The University of the State of New York

The State Education Department
State Review Officer
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No. 12-175

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

Appearances:
Law Offices of Susan J. Deedy, attorneys for petitioners, Ralph Gerstein, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the P'TACH program (P'TACH) 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 has received a diagnosis of an attention deficit hyperactivity disorder (ADHD) and demonstrates delays in areas including reading comprehension and fluency, writing fluency, math reasoning and fluency, language processing, attention, impulsivity, and social/emotional functioning (Tr. pp. 20-24, 48-50, 53-57; Dist. Exs. 1 at p. 3; 2 at pp. 1-2). The student attended P'TACH—a special education program colocated with a nonpublic parochial day school in the district—for the 2010-11 and 2011-12 school years (Tr. pp. 42, 44-45, 55, 61). While at P'TACH,

the student received instruction primarily in classes with 4:1 or 5:1 student-to-teacher ratios and received related services including speech-language therapy and counseling (Tr. pp. 54-57).[1]

In preparation for developing an IEP for the student for the 2011-12 school year, a district psychologist conducted a psychoeducational evaluation of the student in January 2011 (Dist. Ex. 2). On April 27, 2011, a CSE convened to develop the student's IEP for the 2011-12 (tenth grade) school year (Dist. Ex. 1 at pp. 1-2). The CSE found the student eligible to receive special education and related services as a student with a learning disability[2] and recommended a 10-month general education placement with five sessions per week of direct special education teacher support services (SETSS) (8:1) with related services of one 30-minute session per week of individual speech-language therapy (id. at pp. 1-2, 20).[3] To address the student's academic and social/emotional needs, the IEP also contained accommodations and supports (id. at pp. 4, 6). The IEP indicated that the student's behavior did not seriously interfere with instruction and that a regular education teacher could address his behaviors (id. at p. 5).

By final notice of recommendation (FNR) dated June 7, 2011, the district notified the parents of the public school to which the student was assigned and at which his IEP would be implemented for the 2011-12 school year (Dist. Ex. 4). By letter dated August 23, 2011, the parents rejected the April 2011 IEP and informed the district that they would be placing the student unilaterally in P'TACH and seek public funding therefor (Parent Ex. A at pp. 1-2). On September 8, 2011, the student's mother visited a district public school other than that named on the June 2011 FNR (Tr. pp. 96-97, 101-02, 105-10; see Dist. Ex. 4; Parent Ex. B at p. 1). Also in September 2011, the parents signed an enrollment contract for the student's attendance at P'TACH during the 2011-12 school year (Parent Ex. C).

A. Due Process Complaint Notice

By due process complaint notice dated September 22, 2011, the parents requested an impartial hearing, asserting that the district had failed to offer the student a free appropriate public education (FAPE) (Parent Ex. B). The parents contended that the district refused to permit them to visit the assigned public school site without first registering the student, thereby denying the student a FAPE (id. at p. 1). The parents next asserted that, based on the student's significant delays in "all core areas," as reflected on the April 2011 IEP, the provision of SETSS in a general education setting was insufficient to meet the student's needs, and that the CSE had not offered the student a program that would "lead to progress in all areas" (id. at pp. 1-2). Accordingly, the parents indicated that they had enrolled the student in P'TACH for the 2011-12 school year and requested public funding for the cost of the student's P'TACH tuition, that the district provide the

[1] P'TACH has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Parent Ex. D; see 8 NYCRR 200.1[d]; 200.7).

[2] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this appeal (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[3] SETSS services are not defined in State or federal law or regulation nor identified on New York State's continuum of special education services, and the only evidence in the hearing record on this matter seems to indicate that SETSS for this student would have consisted of resource room services (Tr. p. 28; Parent Ex. B at p. 1; see 8 NYCRR 200.6[f]; see also 8 NYCRR 200.6[d]).

student with the related services recommended on the April 2011 IEP, and transportation services (id. at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on December 21, 2011 and concluded on February 14, 2012 after two hearing dates. By decision dated July 30, 2012, the IHO found that the district had offered the student a FAPE and dismissed the parents' claims (IHO Decision).[4] With regard to the substantive adequacy of the April 2011 IEP, the IHO found that the offered program was reasonably calculated to enable the student to receive educational benefits (id. at pp. 9-12). Specifically, the IHO held that the recommendation was consistent with the findings of the January 2011 psychoeducational evaluation and found that the recommended placement constituted the least restrictive environment (LRE) for the student (id.).[5]

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in finding that the district offered the student a FAPE, that P'TACH was an appropriate placement for the student, and that equitable considerations support their request for public funding of the student's private school tuition. With regard to the attempt by the student's mother to visit a district school, the parents assert that the IHO erred both in finding the testimony of the student's mother not to be credible and in precluding them from calling as a witness a staff member at the school. The parents next contend that the recommended program did not offer the student a FAPE because the student's significant deficits required additional assistance beyond that provided by five periods of SETSS per week. In addition to asserting that the student required a greater amount of structure that could only be provided with a small class size, the parents further assert that the student's social/emotional needs warranted the provision of counseling as a related service.

The parents assert that P'TACH met the student's academic needs by providing him with structure and constant support in a small group setting and addressed his social/emotional needs through the provision of counseling. For relief, the parents request reimbursement and direct payment for the costs of the student's 2011-12 P'TACH.[6]

The district answers, admits and denies the parents' allegations, and asserts that the IHO properly found that it offered the student a FAPE. Addressing the parent's contentions regarding the attempt to visit a district school, the district asserts that the IHO properly found the testimony

[4] The hearing record indicates that the parties submitted written memoranda of law to the IHO (IHO Decision at p. 2; Tr. p. 125). The memoranda were not included in the hearing record received by this office.

[5] The IHO summarized the recommendation made in the April 2011 IEP as consisting of placement "in a general education setting, with an 8:1 ratio and [SETSS] " (IHO Decision at p. 10). To the extent that the IHO referred to "an 8:1 general education setting" (id. at p. 11), it appears that he misconstrued the offered placement. The hearing record does not indicate that the recommendation included any guarantee with respect to student-to-teacher ratio in the classroom; rather, the 8:1 ratio appears to be applicable only to the provision of SETSS "in a separate location" (Dist. Ex. 1 at pp. 1, 18-19; see Tr. pp. 16, 24-25; Dist. Exs. 3-4).

[6] The parents explicitly limit their funding request to that portion of the student's P'TACH tuition not devoted to religious instruction.

of the student's mother that she had received an FNR to that school to be not credible and that the parents had no right to visit the assigned public school site in any event. With regard to the recommendation for five periods of SETSS per week, the district contends that the student's abilities warranted his inclusion in the general educational environment to the extent possible and that his reading and writing needs would have been adequately addressed.

The district next argues that the parents failed to establish that P'TACH was an appropriate placement for the student because the hearing record contained insufficient evidence regarding the student's program and how it addressed his needs. The district also contends that P'TACH provided the student with counseling and developed a behavioral intervention plan (BIP) that did not address the student's needs. Next, the district asserts that P'TACH did not provide the student with a placement in his LRE both because of the student-to-teacher ratio utilized and the fact that P'TACH was not as close as possible to the student's home. The district also argues that the parents failed to establish that P'TACH was an appropriate unilateral placement because they did not establish what portion of the student's P'TACH tuition was allocated to secular instruction. Finally, the district asserts that equitable considerations do not support the parents' request for relief.

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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; 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).

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).

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. New York City Bd. 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]).

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). "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. Assigned Public School Site—Parental Visitation

Initially, the hearing record as a whole supports the IHO's conclusion that the testimony of the student's mother that she received notification that the student had been assigned to a public school site other than the assigned public school site specified in the June 2011 FNR was not convincing, inasmuch as no FNR for another recommended assigned public school site was entered into evidence and the student's mother confirmed that the home address specified on the FNR was accurate (Tr. pp. 96-97, 105-10, 113, 117-19; Dist. Exs. 1 at p. 1; 4).[7] However, even if the parents received an FNR other than the June 2011 FNR entered into evidence by the district, the hearing record would not support a finding that the district denied the student a FAPE on the basis that the student's mother was not permitted to visit what she believed to be the assigned public school site. Although the parents correctly argue that "there is no federal or state law that requires parents to register a student at a school before they can visit to evaluate the program," neither the IDEA nor its implementing regulations provides parents with the right to enter the public school site prior to the initiation of services to assess the suitability of the physical location in which the district intends to implement the student's IEP, and the parents have cited to no authority for the proposition that the district had the obligation to provide them with an opportunity to visit any particular school. Additionally, the United States Department of Education has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; but see C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]). Similarly, parents may not direct through veto a district's efforts to implement a student's IEP by personally viewing and approving the assigned public school site (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see C.F. v. New York City Dept. of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; see also Hanson v. Smith, 212 F. Supp. 2d 474, 487 [D. Md. 2002] [noting that the IDEA contains no requirement for districts to permit parents to visit assigned public school sites]).[8]

[7] References are made in the hearing record to a letter that was sent to the district by the student's mother after her visit to the public school (Tr. pp. 99, 110-115). Although the IHO at one point indicated that the exhibit was entered into evidence at the impartial hearing (Tr. pp. 112-13), the exhibit was not included with the hearing record received by the Office of State Review.

[8] Nothing in this decision is intended to discourage districts from offering parents the opportunity to view school or classroom placements, as such opportunities can only foster the collaborative process between parents and districts envisioned by Congress as the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

Because there is no indication in the hearing record that the student's needs could only be met in a specific school, the parents' inability to visit a potential assigned school location does not in this instance rise to the denial of a FAPE.[9]

B. April 2011 IEP

With regard to the recommendation that the student attend a general education classroom and receive five periods of SETSS weekly in an 8:1 ratio, although the parents contend that the district failed to establish that the offered program "would produce significant, measurable progress," the district is not required to guarantee any particular results but instead must develop a program that is "reasonably calculated to enable the child to receive educational benefits" (Rowley, 458 U.S. at 206-07; see Cerra, 427 F.3d at 194-95; Walczak, 142 F.3d at 130). With that standard in mind, I address the adequacy of the April 2011 IEP to meet the student's needs.

The hearing record reflects that the April 2011 CSE considered the results of the January 2011 psychoeducational evaluation and input from CSE members, including the P'TACH program coordinator, in the development of the student's IEP (Tr. pp. 17, 68; Dist. Ex. 1 at p. 2). The parties agree that the student exhibited delays in areas of reading, math, writing, language processing, attention, impulsivity, distractibility, and social/emotional functioning but disagree regarding the severity of the student's deficits (see Tr. pp. 49-50, 56-57, 80; Dist. Exs. 1-3; Parent Ex. B). Based on a review of the hearing record, I find that the recommendation for placement in the general education environment with five sessions per week of SETSS within an 8:1 setting together with one session per week of speech-language therapy did not offer an appropriate level of special education support given the student's ongoing needs in reading comprehension, math fluency, writing fluency, language processing, attention, distractibility, impulsivity, and social/emotional functioning.

The January 2011 psychoeducational evaluation reflected the student demonstrated average cognitive skills in the areas of both verbal and nonverbal reasoning as well as visual processing and fluid reasoning (Dist. Ex. 2 at pp. 3-4). With respect to academic achievement, administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) to the student yielded standard scores (percentile rank, grade equivalency) of 91 (28, 7.1) in letter-word identification, 87 (20, 6.7) in reading fluency, 71 (3, 3.5) in passage comprehension, and 92 (29, 5.4) in word attack (id. at p. 5). The student achieved standard scores (percentile rank) of 95 (37, 7.9) in spelling and 77 (6, 4.9) in writing fluency (id. at p. 7). The student achieved standard scores (percentile rank) of 100 (49, 9.4) in math calculation, 61 (.4, 2.9) in math fluency, and 90 (24, 6.2) in applied problems (id. at p. 6). The school psychologist noted that the student's difficulties in reading appeared to affect his math reasoning skills in a negative manner (id. at p. 7; Tr. pp. 29-30). The report reflected that the student's reading comprehension, math fluency, and writing fluency skills were areas of weakness, while computation was an area of relative strength (Dist. Ex. 2 at pp. 6-8).

[9] I need not determine whether the IHO improperly precluded witness testimony, but note that IHOs are vested with broad discretion regarding the submission of evidence at impartial hearings (see, e.g., Application of the Bd. of Educ., Appeal No. 12-142; Letter to Stadler, 24 IDELR 973 [OSEP 1996]).

At the impartial hearing, the school psychologist testified that the student would attend regular education classes for six out of seven periods per day and receive SETSS instruction for approximately 60 minutes (Tr. pp. 24-25). The school psychologist stated that "[i]t could be possible" for the student to function in a general education class for the remainder of the school day because one session of SETSS per day would address the student's main area of need in reading comprehension (Tr. pp. 25-27). The testimony of the school psychologist reflects that the April 2011 CSE wanted to place the student with nondisabled peers (Tr. pp. 23-24). However, in so doing, it did not address the student's immediate academic and social/emotional needs. In particular, although the student demonstrated several strengths, he also exhibited significant ongoing delays that were not addressed by the April 2011 IEP. Examining the student's overall academic profile indicates that the student required direct specialized instruction modified to align with his reading level, which the April 2011 IEP indicated ranged from a "middle third grade" level for passage comprehension to a "beginning seventh grade" level for letter-word identification (Dist. Ex. 1 at p. 3). The hearing record lacks information indicating that the student would be able to access the curriculum presented in a tenth grade general education class while receiving five sessions per week of SETSS.

The hearing record also shows the student required more special education supports than could be provided within regular education classes. Although the April 2011 CSE documented the student's needs, it is unclear that the recommended SETSS would be sufficient to address these needs (see Dist. Ex. 1). As stated above, the IEP contained accommodations to address the student's academic and social/emotional management needs, including a multisensory approach, structuring and breaking down the work into manageable units, rewards, redirection, refocusing, repetition, review, verbal cues, key word prompts, and opportunities for task analysis, semantic mapping, outlines, graphic organizers, daily/weekly/monthly planners, rephrasing, explanations, elaboration of verbalizations, praise, encouragement, positive feedback, and preferential seating, (Dist. Ex. 1 at pp. 4, 6). However, accommodations, even in conjunction with the provision of SETSS, would not sufficiently address the student's severe academic deficits as noted above. One SETSS session per day of instruction would not adequately compensate for the six periods per day during which the student was placed in the general education environment. While the student would also receive one session per week of speech-language therapy, there is no evidence in the hearing record indicating that speech-language services would compensate for the lack of specialized instruction over the majority of the school day.

With regard to the student's social/emotional functioning, the P'TACH educational director testified that the student exhibited attention problems, impulsivity, and a need for constant refocusing (Tr. pp. 48, 53-55). The parties agree that the student exhibited behaviors related to his ADHD including inattention, impulsivity, and distractibility. In fact, the district school psychologist opined that the student's delayed performance in reading comprehension might have been in part due to his restlessness and defensiveness during the assessment process, rather than a lack of reading skills (Tr. p. 24). The January 2011 psychoeducational evaluation referenced the student's receipt of an ADHD diagnosis, noted that the student was at times "restless and fidgety," reported that he found it "challenging to modulate his activity levels and sustain attention and motivation in an academic environment," and indicated his need for assistance in doing so (Dist. Ex. 2 at pp. 2, 8-9). The evaluation report also indicated that the student's academic difficulties had negatively affected his self-esteem and confidence (id. at pp. 8-9). The report reflected that the student "may feel ineffectual" regarding academic independence, and the evaluator

recommended that the student be provided with "structure and support" to address his social/emotional needs (id.). The school psychologist noted that the student may have the potential for higher verbal comprehension skills "if he were able to maintain focus and concentration" (id. at p. 4). Accordingly, the school psychologist recommended that teachers provide the student assistance to maintain attention and motivation within academic settings (id. at p. 9). The report also indicated that the student found it difficult to concentrate during writing tasks (id. at p. 8).

The April 2011 CSE acknowledged that the student demonstrated difficulties with self-esteem, attention, impulsivity, and social/emotional functioning (Dist. Ex. 1 at p. 5). Although the April 2011 IEP contained several accommodations to address the student's social/emotional needs, including praise, encouragement, positive feedback, and preferential seating (Dist. Ex. 1 at p. 6), no annual goals were included to address the student's needs in the areas of behavior, impulsivity, attention, or low self-esteem (Dist. Ex. 1 at pp. 8-17). As stated above, the student exhibited difficulties with attention and hyperactivity that interfered with his academic performance even during a one-to-one evaluative session (see Dist. Ex. 2 at pp. 2, 4). The student received two sessions per week of counseling at P'TACH in addition to outside counseling and psychiatric consultation for medication management, indicating that his social/emotional and behavioral needs required support within the school setting (Tr. pp. 54-57). The hearing record shows that the student's needs regarding self-esteem, behavior, and social skills were not adequately addressed in the April 2011 IEP and that a general education placement with SETSS would not adequately support the student.

Based on the foregoing, the district did not establish that it recommended a program that was reasonably calculated to enable the student to receive educational benefits. The hearing record supports a conclusion that the program recommended by the April 2011 CSE would not provide adequate support to address the student's identified needs in the areas of reading comprehension, math fluency, writing fluency, language processing, attention, impulsivity, distractibility, and social/emotional functioning.

C. Unilateral Parent Placement

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 should offer an educational program which meets 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). 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, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). 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, quoting Rowley, 458 U.S. at 207; see Gagliardo, 489 F.3d at 115). 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]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15; 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]). When determining the appropriateness of a unilateral placement, a student's "[g]rades, test scores, and regular advancement" from grade to grade are all relevant considerations, but an SRO must also "consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65; see D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. 2012] [stating that "academic progress alone is not a dispositive indicator of appropriateness"]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003]).

Addressing first the district's argument that P'TACH was not the student's LRE, although "parental placements are not subject to the same exacting standards as a public placement" (D.D-S., 506 Fed. App'x at 82, citing Carter, 510 U.S. at 14-15), whether the unilateral placement provides the student with sufficient access to nondisabled peers "remains a consideration that bears upon a parent's choice of an alternative placement" (M.S., 231 F.3d at 105). Such a determination may include such considerations as whether the disabled student's special class was "located within a mainstream school," whether the student "participated in . . . non-academic classes with mainstream children," and whether the disabled and nondisabled students at the unilateral placement "share a school entrance, hallways, and playtime" (M.H., 685 F.3d at 254). In this case, the hearing record indicates that P'TACH was colocated with a "mainstream" nonpublic parochial day school (Tr. p. 44). Additionally, although the majority of the student's instruction was provided in small groups, he attended a regular education social studies class (Tr. pp. 53-54). Based on my review of the student's needs, the unilateral placement did not deny the student access to nondisabled peers to such an extent that P'TACH was thereby inappropriate, despite the possibility that the student could have been educated in a less restrictive classroom setting (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836-37 [2d Cir. 2014]).[10]

With regard to the district's contention that the unilateral placement was inappropriate because P'TACH provided the student with unnecessary counseling and developed a BIP that was not required, the testimony of the educational director indicated that the student's behavior had worsened since the 2010-11 school year, necessitating the implementation of a behavioral intervention plan (BIP), the parameters of which were not clearly specified in the hearing record (Tr. pp. 60-61). At P'TACH, the student received one session per week of individual counseling and one session per week of counseling in a group to address his social/emotional and behavioral needs (Tr. pp. 53-55). The P'TACH education director stated that P'TACH staff coordinated with the student's private counselor to provide the student with monitoring and structure (Tr. p. 55). The P'TACH staff also coordinated with the student's psychiatrist regarding medication management for symptoms related to his ADHD (Tr. p. 56). In any event, regardless of whether a BIP and counseling services were necessary to provide the student with a FAPE, the district has

[10] To the extent that the district argues that P'TACH was not the student's LRE because it was further from the student's home than the assigned school (see 34 CFR 300.116[b][3]; 8 NYCRR 200.1[cc][3]; 200.4[d][4][ii][b]), it has provided no authority for the proposition that this requirement applies to unilateral parent placements (see, e.g., Carter, 510 U.S. at 14-15; Frank G., 459 F.3d at 364; Application of the Dep't of Educ., Appeal No. 12-135). In any event, unlike access to the general education curriculum, regular educational environment, and typically developing peers, the location of a particular school will rarely be a basis for a finding of a denial of a FAPE especially where, as here, the district has asserted no detriment to the student as a result of his placement in a school further from his house than that proposed by the district.

pointed to no evidence in the hearing record that they were detrimental to the student's ability to receive educational benefits so as to support a finding P'TACH was not an appropriate placement for the student on this basis.

Notwithstanding the foregoing, the hearing record contains insufficient evidence regarding the manner in which P'TACH addressed the student's special education needs. No documents indicating the services the student received at P'TACH were introduced into evidence at the impartial hearing. Accordingly, witness testimony provided the only insight into the student's program and, although testimonial evidence may provide a sufficient basis for a finding that a unilateral placement met a student's needs, in this instance the proffered testimony did not sufficiently establish the manner in which P'TACH met the student's needs by the introduction of objective evidence regarding the specialized instruction he received to address his unique needs (see M.S., 231 F.3d at 105). Furthermore, although there is evidence that the student made progress while at P'TACH, progress alone is not dispositive of whether a unilateral placement is appropriate to meet a student's needs (L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *20-*21 [S.D.N.Y. Mar. 19, 2013]).

The P'TACH education director testified that the student exhibited delays in academic as well as social/emotional and behavioral functioning, including that the student exhibited "serious behavioral and attention[] issues" that led to significant inconsistency in the student's academic performance (see Tr. pp. 49-50, 53, 55-57). The P'TACH education director testified that P'TACH provided the student with small group specialized instruction within a structured setting, along with extensive monitoring and repetition (Tr. p. 53). At P'TACH, the student primarily attended classes with a 4:1 and 5:1 teacher to student ratio (Tr. p. 54). The P'TACH education director stated the student required a small structured setting to address his difficulties with attention, impulsivity, and "immaturity" through supports including constant refocusing and monitoring (Tr. pp. 53-54). The P'TACH education director further testified that the student exhibited academic progress during the 2011-12 school year as a result of P'TACH staff providing the student with small group instruction, monitoring, and structure, as shown by his earning passing grades on examinations, report cards, and Regents Competency Tests (RCTs) (Tr. pp. 50, 53, 56, 65).

With regard to related services, the hearing record reflects that the student received two sessions per week of individual speech-language therapy at P'TACH (Tr. pp. 55-57). The P'TACH director testified that the student exhibited significant language processing deficits but exhibited significant progress in the area of language skills (Tr. pp. 56-57). With regard to the student's social/emotional needs, the education director opined that the student required the twice weekly counseling sessions he received at P'TACH to address his attentional and behavioral needs (Tr. pp. 53-55).

Although the P'TACH education director testified that the student demonstrated progress, as indicated on his report cards and passing scores on RCTs, the hearing record lacks any documentary evidence in support of these claims of progress and the education director's testimony was insufficiently specific to determine whether the student's needs as identified in the hearing record were being met. In particular, the testimony of the P'TACH director did not indicate the manner in which teachers modified or differentiated instruction for the student during instruction. Furthermore, while P'TACH provided the student with speech-language therapy, counseling, and a BIP, the hearing record does not contain information as to the content of the services and

supports, or any goals achieved in these areas. With the exception of the P'TACH director's general description of a small structured class which provided monitoring and repetition, the hearing record lacked any specific information as to the specialized instruction and support provided to the student to address his demonstrated.[11] Therefore, I find that hearing record does not establish that P'TACH provided the student with specially designed instruction to address his unique needs.

VII. Conclusion

Although the hearing record supports the parents' contention that the district failed to offer their son a FAPE for the 2011-12 school year, they did not establish that their unilateral placement was appropriate to meet the student's needs. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations reached herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 30, 2012 is modified, by reversing that portion which found that the April 2011 IEP offered the student a FAPE.

Dated: **Albany, New York**
October 23, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[11] While P'TACH provided the student with a small class size that appears to have helped some of his difficulties, the parties point to no authority holding that small class size alone constitutes special education within the meaning of the IDEA (see Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]; Doe v. E. Lyme Bd. of Educ., 2012 WL 4344301, at *8 [D. Conn. Sept. 21, 2012] [holding that small class size alone does not constitute special education]), and I am not inclined to establish such a legal principle in this case.