The University of the State of New York

The State Education Department
State Review Officer
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No. 13-084

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, Cynthia Sheps, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Neal H. Rosenberg, Esq., of counsel, 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 respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Winston Preparatory School (Winston Prep) for the 2012-13 school year. The 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 may 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]).[1]

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. The Committee on Special Education (CSE) convened on April 25, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see Dist. Ex. 1 at pp. 10, 13).[2] In a letter dated August 16, 2012, the parents notified the district that they did not receive a copy of the April 2012 IEP (Parent Ex. F at p. 1). The parents also indicated that they did not approve of placing the student in a 15:1 special class and were unable to visit a classroom identified in a final notice of recommendation (FNR) at a particular public school site to which the district assigned the student to attend for the 2012-13 school year (id.; see Dist. Exs. 1 at p. 6; 5). As a result, the parents rejected the April 2012 IEP and notified the district of their intent to unilaterally place the student at Winston Prep (Parent Ex. F at p. 1). After the student began the 2012-13 school year at Winston Prep, the parents sent another letter dated September 25, 2012 indicating that they spoke with a parent coordinator and that this individual informed them that there was no seat available for the student at the assigned public school site (Parent Ex. E at p. 1). In a due process complaint notice dated October 1, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex 6).

An impartial hearing convened on January 8, 2013 and concluded on March 18, 2013 after two days of proceedings (Tr. pp. 1-189). In a decision dated April 10, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Winston Prep was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 8-11). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Winston Prep for the 2012-13 school year (id. at p. 11).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision and requests that it be overturned in its entirety. The parents filed an answer requesting that the IHO's decision be upheld. The parties' familiarity with the particular issues for review contained within the district's petition and the

[1] The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

[2] In one location, the April 2012 IEP indicates that the CSE meeting occurred in February 2012 (see Dist. Ex. 1 at p. 10). The district representative clarified at the impartial hearing that this was a typographical error (see Tr. p. 15).

parents' answer thereto is presumed and will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO decision should be overturned due to inadequate citation to the hearing record;

2. Whether the IHO erred in determining that the 15:1 special class placement for four periods per day in the April 2012 IEP was substantively inappropriate to address the student's needs;

3. Whether the IHO erred in determining that the particular public school site to which the district assigned the student lacked a seat and, thus, would have failed to implement the April 2012 IEP;

4. Whether the IHO erred in determining that Winston Prep was appropriate and instead should have found that Winston Prep lacked proper speech-language services and was not the student's least restrictive environment (LRE); and

5. Whether the IHO erred in determining that equitable considerations favored the parents' claim for tuition reimbursement.

V. Applicable Standards

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

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

impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; 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 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]).

VI. Discussion

A. Sufficiency of IHO Decision; Citation to Hearing Record

Turning first to the issue of whether the IHO's decision should be overturned due to inadequate citation to the hearing record, State regulations require an IHO to "reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). The section of the IHO's decision containing the findings of fact does not contain any references to the hearing record and, therefore, does not comply with State regulations (IHO Decision at pp. 8-11). However, the remainder of the IHO's decision contains ample citation to the evidence in the hearing record (see id. at pp. 2-8). Therefore, the district's contention is not a sufficient basis for overturning the IHO's decision in this instance.

B. FAPE

With regard to the issue of whether the April 2012 IEP's educational placement was appropriate, the IHO conducted a well-reasoned analysis of the relevant evidence. After careful review of all of the evidence in this case, I agree with the conclusion reached by the IHO and adopt the findings of fact and conclusions of law as my own.

With regard to the issue of whether the IHO erred in finding that the 15:1 special class placement for four periods per day was insufficient, I find the district's reasoning for disturbing the IHO's decision unpersuasive. The strongest argument raised by the district is that the IHO relied on testimony from the student's teacher at Winston Prep in which the teacher opined that the student should be in a class containing no more than twelve students for the entire day (IHO Decision at p. 9; see Tr. pp. 124-26, 133-34). This opinion was not before the April 2012 CSE and, therefore, the IHO should not have relied upon such retrospective testimony (see R.E., 694

F.3d at 186). I also find unpersuasive the IHO's finding that the district failed to rebut the parent's evidence that the April 2012 IEP could not be implemented due to the lack of an available seat within the assigned public school (IHO Decision at p. 9). In this case, the parents clearly rejected the April 2012 IEP on the basis that the 15:1 special class placement was inappropriate and notified the district of their intention to place the student at Winston Prep for the 2012-13 school year (see Parent Ex. F).[3] The fact that the district did not thereafter hold the seat open until September 19, 2012 when the parents telephoned a parent coordinator at the assigned public school who informed them that a seat was not available is not a sufficient basis to find a denial of a FAPE under the circumstances of this case (see Tr. pp. 169-71).[4]

The strengths attributable to the district's arguments end there. The district has reasoned that LRE considerations mandated its choice to limit the student's placement in a special class setting to four periods per day and that the student should attend other classes and activities with her nondisabled peers. Noticeably absent from the district's allegations of error in this appeal is the IHOs finding that "the CSE stated in the [April 2012] IEP that [the student's] academic and language deficits precluded participation in the general education curriculum" (IHO Decision at p. 9; see Dist. Ex. 1 at p. 3).[5] The April 2012 IEP supports the IHOs finding, noting the CSE's conclusion that academic and language deficits precluded participation in the general education curriculum (Dist. Ex. 1 at p. 3). The district also left blank a section of the IEP devoted to the student's participation with other students without disabilities (id. at p. 9). While the district representative testified as to the importance of providing mainstreaming opportunities, this testimony is inapposite as these LRE concerns were not reflected in the IEP (Tr. pp. 37-38). While such a rationale might possibly have been explained in a prior written notice provided to the parent, the district did not produce one in its evidentiary submissions into the hearing record (see 20 U.S.C. § 1415[b][3]; 34 CFR 300.503; 8 NYCRR 200.5[a]; see 8 NYCRR 200.1[oo]).[6] Accordingly, the IHO's conclusion on this issue is supported by the evidence in the hearing record.

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[3] Because it is undisputed that the student did not attend the district's assigned public school site, 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. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; 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]).

[4] The IHO acknowledged that the district had an IEP in effect on the first day of school (IHO Decision at p. 9, n.3).

[5] As a result, this finding has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[6] I appreciate the candor of the district representative who explained that there was a delay in issuing IEPs until the day before school started due to the volume of documents that the CSE was required to produce; however, it seems somewhat precarious under the circumstances of this case to summarize a placement recommendation and offer a particular school site before the controlling document—the student's IEP—had been prepared (Tr. pp. 50, 65-70).

C. Unilateral Placement

Having found that the district failed to offer the student a FAPE, the next issue is whether Winston Prep was an appropriate unilateral placement for the student. 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 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, 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, 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).

The crux of the district's argument on appeal is that Winston Prep was an inappropriate unilateral placement because it did not offer sufficient related services to meet the student's speech-language needs. However, a parent need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9). Nevertheless, a review of the evidence in the hearing record demonstrates that Winston Prep offered instruction that addressed the student's speech-language needs.

At the time of the April 2012 CSE meeting, the student's primary needs related to her use and comprehension of language (Dist. Ex. 1 at pp. 1-2). The hearing record indicates that the student was an English language learner who possessed "a significant history of language deficits" (Dist. Ex. 3 at p. 2). According to the April 2012 IEP, the student's English comprehension deficits impacted her reading and writing (Dist. Ex. 2 at pp. 1-2). With regard to reading, the student demonstrated "poor decoding and fluency skills" which "significantly impact[ed] her ability to comprehend written discourse" (id. at pp. 1, 2).[7] When reading out loud, the student "often read[] quickly" and omitted suffixes and final consonants of words (id. at p. 1). When writing, the student "struggle[d] with organization [and] writing mechanics" (id. at p. 2). The April 2012 IEP further noted that the student benefitted from "outlining and scaffolding" (id.).

A review of the hearing record reveals that the student's teachers at Winston Prep offered specially designed instruction to meet the student's speech-language needs. The student's schedule included a course called "Focus" that met on a daily basis from Monday through Friday (Parent Ex. D at p. 1). Four of these weekly sessions were 42 minutes in duration while one lasted 32 minutes (id.; see also Tr. p. 128). The Focus program, according to a dean at Winston Prep, offered each student "one-on-one instruction in [his or her] areas of greatest need" (Tr. p. 91). The program designed for the student was "specifically designed and tailored" for her and targeted her decoding, fluency, and reading comprehension needs (Tr. pp. 91, 126-27).

The student's Focus teacher, who held a Master's degree in literacy, testified at the impartial hearing that she designed the student's Focus class curriculum to target the student's encoding, decoding, word identification, and spelling skills (Tr. p. 121-22, 127). The teacher also testified that she worked on "academic problem solving issues" which stemmed from the student's comprehension needs (Tr. p. 127). The Focus teacher further indicated that she worked on annual goals similar to those contained in in the April 2012 IEP (Tr. p. 130). With one exception, these goals had "either been met or [we]re being worked on" at Winston Prep during the 2012-13 school

[7] The parent has not challenged the accuracy of the April 2012 IEP's present levels of performance which, in any event, are consistent with the information considered by the April 2012 CSE (compare Dist. Ex. 1 at pp. 1-2, with Dist. Exs. 2, 3, 4; see also Tr. pp. 12-13).

year (Tr. p. 130; see also Tr. pp. 94-96). The Focus teacher also testified that she coordinated with the student's teachers on a daily basis (Tr. pp. 127-28).[8]

Moreover, in all of the student's academic subjects, she received myriad management needs including multisensory instruction, preferential seating, graphic organizers, repetition, chunking, and scaffolding (Tr. pp. 93-94). In addition, Winston Prep provided the student with testing accommodations including extended time and directions read and re-read (Tr. pp. 94, 100-01). The student also received at least 10 minutes of "word study" in each of her subjects, which assisted her development of decoding and vocabulary skills (Tr. pp. 134-35).

Accordingly, a review of the hearing record supports the IHO's conclusion that Winston Prep offered specially designed instruction to meet the student's needs.[9]

D. 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

[8] The IHO's finding that the student made progress at Winston Prep is not supported by the hearing record as it was based solely upon the anecdotal and subjective testimony of the Focus teacher (Rowley, 458 U.S. at 188-89; see Gagliardo, 489 F.3d at 113, 115; Frank G., 459 F.3d at 364-65). Nevertheless, this does not affect the above conclusion that Winston Prep was appropriate for the student because "evidence of [a student's] progress" is "a factor that may be considered" in determining whether a unilateral placement was appropriate but is "not dispositive" of this issue (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *10 [S.D.N.Y. Feb. 4, 2013]; 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).

[9] The district's other argument that Winston Prep 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"]).

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]).

On appeal, the district contends that the following three factors preclude an award of tuition reimbursement to the parents: (1) the parents did not seriously consider a public school placement; (2) the parents failed to visit the assigned public school site; and (3) the August 2012 letter rejecting the district's recommended program did not express any disagreement with the April 2012 IEP.

First, the district's argument that the parents did not intend to enroll the student in a public school placement is not persuasive as parents' "pursuit of a private placement [i]s not a basis for denying . . . 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]). Second, even assuming that a parent's decision of whether to visit an assigned public school was a relevant factor in assessing equitable considerations, it would not be relevant here where the student was denied a FAPE solely based upon deficiencies with the written IEP. Third, contrary to the district's argument, the parents' written rejection of the April 2012 IEP explicitly raised concerns with the April 2012 CSE's placement recommendation (Parent Ex. F at p. 1). Therefore, a review of the hearing record reveals no equitable considerations that would diminish or preclude an award of tuition reimbursement to the parent.

VII. Conclusion

The evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, that Winston Prep was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief. I have considered the remaining contentions and find it unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 9, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER