The University of the State of New York

The State Education Department
State Review Officer
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No. 12-094

Application of a STUDENT WITH A DISABILITY, by his parent, 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:
Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for respondent (the district) to fund her son's tuition costs at Imagine Academy (Imagine) for the 2010-11 school year. The 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 school district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has received a diagnosis of autism and exhibits global developmental delays (Dist. Exs. 3; 4; 5; 7). He exhibits severe deficits in areas of adaptive functioning, including communication, daily living skills, and social skills (Dist. Ex. 3 at pp. 2-3). The student demonstrates limited eye contact and at times engages in self-stimulatory behaviors (id. at p. 2). He primarily communicates for the purpose of requesting items and activities, by using gestures, signs, picture exchanges, and vocalizations (Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 1). The student shows an understanding of one-step verbal directions within the context of his daily routines and his academic skills are below a pre-K level (Dist. Exs. 5 at pp. 1-2; 7 at p. 2). While he expresses enjoyment in activities such as hearing familiar songs, he does not engage in interactions with peers without support (Dist. Exs. 3 at p. 3; 4 at p. 1). At times when he is unable to communicate,

the student exhibits aggressive behavior such as pinching, scratching, biting, and hitting (Dist. Exs. 4 at p. 2; 7 at p. 2). The student demonstrates severe delays in gross and fine motor skills, safety awareness and play skills, and benefits from a daily sensory diet (Dist. Ex. 7 at p. 1).[1]

On April 23, 2010, the CSE convened for the student's annual review and to develop an IEP for the 2010-11 school year (Dist. Ex. 8; Parent Ex. C).[2] The CSE recommended placement in a 6:1+1 special class and that the student receive the following related services: individual occupational therapy (OT) twice per week, OT in a group of three twice per week, individual physical therapy (PT) twice per week, and individual speech-language therapy five times per week (Parent Ex. C at p. 19).[3] The CSE also recommended a full-time behavior management paraprofessional for the student (id.). The student was determined to be eligible for a 12-month program and, at the parent's request, the CSE recommended a 6:1+1 summer program at a specific State-approved nonpublic school (Dist. Ex. 8 at p. 2; Parent Ex. C at p. 1; see also Tr. pp. 263, 270).[4]

The student attended the State-approved nonpublic school indicated on his IEP during summer 2010 (Tr. pp. 270-71).

By final notice of recommendation (FNR) dated June 10, 2010, the district summarized the recommendations made by the April 2010 CSE and notified the parent of the particular public school site to which the student was assigned (Dist. Ex. 12). By letter to the district dated August 18, 2010, the parents notified the district of their intention to unilaterally place the student at Imagine at public expense for the 2010-11 school year (Parent Ex. E).[5] On August 23, 2010, the parent returned to the district its June 10, 2010 FNR with a handwritten note stating that she had visited the recommended placement and determined it to be academically, socially, and emotionally inappropriate for the student (Dist. Ex. D at p. 1). The parent further noted that the student would be attending Imagine for the 2010-11 school year and that she would seek the costs of the student's tuition from the district (id.).

On September 1, 2010, the parent signed an enrollment contract with Imagine for the student's attendance for the 2010-11 school year (Parent Ex. L). On September 3, 2010, the student

[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Tr. pp. 18, 263; see 34 CFR 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

[2] I note that the hearing record contains multiple duplicative exhibits (Dist. Ex. 1; Parent Ex. C). For purposes of this decision, only Parent exhibits were cited in instances where both a Parent and District exhibit were identical. I remind the IHO that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] I note that the minutes from the CSE meeting reflected that the CSE recommended individual OT for the student three times per week (Dist. Ex. 8 at p. 2).

[4] The hearing record reflects that the student had been accepted into the CSE's recommended summer program, "pending SED approval," as early as January 2010 (Dist. Ex. 9).

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

began the 2010-11 school year at Imagine, which concluded on June 23, 2011 (Parent Ex. K; see Tr. p. 262).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated March 8, 2011 alleging that the district failed to offer the student a FAPE for the 2010-11 school year (Parent Ex. A). The parent alleged that some of the goals on the student's IEP were inappropriate and contained vague and immeasurable language, and that there was no indication that the behavioral intervention plan (BIP) attached to the student's IEP was drafted as the result of a functional behavioral assessment (FBA) (id. at p. 2). The parent also alleged that the assigned public school site was not appropriate for the student (id. at pp. 1-2). The parent requested, among other things, that the district reimburse the parent or directly fund the student's tuition costs at Imagine for the 2010-11 school year, and provide the student with the related services recommended on the student's last agreed upon IEP and transportation to and from Imagine (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 18, 2011 and concluded on February 6, 2012, after five days of proceedings (Tr. pp. 1-280). In a decision dated March 19, 2012, the IHO determined that the April 2010 CSE was duly constituted, reviewed the relevant documents, and considered input from student's teacher and therapist from Imagine in developing the student's goals (IHO Decision at pp. 10-11). The IHO determined that the goals contained in the student's April 2010 IEP were appropriate to meet his needs (id. at p. 11). The IHO also determined that the CSE's recommendation of a 12-month program was appropriate for the student, and that the parent's placement of the student in "summer camp" with a staffing ratio of 6:1+1 for summer 2010 and summer 2011, as well as her plan for the same in summer 2012, "weaken[ed]" her argument that a 6:1+1 placement was not appropriate for the student (id.). However, the IHO found that the student was denied a FAPE for the 2011-12 school year, determining that the assigned classroom rendered the recommendation for the student inappropriate because the students in the assigned class were too high functioning compared to the student (id.).

The IHO then addressed the appropriateness of the parent's unilateral placement of the student at Imagine for the 2010-11 school year (IHO Decision at pp. 11-12). As an initial matter, the IHO rejected the district's argument that the student's teacher at Imagine was unqualified, focusing instead on whether placement of the student at Imagine could satisfy the student's unique needs (id.). The IHO then determined that Imagine did not meet the student's needs and was not appropriate for the student because Imagine provided only a 10-month program, rather than the 12-month program that the student required, and also because Imagine was too restrictive for the student (id. at p. 12). Having found that Imagine was not appropriate, the IHO declined to address equitable considerations and determined that the parent was not eligible for tuition costs for the 2010-11 school year (id.)

IV. Appeal for State-Level Review

This appeal by the parent ensued. The parent alleges, among other things, that the IHO erred in finding that the CSE's 6:1+1 special class placement recommendation was appropriate for

the student. The parent further argues that her choice to send the student to a 6:1+1 placement during the summer does not weaken her argument that a 6:1+1 placement is not appropriate for the student, as the 6:1+1 summer program was not comparable to a 6:1+1 placement during the 10-month school year. Regarding the student's placement at Imagine, the parent alleges that the IHO erred in determining that it was not appropriate for the student. The parent alleges that the student did not exhibit substantial regression requiring a 12-month program and to the extent that the student may have required a 12-month program, that need was met by the parent's placement of the student in a summer program recommended by the district. The parent also alleges that the IHO erred in finding that Imagine was overly restrictive for the student. The parent requests reversal of the IHO's decision, except to the extent that the IHO found that the district failed to offer the student a FAPE for the 2010-11 school year, and award the parent the relief requested in the due process complaint notice.

The district responded, asserting that it does not appeal from the IHO's finding that it failed to offer the student a FAPE for the 2010-11 school year but denies many of the substantive allegations made by the parent regarding the placement of the student at Imagine. The district alleges that the IHO correctly determined that Imagine was not an appropriate placement for the student, asserting that a 10-month school year was inappropriate for the student, that the district's provision of a non-district summer program did not render Imagine appropriate for the student, and that Imagine was not the least restrictive environment (LRE) for the student. The district also alleges that equitable considerations do not favor the parent because the parent had no intention of placing the student in public school and the parent's notice of intent to enroll the student at Imagine was inappropriate, in that it challenged only the assigned school/class, not the student's IEP or 6:1+1 placement recommendation. The district further alleges that the parent is not entitled to the relief requested because the parent is not legally obligated to pay Imagine for the student's 2010-11 school year tuition and the parent did not provide her financial information for 2011.

V. Discussion

A. Scope of Review

An IHO decision is final and binding upon the parties unless appealed to an SRO (34 CFR § 300.514[a]; 8 NYCRR 200.5[j][5][v]). As noted above, the district did not cross-appeal the IHO's finding that the district failed to offer the student a FAPE for the 2010-11 school year and that decision has thus become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Answer ¶ 27). Accordingly, it is unnecessary to address the particular findings by the IHO with respect to the appropriateness of the district's recommended placement and services for the student's 2010-11 school year and will instead turn to the appropriateness of the parent's unilateral placement at Imagine.

B. Applicable Standards – Unilateral Placement

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

70 [1985]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65; see M.F. v. New York City Dep't of Educ., 2013 WL 2435081 at *10 [S.D.N.Y. June 4, 2013]). 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" (D.D-S v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012], quoting Frank G., 459 F.3d at 364; Gagliardo, 489 F.3d at 112; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; 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"]; 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]).

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]).

C. The Parent's Unilateral Placement

As discussed further below, I find that the evidence in the hearing record supports the conclusion that Imagine provided the student with, or the student otherwise received, instruction specially designed to meet his unique needs for the time period during which the student did not attend the district's recommended placement, namely the 10-month school year (September 2010 to June 2011).[6] Specifically, the hearing record shows that Imagine is a private special education school serving 15 students who have received a diagnosis of autism (Parent Ex. B at p. 1). A

[6] The Education Law describes a school year as running from July 1 through June 30 (Educ. Law § 2[15]).

description of the program at Imagine contained in the hearing record indicates that the school groups the students in classrooms of up to 5 students and provides 1:1 instruction throughout the day by special educators, occupational therapists, floortime specialists, speech therapists, music therapists, and paraprofessionals (Parent Ex. B; see also Tr. pp. 80-81, 95-96, 128-29, 174, 231-33, 235, 244, 249-50).[7] The student's special education teacher from Imagine testified that during the 2010-11 school year the student was placed in a class with four other students who were similar in age and functioning levels (Tr. pp. 74, 80-82). The hearing record shows that during the year in question at Imagine the student received PT, OT, speech-language therapy, and music therapy (Tr. pp. 85, 93; Parent Exs. F at pp. 2-3; G at p. 1; H at p. 1; I at p. 1; J). PT and OT services were provided in the school's sensory gym (Tr. p. 87).

According to the special education teacher, during the 2010-11 school year the student's social/emotional and communication skills were within a two-year old range, and he was not yet working on reading or math readiness skills (Tr. pp. 82-84). The student independently fed himself and used the bathroom appropriately when following a regularly scheduled routine (Tr. pp. 84-85). At Imagine, the student received instruction on how to organize himself for the day, appropriately use the bathroom and eat lunch, participate in group activities such as "morning meeting," and develop prevocational skills (Tr. pp. 87-90, 92-93, 96; Parent Ex. J). Imagine used Floortime, applied behavior analysis (ABA), and Joint Action Routine Sequence (JARS) instructional methods with the student to improve social/emotional, activities of daily living, and prevocational skills (Tr. pp. 92-95, 100-02). According to the special education teacher and the related service providers, during the 2010-11 school year the student exhibited progress in the areas of prevocational, bathroom, dressing, eating, motor, and communication skills, and his ability to self-regulate and follow directions (Tr. pp. 102-04; Parent Exs. F at pp. 2-3; G at p. 1; H; I at pp. 1-2). Thus a review of the evidence in the hearing record shows that the student's program at Imagine provided instruction to address his unique needs and in conclusion, I find that Imagine provided instruction that was specially designed to address the student's needs.

1. 12-Month Program

The IHO reached the conclusion that Imagine was not an appropriate placement for the student based in part on the student's need for a 12-month program to avoid regression during the summer, which was unavailable at Imagine because Imagine provided only a 10-month program (IHO Decision at p. 12; Tr. pp. 129, 258, 269).[8] Although the parent now argues on appeal that the student does not require a 12-month program, the parent testified to the contrary during the

[7] I note that the program description in the hearing record appears to have been prepared for another student (Parent Ex. B).

[8] Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]; see 8 NYCRR 200.1[eee], 200.4[d][2][x]). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 C.F.R. § 300.106).

impartial hearing that she thought the student needed a 12-month program to prevent regression (Tr. pp. 269-70). Additionally, consistent with the parent's testimony, the evidence indicates that the April 2010 CSE concluded that the student needed a 12-month program and recommended the specific nonpublic school summer program pursuant to the parent's request and the parent correspondingly enrolled the student in the district's recommended summer program for both summer 2010 summer 2011 (Tr. pp. 263, 265, 269-71; Dist. Ex. 8 at p. 2; Parent Ex. C at p. 1). The available evidence weighs in favor of the district's argument that the student requires 12-month services; however, regardless of whether the student required 12-month services, as discussed further below, the parent's unilateral placement of the student at Imagine provided sufficient educational instruction that was specially designed to meet the unique needs the student for the 2010-11 school year.

Although Imagine only provides 10-month services, I decline to find that it was not appropriate for the student for the 2010-11 school year as the parent actually accepted the placement offered to the student by the district for summer 2010 and then, only later, opted to remove the student from the public placement and unilaterally enroll the student at Imagine for the 10- month remainder of the school year; therefore, the student received the 12-month services necessary to address his needs for the school year at issue. As noted above, a parent's unilateral placement need not provide every service listed in the IEP to be appropriate. The student attended the State-approved nonpublic summer program recommended by the district in the April 2010 IEP during summer 2010 (Tr. p. 270-71; Parent Ex. C at p. 1). The parent did not reject the April 2010 IEP until the end of August 2010 and did not enroll the student at Imagine until September 2010 (Tr. p. 262; Parent Exs. K; L). As the district provided the student with an appropriate placement during summer 2010 pursuant to the student's April 2010 IEP, the parent was not required to place the student in a 12-month program beginning in September 2010 (see M.F., 2013 WL 2435081 at *10 [parent's unilateral placement was appropriate despite not providing the student with necessary 12-month services because the district bore the responsibility for providing the summer services and the parent had not removed the student from the public school and unilaterally place in the private school until the fall of the school year at issue]). To find Imagine inappropriate solely on the basis that it did not offer 12-month services where, as here, the district recommended and the parent accepted the district's offer of a nonpublic summer placement would, in effect, penalize the parent for accepting the portion of the district recommendation that she found acceptable for the student.[9] Under the circumstances of this case, the failure of the parent's unilateral placement to provide 12-month services does not render it inappropriate where, at the time the removal from the public school placement and unilateral parent placement was made, the student had already received 12-month extended school year services for July and August 2010 and the 10-month placement unilaterally secured by the parent otherwise provided educational instruction specially designed to meet the unique needs the student, supported by such services as were necessary to permit him to benefit from instruction.[10]

[9] In making this finding, I note that I have considered the arguments and legal authority cited by the district on appeal and nonetheless find that the circumstances of this particular case are distinguishable and do not warrant a finding that the Imagine is inappropriate because it only provides a 10-month program (see Answer ¶¶ 52-62).

[10] Any inadequacy with the design or provision of the summer services in this case would be the responsibility of the district to rectify, not the parent.

2. Restrictiveness of Unilateral Placement

The IHO also based her conclusion that Imagine was not appropriate for the student on her determination that it was overly restrictive for the student, noting that Imagine has a staff of 40 people to provide services to a student body of 21 students and that the student-to-teacher ratio in the classroom was 1:1 (IHO Decision at p. 12). The parent alleges that the IHO erred in finding that Imagine was too restrictive for the student.

An independent review of the evidence in the hearing record supports the parent's argument that the IHO erred in determining Imagine to be inappropriate for the student based in part on her finding that Imagine was too restrictive for the student. As stated above, in evaluating whether a unilateral placement is the LRE for a student, parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the unilateral placement is a relevant factor in assessing the appropriateness of the unilateral placement (Gagliardo, 489 F.3d at 112).

I note first and foremost that an LRE analysis in circumstances such as these refers to the extent to which the student is educated with students who are not disabled, and does not refer to the student-to-adult ratio in the classroom. As the Second Circuit recently explained,

> "[t]he IDEA 'expresses a strong preference' for educating disabled students alongside their non-disabled peers; that is, in their [LRE]. Specifically, the IDEA provides that disabled children be educated '[t]o the maximum extent appropriate . . . with children who are not disabled,' and cautions that 'special classes, separate schooling, or other removal of children with disabilities from the regular educational environment' should only occur 'when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily'"

(M.W. v New York City Dep't of Educ., 2013 WL 3868594, at *9 [2d Cir. July 29, 2013] [emphasis in original] [internal citations omitted]). In the context of unilateral placements, Courts have also explained that "[w]hile failure of a parent to put a student in the LRE is not a bar to tuition reimbursement, it is a factor which may be considered" in determining whether reimbursement is warranted due to the IDEA's requirements for mainstreaming (Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007] [internal citation omitted] [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"]; see Schreiber v. East Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 549, 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"]).

In this instance, the hearing record reflects that Imagine is a nonpublic special education school, but does not indicate any opportunities for the student to interact with or be educated alongside nondisabled peers (see Tr. pp. 1-280; Dist. Exs. 1-12; Parent Exs. A-N). However, the hearing record also does not reflect the extent to which, if any, it would be appropriate to educate the student alongside nondisabled peers due to his significant deficits in areas of adaptive

functioning including communication, daily living, and social skills (Dist. Ex. 3 at pp. 2-3). There is nothing in the hearing record to indicate that the student being educated in a 1:1 environment with a small student body rendered Imagine inappropriate. Other than the student-to-adult ratio which has nothing to do with the extent of the student's access to nondisabled peers, the IHO gave no further reasoning for her conclusion that such was so restrictive that the placement was inappropriate for the student. Moreover the district's position on appeal that the unilateral placement should be determined inappropriate based upon the LRE considerations is virtually incomprehensible, especially where, as here, the CSE took the position through the IEP that the student should be removed from the regular education setting and placed in a 6:1+1 special class setting in a specialized school (Parent Ex C at p. 1).

Therefore, based upon the foregoing, I disagree with the determination of the IHO that Imagine was inappropriate for the student on the basis that it failed to provide 12-month services for the student and that it was not the LRE for the student, and find that the parent prevails with respect to whether the unilateral placement was appropriate for the student. Consequently, I will now turn to the next step of considering whether equitable considerations favor the parent.

D. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 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 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether

a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). 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 v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; 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]).

On appeal, the district alleges that equitable considerations do not favor the parent because the parent had no intention of placing the student in public school and because the notice of intent to enroll the student at Imagine challenged only the district's assigned school/class, not the recommendations in the student's IEP, including the 6:1+1 special class placement recommendation.

In this instance, the parent requested, during the April 2010 CSE meeting, that the district place the student in a specific State-approved nonpublic school for summer 2010 because his current school, Imagine, did not provide a 12-month program. The hearing record reflects that the student had in fact been accepted into the requested summer program in January 2010, that the district included the particular school on the student's April 2010 IEP, and that the student attended the summer program there (Tr. p. 271; Dist. Exs. 8; 9; Parent Ex. C at p. 1). The hearing record also reflects that the parent signed an enrollment contract with Imagine dated September 1, 2010 (Parent Ex. L). Based on the evidence in the hearing record, I cannot find that the parent never intended to enroll the student in public school. Under the circumstances presented I find that the parent was free to explore a potential private school placement, whether that be a continued placement or a new placement, so long as she was working cooperatively with the district to develop an appropriate IEP for the student for the 2010-11 school year.

While I find that equitable considerations support the parent's request for tuition costs at Imagine for the reasons stated above, I also note that in two letters to the district prior to the start of the 10-month 2010-11 school year for which the parent seeks funding, the parent stated that the student would be enrolled at Imagine for that school year and she would seek funding from the district, but the issues she raised pertained solely to the assigned school rather than to the student's April 2010 IEP (Parent Exs. D; E). The parent in this matter did not "put FAPE at issue" for the 2010-11 school year when the district would have had the opportunity to reconvene the CSE and address any concerns raised by the parent to devise an appropriate plan and determine whether a FAPE could be provided in a public school prior to the removal of the student from the public school, but rather the parent waited until her March 2011 due process complaint notice, half way through the 2010-11 school year, to inform the district of her concerns pertaining to the student's IEP (see Carmel, 373 F. Supp. 2d at 414-15; Greenland, 358 F.3d at 160; see also Wood, 2010 WL 3907829, at *7 [noting that each year a FAPE is at issue, the parents must comply with the notice requirements and inform the district of their dissatisfaction prior to enrolling the student in a private school and seeking reimbursement]; S.W., 646 F. Supp. 2d at 362-63; Application of a Student with a Disability, Appeal No. 12-027; Application of a Student with a Disability, Appeal No. 11-103; Application of the Dep't of Educ., Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-099). I note that the parent's March 2011 due process complaint notice raised issues related to the appropriateness and measurability of the goals on the student's IEP as

well as the lack of an FBA (Parent Ex. A at p. 2), yet the parent mentioned nothing with respect the IEP or recommendations contained therein in either her August 18, 2010 "10 day notice letter" or her handwritten note on the June 2010 FNR, noting the parent's visit to the assigned school on July 14, 2010 (see Parent Exs. D; E). Both letters related only that the parent believed the assigned public school site was in appropriate (id.). In factual circumstances similar to this one, it is the IEP in particular upon which parents are entitled to rely (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013] [explaining in similar circumstances that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child]; (R.E., 694 F.3d at 195 [explaining that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement"]). Therefore, having considered the evidence in this case and in my discretion, I find that the parent is entitled to funding of 75 percent of the tuition for the student's enrollment at Imagine for the 2010-11 school year due to waiting until much of the school year at issue had elapsed before even informing the district of that she had concerns with the IEP.

E. Relief

The district further alleges that the parent is not entitled to the relief requested because the parent is not legally obligated to pay Imagine for the student's 2010-11 school year tuition and she did not provide any information regarding her 2011 finances. In support of this argument, the district points out that there is no evidence in the hearing record that Imagine has ever sought payment from the parent.

With regard to fashioning equitable relief, 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. 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).[11] Since the parent has selected Imagine as the unilateral placement,

[11] 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]).

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 Imagine and whether she is legally obligated for the student's tuition payments (Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).[12]

The hearing record reflects that the parent entered into an enrollment contract dated September 1, 2010 with Imagine for the student's tuition for the 2010-11 school year (Parent Ex. L). Under the terms of the contract, the parent acknowledged that "[w]hen signed by the [parent] together with a non-refundable enrollment deposit of $17,500 due on or before April 15, 2010, and accepted on behalf of [Imagine] this shall be a binding enrollment contract for the school year 2010-2011" (id. at p. 1). The contract states that "contracts for returning students will be accepted only if tuition and fees for the current school year are paid in full" (id. [emphasis in original]). The contract contains a payment section setting forth the cost of tuition for the 2010-11 school year and three options that are available for the payment of the tuition, none of which were selected (id. at pp. 1-2). The contract provides that enrollment of the student by execution and submission of the contract is an unconditional obligation to pay the full tuition for the school year (id. at p. 2). It also provides that it cannot be changed except by the express written consent of both parties (id. at p. 3).

An affidavit of payments to Imagine contained in the hearing record reflects that as of November 4, 2011, the parent had not made any payments to the school for the 2010-11 school year (Parent Ex. M; see also Tr. pp. 266, 268, 272-73). During the impartial hearing, the parent testified that if she did not prevail at the impartial hearing she would have to "borrow money because [the student] did attend the school and [the tuition is] a debt that [she] owe[s]" (Tr. p. 268). The parent testified that she was told by the school that she "needed to bring money in but once they agreed to have the case settled for this year [Imagine] said they'd take me" (Tr. p. 273). She further testified that Imagine has not pursued any legal avenue against her to collect the student's tuition (Tr. p. 274).

Regarding the parent's proof of inability to pay the student's tuition to Imagine, I note that the hearing record contains the parents' joint 2010 federal tax return (Parent Ex. N). Although the 2010 tax return for both of the student's parents reflects that the parents' income was significantly less than the cost of tuition at Imagine for the 2010-11 school year, there is little other evidence regarding the parents' financial situation, in particular there is no testimony as to the parents'

[12] 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 a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

income for 2011, or the parents' actual assets, liabilities or expenses during any period (Tr. pp. 1-280; compare Parent Ex. N, with Parent Exs. L; M). However, because the parent persuasively testified during the impartial hearing that the 2010 tax return accurately reflected her and her husband's income in 2010, and because of the significant shortfall between the parents' income and the cost of tuition at Imagine, I find that the parent has met her burden of establishing an inability to pay the cost of the student's tuition at Imagine for the 2010-11 school year (Tr. pp. 266; Parent Exs. L; M; N).

Despite the lack of payment of a non-refundable enrollment deposit of $17,500 that was stated to be due as of the execution of the enrollment contract and despite the failure of the parties to select a payment option within the enrollment contract, I am persuaded by the evidence that the parties to the contract intended the contract to be legally binding, especially where, as here, the terms regarding the deposit were inapplicable to the circumstances at hand (i.e. the April 15, 2010 deposit date was already long past on the date the contract was executed) and the parents and Imagine contemporaneously proceeded to enroll the student in the absence of a deposit (Tr. pp. 268, 273-74; Parent Exs. L; M). The parent also testified that she believed she was responsible for the payment due under the contract if she did not prevail at the impartial hearing (Tr. p. 268). After a review of the hearing record, including consideration that Imagine has not attempted to recover the 2010-11 tuition payment from the parent during the impartial hearing, I find that the evidence nevertheless sufficiently supports the conclusion in this case that the parent remained "legally obligated" to pay the tuition at Cooke (Mr. and Mrs. A., 769 F. Supp. at 406). I also find that, based on the testimony of the parent and the 2010 income tax return contained in the hearing record, that the parent established her inability to front the cost of the student's tuition at Imagine (Tr. pp. 268, 273-74; Parent Ex. L; M; N). Under the circumstances of this case, I find that equitable considerations do not preclude the parent's claim for direct funding of the student's tuition for the 2010-11 school year at Imagine under the factors described in Mr. and Mrs. A.

VI. Conclusion

In summary, I find that the IHO erred in finding that the evidence failed to show that Imagine was an appropriate placement for the student for the 2010-11 school year. I also conclude that equitable considerations support payment of the tuition costs for the student's 2010-11 school year at Imagine, reduced by 25 percent.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 19, 2012, is modified by reversing those portions which determined that Imagine was not an appropriate placement for the student and was overly restrictive for the 2010-11 school year; and

IT IS FURTHER ORDERED that the district shall directly pay 75 percent of the student's tuition costs to Imagine for the 2010-11 school year to the extent that such tuition costs have not already been paid by the parent; and

IT IS FURTHER ORDERED that, to the extent that the parents may have paid any portion of the student's tuition costs at Imagine for the 2010-11 school year, the district shall reimburse the parents for 75 percent of such costs upon the submission of proof of payment to the district.

Dated: **Albany, New York**
August 27, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER