The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-070

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa Khandhar, Esq., of counsel

Partnership for Children's Rights, attorneys for respondent, Amanda Sen, Esq., and Erin McCormack-Herbert, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to pay for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The parent cross-appeals from the IHO's decision to the extent that it did not reach certain issues raised in the due process complaint notice. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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 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]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.[1] The Committee on Special Education (CSE) convened on August 6, 2012, to formulate the student's IEP for the 2012-13 school year (see generally Parent Ex. A). The parent disagreed with the recommendations contained in the August 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year, and, as a result, notified the district of her intent to unilaterally place the student at Cooke (Parent Exs. J; K).[2] In a due process complaint notice, dated October 12, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-2, 4).

An impartial hearing convened on December 3, 2012, and concluded on January 15, 2013 after two days of proceedings (Tr. pp. 1-284). In a decision dated March 25, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for the costs of the student's tuition (IHO Decision at pp. 8, 13, 15). As relief, the IHO ordered the district to directly fund the cost of the student's tuition at Cooke for the 2012-13 school year (id. at p. 15).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer and cross appeal is also presumed and will not be recited here. The crux of the parties' dispute on appeal is whether the August 2012 CSE's recommendation of a 12:1+1 special class in a community school constituted the student's LRE. In addition, as to issues unaddressed by the IHO, the parties dispute whether the student was properly placed in a sixth grade special education classroom based on his age and abilities and whether the district was obligated to establish the appropriateness of the assigned public school site. Finally, the district argues that the IHO erred in determining that Cooke was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parent's request for relief. In addition, the district argues that contrary to the IHO's decision, the parent was not entitled to direct funding of the student's tuition.

[1] Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

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

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]).

The IDEA requires that a student's recommended program must 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 111 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the

general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see M.W., 725 F.3d at 143-44; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see M.W., 725 F.3d at 144; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In fashioning a test to assess a student's placement in the LRE, the Court acknowledged that the IDEA's "'strong preference'" for educating students with disabilities alongside their nondisabled peers "'must be weighed against the importance of providing an appropriate education'" to students with disabilities (Newington, 546 F.3d at 119, citing Walczak, 142 F.3d at 122, and Briggs v. Bd. of Educ. of Conn., 882 F.2d 688, 692 [2d Cir. 1989]; see Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 295 [7th Cir. 1988]).[3] In recognizing the tension created between the IDEA's goal of "providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow," the Court explained that the inquiry must be fact specific, individualized, and on a case-by-case analysis regarding whether both goals have been "optimally accommodated under particular circumstances" (Newington, 546 F.3d at 119-20, citing Daniel R.R., 874 F.2d at 1044).[4]

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

[3] In 1994, the Office of Special Education (OSEP) for the United States Department of Education issued a policy memorandum to provide guidance regarding the IDEA's LRE requirement, which opined that the "overriding rule in placement [was] that each student's placement must be individually-determined based on the individual student's abilities and needs" (OSEP Memorandum 95-9, 21 IDELR 1152 [Nov. 23, 1994]; see Letter to Vergason, 17 IDELR 471 [OSERS 1991] [emphasizing that a student's "educational placement . . . must be determined by the contents of that child's IEP"]; Letter to Lott, 16 IDELR 84 [OSEP 1989] [same]).

[4] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

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. LRE

As an initial matter, the parties do not dispute the adequacy of the evaluative materials relied on by the August 2012 CSE or the appropriateness of the August 2012 IEP's present levels of performance and management needs. Nor do the parties dispute the ability of the 12:1+1 special class placement to adequately support the student's special education needs with appropriate instruction. Instead, the gravamen of the parties' dispute is whether the recommended placement constituted the student's LRE. The IHO found that the district failed to offer the student a FAPE, in part, because the August 2012 CSE failed to "give any consideration to placing [the student] in a mainstream program with appropriate supports and services" in violation of LRE principles (IHO Decision at p. 12). The IHO also determined that the student could be "successfully educated in a mainstream class" if provided with the appropriate supports, including a 1:1 inclusion aide (id.). For the reasons stated below I find that the evidence in the hearing record supports the IHO's ultimate determination that the August 2012 IEP was substantively deficient and that the district failed to offer the student a FAPE in the LRE but my reasoning differs.

The parties do not articulate any meaningful arguments relating to the first prong of the Newington test and the hearing record supports the August 2012 CSE's recommendation to remove the student, at least for some portion of the student's programming, from the general education environment.[5] In coming to a contrary determination, the IHO relied on, among other things, the extent to which the student received instruction in a general education class setting at Cooke during the 2011-12 school year (see IHO Decision at p. 12). This is in error, however, because the evidence does not indicate that the student received primary instruction in the general education classroom at Cooke during the 2011-12 school year (Tr. pp. 131, 155-56; Parent Exs. N at pp. 7-8, 11-12). That is, the June 2012 Cooke progress report indicated that, although the student attended general education classes with 1:1 support for both mathematics and science during the 2011-12 school year, he primarily received academic instruction in a 3:1 setting for mathematics and a 12:1+1 special class for science, with modified, multi-sensory instruction in both (Tr. pp.

[5] As further described below, the student was still, even during the 2012-13 school year, being removed from general education and his nondisabled peers by Cooke in order to provide him with 1:1 academic support sessions.

130-31, 159-160, 162-63; Parent Ex. N at pp. 7-8, 11-12).[6] Thus at the prior to the CSE meeting, Cooke was also finding it necessary to remove the student from the general education setting for portions of the student's programing.

Moreover, contrary to the IHO's finding that the August 2012 CSE failed to give any consideration to placing the student in a general education environment with appropriate supports and services, the hearing record reveals that the August 2012 CSE did consider placement of the student in a general education class placement with integrated co-teach (ICT) services, which was rejected because in the view of the CSE the class size was "too large" to address the student's academic and social/emotional needs (Tr. pp. 65-66, 69, 193, 258; Dist. Ex. A at p. 14).[7] The parent testified that she agreed with this determination (Tr. pp. 258, 277-78).[8] Turning to the second prong of the Newington LRE test—whether the district mainstreamed the student to the maximum extent appropriate—review of the hearing record shows that district failed to include the student in school programs with nondisabled students to the maximum extent appropriate. Here, the district representative who attended the August 2012 CSE testified that the CSE was aware that the student had attended a general education classroom for mathematics and science instruction during the 2011-12 school year; that the April 2012 private psychoeducational

[6] A discrepancy exists between the June 2012 Cooke progress report, which was relied upon by the August 2012 CSE, and the testimony of the student's Cooke special education teacher from the 2011-12 school year (Tr. p. 128; compare Parent Ex. N at pp. 1, 7-8, 11-12, with Tr. pp. 131, 155-56). While the June 2012 progress report indicated that the student received most of his mathematics and science instruction in his special class at Cooke, with additional instruction in the general education class for mathematics and "when time permits" for science, the teacher's testimony indicated that the student received most of his mathematics and science instruction in the general education classroom (compare Parent Ex. N at pp. 8, 12, with Tr. pp. 131, 155-56, 158). Since the Cooke special education teacher did not attend the August 2012 CSE meeting and since there is no other indication in the hearing record that the CSE had information about the student's participation in the partial inclusion program at Cooke other than the description in the progress report, the teacher's retrospective testimony in this regard does not impact the analysis of the appropriateness of the student's IEP (Tr. pp. 37-38, 58, 77, 162, 249; Parent Exs. A at p. 15; N).

[7] The district representative testified that the August 2012 CSE did not consider any program "less restrictive" for the student than an ICT classroom, such as a general education class placement with special education teacher support services (SETSS) or a 1:1 aide because she believed having a 1:1 paraprofessional even in a general education classroom, was "more restrictive" than being in either an ICT class or even a 12:1+1 special class (Tr. pp. 66, 69, 87, 93, 95, 235, 258).

[8] ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an ICT class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). In describing how LRE related to the continuum of service options, State guidance in 2008 indicated that ICT services were "directly designed to support the student in his/her general education class" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 3-4, Office of Vocational and Educational Services for Individuals with Disabilities (VESID) [Apr. 2008], available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf). In addition, the Second Circuit has noted that the two-prong test adopted in Newington did not adequately address the LRE question involving a student's recommended placement in a "general education environment with [ICT] services," which the Court described as a placement "somewhere in between a regular classroom and a segregated, special education classroom" (M.W., 725 F.3d at 144). Declining in that instance to analyze an ICT classroom as a placement in a "special class," the Court determined that the appropriate question focused on whether the "ICT services were appropriate supports for [the student] within a general education environment" (M.W., 725 F.3d at 144).

evaluation report had recommended that the student be immersed in a general education classroom with the help of an aide to allow for increased opportunities for peer interaction and academic progress; and that the parent was concerned that the 12:1+1 special class placement, alone, would not allow the student to interact with socially appropriate peers and meet his full potential (Tr. pp. 83-86, 93; Parent Exs. A at pp. 13-14; G at p. 12). In addition, the hearing record indicates that the student was eager to participate in his general education classes in the Cooke immersion program, showed improved focus, and was benefiting from being with academic and social role models, and that the parent reported to the August 2012 CSE that the student had "experienced success" in his general education classes (Tr. pp. 191, 253, 255; Parent Exs. A at p. 2; N at pp. 8, 11).

However, despite these facts, the August 2012 CSE failed to develop an educational program that that would have provided the student with access to nondisabled students to the maximum extent appropriate (Tr. pp. 65-66, 69; Dist. Ex. A at p. 14). The August 2012 IEP is devoid of any information regarding the extent to which the student would participate in school programs or activities with nondisabled peers (Tr. p. 90; Parent Ex. A at p. 11).[9] While the district representative who attended the August 2012 CSE testified at the impartial hearing that, in a 12:1+1 special class placement in a community school, the student could be mainstreamed for a class, depending on his level of skill, and that the student would be with nondisabled peers peers for lunch, recess and assemblies (but not gym), this testimony is impermissibly retrospective and cannot be relied upon to "rehabilitate a deficient IEP after the fact" (Tr. pp. 73, 105-06; see R.E., 694 F.3d at 186).

Thus, while the hearing record supports a finding the student's needs warranted a special class placement, given the student's success in the inclusion program at Cooke, the August 2012 IEP should have clearly indicated the manner and extent to which the student would be provided access to nondisabled peers. The evidence supports a conclusion that while the student needed to be removed from the general education environment for a least a portion of his program, he could receive at least some academic instruction together with his non-disabled peers. Therefore, the IHO's ultimate conclusion that the district did not satisfy the requirements of offering the student a FAPE in the LRE must be upheld.

B. Grade Level

With regard to the parties' dispute over the appropriateness of the August 2012 CSE's recommended sixth grade classroom placement, the IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR § 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). In this case, the allegations in the parent's cross appeal—which relate to the appropriateness of a particular grade level classroom for the student—do not constitute matters relating to the identification, evaluation or educational placement of the student, or the provision of a FAPE to the student, and therefore the IHO correctly declined to address this issue in his decision (see Education Law § 1709[3] [authorizing a board of education "[t]o prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate

[9] The relevant sections of the IEP were left blank.

the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17, 2013 WL 5614113 [2d Cir. 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955]).[10] While it may be possible in certain cases that the assignment of a student to a particular grade level may give rise to an inference of a possible functional or age range grouping violation (see 8 NYCRR 200.6[h]), no permissible inference to that effect may be drawn from the facts alleged by the parent in this case.

Accordingly, neither the IHO, nor this SRO, has jurisdiction over the allegations regarding the student's particular grade level classroom.

C. Challenges to the Assigned Public School Site

Though not discussed by the IHO, the parent claims that the proposed classroom at the assigned public school site contained students "functioning at a far lower level" than the student, and that the class had "minimal structure," "little supervision," and few opportunities for mainstreaming." For the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I find these assertions without merit. The parent's claims turn on how the August 2012 IEP would or would not have been implemented. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. J; K), the parent cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice"]; K.L., 530 Fed. App'x at 87, 2013 WL 3814669; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012])

D. Unilateral Placement

Because the district failed to offer the student a FAPE in the LRE for the 2012-13 school year, the next issue is whether the parent's unilateral placement of the student at Cooke was appropriate. 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 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 13-14). The private school need not employ certified special education teachers or have its own

[10] Further, neither the IDEA nor State law require a district to specify a student's grade level on his or her IEP (20 U.S.C. § 1414[d][1][A][ii]); see Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419, 427 [8th Cir. 2010]; Dep't of Educ. v. C.B., 2012 WL 220517, at *8 [D. Haw. Jan. 24, 2012]; see also Rowley, 458 U.S. at 200).

IEP for the student (id. at 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; 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, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

Here, the evidence in the hearing record supports the IHO's finding that the program offered by Cooke was appropriately designed to address the specific special education needs of the student (IHO Decision at p. 13). The evidence in the hearing record indicates that, during the 2012-13 school year, the student attended the full inclusion program at Cooke which provided him with access to a general education setting with the full-time support of a 1:1 inclusion assistant at a parochial school affiliated with Cooke (Tr. pp. 138-39, 161, 198, 208; Parent Ex. L at p. 2). As part of his class schedule, the student also received seven 1:1 academic support periods per week (Parent Ex. M at p. 1). In addition the student received the related services of speech-language therapy, OT, and counseling, as well as testing accommodations (Tr. pp. 205, 235, 266). While the district argues that the student was not receiving a specially designed program at Cooke because he lacked the support of a licensed special education teacher, as noted above, the private school need not meet State standards by employing certified special education teachers (see Carter, 510 U.S. at 14). More importantly, the hearing record shows that the staff qualifications were sufficient insofar as the hearing record reveals that the student's 1:1 inclusion assistant had previously been a teacher in a parochial high school (Tr. pp. 199, 235). Moreover, the full inclusion supervisor had her certification in special education, and it was her job to "provide consulting and training service and support for the inclusion assistant and general education teacher" (Tr. pp. 170-71; Parent Ex. L at p. 2).

The district also argues that the parent failed to carry her burden of demonstrating that the student was making academic or social progress at Cooke during the 2012-13 school year.[11] Generally, a finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364). However, evidence of the student's progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522, and Rafferty, 315 F.3d at 26-27).

Here, with regard to the student's academic performance during the 2012-13 school year, both the student's parent and the Cooke full inclusion supervisor testified that the student earned a 91 general average in his classes during the first quarter and that he had made the principal's list (Tr. pp. 201, 266). According to the testimony of the full inclusion supervisor, the student had

[11] The parent submits additional documentary evidence with her answer and cross-appeal to demonstrate the student's progress within his unilateral placement (Answer Exs I-III). The district objects to the consideration of two of the submitted documents. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this instance, a review of the additional documentary evidence reveals that two of the exhibits were available at the time of the impartial hearing and none of the exhibits are necessary to render a decision; accordingly, in the exercise of my discretion I decline to consider the additional evidence.

advanced to a fifth grade level in mathematics, reading, and writing and was "pretty independent" in his math and science classes (Tr. pp. 203, 209). With regard to the student's social and pragmatic language skills, the full inclusion supervisor testified that the student was becoming comfortable with the peers in his class, participated in small group discussions, and was initiating conversations, though he still needed support to elaborate, ask questions, and keep conversations going (Tr. p. 202). With respect to the student's attention difficulties, the full inclusion supervisor testified that a behavior plan had been put into place, and that the student had reduced his need for prompting from ten to twelve major prompts per day, to about two to five prompts per day (Tr. pp. 201-02).

As Cooke provided the student with specially designed instruction and related services to meet the student's unique special education needs, and the student demonstrated progress at Cooke, I find the hearing record supports the IHO's finding that the student's unilateral placement was appropriate.

E. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge 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]; 34 CFR 300.148[d]; 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, 192 Fed. App'x 62, 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 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

While the district argues that the parents never seriously intended to enroll the student in a public school, the parent testified that she signed the Cooke enrollment contract prior to the August 2012 CSE in order to reserve a seat for him in September and only made a final decision to send the student to Cooke after she received the August 2012 IEP (Tr. pp. 268-69). With regard to the district representative's testimony that the parent said during the August 2012 CSE that she wanted the student to continue at Cooke, the district representative also testified that the parent was referring to the setting available at Cooke, which the parent believed was appropriate for the student as it gave him access to non-disabled peers and allowed him to be mainstreamed for a portion of the school day (Tr. pp. 67-68, 258; Parent Ex. A at pp. 13-14). The Second Circuit has recently explained that, so long as parents cooperate with the CSE, "their pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . .

. that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). The district's argument must be rejected and I concur with the IHO that equitable considerations weigh in favor of the parent's request for relief.

F. Relief

Finally, the district argues that the parent is not entitled to the direct funding of the student's tuition at Cooke.

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]).

Here, I concur with the IHO that the record in this matter establishes that the parent lacked the resources to pay the $52,500 annual tuition at Cooke (Tr. p. 269; Parent Ex. P at p. 1). In her testimony, the parent indicates that there are four people living in her household; that her husband is the sole provider with an annual income of $60,000; that she has no other sources of income; that she does not own any property; and that she and her husband have less than $5,000 in savings (Tr. pp. 268-270). Although the district contends that the parents failed to offer documentary evidence related to family income, it offers no legal authorities to support its argument regarding the form of the proof it asserts is required on this issue in an IDEA due process hearing. In these circumstances I will defer to the sound discretion of the IHO in this case who was present to hear the testimony at issue and who determined that it provided "clear evidence" that she could not afford to pay the Cooke tuition, and find no compelling reason to disturb his determination (IHO Decision at p. 15). Notably the district did little to attempt to rebut the parents' testimony, even when it was clear from the inception of the case with the due process complaint notice that the parents' ability to pay would become a factor as it was a direct funding claim as opposed to a reimbursement claim (Dist. Ex. 1 at p. 4).

In addition, the district argues that the parent's contract with Cooke is a "sham" and the parent has failed to show a legal obligation to pay Cooke. In this regard the district contends, among other things, that the parent has not made any payments to the school and that the school itself has done little to enforce the contract. However such facts do not warrant a determination that the parent was not obligated under the contract (see E.M., 758 F.3d at 457-58 [examining parental standing in light of contractual obligations to pay, as well as implied obligations to pursue remedies under the IDEA]). Accordingly, under the circumstances of this case, I find that the parent is entitled to direct funding of the student's tuition at Cooke for the 2012-13 school year, as ordered by the IHO, under the factors described in Mr. and Mrs. A. and subsequent case law interpreting it (see 769 F. Supp. 2d at 406).

VII. Conclusion

In summary, I find that for the reasons discussed above the district failed to offer the student a FAPE in the LRE for the 2012-13 school year, that Cooke was an appropriate placement for the student, that equitable considerations weigh in favor of the parent's request for relief, and that the IHO properly ordered the district to directly fund the student's tuition at Cooke for the 2012-13 school year.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 26, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER