce "progress, not regression" (see Cerra, 427 F.3d at 195; see also Gagliardo, 489 F.3d at 112 [noting that the same considerations and criteria that apply in determining whether a school district's placement is appropriate should be considered in determining the appropriateness of the parents' placement]), and under the circumstances here I cannot conclude that the parent met that standard.

Based on the foregoing evidence, I find that the parent did not establish that Seton was appropriate for the student for either the 2009-10 or 2010-11 school years. Accordingly, I must annul the impartial hearing officer's award of tuition for the 2009-10 and 2010-11 school years.

Equitable Considerations

Although unnecessary to address in light of my determination that the parent did not establish the appropriateness of Seton (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Application of the Bd. of Educ., Appeal No. 11-078), I will nonetheless review the equitable considerations in this matter. 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; Voluntown, 226 F.3d at 68; 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

[11] The hearing record does not support the parent's contention that Seton provided 12-month educational programming to the student (Parent Mem. of Law at p. 16).

[12] I note that the district also argues that Seton is inappropriate for the student because since September 2008 she had "scant exposure to typically developing peers" (Pet. ¶ 45). The hearing record reflects that Seton serves only students with special education needs; however, it does provide opportunities for students to engage in community activities, and had the capacity to offer Seton students exposure to mainstream peers who attend a neighboring school (Tr. pp. 105-06, 490-92). I note that the district's June 2009 summer placement recommendations included an 8:1+1 special class "in a special school," and the 12:1+1 special class recommended in the March 2011 IEP was to be implemented in a special school (Dist. Exs. 5 at p. 1; 14; 20).

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., 646 F. Supp. 2d 346 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 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]).

The district contends that equitable considerations should preclude relief because the parent was aware that Seton was a private school and required payment of tuition, did not read the June 2008 resolution agreement prior to signing it, received tuition agreements from Seton regarding the 2009-10 and 2010-11 school years, was on notice as of June 2010 that the district was not paying the student's tuition at Seton, did not provide the district with the Seton tuition agreements, and was represented by counsel by at least December 2010. The district further alleges that it was unreasonable for the parent not to raise the issue of tuition costs with the district after receipt of the tuition agreements and/or the June 2010 letter from the district, and that the district was prejudiced by the parent's failure to afford the district the opportunity to rectify any miscommunication from that point forward. The district also alleges that the parent's belief that the district was responsible for the student's tuition was unreasonable.

As determined above, the district was obligated to offer the student a FAPE in this matter for each school years at issue in the absence of the parent's written request for IESP services prior to June 1 for each year. The hearing record and the credibility determinations by the impartial hearing officer regarding the parent support that she believed in good faith that the student was attending Seton at district expense for the 2009-10 and 2010-11 school years. The evidence also supports that the parent was unaware that the district had not paid for the student's tuition until she was notified by Seton in a letter dated June 4, 2010, at the end of the 2009-10 school year (see

Parent Ex. L). At some point between receiving the June 2010 letter and December 6, 2010, the parent retained counsel to pursue claims regarding the student's educational program and services. I do not find persuasive the district's allegation that equitable considerations do not favor the parent because she did not provide the district with the tuition agreements that she received from Seton or the June 2010 letter. The parent's failure to forward these to the district is consistent with her belief that the student was placed at Seton with district approval and at district expense. Further, given my determination regarding the manner in which the district failed to offer the student a FAPE, I am not persuaded that the district was particularly prejudiced by the parent's failure to forward the June 2010 letter from Seton to the district earlier and that limitation of tuition reimbursement would be reasonable on this basis. Based on the foregoing, I will not disturb that portion of the impartial hearing officer's conclusion that the equitable considerations favor the parent's claim for relief.

Relief

The district also alleges that it cannot be compelled to pay the student's tuition costs at Seton for the 2009-10 and 2010-11 school years because the parent never signed a tuition contract with Seton or otherwise obligated herself to pay the tuition, and because the parent did not meet her burden of demonstrating that she was eligible for direct tuition payment. In a case of first impression, one court has recently addressed whether it has the authority under the IDEA to grant relief it deems appropriate, including ordering a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are "legally obligated" to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. Feb. 1, 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[13] Since the parent has selected Seton as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Seton and whether she is legally obligated for the

[13] The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 129 S. Ct. at 2494 n.11 see 20 U.S.C. § 1415[i][2][C][iii]).

student's tuition payments (Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

Although unnecessary to my determination in this case, I note that in Mr. and Mrs. A., the court did not establish what should be considered as part of parents' "financial resources" for purposes of determining their ability to pay the costs of tuition for a private school. For instance, it is unclear whether a determination of a parent's financial resources should take into account only his or her annual wages or whether it should also consider items such as cash or its equivalents that the parent has on hand, the parent's ability to access financing, other investments, the unrealized earning potential of a nonworking parent, or the value of luxury items belonging to the parent just to name a few (see Connors, 34 F. Supp. 2d at 806 n.6 [describing that the calculation of a parent's need should be conducted by drawing from a school's experience in determining a parent's eligibility for financial aid]; (Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In consideration of the parent's testimony at the impartial hearing that she earns $31,000 a year, has three children, is separated from her husband (the student's father) and does not receive any support from him, and rents her home (Tr. pp. 559-61, 621, 654), I decline to disturb the impartial hearing officer's determination to credit the parent's testimony that she is unable to afford the tuition at Seton (IHO Decision at p. 19; see Tr. pp. 572, 590, 599). However, I also note that it is uncontroverted that the parent in this matter did not sign any tuition contracts with Seton obligating her to pay the student's tuition for the school years at issue (Tr. pp. 542, 641-45, 652; Parent Exs. Q; R; see Answer at ¶ 30). Further, the parent testified at the impartial hearing that she did not agree to pay, or expect to be financially responsible for, the tuition at Seton and instead believed that the district was responsible for the tuition (Tr. pp. 572, 585-86, 590, 609, 640). Under these circumstances, I find that Seton, who is not a party and is not entitled to relief under the IDEA, incurred a financial burden in this matter, not the parent or the student.[14] The parent cannot assert a claim for relief solely on behalf of Seton, a private entity that lacks standing under the IDEA to maintain a claim against the district in its own right (see Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]); see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]; Application of the Dep't of Educ., Appeal No. 07-032). Under these circumstances, I am constrained to agree with the district that the parent has not met her burden to establish that she is legally obligated to pay the tuition at Seton for the 2009-10 and 2010-11 school years (see Mr. and Mrs. A., 769 F. Supp. 2d at 406).

Conclusion

In summary, I find that the district failed to offer the student a FAPE for the 2009-10 and 2010-11 school years, that the parent did not meet her burden to show that the student's placement at Seton was appropriate, and that the parent is not entitled to the relief sought. I have considered

[14] I do not question what appears to be laudable efforts by Seton in trying to work with the parent, but the Mr. and Mrs. A. Court appeared to contemplate that a private school may assume some portion of the parent's risk, but that the parent must retain some real element of interest in the financial aspects of a unilateral placement (Mr. and Mrs. A., 769 F.Supp.2d at 428). To hold otherwise would make examination of the parent's financial resources (or lack thereof) a pointless exercise.

the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's September 8, 2011 decision determining that Seton was appropriate for the student for the 2009-10 and 2010-11 school years is hereby annulled; and

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's September 8, 2011 decision directing the district to pay for the student's tuition for the 2009-10 and 2010-11 school years is hereby annulled.

Dated: **Albany, New York**
November 15, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER