The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-053

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their son's unilateral placement for the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's order directing the district to continue to fund the student's pendency (stay-put) placement until the student enrolled in a recommended placement.[1] The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

[1] The district does not cross-appeal the IHO's determination that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year; therefore, that issue is final and binding upon the parties and it will not be reviewed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; Answer ¶¶ 1-58).

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

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

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

III. Facts and Procedural History

In this case, the student presents with a history of global developmental delays, a neurological impairment secondary to a static encephalopathy, signs of oral-motor planning difficulties, and sensory integration dysfunction (Dist. Ex. 4 at pp. 2, 6). He has received diagnoses of a pervasive developmental disorder (PDD), a significant receptive-expressive language impairment, and global dyspraxia (id.; Dist. Ex. 15 at p. 2). Overall, the student exhibits significant delays in all areas, including the cognitive domain and adaptive skills (Dist. Ex. 4 at pp. 6-7).

For preschool during the 2010-11 school year, the student attended a school-based program at the Manhattan Children's Center (MCC) five days per week for six hours per day (see Dist. Exs. 4 at p. 2; 5 at pp. 1-3; 7 at pp. 1-4; 12 at pp. 1-2; 13 at pp. 1-3; 14 at pp. 1-2). At MCC, the student received daily 1:1 applied behavior analysis (ABA) services and related services consisting of three 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (OT) (Dist. Exs. 4 at p. 2; 7 at p. 5; 8 at pp. 2-5; 9 at pp. 2-3; 10 at pp. 1-3). In addition to his school-based program at MCC, the student received a home-based program consisting of the following services: 15 hours per week of 1:1 ABA/special education itinerant teacher (SEIT) services; three 60-minute sessions per week of speech-language therapy; three 60-minute sessions per week of OT; and three 60-minute sessions per week of physical therapy (PT) (see Tr. pp. 522-23; Dist. Exs. 4 at p. 2; 11 at pp. 1-2; 20 at pp. 1-2; 24; see also Tr. pp. 380-83, 386-87).

On May 12, 2011, the CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 3 at pp. 1, 12-18, 21). The CSE found the student eligible to receive special education and related services as a student with autism (id. at pp. 1, 17).[2] To address the student's needs, the CSE recommended a 12-month school year program and placing the student in a 6:1+1 special class in a specialized school with the following school-based related services: speech-language therapy, OT, PT, and counseling (id. at pp. 13-14).[3] The CSE also recommended that the student receive the services of a full-time 1:1 health paraprofessional, special transportation accommodations, assistive technology, and adapted physical education (id. at pp. 3, 13-14, 16-17). According to the IEP, the parents expressed concern about the student's delays in cognition and achievement, and wanted the CSE to consider providing 1:1 related services and behaviorally-based teaching support in both the school-based and home-based settings (id. at p. 19).[4]

At the CSE meeting, the parents received a final notice of recommendation (FNR) dated May 12, 2011, summarizing the special education and related services recommended for the 2011-12 school year; however, the FNR did not identify the particular school to which the district had

[2] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The CSE also considered other placement options, such as a special class in a community school—which was rejected as not adequately supportive—and home instruction, which was rejected as too restrictive for the student (Tr. pp. 105-07, 109-11, 138; Dist. Ex. 3 at p. 19).

[4] Although the CSE did not specifically recommend home-based services for the student for the 2011-12 school year, the student's father testified that he believed some of the recommended related services would be provided in the home "based upon the conversation we had at the IEP meeting" (see Tr. pp. 102-04, 109-11, 175-78, 436-40, 449-50, 466-67; Dist. Ex. 3 at pp. 1-21). The hearing record contains no evidence to establish that the district complied with the procedures requiring that prior written notice be given to the parents, which would have required the district to describe why it changed the services and/or refused the parents' request to provide home-based services together with a description of each evaluation, procedure, assessment, record or report that was used as a basis for the refused action (see 34 CFR 300.503; 8 NYCRR 200.5[a][5][ii]). Prior written notice should be sent within a "reasonable time" and under the circumstances of this case it would have been reasonable to send it before the date of initiation of the proposed IEP. The district's responses to the due process complaint notice and the amended due process complaint notice, which are required in those cases when prior written notice is not required, were timely filed, but the responses fail to show that the district considered the parents' request or the rationale for the district's refusal of home-based services (Parent Exs. D at pp. 1-5; E at pp. 1-5; see 34 CFR 300.508[e]).

assigned the student to attend (see Parent Ex. K at pp. 1-2; see also Tr. pp. 448-50). In a letter dated May 31, 2011, the parents wrote to the district, and indicated that they had not received information about the student's "school placement selected" by the district (Parent Ex. J at p. 1).

On June 8, 2011, the parents executed an enrollment contract for the student's attendance at Nexus Language Builders, Inc. (Nexus)—an out-of-State, nonpublic school—beginning on July 5, 2011 (see Parent Ex. DD at pp. 1, 5).[5]

By letter dated June 15, 2011, the parents wrote to the district again, and indicated that they had not received notice of the particular school to which the district had assigned the student to attend for the 2011-12 school year (see Dist. Ex. 26). However, in the same letter the parents rejected the student's recommended placement in a 6:1+1 special class as "inherently inappropriate" because it failed to offer the student "the necessary 1:1 full time instruction" that he required (id.). In addition, the parents advised the district of their intentions to unilaterally place the student at Nexus in a 12-month school year program for the 2011-12 school year at public expense and to obtain the following additional services: transportation on an air-conditioned bus; 15 hours per week of home-based 1:1 ABA/SEIT services; five hours per week of home-based speech-language therapy; four hours per week of home-based OT; three hours per week of home-based PT; four hours per month of parent counseling and training services; three hours per week of program supervision services; and four hours per month of team meetings (id.). The parents also indicated in the letter that they would seek reimbursement for the costs associated with the additional home-based services and transportation (id.).

By letter dated June 24, 2011, the district notified the parents of the particular public school site to which the district had assigned the student to attend for the 2011-12 school year (Dist. Ex. 27; see Dist. Ex. 28 at p. 1 [indicating that the parents received the June 24, 2011 letter from the district on July 5, 2011]).

A. Due Process Complaint Notice

In a due process complaint notice dated July 8, 2011, the parents asserted that the district failed to offer the student a FAPE for the 2011-12 school year, and alleged procedural and substantive violations (Parent Ex. A at pp. 1-8).[6] The parents requested that the district fund the student's home-based pendency placement as reflected in the student's last-agreed upon IEP, dated September 16, 2009, during the due process proceedings (id. at pp. 1-2, 8-9; see Tr. pp. 3-6; Parent Ex. B at pp. 1-3, 28). As relief, the parents requested reimbursement, compensatory, or prospective funding to cover the costs of the student's unilateral placement consisting of both the student's school-based and home-based programs (Parent Ex. A at pp. 1-2, 8-9). With respect to the home-based program, the parents specifically sought reimbursement for the following: 15 hours per week of 1:1 ABA/SEIT services; three hours per week of program supervision services; four hours per month of team meetings; five hours per week of speech-language therapy; four hours per week of

[5] The Commissioner of Education has not approved Nexus as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[6] By letter dated August 5, 2011, the parents wrote to the district regarding their "most recent visit to the recommended placement" on July 15, 2011 (see Dist. Ex. 28 at p. 1). In the letter, the parents advised the district that the recommended placement was not appropriate, and therefore, the student would attend Nexus for the 2011-12 school year, and would receive the additional services as indicated (id. at pp. 1-2).

OT; three hours per week of PT; and four hours per month of parent counseling and training services (id. at pp. 8-9).[7]

B. Impartial Hearing Officer Decisions

The parties proceeded to an impartial hearing on August 15, 2011, which concluded after seven days of hearing on December 20, 2011 (Tr. pp. 1, 433). On the first day of the impartial hearing, the parties addressed the parents' request for funding for the home-based pendency placement (Tr. pp. 1-7). On August 18, 2011, the IHO issued an order on pendency directing the district to fund the following services at the district's approved agency rates: 15 hours per week of 1:1 SEIT services; 4 hours per week of 1:1 speech-language therapy; 4 hours per week of 1:1 OT; and 3.5 hours per week of 1:1 PT (Interim IHO Decision at p. 2).

The IHO rendered a decision on the merits of the case in a decision dated February 7, 2012, and she concluded that the district failed to offer the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 31-44). With respect to the parents' unilateral placement, the IHO concluded that although the evidence indicated that the student made progress with 1:1 ABA instruction, Nexus was not appropriate for the student because it was "unduly restrictive" (id. at pp. 45-46). In particular, the IHO noted that at Nexus the student was "alone in a classroom with one adult for all but a half hour during lunch and unspecified periods of time" when he joined the "'Nexus community'" to work on his gross motor skills, and he did not receive any related services at Nexus (id.). She further noted that the student had no opportunities to interact with his peers at Nexus, which the IHO found particularly troubling given that the student received "extensive" home-based services in a 1:1 setting for approximately 25 hours per week in addition to his school-based program (id. at p. 46). The IHO determined that the evidence did not support findings that the student required 1:1 ABA services in "such a restrictive setting," that he needed to be "totally isolated from his peers during the school day," or that his related services must be provided outside the school setting in order to receive educational benefits (id. at pp. 46-47).

In addition, the IHO expressed concerns about the likelihood of regression in the student's social skills while he attended Nexus, noting that when the student attended MCC, he made progress in his abilities to make eye contact when a peer called his name, to reciprocate greetings with peers, to take turns with a peer during play, and to work within a group setting during morning circle time (IHO Decision at pp. 46-47). She further indicated that the student made progress in the school-based related services he received at MCC (id. at p. 47). Thus, the IHO concluded that Nexus was not an appropriate placement for the student during the 2011-12 school year (id.).[8]

Finding that neither party sustained its respective burden of proof, the IHO remanded the matter to the CSE (IHO Decision at pp. 47-49). The IHO directed the CSE to reconvene and to develop an IEP that fully considered all of the evaluative information about the student (id.). The

[7] The parents filed an amended due process complaint notice, dated September 14, 2011, which, upon review, included virtually identical procedural and substantive allegations as asserted in the July 8, 2011 due process complaint notice (compare Parent Ex. C at pp. 1-8, with Parent Ex. A at pp. 1-8).

[8] The IHO also determined that the "propriety of the home program [was] dependent upon the appropriateness of the school program and the related services offered by that program," and she did not award reimbursement, compensatory, or prospective funding to cover the costs of the home-based program requested by the parents (compare IHO Decision at pp. 47-49, with Parent Ex. A at pp. 8-9).

IHO also directed the CSE to consider an appropriate school program and related services to be "provided in school and/or in the home" (id. at p. 48). Until such time as the CSE reconvened, developed an IEP, and placed the student in an appropriate program, the IHO ordered the district to continue to fund the student's home-based pendency placement as enumerated in the interim order on pendency (id. at pp. 48-49; compare IHO Decision at p. 49, with Interim IHO Decision at p. 2).[9]

IV. Appeal for State-Level Review

The parents appeal, and contend that the IHO erred in concluding that the student's unilateral placement was not appropriate for the student because it was unduly restrictive. The parents argue that the IHO's emphasis on the student's lack of opportunity to interact with peers was contrary to the weight of the evidence, which indicated that the student was not ready for a program with a '"socialization component'" and that he did not demonstrate any interest in his peers. In addition, the parents assert that the IHO improperly supplanted her own opinion for, or otherwise ignored, expert witness testimony provided by the director of Nexus, as well as other testimonial and documentary evidence. The parents also allege that the IHO erred in concluding that the appropriateness of the home-based program was "entirely dependent" upon the appropriateness of the school-based program and that the student would likely experience regression in his social skills at Nexus. The parents seek to reverse the IHO's decision in its entirety and to recover the costs of the student's unilateral placement.

In an answer, the district responds to the parents' allegations, and asserts that the IHO properly concluded that Nexus was not appropriate for the student because it was unduly restrictive, and the student had no opportunity to interact with peers. Moreover, the district contends that Nexus was not appropriate because it failed to offer any related services to the student despite his identified needs in these areas. As a cross-appeal, the district alleges that the IHO erred in ordering the district to continue to fund the student's home-based pendency placement after the date of the final decision on the merits. The district also asserts that the IHO improperly concluded that equitable considerations weighed in favor of the parents. As relief, the district seeks to uphold the IHO's decision denying tuition reimbursement to the parents, but seeks to reverse the IHO's order directing it to continue to fund the student's pendency placement and her finding that equitable considerations weighed in favor of the parents.

V. Applicable Standards

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

[9] Although the IHO determined that the district failed to offer the student a FAPE and that the parents did not sustain their burden to establish the appropriateness of the student's unilateral placement, the IHO nevertheless made alternative findings that addressed the issue of equitable considerations in her decision (see IHO Decision at p. 48). The IHO concluded that the parents cooperated with the district throughout the process, and therefore, equitable considerations would not preclude an award of tuition reimbursement (id.).

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]). Consistent with the IDEA, the student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; 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]).

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

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 CFR 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school 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 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 Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; 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).

Moreover, while parents are not held as strictly to the standard of placement in the LRE as school districts are, courts have routinely and repeatedly considered the restrictiveness of the unilateral placement as a relevant factor in assessing whether the "totality of the circumstances" demonstrates that the "placement reasonably serves a child's individual needs" (Gagliardo, 489 F.3d at 112; see C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 983371, at *11-*14 [S.D.N.Y. Mar. 22, 2012], citing Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir. 2003] [noting the IDEA's strong preference for educating students with disabilities alongside their nondisabled peers when appropriate]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 523-24 [S.D.N.Y. 2011]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 367 [S.D.N.Y. 2010] [indicating that the "level of restrictiveness may be considered in determining whether tuition reimbursement should be ordered"]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *14 [E.D.N.Y. Sept. 2, 2011], citing Frank G., 459 F.3d at 364; M.S., 231 F.3d at 105; 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 [S.D.N.Y. 2007]).[10]

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]).

VI. Discussion

A. Unilateral Placement

Contrary to the parents' arguments, an independent review of the evidence in the entire hearing record supports the IHO's conclusion that the student's unilateral placement was not appropriate to meet his individual needs. Even under the less stringent LRE standard considered by courts in determining the appropriateness of a student's unilateral placement, the evidence demonstrates that the student's school-based program, coupled with his home-based program, was unduly restrictive. Moreover, upon carefully weighing all of the evidence presented, I agree with

[10] U.S. District Courts in New York have upheld denials of tuition reimbursement when the parents' chosen unilateral placement was too restrictive (D.D-S., 2011 WL 3919040, at * 14, citing M.S., 231 F.3d at 104-05 [concluding that the parents' unilateral placement was not appropriate, in part, because it was not "consistent with the IDEA's requirement that children with disabilities be educated in the least restrictive appropriate educational environment"]; S.H. v. New York City Dep't of Educ., 2011 WL 609885, at *9-*10 [S.D.N.Y. Feb. 18, 2011] [denying tuition reimbursement when the parents failed to demonstrate that the student required a residential program "solely for learning disabled students in order to obtain educational benefits"]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 551 [S.D.N.Y.2010] [finding that a "private placement can be appropriately rejected" when a student's opportunities to "participate in the mainstream curriculum were too limited"]; Pinn, 473 F.Supp.2d at 482–83 [concluding that the unilateral placement was not appropriate because "[m]uch of [the student's] education consisted of one-on-one tutoring, and he did not have the opportunity for taking classes in mainstream settings"]).

the IHO's conclusion that the parents failed to sustain their burden to establish that the student required 1:1 ABA services in such a restrictive setting in order to receive educational benefits.

Initially, I note that neither party in this case disputes that the student exhibited significant delays in his socialization skills and a limited interest in his peers. As noted in an October 2010 neurodevelopmental evaluation report, the student engaged in limited eye contact unless the interaction was "of high interest to him, such as to request food" (Dist. Ex. 4 at p. 6). The evaluation report noted that at that time, the student did not interact with other children, he was "attached to his parents and nanny," and he demonstrated an overall "limited" interest in the "speech and actions of others" (id.). According to the evaluators, the student continued to require "1:1 teaching to learn basic skills," and they recommended that he continue to attend an educational placement that focused on the "evidence-based method of ABA, with the development of skills using primarily 1:1 discrete trial training while at the same time actively promoting greater independence and self-sufficiency" (id. at pp. 6-7).

In preparation for the student's annual review in May 2011, the district's school psychologist conducted a classroom observation of the student in April 2011 at MCC, which allowed the psychologist to observe the student during a 1:1 instructional activity and also during lunch (see Dist. Ex. 5 at pp. 1-2; see also Dist. Ex. 3 at pp. 1-3, 17-19). Based upon his observation, the psychologist characterized the student's socialization with other children as "poor," and further indicated that he "appeared to show little to no interaction with other children, particularly during lunch" (Dist. Ex. 5 at p. 2).

Also in preparation for the student's annual review in May 2011, the student's MCC teacher during the 2010-11 school year completed a Preschool Evaluation Scale: School Version (PES:SV) and a report entitled the "Turning-5 Preschool Progress Report" (see Dist. Exs. 5 at pp. 1, 3; 6-7). With respect to the student's social/emotional development, the MCC teacher indicated on the PES:SV that the student "inconsistently" followed one or two step verbal directions, "inconsistently" responded appropriately to redirection, and "inconsistently" demonstrated "little difficulty separating from [his] parents" (Dist. Ex. 6 at p. 3). The MCC teacher also indicated on the PES:SV that the student could not take turns appropriately, play cooperatively with other children, or behave appropriately in social situations without constant adult supervision (id.).

On the Turning-5 Preschool Progress Report, the MCC teacher rated the student's ability to socialize with other children as "poor" (Dist. Ex. 7 at p. 3). In addition, she noted that the student demonstrated a "moderate level of interest in familiar adults" and would often initiate interactions with familiar adults, but that he showed "little interest in his peers" (id.). The student's occupational therapist during the 2010-11 school year at MCC also rated the student's socializations with peers as "poor" (Dist. Ex. 8 at p. 2). However, the student's speech-language pathologist during the 2010-11 school year at MCC rated the student's ability to socialize with peers as "fair," while simultaneously noting that he displayed a "[l]imited awareness" in socializing with children and that he "[e]njoy[ed] adults more than peers" (Dist. Ex. 9 at p. 2; see Dist. Ex. 10 at pp. 1-3). The MCC speech-language pathologist also noted that the student displayed "[l]ittle interest in 'play'" (Dist. Ex. 9 at p. 2).

Notwithstanding the severity of the student's deficits in socialization, the hearing record demonstrates that the student's school-based program at MCC addressed these deficits by providing 1:1 ABA services in a classroom setting with peers and that the student made progress

in these areas during the 2010-11 school year. At the school-based program at MCC, the student attended a classroom consisting of six students, six instructors, and one lead teacher (see Parent Ex. V at p. 1; see also Dist. Exs. 4 at p. 2; 5 at pp. 1-3; 7 at pp. 1-4; 12 at pp. 1-2; 13 at pp. 1-3; 14 at pp. 1-2). At MCC, the student received five hours per day of 1:1 ABA instruction, as well as a one hour instructional lunch and leisure skills session in a 2:1 setting (see Parent Ex. V at p. 1). As described by the MCC teacher, the student's class included regular group instructional formats each day with 1:1 support during small group learning (id.). In addition, the student received speech-language therapy and OT as related services at MCC during the school day (id.).

In an April 2011 progress report, the student's MCC teacher reported that within the social skills domain, the student worked on programs to improve eye contact, greetings, and taking turns with a peer (see Parent Ex. V at pp. 1, 3). She explained in the report that since December 2010, the student "learned to respond to his name when called by an adult and while engaged in a preferred activity," and more specifically, that he was "currently working on responding to his name by making eye contact when a peer called his name" (id. at p. 3). According to the MCC teacher, the student had "learned to reciprocate greetings with peers throughout the school by saying 'Hi,'" and he was "now working on reciprocating 'Bye' with peers throughout the school by making eye contact and an approximation" (id.). At that time, the student had also learned to "reciprocate 'Bye' with various adults throughout the school" (id.). The MCC teacher also reported that the student was "working on taking turns with a peer playing a simple ball game," and further noted that the student had "learned to orient to his peer when his name [was] called before taking his turn as well as reciprocating his turn" (id.). In addition, the MCC teacher reported that the student was "working on expanding his social skills within a group setting during a morning circle routine," which included "greetings, identifying his name, going over a daily calendar, and performing actions to songs with teacher instruction" (id.). Overall, the student's MCC progress reports indicated that he was able to make progress in a setting with other students (see Dist. Exs. 8 at p. 5; 10 at p. 1; 11 at p. 1; Parent Ex. V at pp. 1-4).

Here, however, the hearing record reveals that the parents purposefully selected Nexus—as opposed to reenrolling the student at MCC—for the school-based portion of student's unilateral placement because it provided him with more intensive 1:1 ABA instruction in a "room to himself," which the parents believed was in the student's best interest and would allow him to make progress (see Tr. pp. 444-45, 472-76). In particular, the student's father testified that the student did not return to MCC, in part, because students were pulled out of the classroom to receive related services, and therefore, the students could not receive 1:1 ABA instruction all throughout the "course of the school day" (see Tr. pp. 474-75). He also testified that at Nexus, the student received an additional 1.5 hours per day of 1:1 ABA services compared to the amount of daily 1:1 ABA services he had received at MCC in the 2010-11 school year (see Tr. pp. 476-80). In his testimony, the student's father also noted that at MCC, the student attended a "smaller" and "noisier" classroom and that the student was "very easily distracted during the course of instruction" (Tr. p. 475). The student's father further opined that the student was not "really ready" for a "socialization component within the classroom," and therefore, he considered Nexus to be "beneficial and appropriate" because the student would receive "one-to-one instruction in a room to himself . . . for a good chunk of the day" (id.).

The director of Nexus (director) also testified at the impartial hearing (Tr. pp. 332-78). With respect to placing the student in a less restrictive setting than what was offered at Nexus, the director supported the parents' position, and opined that he was "confidant" that the student "would

not have the opportunities to learn the things that he need[ed to learn] in order to be interacting with his environment in a meaningful way" in a less restrictive setting (Tr. p. 348). The director also testified that he believed the student would be distracted by other students in a classroom and that it would not be appropriate to work on improving the student's social skills through cooperative play at that time (Tr. pp. 377-78).

During the 2011-12 school year at Nexus, 13 instructors provided instructional services to 13 students, and the student attended Nexus five days per week for six hours per day from 9:00 a.m. to 3:00 p.m. (Tr. pp. 360, 366; see Parent Ex. N at p. 1).[11, 12] While the student generally received approximately 5.5 hours of 1:1 ABA services per day in a classroom with no other students, the student would at times go out into the "Nexus community" at the school to work on "following directions in the larger environment," generalizing skills—such as greetings—across persons in the environment, or working on his gross motor skills on a scooter (see Tr. pp. 345, 360, 365-68; Parent Ex. N at p. 1).[13] For example, if the student was out in the Nexus community, another person may be asked to greet the student in order to assess the student's ability to generalize his greeting skills across people, including his "peers" (Tr. p. 368). Otherwise during the school day, the Nexus instructors individually rotated into the student's classroom every hour for the purpose of generalization of skills across different people (Tr. pp. 345-47, 349; Parent Ex. N at p. 1). In addition, the student's school day at Nexus included a 30-minute instructional lunch session, where the student ate lunch in a room with other students (Tr. p. 367).

After completing his school day at Nexus, the student would then return home where he received additional services through his home-based program as part of the unilateral placement during the 2011-12 school year (see Interim IHO Decision at p. 2; Parent Ex. A at pp. 8-9). In total throughout the week, the student received approximately 51 hours of 1:1 instruction with little or no interaction with either his disabled or nondisabled peers (compare Interim IHO Decision at p. 2, with Tr. pp. 345, 360, 365-68; Parent Ex. N at p. 1).

Therefore, based upon the foregoing, I find it difficult to disagree with the IHO's conclusion that the unilateral placement was not appropriate because it was unduly restrictive. Here, it appears that the parents seek to equate the student's lack of interest in peers as a requirement that he receive instruction in nearly complete isolation from not only his nondisabled peers, but also from his disabled peers, and that they otherwise choose to maximize the student's academic development at the expense of the student's social skills development. Given that the hearing record shows that the student demonstrated progress in social and other skills in a classroom setting and did not require segregation from other students in order to obtain meaningful educational benefit, the

[11] A review of an October 2011 progress report revealed that the student's 2011-12 program at Nexus did not incorporate any instruction regarding social skills development, and in addition, did not note any type of interactions—incidental or otherwise—with the remaining 12 students at Nexus (see Parent Ex. N at pp. 1-5).

[12] The parents provided the student's round-trip transportation to Nexus throughout the 2011-12 school year (see Tr. pp. 376, 444). The student's father testified that a one-way commute to Nexus from their home took approximately 35 to 40 minutes (Tr. p. 444).

[13] Nexus specializes in providing instruction solely to students on the autism spectrum (Tr. p. 338). At times, the student-to-teacher ratio increased from a 1:1 setting to a 1:2 setting if the student's "coordinators" were also in the student's classroom at Nexus (see Tr. p. 345). Nexus does not provide any related services to any of its students (see Tr. pp. 362-63).

parents have not sustained their burden to establish the appropriateness of the student's unilateral placement and they are not entitled to an award of tuition reimbursement. Although the parents appear to have given considerable thought in exercising their right to provide their son a private education of their own choosing and have prioritized the benefits that they believe are most important, they have elected an option that is very different from the objectives of the IDEA in terms of the mandate that students be educated in the least restrictive environment and, under the circumstances of this case, I will not disturb the well reasoned decision of the IHO on this issue.

B. Pendency Placement

Finally, the district requests in its cross-appeal that I reverse the IHO's order directing the district to maintain the student's home-based pendency placement as set forth in the interim order on pendency, dated August 18, 2011, until such time that the CSE completed its obligation on remand to reconvene, develop an IEP that fully considered all of the evaluative information about the student, and the student enrolled in a recommended placement.

The IDEA and Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 11-104). A prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *20-*21, *23; Application of the Bd. of Educ., Appeal No. 11-072; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; see 34 CFR 300.514[a]). However, for the pendency provisions of the IDEA to apply, a due process proceeding must be currently pending (Weaver, 812 F. Supp. 2d at 526; Application of a Student with a Disability, Appeal No. 11-154; see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Honig v. Doe, 484 U.S. 305, 323 [1987]; Mackey v. Bd. of Educ., 386 F.3d 158, 160 [2d Cir. 2004]; Bd. of Educ. v. Schutz, 290 F.3d 476, 481-82 [2d Cir. 2002]; Zvi D. v. Ambach, 694 F.2d 904, 908 [2d Cir. 1982]; Letter to Winston, 213 IDELR 102 [OSEP 1987]). While the home-based program may constitute the student's current educational placement for pendency purposes should the parents initiate a subsequent impartial hearing, an IHO has no authority to establish a student's pendency placement on a going forward basis (Application of a Student with a Disability, Appeal No. 11-027; see Zvi D. v. Ambach, 694 F.2d 904, 908 [2d Cir. 1982] [holding that when a district has been found liable for a student's private placement, reimbursement pursuant to pendency is required "for the duration of the review proceedings"]; see also Child's Status During Proceedings, 71 Fed. Reg. 46710 [Aug. 14, 2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). In this instance, I agree with the district that the IHO's order that the district continue to fund the student's home-based pendency placement represents a misapplication of the pendency principle, and therefore, it must be reversed (see Application of the Dep't of Educ., Appeal No. 11-037). However, due to the parties' appeals in the instant matter, the student's home-based pendency placement has been extended for the duration of the parties' appeals and would continue pursuant to law during the pendency of any further proceedings, unless the parties otherwise agree (see Application of the Dep't of Educ., Appeal No. 12-033; Application of the Dep't of Educ., Appeal No. 08-061, aff'd, New York City Dep't of Educ. v. S.S., 2010 WL 983719 [S.D.N.Y. Mar. 17, 2010]).

VII. Conclusion

Based upon the foregoing, I find that the IHO properly weighed and considered the evidence in determining that the student's unilateral placement at Nexus, coupled with the home-based program, was unduly restrictive, and therefore, not an appropriate placement for the 2011-12 school year. I have considered the parties' remaining contentions and find that I need not reach them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated February 7, 2012 is modified by reversing that portion which ordered an extension of the student's pendency placement in the absence of a pending proceeding.

Dated: **Albany, New York**
June 08, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER