



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-033

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

Appearances:

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Westchester Hebrew High School (WHHS) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that 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

Initially, the parents requested an impartial hearing pursuant to a due process complaint notice dated August 3, 2012 (Parent Ex. U at p. 1). In their request the parents indicated that they had not yet received an IEP for the 2012-13 school year and requested that the district provide an IEP for the student (id.). The parents followed up the due process complaint notice with a request for copies of a June 2012 psychoeducational evaluation report and a June 2012 OT evaluation report, as well as a request that the district conduct an assistive technology assessment (Parent Exs. N at p. 2-3; V at p. 1). As relief, the parents requested confirmation of the date, time, and location of the student's CSE meeting, copies of the requested evaluation reports, and an assistive technology assessment (Parent Exs. N at p. 3; V at p. 1). The district responded by indicating that

it scheduled a CSE meeting for August 14, 2012 and that an assistive technology evaluation would be scheduled in September 2012 (Parent Ex. N at p. 2).

A CSE convened on August 14, 2012 to develop the student's IEP for the 2012-13 school year (Parent Ex. A at pp. 6-7, 10). The August 2012 CSE determined that the student continued to be eligible for special education and related services as a student with a learning disability (id. at p. 1). The CSE recommended that the student be placed in a community school with special education teacher support services (SETSS) for ELA and math, and related services to include two 45-minute sessions per week of speech-language therapy in a group of five, one 45-minute session per week of individual occupational therapy (OT), and one 45-minute session per week of individual counseling (Parent Ex. A at pp. 6-7).

On September 5, 2012, the parents noted that the district had developed an IEP for the student and scheduled an assistive technology assessment, and amended their due process complaint notice to generally assert that the district "has not provided a correct and appropriate education for school year 2012/2013" (Parent Ex. X). As relief, the parents requested reimbursement for the cost of tuition and transportation at WHHS for the 2012-13 school year (id.).¹

Prior to the start of the impartial hearing, the parents requested and received an individualized education services program (IESP), dated October 16, 2012, from the school district in which WHHS was located (district of location) (Dist. Ex. 2; Parent Ex. Q).² The October 2012 district of location CSE determined that the student was eligible to receive special education and related services as a student with a learning disability and recommended a resource room program four times per week for 40 minutes in a group of five and one individual 45-minute session of OT per week (Dist. Ex. 2 at p. 2).

After a prehearing conference held on October 24, 2012 (IHO Ex. I), an impartial hearing convened on November 15, 2012 and concluded on December 7, 2012 (Tr. pp. 1-450). In between hearing dates, on November 20, 2012, the district conducted a CSE meeting and developed an IESP for the student, adding a portable word processor as an assistive technology device to the programs and services already recommended in the August 2012 IEP (compare Dist. Ex. 3 at pp. 6-7, with Parent Ex. A at pp. 6-7). The IESP also indicated that the student was "Parentally Placed in a Non-Public School" (Dist. Ex. 3 at p. 9).

In a decision dated January 24, 2013, the IHO denied the district's request to dismiss the parents' claims based on the student having received services through an IESP from the district of location (IHO Decision at pp. 16-18), then determined that the district did not offer the student a free appropriate public education (FAPE) for the 2012-13 school year, that WHHS was not an appropriate placement, and that equitable considerations weighed against the parents' request for an award of tuition reimbursement (IHO Decision at pp. 18-23). The parents appeal from the IHO's determinations that WHHS was not an appropriate placement and that equitable

¹ The parents executed a contract in February 2012 for the student's attendance at WHHS for the 2012-13 school year (Parent Ex. B).

² References to "the district" refer to the district in which the student and his parents resided, and which is the respondent in this matter.

considerations weighed against granting the parents' request for tuition reimbursement. The district cross-appeals from the IHO's determination that it failed to offer the student a free appropriate public education.³

IV. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

³ Although the district correctly identifies the IHO's preliminary finding that it was obligated to provide the student with a FAPE because it did not prove that the student was parentally placed at WHHS, the district did not cross-appeal from this adverse finding (see Answer ¶¶ 32, 52). Accordingly the IHO's determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*10 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 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]).

V. Discussion

A. Preliminary Matters

As an initial matter, the district cross-appeals the IHO's determination that the district was "in default of its burden to prove that its recommendation for [the student] was appropriate" (IHO Decision at p. 18), asserting, without citation to the hearing record, that there is sufficient evidence to indicate that the district developed an appropriate IEP to address the student's needs (Ans. ¶ 52). Upon review of the hearing record, although the hearing record includes a copy of the August 2012 IEP, there is no basis to depart from the IHO's finding that the district did not offer the student a FAPE for the 2012-13 school year without an explanation of the student's needs and how they were addressed within the August 2012 IEP (Parent Ex. A). Moreover, there is no basis to depart from the IHO's decision to hold the district in default, as the district offers no explanation for its failure to be prepared to present evidence at the start of the impartial hearing (Tr. pp. 31, 34-35; IHO Decision at pp. 3-4). Additionally, to the extent that the district asserts that the parents' amended due process complaint notice was insufficient because it did not adequately describe the nature of the problem with the August 2012 IEP, the district had an opportunity to object to the sufficiency of the amended due process complaint notice and did not do so on a timely basis, and therefore it is deemed sufficient (see 8 NYCRR 200.5[i][1][iv], [3], [6]). The district's failure to object to the adequacy of the parents' due process complaint notice in a timely manner is not an excuse for failing to present evidence during the hearing regarding the provision of a FAPE to the student. Accordingly, I decline to disturb the IHO's determination that the district failed establish that it offered the student a FAPE for the 2012-13 school year.

B. Unilateral Placement

As the district failed to offer the student a FAPE, I next consider the parents' contention that the IHO erred in finding that WHHS was not an appropriate placement for the 2012-13 school year. With respect to this consideration, 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. 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]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). 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).

Upon review of the hearing record, and in accord with the IHO, I find that the parents did not establish that WHHS provided special education instruction specifically designed to address the student's unique needs (IHO Decision at pp. 19-20). The parents allege that although WHHS did not provide the student with all of the services indicated on the August 2012 IEP, the school was appropriate because it provided the student with services to address some of his educational needs and the student made progress.

While progress alone is not determinative of the appropriateness of a unilateral placement, it is a relevant factor to be considered and "grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit" (Frank G., 459 F.3d at 364-65). In this instance, although the student had been attending the unilateral placement for approximately three months, and although the student's performance was inconsistent across subject areas, the student's test scores indicate that he received an educational benefit from the instruction at the unilateral placement (Tr. pp. 122-23, 175-76; see Parent Ex. R).⁴ For example, the student generally performed well on tests and assignments in Biology, English, and History (Parent Ex. R at pp. 1-47), while the student's scores in Math and Spanish were lower (id. at pp. 48-55). Accordingly, the student's progress is a factor that weighs in favor of a finding of appropriateness (see Frank G., 459 F3d at 364; Walczak, 142 F3d at 130). However, the parent must also show that WHHS provided instruction specially designed to meet the unique needs of the 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).

According to a June 2012 psychoeducational evaluation report, the student was functioning in the average range of intelligence with scores in the high average range in verbal comprehension and the low average range in processing speed (Parent Ex. I at pp. 2-3). In comparison to other students at his age level, the student tested within the average range for basic academic achievement (id. at pp. 3-4). The student also tested within the average range for reading and math skills and within the low average range in written language skills (id.). The evaluator reported that the student had a history of expressive/receptive language delays and had been "experiencing academic difficulties with processing speed, carrying out multi-step directions, and with sequencing" (id. at p. 1). The evaluator opined that certain issues may adversely impact the student's academic functioning, including attention, working memory, receptive language, visual informational processing and reasoning, and visual sequential processing (id. at p. 5). The evaluator also indicated that the student's issues with processing speed may have an adverse impact on his ability to "keep pace" and complete tasks (id.). The evaluator further indicated that due to these issues, the student was at risk of increased anxiety, frustration, and feelings of being uncomfortable within the academic environment (id.).

WHHS has approximately 35 to 36 students in the student's grade level (Tr. pp. 120-21). The school is primarily a general education environment; however, in the student's grade level approximately one-fifth of the students have IEPs (Tr. pp. 143-45). At WHHS each subject area is broken up into an advanced, middle, and lower level and each class has approximately five to eight students (Tr. pp. 120-21). The parents indicated that the school's resource room, small class sizes, and small size were factors they considered in placing the student there and reasons why they believed it was an appropriate placement for the student (Tr. pp. 54-55, 98, 200-01, 350-53).

The director of WHHS described the student as having "slower processing" and indicated that he required a smaller student-to-teacher ratio due to needs in organizational skills, distractibility, and to "keep on track" with classwork and homework (Tr. pp. 124-25). The WHHS director testified that the school provided a resource room to support students in the areas of

⁴ Although the WHHS principal testified in November 2012 that the student was "very successful" at WHHS, the October 2012 IESP indicates that the WHHS principal reported the student was "struggling somewhat academically" (compare Tr. pp. 122-23, with Dist. Ex. 2 at p. 2).

organizational skills, study skills, and note-taking skills (Tr. pp. 121-22).⁵ The student attended the resource room five days per week in the morning, with two teachers and approximately six students (Tr. pp. 130-31; Parent Ex. D).⁶ The student also received support services in the afternoon two times per week, during which time the teachers reviewed the student's classwork and homework and worked on organization skills (Tr. pp. 135-36). The director testified that one of the teachers in the resource room was certified in "special education support services for high school students with reading and writing difficulties" (Tr. pp. 130-31). The parents testified that the district of location did not include SETSS in the student's October 2012 IESP because the student was already receiving resource room services at WHHS and it would have been redundant (Tr. pp. 235-36).

It appears from the hearing record that the student had related services needs and that prior to the 2012-13 school year, the student had at times received OT, speech-language therapy, and counseling (see Parent Exs. A at pp. 3, 7; K at p. 2; I at p. 1; T at pp. 3, 13-15). However, the hearing record does not include sufficient information to determine the extent to which the student's related services needs were being met at WHHS. For example, a June 2012 OT evaluation indicated that the student required OT to improve his hand-eye coordination, visual perceptual abilities, and attention (Parent Ex. K at p. 5). Yet WHHS did not provide OT; instead OT was provided by the district of location through an October 2012 IESP (Tr. pp. 135, 171; Dist. Ex. 2 at pp. 1, 7).⁷ Additionally, as OT was provided pursuant to an October 2012 IESP, there is no indication in the hearing record that the parent knew the student would receive OT at HWWS at the time the parent made the decision to place the student (Dist. Ex. 2; see Parent Ex. Q).

It is also not clear from the hearing record whether the student's OT needs were addressed by the services provided by the district of location. Significantly, while the August 2012 IEP included OT goals targeting handwriting and fine motor coordination, the OT goals included in the October 2012 IESP targeted other skills, such as typing and the use of a word processor (compare Parent Ex. A at p. 6, with Dist. Ex. 2 at p. 7).⁸ As the hearing record does not indicate

⁵ The support services to develop organizational, study, and note-taking skills are provided to all ninth graders at WHHS (Tr. pp. 143-44).

⁶ The student's WHHS class schedule indicates that the student was scheduled for resource room for five periods per week in the morning and two periods per week in the afternoon (Parent Ex. D). It also indicates that the student was scheduled for OT, speech-language therapy, and counseling (*id.*). However, based on the testimony of the WHHS director, the class schedule would not be accurate for the whole school year because the schedule was based on the August 2012 IEP and would be changed to accommodate the services offered by the district of location pursuant to the October 2012 IESP (Tr. pp. 155-57, 169-71).

⁷ At least one district court in New York has found that services provided by a district should not be considered in determining the appropriateness of a unilateral placement (*K.S. v. New York City Dep't of Educ.*, 2012 WL 4017795, at *8-*9 [S.D.N.Y. Aug. 8, 2012]; but see *F.O. v. New York City Dep't of Educ.*, 976 F. Supp. 2d 499, 522-23 [S.D.N.Y. 2013] [district's provision of a 1:1 paraprofessional at private school negated need for the private school to provide one and did not render the private school inappropriate]).

⁸ Related to the student's OT needs, regarding handwriting and note-taking, the hearing record also indicates that the student required assistive technology to aid in writing notes and homework (Dist. Exs. 2 at p. 8; 3 at pp. 3-4, 7; Parent Ex. O at p. 3). The WHHS director acknowledged that the student would have benefited from the use of an assistive technology device; however, she also testified that the student did not have an assistive technology device at WHHS (Tr. p. 173).

the focus of the OT services provided by the district of location, or how they may have been addressing the student's particular needs, there is insufficient evidence regarding the services to support a finding that the unilateral placement appropriately addressed the student's OT needs (see, e.g., L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011], aff'd, 471 Fed. App'x 77 [2d Cir. 2012] [rejecting argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"]).

Further, although the student received OT services from the district of location for at least part of the school year, the student did not receive speech-language therapy or counseling from WHHS or the district of location (Tr. pp. 171-72, 235; Dist. Ex. 2 at pp. 1, 7). The student's father acknowledged that he was aware that the district of location decided not to provide the student with counseling or speech-language therapy in the October 2012 IESP and indicated that he agreed with the termination of those services (Tr. p. 235; see Dist. Ex. 2).⁹ He also indicated that he believed the student received counseling services from the WHHS director (Tr. pp. 240-42). However, the director testified that the student did not require counseling within the school because the student's anxiety could be addressed during the support period (Tr. pp. 176-77).

Considering the totality of the circumstances, I concur with the IHO's determination that the parent's unilateral placement of the student at WHHS was not appropriate for the 2013-14 school year. Although the hearing record supports a finding that WHHS addressed some of the student's needs in the areas of processing and organizational skills (Tr. pp. 121-22, 135-36), the hearing record does not support a finding that WHHS addressed the student's needs related to OT, speech-language therapy, or counseling (see Parent Exs. A at pp. 3, 7; K at p. 2; I at p. 1; T at pp. 3, 13-15). Additionally, the supports provided at WHHS, such as small class sizes and general support for organization, are the types of educational benefits that any student would benefit from, rather than special instruction tailored to this student's unique needs (see Gagliardo, 489 F.3d at 115; Doe v. E. Lyme Bd. of Educ., 2012 WL 4344301, at *8 [D. Conn. Sept. 21, 2012] [small class size alone does not constitute special education]). Accordingly, the parents have not met their burden of proving that the NPS provided the student with instruction specifically designed to address the student's needs (see Ward v. Bd. of Educ., 568 Fed. App'x 18, 22 [2d Cir. 2014]; L.K., 932 F.Supp.2d at 489-91).

⁹ The student received speech-language therapy during the prior school year (Tr. pp. 48, 104-05).

VII. Conclusion

Having determined that the parents failed to sustain their burden of establishing the appropriateness of the student's unilateral placement at WHHS for the 2012-13 school year, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

Based on my above determinations, it is not necessary to address the parties' remaining assertions contained in the appeal and cross-appeal.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
 October 27, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER