The University of the State of New York

The State Education Department
State Review Officer
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No. 13-027

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, Lisa R. Khandhar, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for his daughter's tuition costs at a nonpublic school (NPS) for the 2010-11 school year. Respondent (the district) cross-appeals from the IHO's determination to the extent that it incorrectly stated the applicable burden of proof. 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

On May 11, 2010, a CSE convened to develop the student's IEP for the 2010-11 school year (Dist. Ex. 1 at p. 1). Finding the student eligible for special education and related services as a student with a learning disability, the CSE recommended placement in a 15:1 special class in a community school as well as the following related services: one weekly 30-minute session of counseling in a group of three and two weekly 30-minute sessions of speech-language therapy in a group of three (id. at pp. 1, 10).[1]

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

In a final notice of recommendation (FNR) dated August 12, 2010, the district summarized the special education and related services outlined in the May 2010 IEP and identified the specific public school where the district would implement the student's IEP (Dist. Ex. 8).

A. Due Process Complaint Notice

In a due process complaint notice dated June 15, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. G). The parent contended that the student's "behavioral, emotional, [and] visual perceptual issues" necessitated placement in a "class [ratio] of 5 to 1" (id.). The parent also indicated that he attempted to view the assigned public school classroom but was not permitted to view the particular class the student would attend (id.). The parent further averred that the NPS offered a 5:1 staffing ratio, and that the student succeeded in this setting (id.). Accordingly, based upon the district's "inappropriate placement", the parent requested "payment" for the 2010-11 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 22, 2012 and concluded on January 7, 2013 after four days of hearing (see Tr. pp. 1-146). In a decision dated January 16, 2013, the IHO found that the district offered the student a FAPE for the 2010-11 school year and denied the parent's request for reimbursement (IHO Decision at pp. 5-6).[2]

The IHO first observed that the district relied upon a number of evaluations to ascertain the student's present levels of performance and, accordingly, based its placement recommendation of a classroom with a 15:1 staffing ratio on these levels (IHO Decision at p. 5). The IHO further noted that the special education teacher at the assigned public school "was trained in modifying . . . instruction to be at a lower grade level so that the [s]tudent could understand the material . . ." (id. at pp. 5-6). The IHO further observed that the May 2010 IEP included testing accommodations for the student (id. at p. 6). Finally, the IHO noted that, according to the testimony of the assistant principal of the assigned public school, the student was of a similar functional level to students in one of the school's 15:1 classrooms and the school could have implemented the May 2010 IEP's related services (id.). Therefore, based upon this evidence, the IHO found that the district offered the student a FAPE for the 2010-11 school year (id.). Given this finding, the IHO stated that he "need not address the [s]tudent's private placement or the equities . . ." (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by finding that the district offered the student a FAPE for the 2010-11 school year. The parent additionally argues that the NPS was an appropriate unilateral placement for the student.

The parent argues that the May 2010 IEP's recommendation of a 15:1 classroom was too large for the student, whose "behavioral, emotional[,] and cognitive issues" required placement in

[2] The date of the IHO's decision is identified as "January 16, 2012"; however, it appears that this was a typographical error (see IHO Decision at p. 6).

a "very small class" that provided "individualized attention." In support of this contention, the parent averred that a district evaluation indicated that the student "need[ed] . . . a small class no larger than 12 children", a recommendation not heeded by the May 2010 CSE. As to the appropriateness of the NPS, the parent contends that it offered the student a "very small class with individualized attention" and, further, that the student benefited from this placement. The parent also noted that the student was placed in a class of "5 or 6 children" at the NPS. Accordingly, the parent requests that the IHO's decision be reversed and that the parent be awarded "funding" for the costs of the student's education at the NPS for the 2010-11 school year.

In an answer, the district denies the parent's material assertions and contends that the IHO correctly determined that the district offered the student a FAPE for the 2010-11 school year. First, the district argues that the parent's petition does not comply with State regulations as it did not set forth its allegations in numbered paragraphs nor utilize typewritten ink. Additionally, the district argues that the parent's claim is barred by the IDEA's statute of limitations.

The district next contends that the May 2010 IEP provided the student with a FAPE for the 2010-11 school year because it addressed the student's "behavioral, emotional, cognitive, and other [needs]" and offered a placement in the least restrictive environment (LRE). The district further posits that, although such considerations are speculative as a matter of law, it could have implemented the student's IEP at the assigned public school site.

The district also avers that the NPS was an inappropriate unilateral placement for the student because it was "too restrictive" and offered no access to regular education peers. Additionally, the district argues that the parent did not establish that the student made progress in this setting. Further, the district contends that the student's teachers did not possess appropriate educational credentials to provide special instruction to the student. The district also alleges that the NPS did not meet the student's language needs because it failed to provide her with speech-language therapy. The district further argues that equitable considerations preclude an award of tuition reimbursement to the parent because he did not seriously consider a public placement and failed to provide the district with sufficient notice that he would enroll the student in a private school and seek public funding for the cost of this placement.

With respect to the parent's sought relief, the district argues that the student may not be reimbursed for the portion of the school day at NPS devoted to religious instruction; accordingly, the district argues that any reimbursement award must be reduced by "at least" 25 percent. Additionally, the parent argues that a direct payment remedy would be inappropriate under the circumstances of this case because the parent failed to introduce evidence that he was unable to pay the costs of the student's education at the NPS. Moreover, argues the district, the contract between the parent and NPS did not constitute a binding agreement between the parties and, as such, is unenforceable.

The district also interposes a cross-appeal alleging that the IHO improperly stated the district's burden of proof by implying that the district bore the burden of demonstrating the inappropriateness of the parent's unilateral placement.

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, 180-83, 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with

disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Sufficiency of Petition

First, the district avers that the petition does not comply with State regulations in that it is not "typewritten in black ink" and does not "set forth [its] allegations . . . in numbered paragraphs" (8 NYCRR 279.8[a][2], [3]). While the district is correct in this regard, the district was not prejudiced by this noncompliance and was able to formulate a response to the parent's allegations (see Ans. and Cross-Appeal at pp. 1-2). Therefore, I decline to exercise my discretion to dismiss the petition on this basis (see 8 NYCRR 279.13).[3]

2. Burden of Proof

On appeal, the district cross-appeals the IHO's determination to the extent that the IHO incorrectly stated the burden of proof in his decision. This claim is not properly presented by the district because the district was not aggrieved by any aspect of the IHO's decision. The IDEA and State regulations provide that only a party who has been "aggrieved" by the decision of IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9—*10 [S.D.N.Y. Nov. 27, 2012]). Here, the IHO's decision denied the parent's requested relief and resolved the appeal entirely in the district's favor (IHO Decision at pp. 5-6). Therefore, the district was not entitled to cross-appeal the IHO's decision in this instance (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). Even assuming for purposes of argument that it was permissible for the district to interpose a cross-appeal, it was not prejudiced by the IHO's allegedly inaccurate statement of the applicable burden of proof. The district's cross-appeal is, therefore, dismissed.

B. Statute of Limitations

Next, I turn to the district's argument that the parent's claims are barred by 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

[3] The district also raises an objection as to the timeliness by which the notice of petition was served, but indicates that it is "not urging dismissal of the [p]etition explicitly on such grounds" (Ans. and Cross-Appeal at p. 8, n. 5). Based upon this representation, the ambiguous evidence in the hearing record as to whether the IHO mailed his decision to the parties, and the fact that it appears that the parent acted in a good faith attempt to comply with State regulations, I similarly decline to exercise my discretion to dismiss the petition on this basis.

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]).

The evidence in the hearing record reveals that the district did not raise its statute of limitations defense at any point during the impartial hearing. As a result, there is no testimonial or other evidence in the hearing record that addresses this issue. It is incumbent upon parties to "raise all issues at the lowest administrative level" in order to promote a "full exploration of technical educational issues" and the development of a "complete factual record" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995]). Therefore, I find that the district waived its right to assert this defense and decline to address this argument (M.G. v. New York City Dep't of Educ., 2014 WL 229835, at *5 [S.D.N.Y. Jan. 21, 2014] ["[b]ecause the [district] did not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also E.H. v. Bd. of Educ. of Shenendehowa Central School Dist., 361 Fed. App'x 156, 158, 2009 WL 3326627 [2d Cir. 2009]; R.B., 2011 WL 4375694, at *6-*7).

C. May 2010 IEP

Turning to the May 2010 IEP, the parent asserts that the IHO erred in determining that the 15:1 special classroom recommendation in the May 2010 IEP was appropriate for the student. Specifically, the parent alleges that this classroom ratio was too large and that the student's behavioral and social/emotional needs could not be managed in a 15:1 classroom setting. Upon review of the evidence in the hearing record, I agree with the parent and find that the district failed to demonstrate how its offered placement would address the student's needs.

Although the parent does not challenge the May 2010 IEP's present levels of performance, a brief discussion of this information illuminates the disputed issue, the CSE's placement recommendation.

The IEP indicated that the student was enrolled in tenth grade at the time of the May 2010 CSE meeting (Dist. Ex. 1 at p. 3). With regard to academics, the May 2010 IEP indicated that, in recent resting, the student performed in the borderline range on a cognitive measure and "below grade level on all tasks presented" (Dist. Ex. 1 at p. 3). The IEP relayed the following standardized scores achieved from an administration of the Woodcock-Johnson III Tests of Achievement: letter-word identification 72, passage comprehension 66, reading fluency 76, writing fluency 64, calculation 58, applied problems 65, and math fluency 48 (id.). These results corresponded with instructional levels ranging from 2.0 to 4.5 (id.). The IEP further indicated that the student exhibited a relative strength in verbal tasks but struggled in the areas of decoding, reading comprehension, spelling, and grammar (id.). With regard to math, the student evinced needs with problem solving steps and determining which procedures to apply when solving word problems (id.).

As for the student's social/emotional needs, the May 2010 IEP indicated that while the student was "polite and cooperative", she "frequently present[ed] with 'mood swings' which interefer[ed] with her ability to focus on class" (Dist. Ex. 1 at p. 4). The IEP further reported that the student had "some good socialization skills" and a desire to socialize but was "socially immature" (id.). The IEP additionally indicated that the student had trouble "cop[ing] with situations . . . perceived of as being stressful" (id.). The IEP stated that the student's behavior did

not seriously interfere with classroom instruction and, further, that it could be addressed by a "general education and/or special education classroom teacher" (id.). The IEP noted that the student did not have health and physical needs and, according to the parent, was healthy (id. at p. 5).

After developing the student's present levels of performance and annual goals, the May 2010 CSE recommended placement in a special classroom bearing a 15:1 ratio. State regulations provide that a special class placement with a maximum class size not to exceed 15 students is designed for "students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). A 12:1+1 special class contains "students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (8 NYCRR 200.1[ww][3][i][d]). It appears, based upon the information in the May 2010 IEP, that the student's academic needs consisted "primarily of the need for specialized instruction" such that they could be appropriately addressed in a classroom containing 15 students and one teacher (see id. at p. 3).

However, the evidence in the hearing record suggests that a 15:1 classroom setting was inappropriate to address the student's social/emotional and behavioral needs. According to CSE minutes taken contemporaneously with the May 2010 CSE meeting, the principal of the NPS reported that the student exhibited "severe emotional fluctuation" and a "low frustration tolerance" in a classroom containing between six to eight students and, on most occasions, two teachers (Dist. Ex. 7 at p. 1; Tr. pp. 79, 88). This information is consistent with the May 2010 IEP's notation that the student "frequently" engaged in "mood swings which interefer[ed] with her ability to focus in class" (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 7 at p. 1).

Yet, after identifying this need, the May 2010 CSE concluded that the student's behavior "d[id] not seriously interfere with instruction" and could be addressed by a single classroom teacher (id.). Considering the student's social/emotional and behavioral difficulties in a classroom containing six or eight students as well as the regulatory standards identified above with respect to a 15:1 special class and, by way of contrast, the standards for a more supportive 12:1+1 special class, I conclude that the May 2010 CSE's recommendation of a 15:1 special class was not supported by the evidence before it.[4] Moreover, the May 2010 CSE did not prescribe any supports for the student's management needs nor indicate how a teacher could address these needs. Instead, in three separate places, the IEP merely states: "[the student's] needs can be addressed in a special class in a community school" (see Dist. Ex. 1 at pp. 3, 4, 5).

[4] At this juncture, I express no opinion as to what placement the May 2010 CSE should have recommended – the regulatory standards pertaining to a 12:1+1 classroom placement have been provided solely to assess the May 2010 IEP's 15:1 placement recommendation provided sufficient support.

While the district correctly argues on appeal that the May 2010 CSE prescribed counseling services to meet the student's social/emotional needs, this does not speak to the main issue identified in the parent's due process complaint notice: whether a 15:1 classroom would be too large for the student who, at the time of the CSE meeting, attended a classroom containing six students and one or two teachers (Tr. p. 79). Thus, although counseling could have provided the student with strategies to manage her behavioral and social/emotional needs, the May 2010 IEP is bereft of any information as to how these needs would be managed in a 15:1 classroom setting.[5]

In reaching a contrary conclusion, the IHO impermissibly relied upon a significant amount of retrospective testimony to reach a conclusion that the district offered the student a FAPE (see IHO Decision at pp. 5-6). The district however, was required to justify the plan as written, and the retrospective testimony in this case cannot be used to rehabilitate the program designed by the May 2010 CSE and I have not considered it (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 185-88 [2d Cir. 2012]).[6] Therefore, after a complete review of the evidence in the hearing record, I conclude that the district failed to demonstrate how the May 2010 IEP's 15:1 special class placement recommendation was sufficient to address the student's behavioral and social/emotional needs. The IHO's findings to the contrary must be reversed.

D. Appropriateness of Unilateral 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 offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether

[5] The testimony adduced at the impartial hearing is unhelpful in this respect: the only district witness who attended the May 2010 CSE meeting, a school psychologist, testified that she did not possess an independent recollection of the meeting (see Tr. pp. 26-27, 32-33).

[6] To be clear however, the Second Circuit declined to adopt a rigid "four corners" rule and testimony may be used to explain or justify components that are listed in the written plan (M.W. v. New York City Dept. of Educ., 725 F.3d 131, 142 [2d Cir. 2013]).

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

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

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

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

According to the testimony of the principal of the NPS, the NPS is a girls' school "certified . . . as a regular high school with a modified curriculum" (Tr. pp. 81, 89-90). The principal oversees the school and has a master's degree in special education (Tr. pp. 81-82). The principal further testified that all students undergo a "screening" process on a yearly basis whereby their skills are assessed in approximately 13-14 different areas including math, reading, reading comprehension, writing, vocabulary, and spelling (Tr. pp. 82-83, 85). Either the principal or teachers working under his direction perform these assessments (Tr. pp. 83, 85). These assessments are "based purely on skills" and "might" include standardized testing (Tr. pp. 85-86). Administration of these assessments on a yearly basis yields skill levels that allow the NPS to ascertain "where the student was before and where the student is now" (Tr. p. 85; see Tr. pp. 84-85). According to the principal, such an assessment was conducted for the student at the beginning of the 2010-11 school year (Tr. p. 85). A January 2011 progress report identifies the student's current levels in several classroom subjects and skill areas (see Parent Ex. E).

During the 2010-11 school year, the student received instruction from two classroom teachers for all academic subjects for "the majority of the time", occasionally from a single classroom teacher (Tr. pp. 79, 88). The student was one of six or eight students in the classroom (Dist. Ex. 7 at p. 1; Tr. pp. 79, 88). When two teachers were present, the class would break into two groups to provide small group instruction, a strategy that the principal at the NPS opined was essential for the student (Tr. p. 79; Parent Ex. E). Specifically, a small group allowed a classroom teacher to provide "timely intervention" when the student became upset (Parent Ex. E). A June 2011 report card noted that "unpleasant consequences" followed when teachers were not able to provide "prompt intervention" to the student (Parent Ex. F at p. 1). To further address the student's social/emotional needs, the hearing record reveals that the NPS provided counseling services to the student twice per week on an individual basis (Tr. pp. 93-94).

In this case, the parent failed to establish that the NPS provided "educational instruction specially designed to meet the unique needs of the [student]" (Rowley, 458 U.S. at 188-89; see Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 365). First, as the district correctly argues, the limited evidence in the hearing record regarding the student's two classroom teachers suggests that they did not possess appropriate qualifications to provide specially designed instruction to the student. According to the principal of the NPS, the student's classroom teacher who taught secular subjects did not possess a college degree (Tr. p. 89; see Tr. pp. 88-89). The district is also correct that there is no evidence in the hearing record that the student's teachers possessed any special education training. To be clear a unilateral placement need not meet State standards by employing special education teachers certified by the State (Carter, 510 U.S. at 14); however, it does have to provide the student with specially designed instruction for the parent to be entitled to reimbursement (Frank G., 459 F.3d at 364-65). The evidence presented by the parent did not demonstrate that the student's teachers possessed sufficient qualifications by way of experience or education to provide specially designed instruction to the student. Moreover, while the hearing record contains a general description of how the NPS ascertained the student's skill levels in several academic areas, there is no information as to what specific strategies were used with the student during the 2010-11 school year.

Accordingly, given the lack of specificity regarding the student's instruction combined with the lack of information regarding the training and qualifications of the individuals providing instruction at the NPS, I am unable to find that the NPS was substantively appropriate to meet the student's needs.[7]

[7] The district's other argument that the NPS was inappropriate because it did not constitute the LRE for the student is unavailing (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 837 [2d Cir. 2014] [holding that "while the restrictiveness of a private placement is a factor [in assessing the appropriateness of a unilateral placement], by no means is it dispositive" and that "where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option"]). Similarly, although the student would have benefitted from speech-language therapy, the NPS's failure to offer this service would not, in and of itself, render the NPS inappropriate for the student (Dist. Ex. 5 at p. 2; Parent Ex. E; see Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999] ["the test for the parents' private placement is that it is appropriate, and not that it is perfect"]).

VII. Conclusion

After reviewing the evidence in the hearing record, I find that the district failed to prove that it offered the student a FAPE for the 2010-11 school year. I also conclude that the parent failed to demonstrate that the NPS offered specially designed instruction to meet the student's needs. Therefore, I need not consider whether equitable considerations support the parent's requested relief.[8]

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that those portions of the IHO's decision dated January 16, 2013 are modified by reversing that portion which found that the district offered the student a FAPE for the 2010-11 school year.

Dated: **Albany, New York**
October 28, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[8] I note that the parent's failure to provide timely notice of the student's removal from the public school system as well as his failure to communicate any disagreement with the May 2010 IEP to the CSE would be relevant factors in this regard (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]).