The University of the State of New York

The State Education Department
State Review Officer
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No. 12-132

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

Appearances:
Courtney Jackson-Chase, Esq., Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

Susan Luger Associates, Inc., Special Education Advocates for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2011-12 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 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's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute in this proceeding (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]; see also Dist. Ex. 1 at p. 1).[1] The hearing record reflects that the student required assistance to perform all activities of daily living (ADLs) and remain on task, communicated using a combination of eye gaze, gestures, pointing, pulling, and verbalizations, and exhibited academic skills in the prekindergarten range (Dist. Exs. 1 at pp. 1-2; 3 at p. 1). The student enjoyed sensory activities and music, sought sensory input, and was working toward improving gross motor, fine motor, visual perceptual and self-care skills (Dist. Exs. 2 at p. 1; 4 at p. 1; Parent Ex. E at p. 1).

[1] I note that the hearing record contains multiple duplicative exhibits (Dist. Ex. 1; Parent Ex. B). For purposes of this decision, only District 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]).

Socially, the student was showing an increased interest in interacting with peers and had good relationships with adults (Dist. Ex. 3 at p. 2).

The hearing record shows that the student received special education services from a young age and in September 2008 entered public school (Tr. pp. 281-83). During the 2009-10 and 2010-11 school years, the student attended a district 12:1+4 special class (see Tr. pp. 15-17).

On May 25, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Dist. Ex. 1). The May 2011 CSE determined that the student continued to be eligible for special education programs and related services as a student with multiple disabilities and recommended placement in a 12:1+4 special class in a specialized school with related services comprised of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (id. at pp. 1, 10). In addition, the CSE determined that the student was eligible for a 12-month program, to participate in the alternate assessment, and receive special transportation accommodations (id. at pp. 8-10).

The student attended the district's recommended 12-month 12:1+4 special class in July and August 2011 (Tr. pp. 50-51, 328; Parent Ex. I).

In a September 21, 2011 letter to the CSE chairperson, the student's mother indicated she had not been notified of the public school in which the student would attend for the portion of the 2011-12 school year beginning in September, and as a result she planned to unilaterally place the student at the Rebecca School (Tr. pp. 297-98; Parent Ex. I).[2] The parent further indicated that she intended to seek an award of tuition reimbursement from the district (Parent Ex. I). On September 26, 2011, the parents signed a contract with the Rebecca School for the student's enrollment for the period of October 4, 2011 to June 22, 2012 (Parent Ex. F at p. 4). The student began attending the Rebecca School in October 2011 (Parent Ex. E at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated October 18, 2011, the parents requested an impartial hearing asserting that the district denied the student a free appropriate public education (FAPE) for the 2011-12 school year because the proposed 12:1+4 special class placement with related services did not offer sufficient supports to address his special education needs (IHO Ex. I at pp. 2-3). The parents also alleged that the annual goals and short-term objectives contained in the IEP were not prepared at the May 2011 CSE meeting, were insufficient to meet the student's educational, social and emotional needs, and were not reasonably calculated to provide the student with educational benefits (id. at p. 2). The parents raised additional concerns, alleging that: (1) the May 2011 CSE was improperly composed; (2) the IEP did not include an attendance page; and (3) that the notice of the public school site to which the district assigned the student was untimely as the district did not provide notice of the assigned school prior to the start of the 12-month school year (id. at pp. 2-3). The parents further asserted that the student's program at the Rebecca School provided instruction, supports and services that were specially designed to meet his unique needs and that equitable considerations favored the parents (id. at p. 3).

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

As relief, the parents sought the costs of the student's tuition at the Rebecca School for the period of October 4, 2011 to June 30, 2012, the costs of the student's related services for the period of July 1, 2011 to June 30, 2012, and transportation services (IHO Ex. I at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 25, 2012 and concluded on April 17, 2012, after four days of nonconsecutive hearing dates (Tr. pp. 1-334).[3] In a decision dated May 22, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at pp. 3, 5-6), that the parents' unilateral placement of the student at the Rebecca School was appropriate (id. at pp. 6-8), and that equitable considerations favored the parents (id. at p. 8). The IHO ordered the district to reimburse the parents for any money already paid to the Rebecca School for the 2011-12 school year and pay the balance of the tuition due for the 2011-12 school year directly to the Rebecca School (id. at p. 10).

In determining that a FAPE was not offered for the 2011-12 school year, the IHO found that the May 2011 CSE significantly impeded the parents' ability to participate in the development of the student's IEP because the district predetermined its program and placement recommendations prior to the May 2011 CSE meeting without the parents' input (IHO Decision at pp. 3-5). The IHO also found that the May 2011 CSE's 12:1+4 special class placement and program recommendations were not reasonably calculated to allow the student to make meaningful educational progress because the student had experienced "a substantial amount of regression" during his prior two years while enrolled in a district 12:1+4 special class (id. at pp. 3, 5-6). The IHO also found that many of the annual goals in the May 2011 IEP were inappropriate to the extent that they mandated the use of an English as a second language (ESL) "methodology" when English was the only language spoken in the student's home and the only language through which the student received instruction (id. at p. 6). Further, the IHO found that ESL in itself was not a methodology (id.).

Regarding the appropriateness of the parents' unilateral placement, the IHO determined that the student's program at the Rebecca School was specifically designed to meet his unique needs because it provided instruction directed at improving the student's difficulty with sensory integration and distractibility as well as addressed the student's communication deficits (IHO Decision at pp. 6-8). The IHO also found that the student had made meaningful educational progress at the Rebecca School (id. at p. 8).

Lastly, the IHO found that equitable considerations favored the parents' request for tuition reimbursement because they cooperated with the CSE process and provided notice of their intent to enroll the student at the Rebecca School (IHO Decision at p. 8). Consequently, although the IHO found that the hearing record did not provide a sufficient basis for her to make any findings of fact regarding the parents' ability to pay the student's tuition at the Rebecca School, the IHO

[3] The hearing record had been closed on March 22, 2012, and was later re-opened on April 17, 2012, for the purpose of allowing the parents to submit additional testimony and an additional exhibit in response to the district's allegation—first raised in closing arguments—that the parents did not provide timely notice of their intention to remove the student from the district's program and place him at the Rebecca School (Tr. pp. 320-33; Parent Ex. I).

issued an order directing the district to directly pay the student's tuition for the 2011-12 school year (id. at pp. 9-10).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year, that the parents' unilateral placement at the Rebecca School was appropriate, and that equitable considerations favored the parents. Specifically, the district asserts that the May 2011 IEP program and placement recommendations were not predetermined, noting that although the district may have developed a draft IEP prior to the CSE meeting, the evidence shows that the IEP was discussed at the May 2011 CSE meeting with the student's mother who had the opportunity to offer input. The district further argues that the IHO erred in finding that the recommended 12:1+4 special class placement with related services was not calculated to enable the student to make meaningful progress. In support of this contention, the district asserts that the hearing record establishes that the student made more than trivial progress in many areas while enrolled in the district's program. Regarding the IHO's finding that the annual goals were inappropriate because several of them used an "ESL methodology," the district contends that these goals were tailored to the student's needs and that the parents do not have the right to compel the district to use a particular methodology in educating a student.

The district also argues that the IHO erred in finding that the Rebecca School was an appropriate placement. The district asserts that the student regressed in certain areas while at the Rebecca School. For example, the district alleges that the student's ability to sit still decreased from 20 minutes to 10 minutes, the student did not practice holding a writing instrument, and the student required a paraprofessional at the Rebecca School to feed him. Regarding equitable considerations, the district asserts that equitable considerations disfavor the parents because they provided insufficient and untimely notice to the district that they were rejecting the district's program. Even if equitable considerations did favor the parents' claim, the district contends that the parents are not entitled to an award of direct payment of the student's Rebecca School tuition.

The parents answer, generally denying the district's assertions and requesting that the IHO's decision be upheld. In support of the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year, the parents assert that the district's failure to comply with the procedural requirements "guaranteeing parental participation and due process" denied the student a FAPE, that any failure to cooperate by the parents was due solely to the district's procedural failures, and that the IHO correctly determined that the parents were denied an opportunity to meaningfully participate in the development of the student's IEP at the May 2011 CSE meeting. The parents assert that they did not have an advocate or an additional parent member at the May 2011 CSE meeting "to help them participate" and that there was no school psychologist at the CSE meeting. In addition, the parents contend that the IHO correctly determined based on the evidence before her that the district impermissibly predetermined the student's placement and program without the parents' input. The parents further allege that the evidence demonstrates that none of the annual goals were written at the May 2011 IEP meeting. According to the parents, the IHO properly addressed the issue of methodology because the parents had alleged in their due process complaint notice that the annual goals were inappropriate and "methodology was a problem explicitly within the goals." With regard to the student's progress, the parents argue that the hearing record lacks any objective evidence that the student made meaningful progress during his prior two years in the district's 12:1+4 special class placement.

In their answer, the parents also include additional arguments to support upholding the IHO's determinations that the Rebecca School was an appropriate placement to meet the student's needs and assert that the hearing record does not support the district's contention that the student regressed in certain areas while at the Rebecca School. The parents further contend that equitable considerations weighed in their favor, arguing among other things that they provided the district with timely notice before placing the student at the Rebecca School and frequently advised the district of their concerns about the student's lack of progress. Lastly, the parents contend that they are entitled to an award of direct payment of the costs of the student's tuition at the Rebecca School.

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., 557 U.S. 230, 239 [2009]; Rowley, 458 U.S. at 206-07).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; H.C. ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869 [2d Cir. June 24, 2013]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132 [quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 (2d Cir. 1989)] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195 [quoting Walczak, 142 F.3d at 130] [citations omitted]); see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. May 2011 IEP

1. Predetermination/Parent Participation

I will first address the IHO's finding that the district impermissibly predetermined the May 2011 IEP program and placement recommendations and thereby denied the student a FAPE by significantly impeding the parents' ability to participate in the development of the student's IEP.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D. D-S, 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

In this case, the district special education teacher who was the student's classroom teacher for the past two years testified that he reviewed data about the student that had been collected throughout the school year, the results of ongoing assessments, the goals, and the student's prior IEP to prepare for the May 2011 CSE meeting (Tr. pp. 30-32, 34). The special education teacher also met with the assigned public school's "unit coordinator," the student's related service providers, the classroom paraprofessionals, the student's ESL teacher, and discussed the student with the parent (Tr. pp. 30-31, 100, 152-53). According to the special education teacher, he met with these individuals in order to gather information about the student before preparing a "first draft" of the IEP (Tr. pp. 30-32).

Within a week before the May 2011 CSE meeting, the unit coordinator testified that she met with the special education teacher and discussed the student's progress, the parents' concerns about the student's progress, and whether a 12:1+4 special class "was the most appropriate placement" for the student (Tr. pp. 152-54, 158). According to the unit coordinator, she and the special education teacher agreed that placement in a 12:1+4 special class was the most appropriate placement for the student at that time (Tr. p. 158).

Participants at the May 2011 CSE meeting included the district special education teacher who also served as the district representative, the student's speech therapist, the student's physical therapist, and the student's mother (Tr. p. 29; Dist. Ex. 1 at pp. 13-14).[4] The special education teacher stated that at the May 2011 CSE meeting he and the related service providers reviewed their summaries about the student with the student's mother to enable her to "give[] input to see what changes might need to be made before we actually formally write the full IEP" (Tr. pp. 31-32, 36-37). He further testified that the student's mother was given the chance to provide input about her overall impression of the draft IEP; including the goals, the student's progress, and any proposed "new adjustments" (Tr. pp. 37, 74; see Tr. p. 153). The student's mother was also asked during the May 2011 CSE meeting if she had "any other thoughts, or any ideas, or any particular desires" for the district to change or amend the draft IEP, which would then be incorporated into the next draft of the IEP (Tr. p. 37). According to the special education teacher, the draft present levels of performance and annual goals were discussed during the May 2011 CSE meeting, and he did not recall that the parent expressed any objections at that time (Tr. pp. 36-45).[5] He further testified that the CSE meeting was the time to present the draft IEP to the parent, "then ask for any input, and if there were any changes that needed to be made" (Tr. pp. 46, 74).

When asked if the May 2011 CSE considered other placement options for the student, the special education teacher responded that the CSE is charged with looking "at the entire gamut, whatever is possible" to not "pigeonhole" a student into one particular ratio or class (Tr. p. 49). The May 2011 IEP indicated that the CSE considered placement in general education, but rejected that option as "not viable" for the student at that time (Dist. Ex. 1 at p. 12). The special education teacher also testified that the May 2011 CSE considered other options, including a 6:1+1 special class or a class specifically designed for students with autism, but after "pretty long discussions"

[4] Contrary to the parents' allegation in their due process complaint notice, a review of the May 2011 IEP shows that an attendance page is included (Dist. Ex. 1 at pp. 13-14).

[5] The student's occupational therapist testified that she drafted the OT goals prior to the May 2011 CSE meeting, and although she had intended to review them, she was late to the meeting (Tr. pp. 173, 177-78, 197). The hearing record showed that the occupational therapist discussed the proposed goals with the parent later on the same day as the meeting (Tr. pp. 178, 299-300).

determined that the student had made progress and his needs could be addressed in the 12:1+4 special class (Tr. pp. 49, 79). The special education teacher further testified that to his knowledge, the student's mother did not object to and was in agreement with the 12:1+4 special class placement recommendation at the May 2011 CSE meeting (Tr. pp. 48-50).

Although the student's mother testified that she had discussions with the special education teacher—expressing concerns over her son's lack of progress— she did not testify about what occurred during the May 2011 CSE meeting (see Tr. pp. 281-303).

In this instance the hearing record does not show, contrary to the IHO's findings, that the preparatory activities that the district engaged in prior to the May 2011 CSE meeting led to impermissible predetermination of the program and placement recommendations (see T.P., 554 F.3d at 253; Nack, 454 F.3d at; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W., 869 F. Supp. 2d at 333-34; D. D-S, 2011 WL 3919040, at *10-11; B.O., 807 F. Supp. 2d at 136; A.G., 2009 WL 806832, at *7; P.K., 569 F. Supp. 2d at 382-83; Danielle G., 2008 WL 3286579, at *6-*7; M.M., 583 F. Supp. 2d at 507; W.S., 454 F. Supp. 2d at 147-48; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). Rather, there is evidence that establishes the May 2011 CSE discussed and considered placement options other that the 12:1+4 special class ultimately recommended, and CSE members including the student's mother, discussed the proposed recommendations with the understanding that changes to the IEP could be made at that time, thus affording the parent the opportunity to participate in the development of the student's IEP.

Regarding the parents' allegation that the annual goals were not prepared at the May 2011 CSE meeting and therefore predetermined, testimony by the special education teacher shows that draft goals were developed prior to the meeting (Tr. pp. 44-46). The student's special education teacher testified that the May 2011 CSE discussed the student's academic and social/emotional deficits and drafted goals based on the deficits observed (Tr. pp. 39-44). At the May 2011 CSE meeting, the goals were discussed and the special education teacher testified that after input was received, adjustments were made to the goals if needed (Tr. pp. 45-46, 74). The special education teacher also indicated that the IEP included goals developed by the student's related service providers, who consulted with the special education teacher and their colleagues, and which were based on the providers' discussions with the parent (Tr. p. 44).

Consistent with my finding above, the CSE is allowed to engage in preparatory activities, and the hearing record does not show that the parents were precluded from discussing the annual goals at the May 2011 CSE meeting or that the district was adverse to adjusting the goals based upon that discussion (see Tr. pp. 30-32, 36-37, 44-46). I therefore decline to find in this instance that the development of the goals before the May 2011 CSE meeting constituted a procedural violation that led to a loss of educational opportunity to the student or seriously infringed on the parents' opportunity to participate in the CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847 [S.D.N.Y. Nov. 9, 2011]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010] [explaining that parental presence is not required during actual goal drafting]; E.G., 606 F. Supp. 2d at 388-89; see also Mahoney v. Carlsbad Unified Sch. Dist., 2011 WL 1594547, at *2 [9th Cir. Apr. 28, 2011] [declining to find a denial of a FAPE where the goals and objectives were pre-drafted, but not provided to the parents]). Accordingly, the IHO's

determination that the district denied the student a FAPE based on a finding that it predetermined the student's placement and program recommendations must be reversed.

2. Annual Goals

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

The parents alleged in their due process complaint notice that the May 2011 IEP annual goals and short-term objectives did not meet all of the student's unique educational, social, and emotional needs and that they were not reasonably calculated to confer educational benefits (IHO Ex. I at p. 2). The IHO found that many of the annual goals in the May 2011 IEP were inappropriate to the extent that they mandated the use of an "ESL methodology" (IHO Decision at p. 6).

A review of the student's May 2011 IEP present levels of performance indicated that the student exhibited "severe global delays" and required assistance to perform all ADLs including toileting and eating (Dist. Ex. 1 at pp. 1-2). The student exhibited extremely limited expressive and receptive language skills and communicated via pointing and gesturing (id. at pp. 1-2). According to the IEP, the student was performing academically at a prekindergarten level and required one-to-one assistance during all learning activities (id. at pp. 1-2). The IEP reflected that the student responded most positively to activities that involved music and that he enjoyed tactile activities and listening to books read aloud (id.). The IEP also indicated that the student needed to learn to hold a book properly, that his ability to hold writing utensils was limited, and that he was not able to differentiate between colors (id.). According to the IEP, although the student participated in class activities to the best of his ability and appeared to enjoy group instruction, he exhibited difficulty attending and required modeling, one-to-one assistance, "constantly reiterated structure," and positive reinforcement to remain on task for "even the shortest time periods" (id.).

Socially, the May 2011 IEP indicated that the student responded to verbal and physical attention and focused for short periods of time when his name was called (Dist. Ex. 1 at p. 1). The IEP noted that the student occasionally expressed his frustration by crying when he did not get his own way, but that these episodes were becoming less severe and less frequent (id. at p. 2). The IEP also stated that the student occasionally interacted nicely with his peers, but needed to be less physically aggressive (id. at p. 1). In addition, the IEP indicated that the student tended to play alone, but would participate in a group lesson with one-to-one adult assistance (id. at p. 2). According to the IEP, the student was learning slowly to be more social and friendly (id.). With respect to the student's physical development, the IEP indicated that the student presented with significant delays in gross motor, fine motor, and self-care skills (id.). The IEP stated that although the student was able to ambulate independently, his balance was compromised (id.). The IEP characterized the student's behavior as "passive," noting little to no initiation of interaction or

exploration of his environment (id.). As reflected in the IEP, the student was working on reducing his tendency to slap his hands together "while engaging his own saliva" (id. at p. 2).

A review of the student's May 2011 IEP shows that it included approximately 10 annual goals and consistent with the CSE's determination that the student participate in the alternate assessment, corresponding short-term objectives to improve the student's ability to hold a book during reading activities, draw straight marks with a writing instrument, match colors, interact with peers, receptively identify classmates, follow one-step directions, walk up and down stairs, open and close doors, string beads, and throw a weighted ball (Dist. Ex. 1 at pp. 3-7, 9). While these goals and short-term objectives address some of the needs identified in the IEP present levels of performance, there are no annual goals for nor does the IEP otherwise address a number of significant areas of student deficit (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 1 at pp. 3-7). As detailed above, the IEP present levels of performance describe the student as nonverbal, severely inattentive, and dependent on others for assistance with all ADLs (Dist. Ex. 1 at pp. 1-2). Despite these significant areas of need, the May 2011 IEP did not include annual goals or short-term objectives to improve the student's expressive communication, attention or ADL skills, nor does the IEP otherwise provide supports and/or services to address those needs.[6]

Moreover, as explained below, testimony by district personnel during the impartial hearing regarding certain services that they described as "programmatic" does not in this instance cure the deficiently written IEP by establishing that the student would have received services beyond those listed in his IEP (see R.E. 694 F.3d at 185-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, *17-*18 [S.D.N.Y. March 21, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 n.19 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]).

In this case, the special education teacher testified that specific IEP goals were not developed addressing toileting needs because it was incorporated into the daily 12:1+4 special class program (Tr. p. 60). Likewise, the unit coordinator testified that certain aspects of the 12:1+4 special class placement such as ADL, some social skills, and adapted physical education, were programmatic (Tr. pp. 144-45).[7] The district personnel's testimony regarding these "programmatic" services is vague and does not explain or justify the services listed on the IEP in this instance (see P.K. v. New York City Dep't of Educ., 2013 WL 2158587, at *4 [2d Cir. May

[6] I note that the May 2011 CSE recommended that the student receive four sessions per week of speech-language therapy (Dist. Ex. 1 at p. 8). However, the IEP does not include annual goals or short-term objectives designed to improve the student's expressive language and functional communication skills, nor does it indicate that the student needed a particular device or service to address his communication needs and/or an assistive technology device/service (id. at pp. 3-7).

[7] If a student with a disability is not participating in a regular physical education program, the IEP shall describe the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education (8 NYCRR 200.4[d][2][viii][d]). I note that the May 2011 IEP included a section that calls for a description of the physical education program the student will participate in, including adapted physical education (Dist. Ex. 1 at p. 10). The May 2011 CSE marked this section as not applicable (id.).

21, 2013] [noting that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"). I note that there is no indication that the parents were informed at the time of the May 2011 CSE meeting of the manner in which a 12:1+4 special classroom would address the student's needs relating to ADL skills or toileting (see R.E., 694 F.3d at 186).

In summary, I agree with the parents that the May 2011 IEP annual goals did not meet all of the student's unique educational needs.[8] Where the hearing record indicates that the student's significant needs relating to expressive communication, attention, and ADL skills were all known to the CSE at the time of the May 2011 CSE meeting, it was improper for the district to fail to address them within the body of the IEP. Although the failure to address every one of a student's needs by way of an annual goal will not ordinarily constitute a denial of a FAPE (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]), under the circumstances of this case, where the student's program consisted largely of habilitation, the absence of ADL and functional communication goals from the May 2011 IEP resulted in a denial of a FAPE to the student.[9]

3. Progress in the District Placement

I turn now to the IHO's finding that the student did not demonstrate meaningful progress during the prior years he was enrolled in the district's 12:1+4 special class placement with related services.[10]

A student's progress under a prior IEP is a relevant area of inquiry for purpose of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation" at p. 18 [NYSED Office of Special Education, December 2010]). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3rd Cir.1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at

[8] In regard to the district's contention that the student's Rebecca School goals were similar to the goals included in the May 2011 IEP, I disagree (compare Dist. Ex. 1 at pp. 3-7, with Parent Ex. E at pp. 8-10). With the exception of short-term objectives to improve the student's ability to use stairs, none of the IEP annual goals are similar to those reflected on the December 2011 Rebecca School progress report (id.).

[9] Having found that the May 2011 IEP annual goals did not meet all of the student's unique educational needs, I need not address the IHO's determination that the May 2011 IEP annual goals were inappropriate because several included the use of "ESL methodology."

[10] The May 2011 CSE recommended the same duration and frequency of PT and OT services for the student in the 2011-12 school year as the student had received in the 2010-11 school year (Dist Exs. 1 at p. 8; 2 at p. 2; 4 at pp. 2-3). The May 2011 CSE, however, reduced the duration and frequency of the speech-language therapy services for the student in the 2011-12 school year (four 30-minute sessions per week) as the student had received in the 2010-11 school year (five 30-minute sessions per week) (Dist Exs. 1 at p. 8; 3 at pp. 1-2).

*12 [E.D.N.Y. Sept. 2, 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Board of Educ. Champaign Community Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D.Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year" at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle, 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

In this case, the district's special education teacher testified that the student made slow, steady progress during the 2010-11 school year (Tr. pp. 20, 40-41). Specifically, the special education teacher reported that the student was able to sit longer for reading, writing, and math activities without incident (Tr. p. 20). The special education teacher also testified that the student was able to hold a writing implement and make marks on a page (Tr. pp. 20, 59-60). In addition, the special education teacher noted that the student was making progress socially and in his toileting and feeding skills (Tr. pp. 38-39, 71-72). According to the special education teacher, at the time of the May 2011 CSE meeting, the student was not throwing books, swinging at people, or crying very much anymore (Tr. p. 39). The student was able to hold a book for a longer period of time and turn pages and the student could sit in his seat for much longer periods without distraction (Tr. p. 41). The special education teacher further testified that at the end of the 2010-11 school year, the student was able to sit and remain on task sometimes for periods of 15-20 minutes (Tr. pp. 57-58). He stated that at the beginning of the school year the student was able to sit and remain on task for only five to ten minutes (Tr. p. 58).

The district occupational therapist testified that the student made no progress from September 2010 to January 2011 and made minimal progress for the remainder of the 2010-11 school year (Tr. pp. 190-91; Dist. Ex.7). The occupational therapist testified that during the time she provided the student with OT services he made progress in his ability to hold a marker and a spork and noted that the student was able to eat by himself at least fifty percent of the time during breakfast and scribble on paper with a marker (Tr. p. 176). However, she acknowledged that by the end of the 2010-11 school year, the student's progress in these areas was minimal (Tr. p. 195). A speech-language therapy progress report, generated around the time of the May 2011 CSE meeting, indicated that the student was both "making slow, steady progress in meeting his goals" and was making "very slow progress" (Dist. Ex. 3 at p. 2).

The student's mother testified that the student did not make progress during the time he was in the public school and noted that he had begun to tantrum at the school, which he did not do in preschool (Tr. pp. 283-85). The student's mother estimated that she visited the student's class 10-12 times during the 2010-11 school year (Tr. p. 286). She testified that the student had regressed as a result of the district's program, specifically with respect to his ability to stay on task and his ability to identify body parts (Tr. p. 288). The student's mother testified that she told the student's special education teacher that she did not believe that the student was improving, but that the teacher told her the student was improving (Tr. pp. 287, 289, 297-98). Although the student's mother expressed concern to the teacher that the student was not improving, the special education teacher testified that he believed the parents were happy with the progress the student was making (Tr. pp. 22-23). The unit coordinator for the district's program indicated that the student made progress in that he was more social, attentive and could sit for longer periods of time (Tr. pp. 115, 155-56), however, the student's mother expressed to her that she had hoped the student would make more improvement (Tr. p. 117). The unit coordinator characterized the student's progress as

minimal, but opined that in regard to the student it was progress (Tr. pp. 156, 157-58). She acknowledged that it might have been less progress than the student's mother had hoped for (Tr. p. 159).

Based on the foregoing, I decline to disturb the IHO's finding that the district's recommended program and placement were not calculated to provide meaningful educational progress, given the conflicting evidence in the hearing record regarding the student's progress in the district's program. Moreover, I note that although progress is important to determining whether the program offered by the district was appropriate, it is not dispositive of all claims brought under the IDEA (see M.S., 231 F.3d at 103-04). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). Upon an independent review of the hearing record, I concur with the parents' contention that "the program does not offer adequate or appropriate instruction, supports, supervision or services" for the student to address his special education needs. In this instance, as previously explained, I find that the district's failure to address the student's significant needs relating to expressive communication, attention, and ADL skills in the May 2011 IEP resulted in a denial of a FAPE for the 2011-12 school year.

B. Unilateral Placement

Turning now to the appropriateness of the parents' unilateral placement of the student, the district argues that the IHO erred in concluding that the Rebecca School was appropriate to meet the student's unique educational needs. The district asserts that as a result of attending the Rebecca School, the student regressed in "certain areas," indicating that the student's ability to "sit still during a task decreased from some 20 minutes to 10 minutes," he had not "practiced holding a writing instrument," and he required a paraprofessional to spoon-feed him at the Rebecca School. As discussed in greater detail below, I find that the district's assertions—even if supported by the hearing record—are insufficient to overturn the IHO's finding that the Rebecca School was an appropriate placement for the student for the 2011-12 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Student with a Disability, Appeal No. 12-036; 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. 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.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49 (2005); L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 (S.D.N.Y. March 19, 2013); see also Educ. Law § 4404[1][c]). "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 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]; see L.K., 2013 WL 1149065, at *15). 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 M.B., 2013 WL 1277308, at *2; D. D-S v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; 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"]; L.K., 2013 WL 1149065, at *15). 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; M.B., 2013 WL 1277308, at *2; 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; L.K., 2013 WL 1149065, at *15; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *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 M.B., 2013 WL 1277308, at *2; Frank G., 459 F.3d at 364-65).

In determining that the Rebecca School was an appropriate placement for the student, the IHO found that the "unrebutted and credible" testimony of the parents' witnesses, as well as the parents' documentary evidence, supported a finding that the Rebecca School was providing the student with educational instruction specifically designed to meet his unique needs (IHO Decision at p. 7). Notably, the IHO found that the instruction provided by the Rebecca School, including use of the Developmental Individual Difference Relationship-Based (DIR) methodology, was effective in addressing the student's distractibility and sensory integration difficulties (id.). In addition, the IHO noted that the student's Rebecca School program included related services of speech-language and occupational therapies and that the program addressed the student's

communication skills, which she characterized as one of the student's "key deficit areas" (id.). The IHO detailed the goals and skills addressed by the student's program, such as regulation and attention, initiating and concluding communication "'circles,'" interest in reading, word recognition, comprehension, mathematics, peer interactions, ADLs, integration of sensory information, motor planning and sequencing, visual-spatial processing, muscle strength and endurance, bilateral coordination, engagement and pragmatic language, oral motor skills and expressive and receptive language (id.). She noted that extensive parent training and counseling were also part of the Rebecca School program (id.). Based on her review of the hearing record, the IHO concluded that the student's program at the Rebecca School was designed to meet the student's unique needs (id. at pp. 7-8). She also noted that in developing the student's program, Rebecca School staff observed the student and assessed his deficits and areas of strength (id. at p. 8). As a result of the above, the IHO determined that the parents' met their burden of establishing that the student's program at the Rebecca School was designed to allow the student to make meaningful educational progress (id.).

A review of the hearing record supports the IHO's determination that the program and services the student received at the Rebecca School during the 2011-12 school year were specifically designed to address the student's unique needs. Although the district contends that the student regressed in his attention and his ability to manipulate writing instruments and utensils while at the private school, the record shows that the student has made progress in the private placement.

With respect to the program and services provided to the student, the December 2011 Rebecca School interdisciplinary report of progress indicates the student was attending a 9:1:4 class at the private school (Parent Ex. E at p. 1). According to the report, the student's classroom schedule consisted of a morning group meeting, literacy, math, science, afternoon good-bye meeting, sensory activities, modulation and visual spatial activities, and individual floortime sessions (Parent Exs. D; E at p. 1). The report also indicates that the student received speech-language therapy two times per week individually; OT three times per week, twice individually and once in an obstacle course with a classroom peer; and PT twice individually and once as part of a movement group (Parent Ex. E at pp. 4-6). In addition, the report detailed long and short-term goals developed by Rebecca School staff to address the student's identified needs (id. at pp. 8-10).

The Rebecca School program director testified that the school employs the DIR methodology (Tr. p. 208). According to the DIR model there are six basic developmental levels that all children go through, and that children with neurodevelopmental delays in relating and communicating do not pass through the developmental levels at the same rate or in the same way as a "typical" child (Tr. pp. 208-09). The program director explained that Rebecca School staff determine a student's developmental level, see where a student's strengths and "holes" are, and "want to move them up the developmental level" (Tr. p. 209). She suggested that all children with neurodevelopmental delays in relating and communicating also have sensory processing difficulties, which fall along a continuum (id.). The program director explained that the Rebecca School staff ensured that they regulate students' sensory systems so that students were able to focus, attend, learn, and participate (Tr. pp. 209, 210-11). With respect to relationships, the program director explained that Rebecca School staff wanted to build on students' existing relationships and have all learning be intrinsically motivating so that students are able to generalize learning across all areas of development (Tr. pp. 210, 211-12).

The Rebecca School program director testified that as part of the school's admissions process the student was administered the Functional Emotional Assessment Scale, which looks at a student's developmental level (Tr. p. 214). She explained that once a student enrolls and is placed in a classroom, the classroom team observes the student for the first week or two to determine what the staff wants to work on and how they want to address the student's needs (Tr. p. 215).[11] She reported that the team developed a plan at that time, which was then revisited in December and again in June (Tr. pp. 215-16).

According to the program director, when the student entered the program, he was "incredibly" sweet and warm and was able to use those strengths to get his needs and wants met (Tr. p. 216). The student was also non-verbal, exhibited sensory integration dysfunction, and demonstrated some learning difficulties (id.).

The program director reported that the school's occupational therapist set up a sensory diet for the student and trained the classroom staff to carry it over (Tr. p. 218). The program director confirmed that the student received speech-language therapy and OT at the Rebecca School (Tr. p. 224). She explained that under the umbrella of parent training, every family was assigned a social worker who offered general support with regard to referrals, as well as counseling to family members (id.).

The student's teacher at the Rebecca School testified that her class consisted of eight students who ranged in age from five to eight years old (Tr. p. 232). The classroom was staffed by the head teacher, who was certified in both general and special education, and three teaching assistants (Tr. pp. 231, 232).[12] According to the Rebecca School teacher, seven of the students had been diagnosed "on the autism spectrum" and the eighth student had a genetic disorder (Tr. p. 233). The Rebecca School teacher recalled that when the student entered her classroom he was interested in sports, but not very aware of what was going on in the environment (id.). She further reported that when the student first started he did not initiate interactions with anyone and tended to engage in self-directed play (Tr. pp. 233-34). The teacher explained that she set goals for the student to increase his initiation with adults and peers, to spend more time engaged in one activity, and to indicate his wants and needs (Tr. p. 234). She described some of the academic skills on which the student was working, such as answering to his name and understanding the concept of 1:1 correspondence (Tr. pp. 246-48).

The Rebecca School speech-language pathologist testified that she provided the student with two 30-minute sessions of individual speech-language therapy per week (Tr. p. 259). She explained that she was targeting the student's abilities at functional emotional developmental levels one and two, which focused on engagement and regulation (Tr. p. 260). She opined that until the student reached those levels and could move on to reciprocal interaction that he would not be ready for speech-language therapy in a dyad (id.). The speech-language pathologist reported that she met with classroom staff at least once a week to discuss the student's progress toward his goals and that the goals were being targeted in the classroom on a consistent basis (id.). The speech-language pathologist testified that the primary skills on which she was working with the student were initiating and reciprocating an interaction (Tr. p. 261). She stated that the student

[11] The program director testified that the classroom team included the teacher, teacher assistants, teacher supervisor, speech-language pathologist, occupational therapist, and physical therapist (Tr. p. 215).

[12] The teacher testified that one of the students in the class also had a paraprofessional (Tr. p. 232).

demonstrated some weaknesses with regard to oral motor awareness and that she was working with the student to increase awareness of his tongue and "checks" (Tr. pp. 261, 262).

The Rebecca School occupational therapist testified that she worked with the student four days per week (Tr. p. 271). She described the student as having low arousal and low activity and opined that for the majority of the day he was not receiving enough feedback from his sensory system to engage appropriately at his optimal level (id.). The therapist reported that she worked with the student to meet these needs in order for him to reach the optimal level for activity and engagement within the classroom (Tr. p. 272). The occupational therapist described her therapy sessions with the student which included seeing if the student would engage with her and initiate going to therapy, and providing the student with vestibular input in the sensory gym (Tr. p. 273). She also noted that she worked on self-feeding, ADLs, and modulation with the student, among other things (Tr. pp. 274-76). Based on the above, I find that the student's Rebecca School placement was reasonably calculated to enable him to receive educational benefits.

Also, while not dispositive in this matter, the hearing record shows that the student was making progress in his areas of need while attending the Rebecca School during the 2011-12 school year (see Frank G., 459 F.3d at 364). The program director reported that the student had made gains, specifically with regard to his ability to communicate effectively, and noted that he was now finishing interactions that were opened by the teachers (Tr. p. 217). She reported improvement in the student's sensory system, and noted that the student was able to focus and attend for longer periods of time after receiving sensory input (Tr. pp. 217-18). The Rebecca School program director testified that the student was making meaningful progress at the Rebecca School (Tr. p. 225). The private school special education teacher pointed to specific areas of progress, including increased involvement in activities, recognizing his picture, following one-step directions, and communicating his desire to continue an activity (Tr. pp. 237-239, 246-247, 251). The student's speech-language therapist and occupational therapist also noted improvement in his performance since entering the Rebecca School (Tr. pp. 262, 263, 266, 276-77). In addition, the student's parents also testified that the student progressed significantly while at the Rebecca School, specifically noting improvements in making eye contact, in eating by himself, in toileting, and in his general attitude (Tr. pp. 291-92).

I have considered the district's assertions that the student regressed in certain, specific areas as a result of his attendance at the Rebecca School, specifically in his ability to attend and to manipulate writing instruments and utensils. However, I find that even if the district's assertions are true, the weight of the evidence shows that the Rebecca School offered the student an educational program which met his special education needs and that overall the student made progress in this setting.

C. Equitable Considerations

Having found that the district failed to offer the student a FAPE for the 2011-12 school year and that the parents' unilateral placement of the student at the Rebecca School was appropriate, I must now address whether equitable considerations otherwise preclude an award of tuition reimbursement under the facts of this case.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ.,

226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). 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 J.P. v. New York City Dep't of Educ., 2012 WL 359977, at *13-*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at *10; S.W., 2009 WL 857549, at *13-14; 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 M.C., 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of a Student with a Disability, Appeal No. 12-036; 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]).

1. Sufficiency of 10-Day Notice

The district contends that equitable considerations should preclude or diminish an award of relief in this case because the parents' 10-day notice of unilateral placement, dated September 21, 2011, failed to indicate any specific allegations regarding the purported defects in the program offered to the student in the 2011-12 IEP, and therefore, it was insufficient as a matter of law. In addition, the district asserts that the parents did not offer any input, or express any objections or concerns, to the district about the recommended 12:1+4 special class placement at the May 2011 CSE meeting, despite attending and participating in the meeting. As a result, the district argues that equitable considerations cannot weigh in favor of the parents' requested relief.

In this case, the hearing record establishes that consistent with the 12-month school year program recommended in his May 2011 IEP, the student attended and received services pursuant to the May 2011 IEP at the same district public school for the months of July, August, and most of September 2011 that he had continuously attended since September 2008 (see Tr. pp. 11-12, 50-51, 53-57, 283, 327-28; see also Dist. Ex. 8 at p. 3). However, in a letter dated September 21, 2011, the parents advised the district that the student had "not been offered a placement" for the 2011-12 school year, and they had hoped to "hear from [their] office in terms of a recommended program/placement prior to the beginning of the new school year" (Parent Ex. I at p. 1).[13] In the same letter, the parents notified the district of their intentions to unilaterally place the student at the Rebecca School for the 2011-12 school year beginning on October 4, 2011, and to seek tuition reimbursement at public expense for the placement (id.). On September 26, 2011, the parents executed an enrollment contract with the Rebecca School for the student's attendance (Parent Exs. F at pp. 1-4; G at pp. 1-2). Shortly thereafter, the student began attending the Rebecca School, and the parents requested an impartial hearing by due process complaint notice, dated October 18, 2011 (see Parent Ex. I at p. 1; IHO Ex. I at p. 1).

Based on the foregoing, I find that while the parents timely provided the district with the required 10-day notice prior to removing the student from the district, I agree with the district's argument that the 10-day notice was insufficient as a matter of law because it did not set forth any concerns about the special education programs and related services recommended in the student's 2011-12 IEP (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). As noted above, without this information the district has no opportunity—before the student is removed from the public school—to assemble a team, devise an appropriate program, or otherwise remedy concerns expressed by the parents with respect to the recommended special education programs and related services in the student's IEP in order to offer the student a FAPE. In addition, it is unclear what other information the parents required about a recommended "program/placement" in this instance, given that the student had already been attending a public school site and receiving his IEP services for approximately three months at the time the parents sent the 10-day notice and given that the hearing record does not contain any evidence that at any time between the May 2011 CSE meeting and the date of the parents' 10-day notice in September 2011, the parents contacted the district to voice any concerns or dissatisfaction with the special education programs or related services recommended in the student's 2011-12 IEP or regarding how the district was implementing the student's May 2011 IEP in July, August, and September 2011 (Tr. pp. 1-334; Dist. Exs. 1-5; 7-8; Parent Exs. A-I; IHO Exs. I-VI).

A review of the hearing record also reveals that although the parents may have expressed concerns about the student's lack of progress to the student's special education teacher during previous school years, I do not find this sufficient to put the district on notice—consistent with provisions governing 10-day notices—of the parents' concerns specifically related to the special education programs and related services recommended in the student's 2011-12 IEP (see Tr. pp. 287-89, 297-98). As noted previously, the parents attended and participated in the May 2011 CSE

[13] In its October 27, 2011 response to the parents' due process complaint notice, the district indicated that a final notice of recommendation (FNR) had been issued on September 8, 2011, which identified the particular school to which the district assigned the student to attend for the 2011-12 school year; however, neither party submitted the FNR into the hearing record as evidence (see Dist. Ex. 8 at p. 3; see also Tr. pp. 1-334; Dist. Exs. 1-5; 7-8; Parent Exs. A-I; IHO Exs. I-VI). According to the district's response, the FNR identified the same public school site for the student's attendance during the 2011-12 school year that the student had attended for the previous three school years (compare Dist. Ex. 8 at p. 3, with Tr. pp. 53-57, 283, 327-28).

meeting to develop the student's IEP and were provided opportunities throughout the CSE meeting to express concerns, ask questions, or discuss the information presented at that time.

Consequently, the parents' failure to comply with the 10-day notice requirements weighs against them with respect to equitable considerations, and in my discretion, warrants a 20 percent reduction in any award of the parents' requested relief.

2. Relief

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).[14] Since the parents have selected the Rebecca School as the unilateral placement, and their financial status is at issue, it is the parents' burden of production and persuasion with respect to whether the parents have the financial resources to "front" the costs of the Rebecca School and whether they are legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, while the district agrees that the parents may be entitled to seek the tuition remedy enunciated in Mr. and Mrs. A, the district argues that contrary to the IHO's findings the parents have not sufficiently established the fourth element regarding whether, due to a lack of financial resources, they were financially unable to front the costs of the tuition at the Rebecca

[14] 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]).

School for the 2011-12 school year and that they were legally obligated to do so.[15] Upon careful review, I agree.

In this case, the parents executed an enrollment contract with the Rebecca School on September 26, 2011, for the student's attendance from October 4, 2011 through June 22, 2012 (see Parent Exs. F-G). The parents testified that in light of their "financial situation," their mortgage, and "financial responsibilities," they have been unable to pay the student's tuition costs at the Rebecca School (see Tr. pp. 293-95, 301 [indicating that the family household included both parents and two children and that they were responsible for paying the mortgage on their home, as well as utilities, with no receipt of any type of government subsidy or help]). The parents also testified that given the family's "net income," they were not in a "financial position to be able to afford" the Rebecca School's tuition (Tr. p. 295). If they were unsuccessful at the impartial hearing, the parents testified that they did not know how they would pay for the tuition costs, but they understood that they were still obligated to pay the full amount of the tuition costs under the enrollment contract (see Tr. pp. 301-03). Based upon the foregoing, the weight of the evidence supports the IHO's finding that the parents were legally obligated to pay the full amount of the student's tuition costs at the Rebecca School for the 2011-12 school year and the parents have, at this point, partially sustained their burden under the fourth element of the standard for the tuition remedy available under Mr. and Mrs. A..

Next, however, a review of the hearing record indicates that the parents have not provided sufficient evidence regarding whether, due to a lack of financial resources, they were financially unable to front the costs of the tuition at the Rebecca School for the 2011-12 school year (Tr. pp. 1-334; Dist. Exs. 1-5; 7-8; Parent Exs. A-I; IHO Exs. I-VI).[16] In addition to the testimonial evidence submitted regarding the financial circumstances of the parents' household, the parents also submitted the first two pages of their 2010 income tax return that reflect income of approximately $135,000 (see Parent Ex. H at pp. 1-2). While the parents' income is not insignificant, the hearing record does not contain any other evidence of the parents' assets, liabilities or expenses during the relevant time period, nor is there evidence of the parents' investments, savings, or other resources that make up their "financial resources" (see Tr. pp. 1-334; Dist. Exs. 1-5; 7-8; Parent Exs. A-I; IHO Exs. I-VI; see also IHO Decision at pp. 9-10). However, as the parents submitted proof of partial payment of the student's Rebecca School tuition for the 2011-12 school year (Parent Ex. G), I direct the district to reimburse the parents for eighty

[15] In the due process complaint notice, the parents requested prospective payment of the student's tuition costs under Connors v. Mills, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) (IHO Ex. I at p. 3). In the decision, it appears that the IHO—without explanation—transformed the relief sought by the parents from prospective payment under Connors to direct retrospective payment under Mr. and Mrs. A. (see IHO Decision at pp. 8-10). Neither party, however, challenges this aspect of the IHO's decision.

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

percent of the amount already paid and, upon proof of payment, for the eighty percent of the balance of the student's 2011-12 school year Rebecca School tuition.

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year and that the parents' placement of the student at the Rebecca School was appropriate. However, to the extent that the IHO decided the district predetermined the recommended program and placement and to the extent that equitable considerations factor against direct payment by the district, the appeal must be sustained.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 22, 2012 is modified by reversing that portion which determined the district predetermined the IEP program and placement for the 2011-12 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated May 22, 2012 is modified by reversing that portion which ordered the district to make direct payment to the Rebecca School; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for eighty percent of the student's Rebecca School tuition for the period beginning October 4, 2011 and ending June 22, 2012, upon submission of proof of payment.

Dated: **Albany, New York**
July 19 , 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER