The University of the State of New York

The State Education Department
State Review Officer
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No. 13-107

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:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 the student's tuition costs at the Mary McDowell Friends School (Mary McDowell) for the 2012-13 school year and the cost of occupational therapy (OT) and physical therapy (PT) at Sensory Freeway during summer 2012. The appeal must be sustained.

II. Overview—Administrative Procedures

The decision of an 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]).

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 CSE convened on February 6, 2012 to formulate the student's IEP for the 2012-13 school year (see generally Parent Ex. C). The parents disagreed with the recommendations contained in the February 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 their intent to unilaterally place the student at Mary McDowell (see Dist. Ex. 3; Parent Ex. A at pp. 1-6). In a November 15, 2012 due process complaint notice the parents alleged various reasons why the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at pp. 1-6). The parents asserted the special class program of 12:1+1 was predetermined and inappropriate for the student and that the program was not based on the student's unique needs but rather it was based on the programs the district had available (id. at pp. 2, 4). Further, the parents alleged they were denied the opportunity to meaningfully participate at the February 2012 CSE meeting because their concerns were not addressed during the review (id. at p. 2). The parents also alleged that the February 2012 CSE meeting was held prematurely because the progress report from the nonpublic school was not available at the time CSE convened and therefore the CSE did not have appropriate evaluative information (id. at p. 3). The parents maintained the February 2012 CSE was not duly constituted because the general education teacher was not a person who would be responsible for implementing the 2012-13 IEP (id.). Further, the parents alleged that the 2012-13 IEP was devoid of meaningful academic or social needs, there was no baseline provided for the goals to measure progress and the parents were denied participation in the development of the goals (id. at pp. 3-4). The parents asserted that the lack of appropriate evaluative material did not allow for the necessary information upon which to develop the student's skill levels (id. at p. 4). Additionally, the parents alleged that the district failed to respond to their request for the CSE to reconvene to discuss the student's need for a 12-month program consisting of OT and PT in order to prevent substantial regression (id. at p. 2).

An impartial hearing convened on February 5, 2013 and concluded on March 5, 2013 after four days of proceedings (Tr. pp. 1-362). In a decision dated May 10, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year, that Mary McDowell 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. 38-40).

IV. Appeal for State-Level Review

The following issues are presented by the parties on appeal in their challenges to the IHO's decision:

1. Whether the IHO erred in finding that the timing of the February 6, 2012 CSE meeting was appropriate for and IEP that was in effect from September 2012 through June 2013.

2. Whether the IHO erred in finding the February 2012 CSE was not properly composed because the district failed to have an appropriate regular education teacher at the meeting.

3. Whether the IHO failed to address the parents' claim that the February 2012 CSE failed to rely on appropriate evaluations in developing the 2012-13 IEP or erred in finding that the February 2012 CSE's made permissive use of the Mary McDowell report in its formulation of the IEP.

4. Whether the IHO erred in failing to address the parents' claims that the goals in the February 2012 IEP were inappropriate because they lacked baseline information, were immeasurable and were not completed during the February 2012 CSE meeting.

5. Whether the IHO failed to find that the 2012 IEP was devoid of meaningful management needs.

6. Whether the IHO failed to conclude that the student's IEP was pre-determined and that the parent was prevented from participating in the meeting.

7. Whether the IHO erred in concluding that the program recommendation of 12:1+1 specialized classroom in a community school was appropriate for the student.

8. Whether the IHO failed to find that the district would not implement the student's IEP or that the district would not comply with State regulations regarding functional grouping at the public school site.

9. Whether the IHO erred in finding the parents' new information regarding regression and 12-month services was not sufficient to warrant the reconvening of the CSE;

10. Whether the parents' unilateral placement of the student at Mary McDowell was appropriate.

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]).

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

In the May 10, 2013 decision, the IHO found that that the district offered the student a FAPE for the 2012-13 school year and accordingly, denied the parents' request for tuition reimbursement for Mary McDowell in its entirety (IHO Decision at p. 40). Among other things, the IHO found that the timing of the CSE in February 2012 was appropriate because the CSE team was equipped to assess the needs of the students and develop a program for the following year (id. at p. 34). The IHO also noted there was no evidence that indicated the parents objected to the scheduling of the February 2012 CSE meeting (id.). Regarding the composition of the February 6, 2012 CSE the IHO found that a certified regular education teacher from the district was a member of the CSE as was the student's special education teacher from Mary McDowell thus the February 2012 CSE consisted of all the mandated members under federal and State regulations (id. at pp. 34-35). The IHO also found that the district provided the student with a FAPE in the least restrictive environment and that a 10- month program in a 12:1+1 special class in a community school with speech-language therapy, OT and PT was appropriately designed to address the student's needs (IHO Decision at p. 36). Additionally, the IHO found the district established that all parties actively and meaningfully participated in the February 2012 CSE meeting (IHO Decision at pp. 35-36). Further, the IHO found that the parents did not demonstrate

that the student would substantially regress without 12-month services thereby affirming the February 2012 CSE's decision that the student did not require a 12-month program (id.).

In this instance, I find that the IHO correctly found that the district had not denied the student a FAPE with regard to most of the allegations of deficiencies regarding the February 2012 CSE and the resultant IEP and with the exception of the two specific issues noted below, I adopt the IHO's conclusions as my own. However, I also find that the IHO erred in two respects. First, the IHO erred in not addressing the parents' claim that the February 2012 CSE did not rely on the necessary evaluative information to properly gauge the student's skills and needs (see generally IHO Decision at pp. 34-38). Secondly, and more significantly with regard to the outcome of the case, the IHO erred in upholding the district's refusal to reconvene the CSE in accordance with the parents' request to address the student's need for 12-month services (IHO Decision at pp. 34-38; Parent Exs. A at p. 4; H). In this instance, the district's failure to reconvene the CSE significantly impeded the parents' ability to participate in the decision-making process regarding the provision of such services and thereby denied the student a FAPE. Therefore, for the reasons discussed below, the IHO's decision while correct on most issues presented by the parties, must be overturned regarding the outcome.

A. February 2012 IEP

1. Evaluative Information

Turning first to the evaluative information available to the February 2012 CSE, the district school psychologist, who also functioned as the district representative at the February 2012 CSE meeting, testified that the CSE relied on the student's Mary McDowell September 2011 to January 2012 progress report that was verbally presented (Mary McDowell progress report) and a January 30, 2012 PT assessment report from the student's private provider (Tr. pp. 50-51, 54-55; Parent Exs. D at pp. 1-24; E at pp. 1-4). The Mary McDowell progress report included the teachers' general observations of the student as well as the student's performance in reading, writing, mathematics, social studies and science (Parent Ex. D at pp. 1-16). Additionally, the Mary McDowell progress report contained an update of the student's speech-language and OT skills (Parent Ex. D at pp. 17-22). The district representative indicated that the Mary McDowell teacher verbally reported not only on the academic information, but also information related to the student's socialization, physical health, vitality, executive functioning, and related service needs (Tr. pp. 32, 43). Further, the district representative testified that the student's teacher provided the information from the Mary McDowell progress report verbally because the progress report, although completed, had not yet been sent out to the parents or the district (Tr. pp. 32, 43, 53, 54-55, 277-79; Parent Ex. E at pp. 1-4). Therefore, the progress report was not physically available at the time of the February 2012 CSE meeting to any of the parties involved (id.).[1]

In the OT portion of the Mary McDowell progress report the student's occupational therapist at Mary McDowell noted the student presented with low muscle tone, overall decreased

[1] The February 2012 IEP did not reflect the content of the speech-language 2011-12 mid-year report in the present levels of performance and the contents of this report will not be presented as speech-language services were not specifically raised regarding the student's need for 12-month services (compare Parent Ex. C at p. 1, with Parent Ex. D at pp. 17-18).

strength and endurance, as well as, delayed postural reactions and protective reflexes (Parent Ex. D at p. 22). Further, she noted the student demonstrated difficulties with motor planning and visual processing skills (id.). The occupational therapist stated the student benefitted from adaptive seating, "Alternative Hand Hugs," occasional gum use, the use of thick/broken crayons, triangular crayons, finger crayons, pencil grips and individual sensory breaks (id.).

The district representative testified that the January 2012 PT report was physically present at the February 2012 CSE meeting and the CSE discussed the report at that time (Tr. pp. 41-42; Parent Ex. E at pp. 1-4). The January 2012 PT assessment report noted the student demonstrated left sided weakness, dyspraxia, decreased body in space awareness, and visual motor integration difficulty (Parent Ex. E at p. 2). The physical therapist indicated the student required repetition of directions and tactile cues to understand tasks which she opined maybe secondary to the student's difficulty with processing verbal directions, poor body schema and dyspraxia (id.). The physical therapist stated the student's gross motor abilities fell in the first percentile and that he functioned below the four year old level (id.). She reported that the student's progress depended on the consistency of the PT services provided in a sensory enriched environment that included various pieces of dynamic equipment (id.). Further she noted that the student's lack of consistent PT services impacted his progress in attaining higher gross motor abilities as he has only made partial progress toward his IEP goals (id.). The physical therapist recommended that PT services be provided on a 12-month basis to ensure the student did not lose gained skills (id.).

Based on the foregoing, I find that the Mary McDowell progress report and the private January 2012 PT assessment provided sufficient information regarding the student's needs and abilities for the February 2012 CSE to develop the student's IEP.

2. Parent Request to Reconvene the CSE

Next, for the reasons that follow, the evidence in the hearing record supports the conclusion that in this particular instance the district significantly impeded the parents' right to participate in the development of the student's IEP by failing to reconvene the CSE in response to the parents' request.

In addition to a district's obligation to review the IEP of a student with a disability at least annually, federal and State regulations also require a CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents' opportunity to participate in the decision-

making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In this case, the parent raised concerns at the February 6, 2012 CSE meeting regarding the student's need for 12-month services (Tr. pp. 41, 281). Specifically, the parents' concerns related to the provision of OT and PT over the 12-month period to prevent the regression of skills the student achieved during the school year (id.). The district representative and the parent testified that the correspondence between them regarding the lack of a recommendation for 12-month services continued after the February 2012 CSE meeting via phone and email (Tr. pp. 44, 72-73, 289-90; Parent Ex. G; H; I; J; K). The parent testified that she requested, by phone and email, that the CSE reconvene because there were no related service providers present at the February 2012 CSE meeting and she wanted the providers to speak with the CSE regarding the student's need for 12-month services (Tr. pp. 290, 293).

By email dated May 21, 2012, the parent requested that the district provide the student with OT and PT for the summer of 2012 by issuing related service authorizations (RSA) (Parent Ex. G). The parent also indicated she sent reports from the student's current occupational therapist and physical therapist (id.). The parent stated that she and the therapists opined that the student "will substantially regress when school resumes in September" if summer services were not provided (id.). In a follow up email on June 19, 2012 the parent again contacted the district to indicate she had not received notice of a date for the CSE to reconvene, as she anticipated, based on her previous phone conversation with the district (Parent Ex. H).

On June 20, 2012 the district representative responded to the parent's inquiry and indicated that she received the parent's emails and explained that the CSE discussed the January 30, 2012 PT assessment report and the OT report contained in the Mary McDowell September 2011-12 school report at the February 6, 2012 CSE meeting (Parent Ex. I). Further, in the same email, the district representative reiterated the CSE's recommended services for OT and PT noting that the February CSE maintained the student's related service even though he had not been receiving PT services or his full OT mandate at Mary McDowell (id.). The district representative concluded the email by indicating she attached a copy of the parent's due process rights should the parent not be in agreement with the recommendations of the February 6, 2012 CSE (id.).

The parent responded by email the same day, June 20, 2012, and provided the district with the copy of the January 2012 PT assessment report and a letter from the student's occupational therapist dated May 17, 2012 (Parent Ex. J). The parent indicated the OT letter was not available at the February 2012 CSE (id.). Further, the parent stated she awaited a date for an "amended" meeting (id.). On the same day the district representative responded that the OT letter did not specifically state what progress the student made in therapy or what goals the student met and the letter did not specifically delineate the student's documented regression from the lack of summer services (Dist. Ex. 2 at p. 1). She further requested the parent obtain additional information from the occupational therapist and forward that to the CSE to substantiate the need for an additional IEP review (id.). A subsequent email from the district dated the same day also noted that if the parent had new information in support of her request for 12-month services that should also be sent to the CSE (Dist. Ex. 2 at p. 2).

In an email dated July 17, 2012, the parent indicated that she had sent the above noted reports to the district and she requested confirmation that the district "received and [was] considering same in order to hold a meeting so [the student] may be able to receive OT services over the summer" (Parent Ex. K).

The district representative testified that in her communication with the parent she indicated that the February 2012 CSE reviewed the PT report at the CSE meeting and the letter submitted from the occupational therapist did not "constitute sufficient new information to hold yet another IEP review meeting" (Tr. pp. 44-45). She testified that she told the parent that should the [occupational therapist] submit a true evaluative report, that then [the CSE] would look at that [at a] future time, but there was never a subsequent meeting held" (Tr. pp. 45, 73, 75-76).

Further, the district representative testified that she did not send the parent "prior written notice" indicating why a CSE review was not going to be held (Tr. pp. 75-76). The district representative provided the rationale that she indicated in an email to the parent that the information they provided did not offer "sufficient data, statistical data, to warrant having another meeting and it was clear that we did not have the intention to hold another meeting" (Tr. pp. 75-76; District Ex. 2 at p. 1). The district representative also testified that if the parent had "new information to drive a new IEP meeting, that ha[d] to be submitted for review prior to the meeting," while also indicating she "would never hold another meeting based on a letter that ha[d] no firm data in it." (Tr. p. 76). As stated by the district representative "[i]t's not sufficient grounds to hold another meeting" (id.). Further, she testified that the district had already met their obligation for the year by holding the annual review and making recommendations (Tr. pp. 76-77).

In this case, the district is the LEA and it is the LEA that the IDEA assigns the task of sufficiently evaluating the student's needs. Although the CSE relied upon Mary McDowell evaluation reports or assessments of the student to identify the student's needs and develop the student's educational program, which is permissible, to the extent that such evaluation reports or assessments were not sufficiently complete for the purpose of determining the student's need for 12–month services, the responsibility for such evaluative deficiency lies with the district and not the parent (see 34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]). In this case, if the district believed it lacked sufficient evaluative material to determine whether the student was likely to experience substantial regression, it was the district's obligation to resolve that uncertainty. However, the district indicated that it would honor the request to reconvene the CSE and examine the need for 12-month services if the parent obtained additional assessment information. The district thereby abdicated its responsibility and instead attempted to thrust it on the parents. The district points to no authority suggesting that a parent is required to obtain an evaluation of a student in order to request a new CSE meeting to address concerns they have with their child's educational program. Notwithstanding the district's misstep, in this case the parent went forward in any event and obtained new information but even then the district refused to reconvene the CSE, which I find significantly impeded the parents' participation in the development of the IEP, and denied the student a FAPE.[2]

[2] I need not under the circumstances of this case determine how many times a CSE must honor a parent's request to reconvene the CSE to repeatedly address the same disagreement.

B. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 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).

With regard to the party's dispute over whether the parent's unilateral placement of the student for the 2012-13 school year was appropriate I affirm the IHO's finding that the Mary McDowell program was appropriately designed to address the specific special education needs of the student (IHO Decision at pp. 39-40). The district's sole argument on appeal is that Mary McDowell was not appropriate because it did not provide the student with related services in the amounts recommended by the February 2012 CSE.

The evidence in the hearing record reflects that the student demonstrated kindergarten level academic skills in mathematics and reading, with delays in sensory processing and significant challenges regarding distracting behaviors, focus, attention, and organizational skills (Tr. pp. 36, 205; Parent Ex. C at pp. 1-2). Further, the hearing record indicates the student was an "emergent writer" who displayed delays in receptive language, expressive language, pragmatic skills, articulation, and auditory processing, which impacted his ability to answer questions, follow directions, express himself in complete sentences, sustain a conversation, and interact appropriately with adults and peers (Parent Exs. C at pp. 1-2; D at pp. 17-18, 19). Regarding the student's motor skills, the hearing record indicates the student had low tone and decreased strength and endurance, with delays in postural reactions and protective responses (Tr. pp. 138-39; Parent Ex. D at p. 22). The hearing record also notes that the student demonstrated difficulty participating in activities involving higher level body coordination, poor safety awareness, poor visual spatial awareness and difficulty with motor planning (Tr. pp. 138-39; Parent Ex. D at p. 22). The occupational therapist indicated the student had difficulty with graphomotor and visual motor skills impacting fine motor and visual perceptual abilities, which made writing challenging for the student (Parent Ex. D at p. 22). The physical therapist indicated the student had difficulty sustaining an optimal level of arousal/organization with difficulty with sensory integration and praxis, which impacted the student's "ability to perform demonstrated skill" limiting his gross motor development (Parent Ex. E at p. 1). The physical therapist also noted the student's difficulty in processing vestibular information and his unilateral weakness impacted his ability to negotiate stairs, jump, and run, which resulted in significant delays in gross motor abilities (id. at pp. 1-2).

The hearing record indicates the student needed support in reading, mathematics, speech-language, and motor skills (see Parent Ex. D at pp. 2-22). To support learning the student also required small group instruction, redirection, and support with social pragmatic skills and organization (Parent Ex. C at pp. 1-3). Further, the hearing record indicates the student required: visual schedules; clear expectations with visual review; repetition; a multisensory approach; kinesthetic participation; pencil grips; related services; visual and verbal prompting; movement breaks; "heavy sensory work"; noise reducing headphones; and use of special seating, cushions, and chair to support attention to tasks (id.).

To address the student's needs Mary McDowell provided the student with an academic program and related services in a class with 10 students and two teachers (Tr. pp. 175-76, 205). The student received reading instruction four times per week in a group of four students with one teacher focusing on emergent reading skills and behaviors, phonics skills, and handwriting using a multisensory reading program (Tr. p. 176; Parent Ex. L at p. 5). To assist the student's writing during dictation the teacher provided laminated cards with the words provided to trace, paper with larger spaces between lines, triangle crayons, teacher support in planning the drawing, and teacher modeling and modifications (Tr. pp. 216-17; Parent Ex. L at pp. 7, 12). To support the student's encoding skills the teacher tapped out the sounds allowing the student to be successful during

dictation (Parent Ex. L at p. 7). For journal writing the teacher provided the student with redirection and seating outside the classroom in the hallway to reduce distraction (Tr. p. 229; Parent Ex. L at p. 11).

In mathematics Mary McDowell used a multisensory program that made use of manipulatives, pictures, and symbols to reinforce mathematical concepts and skills (Parent Ex. L at p. 13). The student received mathematics in a group of six students with one teacher three times per week (Tr. p. 176; Parent Ex. L at p. 13). The curriculum was modified for the student using "sky writing," prompts, breaking down directions, and managing the manipulatives (Tr. pp. 218-19). To assist the student with his attention to task during mathematics he sat in a chair near the group for calendar, graph interpretation, and weather observation activities (Parent Ex. L at p. 16).

The student received speech-language therapy in a group of two students outside the classroom twice a week for 30 minute sessions and a 45 minute language/OT session with the entire class (Tr. pp. 222-23; Parent Ex. L at p. 23). Speech-language therapy addressed the student's receptive language skills, auditory processing, expressive language and pragmatic skills with a focus on executive function skills, understanding and using wh-question words and developing social-pragmatic skills (Parent Ex. L p. 27). Due to the student's difficulty monitoring and modulating his voice as well as regulating his arousal levels the teachers provided direct teaching and used a visual voice monitor (Tr. pp. 221-22). The teacher also provided the student with support to help him initiate play with peers (Tr. p. 222).

To address the student's motor skills the occupational therapist provided OT one time per week in a group of two and the student participated in a whole class language/OT group one time per week (Parent Ex. L at p. 31). OT focused on motor memory for letter writing, fine motor skills, bilateral integration, cutting skills, motor planning, strength, endurance, and balance skills (id.). Mary McDowell provided the student with special paper for writing and frequent one-to-one support (Tr. pp. 208-09). To optimize success the student used a specialized chair, Alternative Hand Hugs, pencil grips, sensory breaks with heavy work, and a weighted vest, among other things (Parent Ex. L at p. 31). To address the student's attention difficulties Mary McDowell provided movement breaks, heavy work to help him regulate his body, refocusing, one-to-one support, directions repeated, and use of an FM system in the classroom (Tr. pp. 206-09). Additionally, the student received approximately eight sessions of OT during summer 2012 at a private clinic (Parent Ex. S at p. 1).

PT was not provided by personnel at Mary McDowell during the 2012-13 school year, but the parent arranged and paid for PT from a private clinic to address the student's gross motor needs (Tr. pp. 181, 225, 251, 296, 298-99; Parent Ex. S at pp. 1-3). This included approximately 14 PT sessions provided during summer 2012 (Parent Ex. S).

While a finding of progress is not required for a determination that a student's private placement is appropriate (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 [2d Cir. 2012]; see also Frank G., 459 F.3d at 364), a finding of progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing

Berger, 348 F.3d at 522, and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). The Second Circuit has also explained that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364).

The IHO found the student made progress and, although the student did not receive the full amount of related services at Mary McDowell recommended by the February 2012 CSE, the progress noted in the hearing record from the speech-language pathologist and occupational therapist indicated the student benefitted from their strategies and therapy (IHO Decision at p. 40). The hearing record supports the IHO's finding of the student's progress in various areas at Mary McDowell (Tr. pp. 181, 215-16). In reading his teacher indicated the student's decoding skills progressed significantly and that the student identified most of the consonant-vowel-consonant words, he began to identify words throughout the classroom, and he demonstrated a consistent understanding of the plural concept and punctuation with minimal teacher prompting (Parent Ex. L at p. 7). In the Mary McDowell year-end report for 2011-12 the teacher indicated the student achieved a midyear goal of writing his first name independently, and demonstrated an understanding of question words and conjunctions showing progress in writing (id. at pp. 11-12). The student's teacher testified the student made progress in reading comprehension and his ability to answer questions about a story read aloud (Tr. pp. 215-16). She also stated the student learned to write uppercase and lowercase letters and expanded his decoding skills to words and sentences throughout the day (id.).

The student's teacher noted the student made progress in attentiveness and appropriateness during mathematics morning meeting time, in that he made improvement in interpreting graphs and generating weather observations with increasing independence and self-correction (Tr. p. 219; Parent Ex. L at p. 16). The Mary McDowell end of year 2011-12 progress report also noted the student made progress toward his mid-year goal of being able to write numbers independently (Parent Ex. L at p. 16). The student's teacher indicated the student made progress in motor skills requiring less teacher support for gross motor skills (Tr. p. 234). The speech-language pathologist reported the student demonstrated overall progress in his comprehension and use of wh-questions, which improved his ability to understand short stories and to tell personal narratives (Parent Ex. L at pp. 27-28). The speech-language pathologist also noted the student showed improvement in his ability to gain other's attention, work cooperatively, make compromises, take turns, and request help (id. at p. 28). In the motor area the occupational therapist opined the student "made clear progress" during the year (id. at p. 33). She indicated the student could attempt to write letters from memory without frustration, showed improved pencil grasp, used a more efficient grasp, performed asymmetrical movement patterns, and showed improved cutting skills (id. at p. 31).

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

C. 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]).

Turning to the parties' disagreement over equitable considerations in this case, I find the IHO properly found that the evidence supports that the parents cooperated with the district and there is no reason to disturb the IHO's decision. The district's argument that the parents did not intend to enroll the student in a public school placement is unavailing, as "their pursuit of a private placement was not a basis for denying their 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]).

VII. Conclusion

In this instance, the district significantly impeded the parents' opportunity to participate in the decision-making process by failing to respond to the parents' April 2012 request to reconvene the CSE, which under these particular circumstances, was a denial of a FAPE for the 2012-13 school year. The evidence in the hearing record does not support the IHO's determination that the district offered the student a FAPE for the 2012-13 school year; however it amply supports her conclusions that Mary McDowell provided the student with an educational program that was reasonably calculated to address the student's unique needs and that equitable considerations weighed in favor of the parent's request for relief. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 10, 2013 is modified by reversing those portions which found that the district offered the student a FAPE for the 2012-13 school year and denied the parent**s**' request for reimbursement; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the costs of the student's tuition at Mary McDowell for the 2012-13 school year and the private related services obtained during summer 2012.

Dated: **Albany, New York**
November 18, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER