The University of the State of New York

The State Education Department
State Review Officer
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No. 12-222

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

Appearances:
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. Petitioner (the parent) appeals, pro se, from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Winston Preparatory School (Winston Prep) for the 2009-10 school year and to be reimbursed for her daughter's tuition costs at the Maplebrook School (Maplebrook) and for a tutoring service for the 2010-11 school year. Respondent (the district) cross-appeals from the IHO's determination that Winston Prep was an appropriate placement for the student for the 2010-11 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

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

Because there is limited evidence in the hearing record regarding the 2009-10 school year, the following facts regarding the 2009-10 school year are pieced together from the parent's due process complaint notice and the exhibits attached thereto (Answer Ex. 1).[1] The CSE convened on June 15, 2009 and again on June 16, 2009 to develop an IEP for the 2009-10 school year (id. at p. 4). In response to the June 2009 IEP, the parent sent a 25-page letter to the district dated July

[1] The due process complaint notice was not introduced into evidence at the impartial hearing; it was submitted by the district as an exhibit to the district's answer and cross-appeal. Because it is necessary for my decision and the parent also references the due process complaint notice, I have accepted it into the hearing record for purposes of this appeal.

22, 2009, specifying numerous objections to the June 2009 IEP, including that the CSE had not conducted a mandatory reevaluation of the student and did not have sufficient evaluative data to prepare the June 2009 IEP (id. at pp. 7-31). The district conducted an evaluation of the student in August 2009 and attempted to reconvene the CSE on September 1, 2009 (id. at pp. 32-33).[2] The parent sent an e-mail to the district explaining that she could not attend a CSE meeting on September 1, 2009 because she had just received notice of the meeting and the evaluation reports the day before and needed time to review them (id. at p. 34). According to e-mail correspondence between the student's parents, on September 15, 2009, the parent met with a district representative for a resolution meeting pertaining to a due process complaint notice filed with respect to the 2007-08 and 2008-09 school years (id. at p. 36). During the September 15, 2009 meeting, the parent apparently expressed concerns over the August 2009 evaluation and the district agreed to send the parent materials describing the "independent evaluation process" (id. at pp. 36-37). In an October 2009 e-mail, in response to a request from the district to evaluate the student, the parent advised the district that she would not provide consent for the district to evaluate the student and that she did not think it would be appropriate to schedule a CSE meeting for the student's annual review until after the parent had obtained an independent evaluation of the student (id. at pp. 39-40).

The CSE convened on May 17, 2010 to conduct the student's annual review and to develop an IEP for the 2010-11 school year (Parent Ex. N).[3] At the time of the May 2010 CSE meeting the student was 18 years old and was attending Winston Prep (Parent Exs. A at p. 1; N at pp. 1, 3). Finding that the student remained eligible for special education and related services as a student with an orthopedic impairment, the CSE recommended a 10-month program consisting of placement in a 15:1 special class in a community school with related services of individual and group counseling, occupational therapy (OT), physical therapy (PT), and speech-language therapy (Parent Ex. N at pp. 1, 26, 28).[4] The CSE also recommended the student receive services from a shared health paraprofessional (id. at p. 28). At that time, the parent requested that the student be provided with a 12-month program (Tr. pp. 106-07). During July 2010, the parent arranged for the student to attend a program at Maplebrook which provides transition type services, such as such as internships, daily living skills instruction, meal preparation, and personal budgeting (Tr. pp. 91-93, 170-71; see Parent Exs. C-F).

In an August 9, 2010 letter, the parent requested a new CSE meeting to review the results of a privately-obtained evaluation (the July 2010 evaluation), on which the parent expected to receive a report "very soon" (Parent Ex. CC). Further the parent advised the district that unless an agreement was reached on an appropriate placement the parents would reenroll the student at Winston Prep for the 2010-11 school year and seek reimbursement for expenses associated with Winston Prep as well as expenses for related services (id.). The parent enrolled the student at

[2] The report of the August 2009 evaluation was not included in the hearing record.

[3] The parent sent the CSE e-mails on May 10, 2010 and May 13, 2010 requesting that the CSE reschedule the May 2010 CSE meeting as the student had not yet been evaluated (Answer Ex. 1 at pp. 41, 45). A private neuropsychological and educational evaluation was later completed in July 2010 (Parent Ex. A at p. 1).

[4] The student's eligibility for special education programs and related services as a student with an orthopedic impairment is not in dispute in this appeal (see 34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

Winston Prep for the 10-month 2010-2011 school year and obtained additional tutoring and related services (Parent Ex. MM at pp. 1, 6, 8, 14-30).

A. Due Process Complaint Notice

By due process complaint notice dated September 4, 2011 the parent requested an impartial hearing, alleging the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 and 2010-11 school years (Answer Ex. 1 at p. 4).[5] Regarding the 2009-10 school year, the parent asserted that the district did not complete an appropriate evaluation of the student or develop an appropriate IEP (id. at p. 5). The parent also incorporated a 25-page letter sent to the district on July 22, 2009 detailing numerous allegations related to the development of the June 2009 IEP, the sufficiency of the June 2009 IEP, and the district's selection of a school site (id. at pp. 4, 7-31). Regarding the 2010-11 school year, the parent asserted that the CSE failed to offer the student a FAPE because it held the May 2010 CSE meeting without properly evaluating the student, refused to adjourn the meeting to allow time for completion of a private evaluation, and ignored the parent's written request to schedule a new CSE meeting to review the results of the private evaluation (id. at pp. 5-6, 52). As relief, the parent requested reimbursement for the costs of the July 2010 evaluation, the student's tuition at Winston Prep for the 2009-10 and 2010-11 school years, additional privately-obtained related services for those school years, and tuition at Maplebrook for July 2010 and July 2011 (id. at p. 6).[6]

B. Impartial Hearing Officer Decision

A prehearing conference was held on February 15, 2012 to consider the district's motion to dismiss the parent's allegations relating to the 2009-10 school year based on the statute of limitations (Tr. pp. 1-58). Subsequently, the IHO advised the parties on the record that he was dismissing the parent's complaints relating to the 2009-10 school year because the parent "knew or should have known about alleged action[s] that form[ed] the basis for that particular complaint" and neither exception to the limitations period applied (Tr. p. 82). In addition, the district conceded that it did not offer the student a FAPE for the 2010-11 school year (id.).

An impartial hearing convened on June 7, 2012 and concluded on August 3, 2012 after two days of hearings (Tr. pp. 82-230).[7] In a decision dated October 16, 2012, the IHO determined that Winston Prep was an appropriate placement for the student and that equitable considerations favored awarding the parent reimbursement for the costs of the student's tuition at Winston Prep and for the costs of privately-obtained related services, including speech-language therapy, OT, PT and counseling (IHO Decision at pp. 11-12). The IHO also found that the parent was entitled

[5] The hearing record indicates that the due process complaint notice was filed on September 7, 2011 (Tr. pp. 7-8).

[6] The parent apparently withdrew her request for reimbursement for the costs of the student's attendance at Maplebrook for July 2011 (see IHO Ex. I at pp. 31-32).

[7] The August 3, 2012 hearing was held to memorialize the admission of evidence and discuss submission of the parties' post hearing briefs, during which the district objected to the parent's post hearing brief on the basis that it exceeded the permitted page length and included exhibits that had not been introduced into evidence (Tr. pp. 209-229; see IHO Decision at p. 5). The IHO accepted the parent's post hearing brief, but apparently rejected the exhibits attached thereto (Tr. pp. 224-26; IHO Ex. I).

to recoup the costs of the privately obtained July 2010 evaluation (id.). However, the IHO denied the parent's request for reimbursement for the costs of private tutoring and the costs of the student's attendance at Maplebrook (id. at p. 12).

Regarding the IHO's determination that the parent's claims related to the 2009-10 school year were barred by the statute of limitations, the IHO explained that the parent's July 22, 2009 letter to the district rejected the district's proposed placement and that none of the district's actions after that date tolled the two-year statute of limitations (IHO Decision at pp. 4-5). The IHO found that the district's actions after the July 22, 2009 letter were a response to the parent's request for a reevaluation and did not constitute misrepresentations made by the district that prevented the parent from timely filing a request for due process (id.). The IHO also acknowledged that the parent raised pendency as an issue during closing statements, but rejected the parent's pendency claims as being outside the scope of the hearing (id. at p. 5).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that pendency was outside the scope of the impartial hearing, that the parent's claims related to the 2009-10 school year were time-barred, and that the parent was not entitled to reimbursement for the costs of tutoring services or the services provided by Maplebrook in July 2010.[8]

The parent asserts that the IHO erred in dismissing her claims related to the 2009-10 school year as time-barred. The parent argues that because her July 22, 2009 letter requested a reevaluation of the student and a reconvene of the CSE, it triggered an obligation on the part of the district to either reevaluate the student or provide the parent with notice that the district was refusing to reevaluate the student or change the student's educational placement. The parent further argues that because the district was obligated to respond to her letter, her claims against the district were not ripe for adjudication and therefore did not accrue until the district responded or a reasonable time period had passed. The parent alleges that she was not aware that the district would not meet its obligations until at least after the start of the 2009-10 school year, which was within the two years prior to the parent's filing of the due process complaint notice.

As an alternative, the parent argues that her pendency claims are not subject to the district's statute of limitations defense and that the IHO erred in failing to address them. The parent asserts that she did not have to raise pendency as an issue in her due process complaint notice because the due process complaint notice included the factual statements upon which the parent based her pendency claims, she notified the district in advance of the August 3, 2012 hearing that she intended to raise pendency as an issue, and pendency may be raised at any point in the proceedings. The parent argues that Winston Prep was the student's placement for the purposes of pendency for the 2009-10 school year because an unappealed 2008 IHO decision found Winston Prep to be an appropriate placement for the student for the 2005-06 and 2006-07 school years, the parents rejected the IEPs developed for the 2007-08 and 2008-09 school years, and the parent requested

[8] Prior to the filing of the parent's petition, but after the filing of the parent's notice of intention to seek review, the district filed a petition with this office seeking review of the same IHO decision, which was designated as Appeal No. 12-220. Because the parent had already filed her notice of intention to seek review, the district's petition under Appeal No. 12-220 was returned to the district and the proceedings were consolidated under Appeal No. 12-222 as explained in a letter to the parties dated November 28, 2012.

an impartial hearing for those school years, which was pending at the beginning of the 2009-10 school year.

The parent also argues that the IHO erred in denying her requests for reimbursement for tutoring services and for the costs of the student's tuition at Maplebrook. The parent asserts that 1:1 at-home tutoring as a related service was appropriate and necessary for the student to complete her homework and obtain an educational benefit from it. In addition, the parent asserts that Maplebrook was appropriate, asserting that it was recommended by Winston Prep and provided the student with transition services through a transitional supportive living environment which was recommended in the private evaluation.

The district answers, denying the allegations contained in the petition. In response to the parent's pendency claims, the district asserts that the parent is attempting to enforce pendency rights arising from a prior proceeding, that the IHO and SRO lack jurisdiction to address such claims, that the parent should have raised those claims in the due process complaint notice, and that because the prior proceeding was settled, res judicata barred the parent from raising the issue of the student's pendency during that proceeding in this proceeding.

The district also cross-appeals the IHO's determination that Winston Prep was an appropriate placement, asserting that the parent did not meet her burden of proving that Winston Prep provided educational instruction specially designed to meet the unique needs of the student. Specifically, the district alleges that the only teacher who provided the student with specialized instruction did not have any special education qualifications, that the documentation presented by the parent from Winston Prep was generic and not tailored to the student's needs, and that the curriculum was too difficult for the student. The district further asserts that Winston Prep is inappropriate because it did not provide any of the student's related services and because the related services provided were insufficient to meet the student's needs. The district also cross-appeals the IHO's determination that equitable factors weigh in favor of granting the parent's requested relief. Specifically, the district alleges that equitable factors weigh against granting relief because the parent did not in good faith consider placing the student in a public school and did not provide the district with sufficient notice of her reasons for rejecting the IEP.

The parent answers the cross-appeal, denying the allegations contained in the cross-appeal and asserting that Winston Prep was an appropriate placement for the student. The parent alleges that Winston Prep was not a unilateral placement, but was an agreed upon placement between the parent and the district as a result of the prior 2008 IHO decision. The parent also asserts that Winston Prep provided the student with specially designed instruction and that all of the educational components provided by the parent, including Winston Prep, Maplebrook, at-home tutoring, and related services, are appropriate for the student when considered together. Regarding equitable considerations, the parent asserts that she acted in good faith and alleges that the district acted in bad faith, noting that the district ignored her letter requesting a new CSE meeting.

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]).

Because the district conceded that it did not offer the student a FAPE for the 2010-11 school year, I need not address this issue and will move on to the issue of whether the parent's unilateral placement of the student was appropriate.

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2nd Cir. 2006]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), that is, the private school must provide 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). 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. at 13-14). 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], abrogated on other grounds by Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]). "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 at 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the

child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

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. Preliminary Matters

1. Timeliness of Appeal for Claims Related to 2009-10 School Year

As an initial matter, the evidence in the hearing record supports the IHO's decision that the parent's allegations related to the 2009-10 school year fell outside the scope of the IDEA's statute of limitations. The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i];

Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir.2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013]; R.B. v. Dept. of Educ., 2011 WL 4375694, at * 2, *4 [S.D.N.Y. Sept. 16, 2011]). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 W.L. 4375694, at * 6).

As a basis for alleging that the student was denied a FAPE for the 2009-10 school year, the parents' due process complaint notice incorporated a 25-page letter dated July 22, 2009 raising a number of allegations related to the development of the June 2009 IEP, the sufficiency of the June 2009 IEP, and the district's selection of a school site (Answer Ex. 1 at pp. 7-31). The due process complaint notice also alleged that the district evaluated the student in August 2009 and that the parent received a copy of the evaluation report on August 31, 2009 (id. at p. 4). As the parent had knowledge of her objections to the June 2009 IEP and should have had knowledge of her objections to the August 2009 evaluation more than two years prior to filing the due process complaint notice on September 7, 2009, the parent's allegations related to the June 2009 IEP and the August 2009 evaluation are time-barred (see G.W., 2013 WL 1286154, at *17).[9]

In order to avoid the statute of limitations the parent constructs a creative, yet ultimately unpersuasive argument. The parent asserts that her July 22, 2009 letter was a request for a reconsideration of the June 2009 IEP by the CSE and that the parent could not have initiated a due process hearing until the district either reconvened the CSE or provided the parent with prior written notice explaining its refusal to change the student's educational placement. However, the parent's argument is unavailing, as her claims were ripe for challenge at the same time that they accrued for purposes of the statute of limitations—when she "discovered the alleged denials of FAPE" (Somoza, 538 F.3d at 115-16). The parent had the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" upon discovering an alleged violation (20 U.S.C. §1415[b][6][A], [B]; Educ. Law §4404[1][a]; 34 CFR 300.511[a]; 8 NYCRR 200.5[i]).

Although the parent does not allege that either of the exceptions to the statute of limitations apply, the parent's assertion that the district did not provide the parent with prior written notice

[9] While the parent argues that her claims regarding the evaluation could not have accrued when she received the evaluation report on August 31, 2009 because she needed time to review it, the parent does not identify any authority regarding a prescribed period of time to review it that would toll the two-year statute of limitations, and it appears that she should have known what her objections were to the evaluation prior to September 7, 2009—the date two years prior to the filing of the due process complaint notice (but see K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16-* [E.D.N.Y. Aug. 6, 2014] [holding that certain claims did not accrue until a subsequent evaluation provided additional information about the student's needs]). To the extent the IDEA explicitly contemplates a particular process to be followed by parents in the event that they disagree with a district evaluation of their child (20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), and the parent was able to express her dissatisfaction with the August 2009 district evaluation of the student prior to obtaining the July 2010 evaluation (see Answer Ex. 1 at pp. 33, 36-37, 39-40), the reasoning of K.H. is not applicable in this instance.

stating its refusal to change the student's educational placement might have been more properly framed as a request to apply the "withholding of information" exception to the statute of limitations (see 20 U.S.C. § 1415[f][3][D]; Educ. Law § 4404[1][d]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). Courts have interpreted the "withholding of information" exception to the statute of limitations as applying to the requirement that parents be provided with certain procedural safeguards required under the IDEA, including prior written notice and the procedural safeguards notice (D.K. v. Abbington Sch. Dist., 696 F.3d 233, 246 [3rd Cir. 2012]; R.B., 2011 W.L. 4375694, at * 6; D.G. v. Somerset Hills Sch. Dist., 559 F. Supp. 2d 484, 492 [D.N.J. 2008] [applying the exception where district failed to provide a parent who had requested an evaluation with either prior written notice explaining why the district refused to evaluate the student or a procedural safeguards notice]). However, even if the parent's arguments were presented as such, the district responded to the parent's request for an evaluation contained in the July 22, 2009 letter by evaluating the student in August 2009 and the parent does not allege that she was not provided with a copy of the procedural safeguards notice (Answer Ex. 1 at p. 4).

Additionally, the parent's request for an evaluation of the student is a separate and discrete claim from her claim that the student was denied a FAPE for the 2009-10 school year. The parent asserts that she met with a district representative on September 15, 2009, discussed the August 2009 evaluation, and that during that meeting she informed the district she intended to obtain an independent educational evaluation (IEE) (Answer Ex. 1 at pp. 5, 37, 40). The parent's due process complaint notice included a request for reimbursement for the cost of the July 2010 IEE, asserting that the parent arranged for the IEE after the district agreed that its evaluation was inappropriate (id. at p. 5). These facts support the parent's claim for reimbursement for an IEE, but do not assert a basis for a denial of FAPE outside of the allegations already included in the parent's July 22, 2009 letter (id. at pp. 7-13). Accordingly, while the parent's claim for an IEE may have been within the limitations period, the IHO properly dismissed the parent's claims asserting a denial of FAPE for the 2009-10 school year (see e.g., SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *6-*8 [S.D.N.Y. July 14, 2004] [declining to apply the continuing violation doctrine to claims under the IDEA]).[10]

2. Scope of Review—Pendency

As an alternative means of avoiding the district's statute of limitations defense, the parent asserts that she is entitled to tuition reimbursement pursuant to an unappealed IHO decision dated March 14, 2008, establishing the student's pendency (stay put) placement during a separate due process hearing commenced prior to the start of the 2009-10 school year (2009-10 proceeding) regarding the 2007-08 and 2008-09 school years.[11] However, under the circumstances herein, the IHO properly dismissed the parent's claim for pendency as being outside the scope of the impartial

[10] The IHO awarded the parent reimbursement for the cost of the IEE and the district does not appeal the IHO's decision on that point (IHO Decision at pp. 11-12). Therefore the IHO's determination regarding the IEE has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[11] A copy of the March 2008 IHO decision was not included in the hearing record. Although the parent apparently attached a copy of the decision as part of her post hearing brief, it was not included with the hearing record and the IHO's decision does not reflect its inclusion in evidence (Tr. pp. 222-24; IHO Ex. I; see IHO Decision at p. 15).

hearing because the parent did not raise it in her due process complaint notice (IHO Decision at p. 5).[12]

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. §1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

Recently, the Second Circuit noted that "the IDEA's pendency provision entitles a disabled child to 'remain in [his] then-current educational placement' while the administrative and judicial proceedings . . . are pending" (T.M. v. Cornwall Cent. School Dist., 2014 WL 1303156, at *2 [2d Cir. Apr. 2, 2014], quoting 20 U.S.C § 1415[j]; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *6 [S.D.N.Y. Dec. 23, 2013]; K.L. v. Warwick Valley Cent. Sch. Dist., 2013 WL 4766339, at *2 & n.4 [S.D.N.Y. Sept. 5, 2013]). The Court also found that districts are required to implement a student's pendency placement "until the relevant administrative and judicial proceedings are complete," providing further support for the conclusion that a student's entitlement to his or her stay-put placement does not arise upon a parent's expressions of disagreement with a program but is triggered only upon the formal commencement of administrative due process proceedings, the filing of the due process complaint notice (T.M., 2014 WL 1303156, at *20; see M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124 [3d Cir. 2014] [holding that a student's entitlement to a stay put placement comes into existence when "proceedings conducted pursuant to the IDEA begin"]; A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] ["a stay-put placement is effective from the date a student requests an administrative due process hearing"]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011] [finding that the "plain

[12] The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B., 2011 WL 4375694, at *6-*7; M.P.G., 2010 WL 3398256, at *8).

language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that a student's pendency entitlement was "triggered . . . when [the parents] filed the due process demand notice"]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]).

As pendency has the effect of an automatic injunction, it is normally not necessary for a parent to bring a separate action for pendency and a parent may raise a claim for pendency at any point during the hearing (M.R., 744 F. 3d at 123; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]). However, in this instance, the parent's due process complaint notice is dated September 4, 2011—after both school years for which the parent is now seeking reimbursement had passed (Answer Ex. 1). In effect, the request for pendency seeks to enforce an automatic injunction in the prior 2009-10 proceeding during the pendency of the current proceeding. Accordingly, as the parent is not seeking an automatic injunction to maintain the status quo in this action, but is instead seeking reimbursement for the cost of the student's tuition during the 2009-10 and 2010-11 school years based on what would have been an automatic injunction in the 2009-10 proceeding, the claim for pendency from a different proceeding should have been raised in the due process complaint notice in order to afford the district fair notice and a reasonable opportunity to respond and prepare a case (see 20 U.S.C. §1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

While the parent concedes that the due process complaint notice did not assert pendency as a basis for relief, the parent contends that it included sufficient facts to place the district on notice of the parent's intention to seek reimbursement based on the 2009-10 proceeding.[13] However, upon review, the due process complaint notice cannot reasonably be read to place the district on notice of a claim for reimbursement upon a pendency basis for the 2009-10 proceeding (Answer Ex. 1).[14] The only reference to the 2009-10 proceeding contained in the due process complaint notice and its accompanying exhibits, totaling 52 pages, is an e-mail between the student's parents regarding a resolution meeting (Answer Ex. 1 at p. 36).

Additionally, the parent did not raise the pendency theory until the submission of her post hearing brief on the last day of the impartial hearing (Tr. pp. 215-25; IHO Ex. I at pp. 5-19).[15] Furthermore, the only evidence regarding pendency during the prior proceeding were three exhibits attached to the parent's post hearing brief, which the IHO excluded and which the parent did not submit for consideration on appeal (Tr. pp. 224-26; IHO Ex. I). Accordingly, there is insufficient documentary evidence in the hearing record as to the student's particular program or

[13] While at least one Court has held that a formal demand for tuition reimbursement based on pendency is not necessary "when there is no viable response to that demand," that Court was answering the question of when a claim for tuition reimbursement based on pendency accrues, rather than the sufficiency of the parties' pleadings (M.R., 744 F.3d at 123-24).

[14] Perhaps this is because the parent asserts she "first became aware that pendency supported her case when she was conducting further research . . . for purposes of her closing brief" (Pet. ¶ 16).

[15] The final hearing date was scheduled for the purposes of submitting post hearing briefs and addressing "some issues that have arisen since the last hearing" (Tr. p. 209).

special education services as of the start of the 2009-10 school year to rule on the issue in this proceeding.

As the parent is not seeking an injunction or reimbursement for tuition costs incurred during the pendency of this proceeding, the parent did not raise pendency during the prior proceeding as a basis for relief in this proceeding until the submission of her post hearing brief, it would not be proper to address the parent's claims related to pendency during the 2009-10 proceeding in this action. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).[16] While I do not address the merits of the parent's claims for pendency as they are not properly within the scope of this proceeding, it is worth noting that pendency operates as an automatic injunction and it may still be possible for the parent to raise her pendency claim in a separate administrative proceeding (see M.R., 744 F.3d at 122-23).[17]

B. Unilateral Placement

Since the district has conceded that it did not offer the student a FAPE for the 2010-11 school year, I next turn to the district's arguments that the parent's unilateral placement was not apropriate. The parent provided the student with a package of services for the '2010-11 school year, including (1) Winston Prep; (2) outside related services, including one hour each per week of PT, OT, speech-language therapy, and counseling; (3) one hour of tutoring services for four days per week; and (4) Maplebrook in July 2010 for transition services (Tr. pp. 148-49, 156, 161, 164-65; IHO Ex. VI; Answer Ex. 1 at p. 6). However, before addressing the program and services

[16] As the Second Circuit has explained, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parent] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 n.2 [S.D.N.Y, May 14, 2013], aff'd 2014 WL 2748756 [2nd Cir. June 18, 2014] [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]).

[17] Some courts have also indicated that a parent may bring an action for pendency without first exhausting administrative remedies (Murphy v. Arlington Cent. Sch. Dist., 297 F3d 195, 199-200 [2nd Cir. 2002] [administrative process is inadequate given the time sensitive nature of stay-put rights]; but see M.M. v. New York City Dep't of Educ., 2010 WL 2985477 at * 10-11 [S.D.N.Y. July 27, 2010] [applying exhaustion requirement to claim for reimbursement under stay-put provision]).

provided by the parent during the 2010-11 school year, some review of the background information relating to the student's academics and functioning is in order.

In order to determine the student's educational needs for the 2010-11 school year, the parent arranged for an IEE, which was completed in July 2010 (Tr. pp. 89-90; Parent Ex. A at p. 1). The evaluation report indicates the student had a significant medical history for a seizure disorder and athetoid cerebral palsy, characterized by involuntary and uncontrollable muscle movements (id. at pp. 1-2). The report also indicates the student was prescribed medicine to control her seizures and that she experienced side effects from the medicine such as "brain fuzz," fatigue, and an exacerbation of symptoms associated with her diagnosis of cerebral palsy (id. at pp. 2-3).

Results of cognitive assessments yielded a general ability index score of 97, identifying the student as one who performed better than 42% of individuals of her age on a variety of measures associated with verbal and nonverbal intellectual functioning (Parent Ex. A at p. 3). The student's perceptual reasoning was found to be solidly in the average range and the examiners identified strengths in aspects of her verbal intelligence that involved ability to reason, draw conclusions, and understand how details could be organized into meaningful concepts and categories (id. at pp. 3-4). In contrast, the student showed weaknesses in aspects of verbal intelligence that involved crystallized knowledge (id. at p. 3). The examiners explained that the student entered new situations with a smaller base of knowledge and vocabulary, and built her knowledge base more slowly than others of her age (id. at pp. 3-4).

The examiners observed in the student a more limited capacity to sustain attention over time compared to most young adults and found that she was slow to execute tasks because of her motor deficits (Parent Ex. A at p. 4). With regards to executive functioning, the student's parents and teacher reported significant difficulties with task initiation, planning, and organization (id.). Formal testing supported these observations, as the examiners found significant difficulties with planning a series of steps ahead of time before carrying out a task, as well as with self-monitoring task performance (id.). Regarding memory skills, the student showed stronger and more consistent skills for holding visual information and weaker skills for retaining verbal and auditory information (id.). Further, the assessment revealed the student learned information in smaller chunks (id. at p. 5).

Academic assessments revealed the student's reading skills to be in the average range with a notable weakness in reading speed (Parent Ex. A at p. 5). The student demonstrated a number of weaknesses in the area of mathematics including; reasoning, problem solving, and tackling real world problems (id.). The examiners further noted the student's speed in completing math problems and her facility to recall math facts was very slow (id.). In the area of written language, the examiners found that the student's motor deficits made it difficult for the student to write with reasonable speed and legibility and typing was also found to be a slow process for her (id. at p. 6). According to the examiners, the student's teacher reported that the student was below grade level in reading, writing and math skills (id.). Following administration of language screening subtests, the examiners reported that the student presented with dysarthric speech, yet the content, meaning, and grammar in the student's speech was age appropriate (id. at p. 5).[18] The examiners noted,

[18] The parent testified that the student's dysarthria affected her ability to physically articulate during speaking, due to low oral muscle tone (Tr. pp. 159-60).

though the student adequately "derives the gist" of what is said to her, she failed to understand and remember particular facts (id.).

According to the examiners, the student continued to require substantial support in order to compensate for deficits in attention, memory and learning, executive functioning, and language and auditory processing (Parent Ex. A at p. 7). The examiners recommended accommodations and program modifications including extended time, instructions repeated and clarified, availability to a computer or scribe, use of a recording device, and copies of class notes (id. at pp. 7-8). The examiners also recommended that the parents consider incorporating vocational training and opportunities into the student's educational plan, consider a medication consultation, obtain an auditory processing evaluation and a comprehensive assistive technology evaluation, and consider family-based therapy (id. at p. 8).

1. Winston Preparatory School

The parent reenrolled the student at Winston Prep for the 2010-11 school year, the seventh consecutive year the student attended the school (Parent Ex. H at p. 1; MM at pp. 14-15). The parent described Winston Prep as being specifically designed for students "who have learning issues" (Tr. p. 127). The parent testified that the student is in small classes with other students who have similar learning issues and management needs (Tr. pp. 86-87, 143). In addition, Winston Prep offered a specialized "Focus" class for one school period per day, in which instructors worked with students "in their particular area of difficulty" and coordinated with other teachers, therapists, and parents (Tr. pp. 127-28; see Parent Ex. G at pp. 2-3).

According to a fall 2010 Winston Prep report, Winston Prep created a learning profile for the student based on the July 2010 IEE, informal assessments, conferencing with previous teachers and initial observations (Parent Ex. H at p. 1). The report indicated the student's Focus curriculum would target remediation in the areas of reading comprehension, written expression, and academic problem solving (id.). The specific goals the student's Focus teacher developed for the student included strengthening vocabulary, expanding critical thinking skills, implementing time-management strategies, developing efficient note-taking and study skills, and improving academic awareness and independence (id. at pp. 1-2). To achieve those goals, the Focus teacher identified specific instructional approaches and strategies for faculty to use with the student that included active reading (taking margin notes, highlighting relevant supporting details, and underlining unfamiliar vocabulary words), reciprocal teaching (asking questions, clarifying information, making predictions, and summarizing what she has read), multisensory techniques, activities targeting critical thinking skills, graphic organizers, outlines, pre-writing strategies, and editing checklists, timelines and schedules, note-taking and memorization, self-monitoring and self-reflections (id. at pp. 2-3).

According to the Winston Prep final report for the 2010-11 school year, to address the student's reading comprehension needs staff used a "life skills approach" and current event articles relevant to the student (Parent Ex. J at p. 2). The student participated in active reading strategies such as taking margin notes to identify the main idea and relevant supporting details (id.). The report indicated that the student needed the use of strategies such as breaking information down into smaller chunks, scaffolding, and giving explanations and examples (id.). The student benefitted from paraphrasing of discussions and reading materials, rereading text, and asking questions to monitor her comprehension (id.). The student was also encouraged to use a dictionary

or internet search to expand her knowledge base (id.). Winston Prep also provided the student with opportunities to use reading skills in the community (id.).

The 2010-11 final report indicated that in the area of written expression, the student required visual supports, graphic organizers, direct modeling, and direct instruction (Parent Ex. J at p. 2). Instructors explicitly taught the student to create complex sentences, and sentence activities targeted the student's ability to develop ideas and improve coherence and fluidity (id.). The student "workshopped" drafts with her instructor, and engaged in composing complex sentences, outlining, taking paraphrased notes, typing structured paragraphs, and writing more independently (id. at p. 4). In the area of academic problem solving and time management, the report stated that the student utilized teacher-generated worksheets to keep track of how long she spent on assignments, and planned events with teacher guidance (id. at p. 3).

According to the fall 2010 report, to address the student's needs in mathematics Winston Prep designed a curriculum to focus on strengthening her foundational skills, expanding her problem solving skills, and helping her to recognize the connection to practical applications (Parent Ex. H at p. 4). Identifying the student as a visual learner and noting the student's weaknesses in math reasoning, processing speed, and memory, Winston Prep afforded the student accommodations such as broken-down and simplified information, graphic organizers, and visuals such as introducing concepts with the use of a projector (id. at pp. 4-5). During the school year the instructor provided the student with teacher-generated worksheets to develop her understanding of various math concepts, and the student engaged in activities to improve skills in the areas of written expression, problem solving, solving one-step and multi-step equations, and self-monitoring (Parent Ex. J at p. 4). The final report also indicated that the student completed teacher-guided classwork and received direct assistance to "clear any confusion" (id.). Further, the student completed monthly self-reflection assignments that required her to reflect on her strengths, areas of improvement and successful strategies (id. at p. 5).

Based upon the foregoing, I find that the hearing record establishes that, relative to the 2010-11 school year, Winston Prep identified the student's needs in reading comprehension, written expression, and mathematics, including math reasoning, processing speed, and memory, and developed a special education program that provided educational instruction specially designed to meet the unique needs of the student, supported by such services as were necessary to permit the student to benefit from instruction (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).[19]

[19] While the district asserts that the student's academic struggles during the 2010-11 school year were an indication that the student's placement was inappropriate, the hearing record supports the IHO's determination that the student's struggles in school were due to non-academic stressors (Tr. pp. 152-54; Parent Exs. JJ-LL). The hearing record also does not indicate a complete lack of progress; as although the student's grades in Literature and Writing did drop during the 2010-11 school year, she maintained her grades in Math, an area in which she traditionally struggled, and in History, Science, Focus, Art, and Physical Education (compare Parent Ex. I, with Parent Ex. M). In addition, a finding of progress or a lack thereof, while a relevant factor to consider, cannot be the determining factor in deciding whether a student's unilateral placement is appropriate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 F. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D. D-S v. Southold Union Free Sch. Dist., 506 F. App'x 80, 82 [2d Cir. Dec. 26, 2012].

2. Related Services

As an initial matter, contrary to the district's arguments, the related services obtained privately by the parent are a part of the unilateral placement and are a relevant consideration in the analysis of the appropriateness of the unilateral placement (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014] [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365).

Although the district agrees that the student exhibited needs for OT, PT, speech-language therapy, and counseling, the district argues that the related services provided by the parent were insufficient to meet the student's needs. However, a parent need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9). In this instance, the hearing record indicates that during the 2010-11 school year the student received related services of OT, PT, speech-language therapy, and counseling, each individually for one hour per week (Tr. pp. 148-50, 156-57, 161; Parent Exs. Q; R; S).[20] While the parent acknowledged that the district had suggested the student might benefit from more related services than what the parent provided, she also testified that the amount of related services that could be provided to the student was limited by the student's fatigue and a lack of time during the day (Tr. pp. 148-49). Upon review of the hearing record, although the parent did not provide the same amount of related services as called for in the May 2010 IEP, as explained below, the related services provided by the parent addressed the student's needs.[21]

A spring 2010 PT progress report identified the student's needs in the areas of negotiating uneven surfaces, supporting her weight with arms extended, and balance (Parent Ex. O at p. 1). According to a spring 2011 PT report, during the 2010-11 school year the student worked on running, negotiating uneven surfaces, single leg stance, core stabilization, supporting her weight with extended arms, and ascending and descending stairs (Parent Ex. R at p. 1). A spring 2010 OT progress report identified the student's needs in the areas of passive and active range of motion,

[20] The May 2010 IEP recommended that the student receive one 40-minute individual session of counseling per week, one 40-minute session of counseling per week in a group of three, two 40-minute individual sessions per week of OT, three 40-minute individual sessions per week of PT, and two 40-minute sessions per week of speech-language therapy in a group of three (Parent Ex. N at p. 28).

[21] It should also be noted that the district bases its objections to the related services on the recommendations contained with the May 2010 IEP, which was rejected by the parent. However, the district has conceded that it did not offer the student a FAPE for the 2010-11 school year and has declined to submit any testimony or other evidence regarding the student's special education needs (Tr. p. 82). Under these circumstances, the district cannot controvert the evidence submitted by the parent indicating the student's needs and the extent to which the parent's unilateral placement either addressed or failed to address those needs (see A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). As the district does not point to anything in the hearing record other than the May 2010 IEP indicating a need for a part-time health paraprofessional, the district's argument that Winston Prep was inappropriate because it did not provide the student with a part-time health paraprofessional also fails for this reason.

stretching, and joint mobilization (Parent Ex. P at p. 1). Additionally, the spring 2010 OT progress report recommended that the student work toward improving independence in the areas of dressing, personal hygiene, and hand writing (id. at pp. 1-2).[22] In her testimony, the parent explained that OT was important for the therapeutic exercises, such as the student performing various exercises to maintain her fine motor abilities (Tr. pp. 147-48).

In the area of speech and language skills, the 2010 evaluation report indicated that the student presented with dysarthric speech and failed to understand and remember particular facts said to her (Parent Ex. A at p. 5). An undated related service provider report prepared by a speech-language pathologist acknowledged the student's oral motor weakness and limited ability to articulate particular sounds (Parent Ex. S at pp. 1-2).[23] The speech-language report showed that the student worked toward the goal of improving oral motor strength and coordination for speech purposes (Parent Ex. S at pp. 2-3).[24]

Regarding counseling, the hearing record indicates that a therapist began working with the student when she was three years old, and that during the 2010-11 school year the same therapist generally worked with the student once per week for a 60-minute session (Tr. pp. 157, 163; Parent Exs. Q). In a letter dated March 2011, the student's therapist shared a short description of the student's current areas of concern and stated that she "focused on the various psychosocial issues regarding [the student's diagnosis of] cerebral palsy, school life, and family life" (Parent Ex. Q). Additionally, the parent testified that a Winston Prep counselor was available to the student for times when the student was upset or an "emergency" occurred during the day (Tr. pp. 155-57; see Parent Exs. JJ; KK).[25]

As the district and the parent agree that the student had needs with regard to OT, PT, speech-language therapy, and counseling, and as the hearing record indicates that the parent provided related services that, although less than the amount recommended by the district, were reasonably calculated to address these needs, in this instance the related services form part of an appropriate program (C.L., 744 F.3d at 838-39).

[22] At the time of the hearing in June 2012, the parent testified that she has provided the student with one-hour per week of OT (Tr. p. 148). Although the parent does not specifically refer to the provision of OT during the 2010-11 school year, because the hearing record includes a spring 2010 OT report indicating recommendations for the upcoming 2010-11 school year and the district does not assert on appeal that the parent did not provide OT, it is reasonable to assume based on the parent's testimony that the student received OT during the 2010-11 school year (Tr. pp. 147-48; Parent Ex. P at pp. 1-2).

[23] Although undated, the related service report reflects the student's date of birth and her chronological age at the time of the report, indicating that the speech-language pathologist prepared the report in approximately March 2011 (Parent Ex. S at p. 1).

[24] In addition, the 2011 Winston Prep final report noted that the student worked on paraphrasing discussions and readings to monitor her comprehension (Parent Ex. J at p. 2).

[25] The parent further noted that the school counselor and the private therapist coordinated about the student when a "situation" arose (Tr. p. 156).

3. Tutoring

The parent contends that tutoring services provided to the student after school should also be reimbursed as part of the package of services creating the unilateral placement. However, the parent has not provided sufficient information regarding the tutoring services to indicate whether they were addressing the student's special education needs as expressed in the 2010 evaluation. Although the parent testified that the 2010 evaluation indicated a need for tutoring due to the student's "memory issues" and indicated that the tutor retaught material and acted as a scribe, the parent did not provide details as to how the tutor was addressing the student's needs and the student's tutor did not testify at the hearing (Tr. pp. 164-65, 167).

The information contained in the hearing record indicates that the tutor helped the student with homework in a general way (Tr. p. 181). For example, in a September 2010 e-mail the tutor outlined a weekly schedule indicating that the time allotted would be sufficient to assist the student with homework and college applications (Parent Ex. DD). In addition, the parent testified that the tutor coordinated with the student's Focus teacher at Winston Prep "to make sure they were on the same track" (Tr. p. 181). However, there is nothing in the hearing record from the tutor or Winston Prep to indicate what was discussed or what type of coordination occurred. Indeed, invoices from the tutor were marked with an "N/A" with regard to "Consultation/Visit to School" and "Consultation with School" (Parent Ex. MM at pp. 20-30).

Accordingly, although the student may have benefited from the tutoring service, the IHO correctly found that the parent did not meet her burden of establishing that the tutoring service provided the student with educational instruction specially designed to meet the student's unique needs (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365; see also Rowley, 458 U.S. at 188-89).[26] In addition, the hearing record does not reflect that the tutoring was uniquely tailored to meet the student's individual needs, but was more akin to the "kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115).

4. Transition Services

The parent also seeks reimbursement for the cost of Maplebrook, a separate program that provided transition services to the student during summer 2010. The parent testified that she placed the student in the Center for the Advancement of Postsecondary Studies (CAPS program)

[26]In the event that the parent had submitted sufficient evidence to show that the tutoring services did provide specially designed instruction to meet the student's unique needs, there is nothing in the hearing record indicating that the student required those services to receive an educational benefit and reimbursement for those services could also have been denied on equitable grounds. While a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011]; see Jennifer D. v New York City Dept. of Educ., 550 F. Supp. 2d 420, 436 [S.D.N.Y. 2008]).

at Maplebrook because of concerns that the student had not received transition services and after an advisor at Winston Prep recommended it to her (Tr. pp. 91-92).[27]

In this instance, the 2010 evaluation establishes the student's needs for transition services, recommending "incorporating vocational training and opportunities into [the student's] educational plan" and "the possibility of placement in a transitional supportive learning environment" (Parent Ex. A at p. 8). However, the parent has not provided sufficient evidence to identify whether Maplebrook provided instruction specially designed to meet the student's unique needs in this area (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365).

Transition services are defined as a "coordinated set of activities . . . to facilitate movement from school to post-school activities" which must be based on a student's "strengths, preferences and interests, and shall include instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation" (Educ. Law § 4401[9]; 8 NYCRR 200.1[fff]; see (20 U.S.C. §1401[34]; 34 CFR 300.43). The only documentation submitted by the parent regarding Maplebrook is a generic mission statement (Parent Ex. C), a chart of the school's curriculum (Parent Ex. D), an August 2010 letter summarizing the 2010 summer session (Parent Ex. E), and various materials the parent printed from the school's website (Parent Ex. F). While the parent has provided information regarding generic activities provided at Maplebrook, such as internships, daily living skills instruction, meal preparation, personal budgeting, and so on, the parent has not described how those activities met the student's transition needs or whether they were based on the student's strengths, preferences, and interests (Tr. pp. 92-93; Parent Ex. E). In addition, although the parent indicated the student participated in a work setting during the summer, she did not provide any details to form a basis as to whether it was an appropriate setting for the student (Tr. p. 95).

Accordingly, while it is possible that Maplebrook may have provided the student with appropriate services to aid her in transitioning into post-school activities, there is insufficient evidence in the hearing record to indicate what services the student received at Maplebrook and whether or not those services were appropriate to address her unique needs. Accordingly, the IHO was correct to deny the parent reimbursement for the cost of the student's tuition at Maplebrook (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365).[28]

C. Equitable Considerations

As the district concedes that it did not offer the student a FAPE for the 2010-11 school year and the parents' unilateral placement of the student at Winston Prep along with outside related

[27] The materials provided by the parent describe Maplebrook as a "coeducational international boarding and day school for students with learning differences and/or attention deficit disorder (ADD)" (Parent Ex. F at p. 1). The CAPS program is described as "an extension of the pre-vocational training" students receive at Maplebrook (id. at p. 5).

[28] As with the tutoring services above, the hearing record does not contain any evidence that the services provided by Maplebrook were necessary to provide the student with an educational benefit and denial of reimbursement for those services may have been warranted on equitable grounds, as the district is not required to fund services designed to maximize the benefits received or provide all services that may be desired by loving parents (see Rowley, 458 U.S. at 189, 199; Garden Grove, 635 F. 3d at 1160; Walczak, 142 F.3d at 132).

services 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; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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]).

The district contends that equitable considerations should preclude or diminish an award of relief in this case, asserting that the parents' 10-day notice of unilateral placement, dated August 9, 2010, was insufficient as a matter of law because it did not indicate specific allegations regarding the purported defects in the program offered to the student in the 2010-11 IEP.

The parent's August 2010 letter requested that the CSE reconvene to review the 2010 evaluation, which the parent expected to receive "very soon" (Parent Ex. CC). The letter also indicated that the parent disagreed with certain aspects of the IEP, although it did not specify what those disagreements were (id.). As a possible explanation of the parent's disagreement with the

IEP, the parent's due process complaint notice included e-mail correspondence from the parent to the district indicating the parent's objection to holding the May 2010 CSE meeting prior to completion of the 2010 evaluation of the student (Answer Ex. 1 at pp. 41, 43, 45, 48). In addition, the parent's allegations in the due process complaint notice regarding the 2010-11 school year focus on the district's failure to reconvene the CSE meeting to consider the 2010 evaluation (Answer Ex. 1 at p. 5). Based on the foregoing, although the parent's August 2010 letter did not detail specific concerns with the May 2010 IEP, the hearing record indicates that the parent provided the district with sufficient notice of her concerns related to the development of the May 2010 IEP without the CSE having access to the 2010 evaluation prior to removing the student from the district and placing her at Winston Prep (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]).[29]

The hearing record also does not support the district's allegation that equitable considerations should preclude relief because the parent had no intention of enrolling the student in a public school. There is nothing in the hearing record to indicate that the parent engaged in conduct designed to obstruct the CSE process or its ability to provide the student with a FAPE (see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 249 [S.D.N.Y. 2010]). Instead, the hearing record reflects that the parent participated in the May 2010 CSE meeting along with the student's teacher from Winston Prep, gave the district permission to observe the student at Winston Prep and for Winston Prep to share the student's records with the district, and arranged for progress reports from the student's related services providers (Parent Ex. N at p. 2; Answer Ex. 1 at p. 39, 41). The fact that the student had been at Winston Prep for over six years or that the parent had made payments to Winston Prep prior to rejecting the district's program are not sufficient, on their own, to support finding that the parent had no intention to enroll the student in a public placement (Parent Exs. H at p. 1; MM at pp. 13, 15).[30] In any event, the Second Circuit has recently held that when parents cooperate with the district, their intention to place the student privately does not constitute a basis for a denial of tuition reimbursement (C.L., 744 F.3d at 840).

VII. Conclusion

Based on the foregoing, I concur with the IHO's determinations that the parent's allegations related to the 2009-10 school year were untimely, that Winston Prep and the outside related services secured by the parent provided the student with specially-designed instruction to address her areas of need, and that equitable considerations support an award of reimbursement to the parent for the cost of the student's tuition at Winston Prep and for the outside related services of counseling, OT, PT, and speech-language therapy (see C.L., 744 F.3d at 838-39; Frank G., 459 F.3d at 365). I also concur with the IHO's decision denying reimbursement for the costs of

[29] While the parent provided a sufficient 10-day notice prior to placing the student at Winston Prep in September 2010, the parent did not provide the district with any notice prior to placing the student at Maplebrook for summer 2010 (Parent Ex. CC). The parent testified that she discussed Maplerbook during the May 2010 CSE meeting; however, she did not testify that she rejected the district's program or notified the district she intended to enroll the student at Maplebrook over the summer (Tr. pp. 106-07). Accordingly, even if I had found Maplebrook appropriate, it would be appropriate to reduce or deny the parents' requested relief regarding Maplebrook based on the parent's failure to timely notify the district of her intention to place the student there (see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]).

[30] Of the $46,800.00 in tuition, the parent only paid $5,000.00 prior to the May 2010 CSE meeting, with the remaining payments being made after the CSE meeting in May and June 2010 (Parent Ex. MM at pp. 13, 15).

Maplebrook and tutoring services as the parent has not provided sufficient evidence to establish that they provided the student with specially-designed instruction (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 14, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER