

The State Education Department
State Review Officer
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No. 13-146

**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:

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Alexander M. Fong, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Marc Gottlieb, 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 respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Marvelwood School (Marvelwood) for the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The CSE convened for an annual review on March 15, 2012 to develop an IEP for the student, which was to be implemented beginning the next day (Dist. Ex. 3 at pp. 1, 9). Finding that the student remained eligible for special education services as a student with an other health-impairment,¹ the CSE recommended a program consisting of placement in a general education classroom in a community school along with special education teacher support services (SETSS)² three periods per week for integrated science and math, SETTS two periods per week for

¹ The student's eligibility for special education and related services as a student classified as having an other health-impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

² SETSS is described in the hearing record as the provision of instruction by a special education teacher to students within the general education environment (Tr. pp. 79, 111-12).

humanities/writing, and one 30-minute counseling session per week in a group (Dist. Ex. 3 at pp. 1, 5, 8-9). The CSE also recommended testing accommodations of extended time, use of a laptop for writing, and a separate location of not more than 25 students (Dist. Ex. 3 at p. 6).

The parents removed the student from the public school on March 23, 2012 and placed him in a private residential school at their own expense (Tr. pp. 71-72, 252; Parent Ex. 10). In July 2012, the parents sent a letter to the district advising the district of their concerns that the March 2012 IEP did not meet the student's needs and stating their intention to enroll the student at Marvelwood for the 2012-13 school year and to seek reimbursement for the cost of the student's tuition at Marvelwood from the district (Dist. Ex. 11).³ The parents signed a contract for the student's attendance at Marvelwood for the 2012-13 school year on September 8, 2012 (Dist. Ex. 13).

A. Due Process Complaint Notice

The parents requested an impartial hearing pursuant to an amended due process complaint notice dated January 24, 2013, seeking reimbursement for the costs of the student's room and board, tuition, and related services at Marvelwood (Dist. Ex. 1).^{4, 5} The parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, raising procedural and substantive issues regarding the March 15, 2012 CSE meeting and resulting IEP (*id.* at p. 1).⁶ Specifically, the parents alleged that the CSE was invalidly composed, failed to consider appropriate evaluative data, and failed to consider the parents' request for placement in a specialized residential school setting (*id.* at pp. 1-2). Additionally, the parents alleged that the CSE failed to respond to their request that the CSE consider a psychiatric evaluation obtained by the parents subsequent to the March 2012 meeting (*id.* at p. 2). Regarding the IEP, the parents alleged that the March 23, 2012 IEP contained insufficient goals that could not be met in the district's proposed program (*id.* at p. 1). The parents also argued that the recommended placement in a general education class in a community school with SETSS did not provide the student with sufficient support to make academic and social progress (*id.* at p. 2). The parents requested reimbursement for the cost of the student's tuition at Marvelwood, room and board, transportation, and related services (*id.*).

³ The hearing record reflects that Marvelwood is a boarding school located in Connecticut that serves students in need of academic and therapeutic supports in a small school environment, one third of whom are students with disabilities (Tr. pp. 150-51). The Commissioner of Education has not approved Marvelwood as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

⁴ According to the IHO's decision, the parents' original due process complaint notice was dated November 9, 2012 and was filed on November 14, 2012; however, a copy of the original due process complaint notice was not included in the hearing record (IHO Decision at p. 3; Dist. Exs. 1-14; Parent Exs. A-W; IHO Exs. I-IV).

⁵ The January 24, 2013 amended due process complaint notice is incorrectly dated January 24, 2012 (Dist. Ex. 1 at p. 1).

⁶ The parents' amended due process complaint notice refers to the CSE meeting as taking place on March 23, 2012; however, the hearing record indicates that the CSE meeting was held on March 15, 2012 (Tr. p. 53; Dist. Exs. 1 at p. 1; 3 at p. 9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 11, 2013 and concluded on May 8, 2013, after two nonconsecutive hearing dates (Tr. pp. 1-322). In a decision dated July 2, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that the unilateral parental placement of the student at Marvelwood was appropriate, and that equitable considerations weighed in favor of the parents' request for reimbursement for all costs associated with the placement of the student at Marvelwood for the 2012-13 school year (IHO Decision).

Prior to finding that the district failed to offer the student a FAPE, the IHO found that the parents' claims regarding the composition of the March 2012 CSE, the adequacy of the evaluative data available to the CSE, and the adequacy of the goals contained in the March 2012 IEP did not result in a denial of a FAPE to the student (IHO Decision at pp. 14-17). However, the IHO then determined that the general education with SETSS placement recommended by the March 2012 CSE was not reasonably calculated to provide the student with educational benefits, finding that as the student had received SETSS during the 2011-12 school year but failed to pass his classes, it was unreasonable for the CSE to conclude that an increase in SETSS would allow the student to make progress (id. at pp. 17-18). The IHO noted that evidence in the hearing record indicated that the student's executive functioning deficits contributed to his inability to make academic progress (id.).

The IHO went on to determine that the unilateral parental placement of the student at Marvelwood for the 2012-13 school year was appropriate (IHO Decision at pp. 18-20). The IHO found that Marvelwood addressed the student's executive functioning needs through a variety of supports, including a planner, modified assignments, and an evening study hall (id. at pp. 19-20). The IHO also addressed the restrictiveness of the parents' unilateral placement, determining that although Marvelwood was more restrictive than the recommended public school program, the parents had no alternative other than to place the student in a private facility because the student had not been successful in the public school setting and the district continued to offer the same program in which the student had been unsuccessful in the past (id. at p. 20).

The IHO next found that equitable considerations did not warrant a reduction in tuition reimbursement (IHO Decision at pp. 20-22). Specifically, the IHO found that the parents provided the district with adequate written notice of their intent to place the student at Marvelwood at public expense for the 2012-13 school year (id. at p. 21). In addition, the IHO found that the parents' application for the student's admission to Marvelwood in June 2012 was not a sufficient basis for a reduction or denial of reimbursement absent evidence that the parents interfered with or failed to cooperate with the CSE in the development of the student's IEP (id.).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision, asserting that the district offered the student a FAPE for the 2012-13 school year, that Marvelwood was not an appropriate placement for the student, and that equitable considerations warranted a reduction in the award of tuition reimbursement.

The district asserts that the IHO erred in finding the increase in SETSS from three to five periods per week was not reasonably calculated to address the student's needs. In particular, the district asserts that the March 2012 IEP was reasonably calculated to provide the student with

educational benefits, as the IEP taken as a whole included the increase in SETSS, counseling, testing accommodations, and various goals and strategies to address the student's deficits. Additionally, the district asserts that there was no evaluative data available to the March 2012 CSE indicating the student required a residential placement in order to make progress and the district's recommended placement in a general education classroom with SETSS was the least restrictive environment (LRE) for the student. The district further argues that the district was not responsible to provide after-school services to ensure that the student complete his homework, stressing that it was the parents' responsibility. Nevertheless, the district suggests that it fulfilled any obligation it may have had to ensure homework completion by providing the student with after-school services on a voluntary basis.

The district also asserts that the IHO erred in finding Marvelwood to be an appropriate placement for the student for the 2012-13 school year. The district argues that a private residential boarding school is too restrictive for the student because the student functions at or above grade level and his main deficit is an inability to complete homework assignments. The district also claims that the 1:1 student/teacher ratio in the student's math class at Marvelwood is overly restrictive. In addition, the district asserts that the learning supports available in the private placement are comparable to SETSS and argues that the study hall provided at the private placement was not a special education service and therefore does not support the appropriateness of the private placement.

The district goes on to argue that equitable considerations weigh in favor of denying the parents' request for relief, alleging that the parents did not enter into the March 2012 CSE meeting in good faith. The district emphasizes that the parents considered private residential placements two months prior to the March 2012 IEP meeting and did not share the results of a privately obtained neuropsychological evaluation report with the CSE. Additionally, the district asserts that although the parents are not seeking reimbursement for any portion of the 2011-12 school year, the parents' removal of the student from public school in March 2012 without providing written notice to the district should weigh against granting the parents' claims for tuition reimbursement for the 2012-13 school year.

The parents answer, denying the allegations contained in the petition and asserting that the IHO was correct in determining that SETSS would not have been sufficient to address the student's academic needs.

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 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., 2010 WL 3242234, at *2 [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, 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, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

Turning to the district's recommended program, a review of the hearing record supports the IHO's conclusion that a general education placement with SETSS five periods per week was not reasonably calculated to provide the student with educational benefits.

The IHO decision was based, in part, upon the results of the student's academic struggles during the 2011-12 school year while receiving three periods of SETSS per week despite his academic potential (IHO Decision at pp. 17-18). A student's progress under a prior IEP is a relevant area of inquiry for purpose of determining whether a subsequent IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact

that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3rd Cir.1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Board of Educ. Champaign Community Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). However, when a student fails to make any progress under an IEP in one year, continuing to use an identical IEP in a subsequent year may be questionable (J.C.S. v Blind Brook-Rye Union Free School Dist., 2013 WL 3975942 at * 11 [SDNY Aug. 5, 2013]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 534 [3rd Cir. 1995][noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

In this instance, the student's academic struggles while attending the district's program and receiving SETSS three times per week during the 2011-12 school year were well documented. The student's report card reflects that he was failing five out of seven classes by the end of the first marking period of his ninth grade year and six out of seven classes at the end of the second marking period, including math and writing (Parent Ex. B at p. 1).⁷ At the time of the March 2012 CSE meeting, the student had received a diagnosis of an attention deficit disorder, predominantly inattentive type (ADD), and he had a history of hyperactivity and inattention at home and school, difficulty with executive functioning related to organizational skills including note taking and written expression, and visual motor deficits particularly with regard to handwriting, all of which resulted in poor task and homework completion (Tr. pp. 124, 231-38; Dist. Exs. 3 at pp. 1, 2; 4 at p. 1; 6; 7; 8 at p. 1; 9 at pp. 1-2). In addition, the March 2012 IEP reflects that the student struggled with staying focused and on task, completing and handing in assignments, and was exhibiting poor management and organizational skills, which were all described as major areas of concern on the student's prior (April 2011) IEP (Dist. Exs. 3 at p. 1; 4 at p. 1).

In order to address the student's needs in executive functioning, the March 2012 CSE recommended the student be placed in a general education classroom and receive group SETSS three periods per week in his integrated science and math class and two periods per week in his humanities/writing classes: to address the student's apathy and lack of engagement with school, the CSE recommended one 30-minute group counseling session per week (Tr. p. 69; Dist. Ex. 3 at p. 5). The only change in the services recommended for the student from the April 2011 IEP to the March 2012 IEP was the addition of two periods per week of SETSS (compare Dist. Ex. 4 at p. 7, with Dist. Ex. 3 at p. 5). Additionally, testimony by the student's SETSS teacher indicated that during the first semester of the 2011-12 school year she was present in the student's classroom for five periods per week and during the second semester the student was switched to a class in which she worked for ten periods per week (Tr. p. 121).⁸ The student's SETSS teacher testified

⁷ The hearing record reflects that the student received math instruction in an integrated science and math class (Tr. pp. 80, 245). The student's report card indicates that while the student failed his integrated science and math class during both the first and second marking periods, his grade decreased from the first marking period to the second marking period (Parent Ex. B at p. 1).

⁸ The hearing record does not reflect that the CSE reconvened or otherwise agreed to formally change the frequency of the student's SETSS on his IEP.

that the amount of time she spent with the student for each class period was about the same but that she saw him more periods per day so the quantity of individual instruction she provided to the student increased (Tr. p. 132). While the SETSS teacher indicated that she was unsure whether the change in classroom had an effect on the student's grades due to the short amount of time the student attended the new classroom, I note that the student remained in the district through March 23, 2012, thus, the student would have received the increased level of support in the new classroom for a minimum of several weeks (Tr. pp. 71, 122-23).⁹ This should have been ample time to determine whether the student benefited from the increase in SETSS. In light of the student's lack of progress with three periods of SETSS per week pursuant to the April 2011 IEP, and considering the SETSS teacher was actually present in the student's classroom for five periods and then later ten periods per week, the IHO was correct in determining that an increase in SETSS from three periods per week to five periods per week was not reasonably calculated to provide the student with educational benefits.

According to the student's SETSS teacher, the student could have been successful in a general education classroom with SETSS and failed his classes because he did not complete his homework and was inconsistent at completing his schoolwork (Tr. pp. 63, 68-69, 117-18; Dist. Ex. 3 at p. 2). She further testified that the student's greatest area of need that prevented him from making academic progress was his inability to complete his work on time (Tr. pp. 59-60, 63). The student's SETSS teacher also indicated that because most of the classroom assignments also had a homework component, the student's failure to complete homework assignments was impacting his ability to do classwork as well (Tr. p. 63). However, the March 2012 CSE did not provide the student with significant new or additional supports to address his executive functioning issues or his difficulties with completing assignments.¹⁰ Rather, the supports contained in the March 2012 IEP included the use of an after-school schedule, a planner and checklists to manage assignments, and the use of a homework schedule, all of which, except for the use of checklists, were strategies that the IEP indicated had already been implemented with minimal success (Dist. Ex. 3 at pp. 2, 4).

In addition to the student's difficulties with executive functioning, the student demonstrated academic deficits in decoding, math fluency and math calculation, which appear to have been overlooked by the March 2012 CSE (Dist. Exs. 3 at pp. 1-2; 7).¹¹ Although testimony by the student's SETSS teacher indicated that, at the time of the CSE meeting, the student tested on grade

⁹ Although the SETSS teacher did testify that the student showed slight progress in terms of his ability to focus, she attributed the increase in focus to the composition of the other students in the classroom rather than to the increase in support (Tr. p. 122).

¹⁰ In order to address the student's difficulties in completing homework, the student's SETSS teacher testified that the school developed a plan wherein the student would attend after school sessions (Tr. pp. 123-24). However, extended school day services are not listed on the IEP and "retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered" (R.E., 694 F.3d at 186). Nevertheless, the hearing record also indicates that although the district was aware that the after school sessions were ineffective because the student's attendance was inconsistent, the district did not offer any alternative types or levels of support to address the student's difficulties with homework completion (Tr. pp. 123-24, 269-70, 272; Dist. Ex. 3). As an example, the district could have recommended parent training services to assist the parents in helping the student at home, or a class period prior to the end of the school day where the status of his homework could be assessed and where the student could be assisted in organizing and completing his homework.

¹¹ The SETSS teacher testified that the March 2012 CSE's recommendation for SETSS was based on the assumption that the student was functioning at grade level (Tr. 67-69).

level in both reading and math, the student's grade equivalent scores reflected on the March 15, 2012 IEP indicate otherwise (Tr. pp. 68-69; Dist. Exs. 3 at p. 1; 4 at p. 1). While the student was in the seventh month of his ninth grade year (9.7) at the time of the March 2012 CSE meeting, based on testing completed by the district psychologist on March 12, 2012, and reflected in the IEP, the student was performing at a grade equivalent of 10.1 in passage comprehension, 8.0 in decoding, 8.9 in math fluency, and 7.3 in calculation, which indicates that although the student was performing above grade level in passage comprehension, he was performing below grade level in decoding, math fluency, and calculation skills (see Tr. p. 89; Dist. Exs. 3 at p. 1; 5; 7).^{12, 13} Considering that the hearing record indicates that the student was not functioning at grade level at the time of the March 2012 CSE meeting, the CSE did not provide sufficient supports to address the student's academic needs.

Based on the above, the hearing record demonstrates that the supports included in the March 2012 IEP, and in particular the recommendation of SETTTS, were not adequate to address the student's needs. The CSE should have more carefully considered the extent of the student's academic deficits, his attention deficits, and ongoing difficulties with executive functioning skills, and their impact on his ability to complete work both at school and at home, and the lack of success the student had experienced with the current level of support. As such, the hearing record supports the IHO's determination that the offered program was not reasonably calculated to provide the student with educational benefits and the district did not offer the student a FAPE for the 2012-13 school year.

B. Appropriateness of Marvelwood

Having determined that the district did not offer the student a FAPE for the 2012-13 school year, I now turn to the appropriateness of the parents' unilateral placement of the student at Marvelwood. 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 (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply

¹² The March 2012 IEP also reflects that the student's instructional/functional levels were ninth grade in reading and eighth grade in math (Dist. Ex. 3 at p. 9).

¹³ While the March 2012 IEP reflects that the student received a grade level equivalent of 10.1 in passage comprehension, the test protocol contained in the hearing record does not include the passage comprehension subtest results (see Dist. Ex. 5). Additionally, I note that although grade equivalent scores are not typically considered the most precise measure of a student's performance in comparison to percentile ranks or standardized scores, in this case, the hearing record does not include a report of the student's performance using standardized scores or percentile ranks (see Dist. Ex. 5).

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 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether 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).

Testimony by the director of the Strategies program at Marvelwood¹⁴ indicated that Marvelwood is a small independent boarding school of 150-160 students, almost all of whom reside at the school (Tr. p. 150).¹⁵ She testified that the main focus of the school is on academic support, although she described the school as having a therapeutic feel and noted that most of the students attending Marvelwood also suffered from feelings of academic inadequacy (Tr. pp. 150-51). She further testified that the school is comprised of one third students who have received a diagnosis of learning disabilities, one third of typical students who required a small school

¹⁴ As discussed in greater detail below, the Strategies program was a learning support program that met daily either individually or in small groups of no more than three students or in a 1:1 setting and provided supports based on a student's individual needs (Tr. pp. 148-50).

¹⁵ The hearing record reflects that Marvelwood has approximately 10 day students (Tr. p. 150).

environment, and one third international students (Tr. p. 151). Of the students enrolled at Marvelwood, the director indicated that between 25 and 35 percent have IEPs (id.).

Regarding the student's general curriculum classes, the hearing record reflects that they included both regular and special education students and had no more than 11 students in each classroom (Tr. pp. 161, 183, 213-14). In addition, the student participated in a 1:1 tutorial class for math instruction, an option chosen for him because his parents and the school agreed it would be the best way to increase the student's math competence and skills (Tr. pp. 158-59). In the 1:1 tutorial, the student worked on algebra skills at his own pace, the class was modified directly to his needs, and he received the full attention of the teacher (Tr. p. 159). The student also received modified homework as needed in other classes; in his history class the student received both a modified and unmodified syllabi and he and the teacher decided on a daily basis which assignment was more appropriate (Tr. pp. 158, 165).

According to the student's parents, at the time of the impartial hearing the student had made progress in self-confidence and self-esteem, as well as in his academic performance (see Tr. pp. 257-59). Although progress alone is not determinative of the appropriateness of a unilateral placement, it is a relevant consideration and "grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit" (Frank G., 459 F.3d at 364-65). In this instance, the hearing record reflects that the student was advancing academically while attending Marvelwood: he earned grades of B+ in English 10; B+ in Biology 2; A- in World History 2; D+ in Spanish 2; C- in Math Tutorial; B in Art; and pass (P) in Strategies, community service, and basketball (Parent Ex. N at p. 1).¹⁶ The student's passing grades at Marvelwood are an improvement from his last semester in the district's program, where he failed all of his classes except for physical education, and are an indication that the placement was reasonably calculated to enable the student to receive educational benefits (see Frank G., 459 F3d at 364; Walczak, 142 F3d at 130).

The director of the Strategies program indicated that she believed the student's success at Marvelwood could be attributed to the multiple "safety nets" provided at the school (Tr. p. 170). For example, she testified that in addition to the support provided during classes, a key to the student's success was the reinforcement obtained during a two hour study hall for all students that took place in the students' dorms every night (Tr. pp. 170-72). The study hall was staffed by two teachers in each dorm, who assisted students with their homework and checked plan books and homework completion (Tr. pp. 172-73). The director of Strategies indicated that it was typical for teachers to work with several students during study hall because they knew that certain students do not complete their homework to the best of their ability or needed additional support (Tr. pp. 174-75). She also testified that study groups were common, in which a group of students would prepare for a test together with the appropriate teacher (Tr. p. 175). She added that it was important for the student to see everyone doing their homework at the same time and studying for two hours (Tr. pp. 172-73). Although Marvelwood offered additional levels of support including "make-up study hall" to which teachers assigned students based on missing assignments, and library supervised study hall, which provided "a smaller, even quieter place for students to study" for students who had many missing assignments, the director of Strategies testified that the student

¹⁶ Although the student's grade in his Math Tutorial class declined from a B- during his first semester at Marvelwood to a C- during his second semester, the Strategies director explained that the student's difficulties could be attributed to the increased complexity of the content (Tr. p. 199; Parent Ex. N at pp. 1-2).

had only been assigned to make-up study hall once when he had been sick for several days, and that he had never required the library supervised study hall (Tr. pp. 171-72).

Although some of the supports provided at Marvelwood may be considered the sort of benefits that the parents of any student would prefer, such as a small class size, Marvelwood also offered the student specially designed instruction to address his unique needs. In particular, the student attended a learning support program called the Strategies program (Tr. p. 148). The Strategies class met daily, as one of seven periods in the school day, and could be implemented in a small group class of no more than three students or in a 1:1 setting (Tr. pp. 149-50). The student initially received Strategies in a 1:1 setting, but in April 2013 the student began receiving Strategies in a small group led by the director of the Strategies program (Tr. p. 155). The director testified that the Strategies class provided everything from executive functioning support (organization) to pre-teaching, re-teaching, homework support, scribing, tutoring, re-reading, assisting in outlining an essay, or other supports a student may need (Tr. pp. 149-50). She indicated that the Strategies class addressed the student's two biggest areas of concern: his executive functioning/organizational needs and his writing deficits (Tr. p. 155). To address his needs in organization, the student utilized a plan book at Marvelwood (Tr. pp. 156, 203). The student wrote his assignments in the plan book and his teachers checked the book daily so that it became a routine for the student (Tr. p. 156). To further address the student's organizational needs and his needs in writing, Marvelwood provided the student assistance with the writing process, including outlining for essays, co-writing assistance, review of content material in English and history to confirm his understanding of what he read and to then describe what he understood, and help with essays (Tr. pp. 156, 218-19).

While the district offered counseling services in the March 2012 IEP to address the student's apathy and lack of engagement in school, I note that testimony by the director of the Strategies program indicated that she did not believe the student required counseling services in order to improve his academic performance (Tr. pp. 69, 181; Dist. Ex. 3 at p. 5). In addition, the strategies director testified that the student's advisor at Marvelwood is a certified school psychologist and that the school specifically chose the student's advisor to provide a counseling component to the student's program (Tr. pp. 195-96). At Marvelwood, each advisor met with their advisees twice per week (Tr. p. 176). The hearing record supports the conclusion that the student had sufficient contact with his advisor, Marvelwood's school psychologist, to justify the absence of a formal counseling program.

Based on the foregoing, the hearing record demonstrates that Marvelwood appropriately addressed the student's executive functioning and organizational needs, as well as his academic needs in math and writing, during the 2012-13 school year.

1. Least Restrictive Environment

Next, I address the district's contention that Marvelwood is not the student's LRE. Although the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 549 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]), parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15).

Here, the parents' placement of the student at Marvelwood balances two aspects of the LRE concept. While Marvelwood educates the student alongside regular education students, it is also a residential facility and therefore removes the student from his home environment (Tr. pp. 150-51, 213). 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]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North 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. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]).¹⁷ For the most part, Marvelwood has been educating the student alongside regular education students, as the student attends classes with regular education students and participates in sports and activities at the school (Tr. pp. 205, 211-12, 213).¹⁸ However, Marvelwood is also a residential placement and residential placements are more restrictive than a local extended day program because the "norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132, citing Carlisle, 62 F.3d at 534). Additionally, federal regulations specifically provide that a district is liable for the cost of a residential placement if it is "necessary to provide special education and related services to a child with a disability" (34 CFR 300.104). However, as parents are not as strictly held to the standard of placement in the LRE as are school districts, it is unclear as to when a parent may be reimbursed for the cost of a residential placement.

While some Circuit Courts of Appeal have adopted separate tests to determine whether a unilateral residential placement is reimbursable under the IDEA, in determining the appropriateness of any unilateral placement, including a residential one, the Second Circuit has employed an analysis considering the "totality of the circumstances," with LRE being one factor (D.D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012] [holding tuition reimbursement was not warranted for a residential placement because the parent did not present evidence that the placement was appropriate to address the student's educational needs]; see Mrs. B., 103 F.3d at 1120-22; see also Jefferson County Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227, 1238-39 [10th Cir. 2012], cert. denied 133 S. Ct. 2857 [2013] [holding that the

¹⁷ Although Newington was developed to determine whether a district's placement is in the LRE, the same factors may also be helpful in determining the overall appropriateness of a parental placement (C.L. v Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34-35 [S.D.N.Y. 2012]; Schreiber, 700 F.Supp.2d at 549 n. 10).

¹⁸ The student's Math Tutorial class is provided in a 1:1 setting and his Strategies class is in a small group setting with two other special education students; otherwise, the student attends all of his classes alongside regular education students (Tr. pp. 189-90, 213-14).

essential question is whether the residential placement provides specially designed instruction and related services to meet the student's unique needs)].^{19, 20}

In this instance, the parents indicated that they relied on an August 21, 2012 psychiatric evaluation report in deciding to place the student at Marvelwood (Tr. p. 280). In the psychiatric evaluation report, the evaluator opined that the student "require[d] the support of a specialized residential school setting offering supervision within a structured, yet nurturing milieu" (Parent Ex. E at p. 10). The student's mother further testified that in placing the student the parents did not necessarily believe that he required a residential placement, but focused on his needs for executive functioning support and organization (Tr. p. 286). Additionally, during cross-examination the Marvelwood director indicated that the student could have received some educational benefit as a day student; however she also indicated that the student benefitted greatly from Marvelwood's evening study hall and, in particular, from the structure of knowing there was a set time for studying (Tr. pp. 204-07).

While the evidence in the hearing record may not support a finding that a residential program was necessary for the student, the hearing record does indicate that the student made progress due to the supports provided at Marvelwood, that Marvelwood provided specially designed instruction to address the student's executive functioning, organizational, and academic needs, and that Marvelwood educated the student alongside regular education students. Considering the totality of the circumstances, LRE considerations do not outweigh the other indications in the hearing record that Marvelwood was an appropriate placement for the student for the 2012-13 school year.

C. Equitable Considerations

Having determined that Marvelwood was an appropriate placement to address the student's needs during the 2012-13 school year, I now consider whether equitable considerations warrant a reduction in tuition reimbursement. 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

¹⁹ The Circuit Courts for the Third, Fifth, and Seventh circuits have adopted various tests for determining the appropriateness of a residential unilateral placement (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 297-300, 298 n.8 [5th Cir. 2009] [holding that a residential placement must be essential for the student to receive meaningful educational benefits and primarily oriented toward enabling the student to receive an education]; Mary T. v. Sch. Dist., 575 F.3d 235, 242-44 [3d Cir. 2009] [holding that a residential placement must be necessary for educational purposes as opposed to being a response to medical or social/emotional problems segregable from the learning process]; Dale M. v. Bd. of Educ., 237 F.3d 813, 817 [7th Cir. 2001] [holding that the services provided by the residential placement must be primarily oriented toward enabling the student to obtain an education, rather than noneducational activities]).

²⁰ Although regulations only provide that a residential placement must be at no cost to the parent when it is necessary to provide special education and related services to a student with a disability, those regulations apply to the district's obligation to provide a FAPE rather than to a parent's unilateral placement (34 CFR 300.104; see Educ. Law §4402 [2.b][2]).

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 T.M. v. Kingston City Sch. Dist., 891 F. Supp. 2d 289, 295 [N.D.N.Y. 2012]; J.P. v. New York City Dep't of Educ., 2012 WL 359977, at *13-*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at *10; S.W., 2009 WL 857549, at *13-14; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; see also Frank G., 459 F.3d at 363-64; 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]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district contends that equitable considerations should preclude or diminish an award of relief in this case because the parents removed the student from the public school on March 23, 2012 and enrolled the student at a private boarding school without providing the district with a sufficient 10-day notice. While the hearing record does indicate that the parents removed the student from public school on or about March 23, 2012, the parents are not seeking relief for any portion of the 2011-12 school year (Tr. p. 273; Dist. Ex. 1). The parents applied for the student's admission to Marvelwood in early June 2012 (Dist. Ex. 14 at pp. 2, 4). By letter dated July 16, 2012, the parents rejected the program recommendation contained in the March 2012 IEP as being insufficient to address the student's needs and notified the district of their intention to enroll the student at Marvelwood for the 2012-13 school year beginning September 7, 2012 (Dist. Ex. 11). The parents further notified the district of their intention to seek reimbursement for the cost of the student's tuition (id.). The parents entered into an enrollment contract with Marvelwood dated September 8, 2012 and the student began attending Marvelwood in September 2012 (Dist. Ex. 13; Parent Exs. G; I). As the district's only allegations regarding the parents' conduct relate to the 2011-12 school year and the parents are only seeking tuition reimbursement for the 2012-13 school year, the IHO correctly found that the parents' July 2012 letter provided the district with adequate notice of their concerns (Dist. Exs. 1; 11). Additionally, while the parents did not include a specific request to reconvene the CSE in their March and July 2012 letters (Dist. Exs. 10; 11), the district did little, equitably speaking, to better its position, such as voluntarily holding an additional CSE

meeting (or offering to modify the IEP without a meeting) to increase the chances of satisfactorily addressing the parents' concerns with the IEP.²¹

The district also challenges the reasonableness of the parent's selection of a residential placement rather than a day program. A parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits (Jennifer D. v New York City Dept. of Educ., 550 F. Supp. 2d 420, 436 [S.D.N.Y. 2008]). However, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011]). Additionally, a parent's failure to locate a placement closer to home—to obviate the need for a residential placement—may be considered as a factor in reducing tuition reimbursement (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *10 [S.D.N.Y. Feb. 4, 2013]).

In this instance, the parents had sufficient time, from the removal of the student from the district public school in March 2012 to the start of the school year in September 2012, to conduct a search for an appropriate day school. The parents acknowledged that the student did not necessarily require a residential placement (Tr. p. 286). And while the student's mother testified that the parents' search focused on finding a school that could address the student's executive functioning needs, rather than on placing the student in a residential program, the parents noted their preference for a residential placement (Tr. pp. 280-81).²² Additionally, there is no testimony in the hearing record indicating that the parents pursued a local day program for the student.

Considering the above, the parents' failure to explore a local day program weighs in favor of reducing the relief requested by the cost of the boarding component of the program. However, I must also consider other factors affecting the reasonableness of the cost of the student's education. In this instance, the student received a significant financial aid award, accounting for more than half of the cost of tuition at Marvelwood for the 2012-13 school year (Tr. pp. 261-62, 293; Dist. Ex. 13; Parent Ex. I). Accordingly, I limit the parent's requested relief to the non-residential portion of the student's tuition at Marvelwood; the district shall be liable for that portion of the non-residential portion of the student's tuition remaining after pro-rata application of the financial aid award between the residential and non-residential portions of the costs of the student's tuition.²³

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year and that the parents' placement of the student at Marvelwood was appropriate. However, to the extent that the IHO decided that

²¹ To be clear, the CSE was not required under state regulations to reconvene simply because the parents provided 10-day notice identifying concerns; however, when the parents have provided a 10-day notice window—which was envisioned as providing public schools with an opportunity to cure alleged defects in a student's program—and the district makes no attempt at all, such inaction does nothing to enhance a district's position in the weighing of equitable factors.

²² The parents' request for recommendations from the district for boarding schools in January 2012, prior to the March 2012 CSE meeting, is another indication of the parents' preference for a residential placement (Tr. pp. 50-51, 269).

²³ The hearing record does not specify the costs of the residential portion of the student's tuition at Marvelwood for the 2012-13 school year, separate from the regular tuition costs (Dist. Ex. 13 at p. 1; Parent Ex. I).

equitable considerations do not weigh in favor of a reduction of the relief requested, the appeal must be sustained in part.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 2, 2013 is modified, by reversing that portion which determined that equitable considerations fully supported the parents' request for relief; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the non-residential portion of the student's tuition at Marvelwood for the 2012-13 school year after pro-rata application of the financial aid award to the non-residential portion of the student's tuition, upon submission of proof of the cost of the non-residential portion of the student's tuition and the application of the financial aid award thereto.

Dated: **Albany, New York**
 October 30, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER