The University of the State of New York

The State Education Department
State Review Officer
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No. 13-165

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Francesca J. Perkins, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, William Meyer, 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 the costs of the student's tuition at the Winston Preparatory School (Winston Prep) for a portion of the 2012-13 school year. The parents cross-appeal from the IHO's determination that the Committee on Special Education (CSE) was properly composed. The appeal must be sustained in part. The cross-appeal must be sustained.

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 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

On January 23, 2012, the CSE convened to conduct the student's initial review and to develop an IEP to be implemented between March 12, 2012 and January 20, 2013 (see Dist. Ex. 1 at pp. 1-2, 8-9, 12-13).[1] Finding the student eligible for special education as a student with an

[1] At the time of the January 2012 CSE meeting, the student was attending Winston Prep (see Dist. Exs. 1 at p. 2, 14-15; 4 at pp. 1-2; 5 at p. 1; 9 at pp. 1-10). The Commissioner of Education has not approved Winston Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

other health-impairment, the January 2012 CSE recommended integrated co-teaching (ICT) services in a general education classroom for English language arts (ELA), social studies, and science, as well as special education teacher support services (SETSS) in a separate location for mathematics (id. at p. 8).[2,3] In addition, the January 2012 CSE recommended related services of two 40-minute sessions per week of individual speech-language therapy (id. at p. 9). The January 2012 CSE also recommended support for management needs, such as reteaching and the development of time management skills, as well as a transition plan and annual goals (id. at pp. 3-8).

By correspondences dated May 14, May 20, June 4, and June 21, 2012, the parents notified the district that they had not received a "placement" for the student for the 2012-13 school year, and they "would very much like to visit the school" during the 2011-12 academic school year (see Parent Exs. N-Q). By final notice of recommendation (FNR) dated August 10, 2012, the district summarized the ICT services and speech-language therapy recommended in the January 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. L).

On August 21, 2012, the parents signed an enrollment contract with Winston Prep for the student's attendance during the 2012-13 school year from September 2012 through January 2013 (see Parent Ex. E at pp. 1-2).

By letter, dated August 21, 2012, the parents also informed the district that in response to receiving the FNR, they attempted to reach the assigned public school site to schedule a visit (see Parent Ex. C). However, the parents had not yet reached staff, but indicated they would continue to try to schedule a visit (id.). In a letter dated August 22, 2012, the parents notified the district of their intentions to place the student at Winston Prep for the 2012-13 school year, and to seek public funding for the costs of the student's tuition, as well as the provision of transportation services (see Parent Ex. B at pp. 1, 3). The parents also rejected the IEP, indicating that the CSE had not convened for the 2012-13 school year and it was "unclear" when the January 2012 IEP would be implemented (id. at p. 2). In addition, the parents indicated that the annual goals were "generic, vague, and wholly in appropriate" to meet the student's needs, and the transition plan was "too broad" (id.). The parents noted that the recommended ICT services and SETSS were not appropriate, and instead, the student required a "small, structured classroom in a small school environment" to meet his needs (id.). The parents also expressed their intention to visit the assigned public school site (id.).

On September 24, 2012, the parents visited the assigned public school site, and by letter dated September 25, 2012, the parents rejected the public school site as not appropriate for the student because the classrooms were "loud and noisy" and "very large in size," and the student would be required to "take and pass all the required Regents exams" (see Dist. Ex. 11; Parent Ex.

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

[3] The January 2012 CSE meeting minutes noted a 12:1 student-to-teacher ratio for ICT services and an 8:1 student-to-teacher ratio for SETSS (see Dist. Ex. 10 at p. 2).

D). The parents also informed the district that they would be "happy to look at any other schools" (Parent Ex. D).

A. Due Process Complaint Notice

In an amended due process complaint notice dated February 1, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year on both substantive and procedural grounds (see Parent Ex. A at p. 1). The parents alleged that: (1) the January 2012 CSE meeting was untimely, in that it took place several months after the parents' initial referral of the student during the 2011-12 school year and several months prior to the start of the 2012-13 school year; (2) the January 2012 IEP did not clearly indicate the date of implementation; (3) the January 2012 CSE was not properly composed because it lacked a regular education teacher and an additional parent member; (4) the January 2012 CSE deprived the parents the opportunity to meaningfully participate in the development of the student's IEP; (5) the January 2012 CSE did not properly identify the student's management needs; (6) the annual goals listed in the January 2012 IEP were not sufficient to meet the student's needs; (7) the January 2012 CSE's recommendation for ICT services was not appropriate for the student; (8) the January 2012 CSE failed to recommend appropriate transition services; (9) the promotional criteria identified in the January 2012 IEP were not appropriate; and (10) the January 2012 CSE failed to discuss or recommend assistive technology (id. at pp. 2-8). The parents also alleged that the assigned public school site was not appropriate for the student because the classroom was too loud, crowded, and disorganized (id. at p. 8).

In addition, the parents alleged that the student's unilateral placement at Winston Prep was appropriate and that equitable considerations weighed in favor of their request for relief (Parent Ex. A at pp. 8-9). As relief, the parents requested that the IHO order the district to reimburse them for the costs of the student's tuition at Winston Prep from September 2012 through December 2012 (id.).

B. Impartial Hearing Officer Decision

On March 8, 2013, an impartial hearing was convened in this matter and concluded on May 14, 2013, after four days of proceedings (Mar. 8, 2013 Tr. pp. 1-34; Apr. 26, 2013 Tr. pp. 35-212; Apr. 29, 2013 Tr. pp. 171-517; May 14, 2013 Tr. pp. 518-626).[4] By decision dated July 31, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that Winston Prep was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 11-17). Initially, the IHO determined that the January 2012 CSE was properly composed, finding that one individual served as the regular education teacher, the special education teacher, and the district representative at the meeting (see id. 6-8). However, the IHO determined that the January 2012 IEP did not reflect that the student needed small group instruction and individual instruction; the recommendation for ICT services did not meet the student's need for a "small classroom of limited size and individual attention"; the recommendation for SETSS resulted in the student's "de facto placement" in a general education setting for mathematics, which was not appropriate; and the

[4] To address the issue of duplicative pagination in the transcripts, references to the transcript are prefaced by the date of the proceedings.

transition plan in the January 2012 IEP was not sufficient (id. at pp. 11-12). The IHO also rejected the district's position at the impartial hearing that it was not required to present evidence regarding the assigned public school site and, therefore, found that the district failed to "contradict [the p]arents' claims that the offered school could not provide a proper functional grouping" for the student (id. at pp. 12-13).

The IHO also determined that the parents satisfied their burden to establish that Winston Prep was an appropriate unilateral placement for the 2012-13 school year, finding that Winston Prep offered a program individualized to meet the student's needs; the student made progress during his attendance at Winston Prep; and, while Winston Prep did not offer speech-language therapy, the teachers worked on language skills with the student (IHO Decision at pp. 13-14). The IHO also observed that teachers at Winston Prep need not be certified special education teachers (id. at p. 14). Lastly, the IHO determined that equitable considerations weighed in favor of the parents' request for relief because the hearing record indicated that they cooperated with the district and acted reasonably in securing a spot for the student at Winston Prep (id. at pp. 14-17). Consequently, the IHO ordered the district to pay the costs of the student's tuition at Winston Prep for the 2012-13 school year prorated for the time period the student was actually enrolled at the school (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, that Winston Prep was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief. The district initially asserts that the IHO correctly found that the January 2012 CSE was properly composed. With regard to matters not addressed by the IHO, the district argues that the January 2012 CSE convened in a timely manner and offered the student an IEP and assigned public school site before the beginning of the 2012-13 school year, the hearing record substantiated that the parents were afforded the opportunity to meaningfully participate in the development of the student's January 2012 IEP, the student did not require and no one at the January 2012 CSE meeting requested that the student receive assistive technology, and finally, the promotional criteria listed in the January 2012 IEP were appropriate.

Contrary to the matters that were addressed in the IHO's decision, the district asserts that given the student's functional levels the ICT services were appropriate and addressed the student's need for small group instruction and peer modeling within the least restrictive environment (LRE); SETSS, as recommended for mathematics, was consistent with the recommendation in a privately obtained evaluation and the parents agreed with that recommendation; and the January 2012 CSE recommended appropriate transition activities. Relative to the assigned public school site, the district asserts that since the parents rejected the January 2012 IEP, the district was not required to demonstrate at the impartial hearing that the public school site was appropriate.

The district also alleges that the IHO erred in finding Winston Prep to be an appropriate unilateral placement because the student did not make progress, and the school was too restrictive and did not provide the student with speech-language therapy. With respect to equitable considerations, the district alleges that the parents did not seriously intend to enroll the student at the public school site. Finally, the district argues that the parents' contract with Winston Prep was illusory. Consequently, the district seeks an order reversing the IHO's decision in its entirety.

In an answer and cross-appeal, the parents respond to the district's petition by denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Winston Prep was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition. The parents also argued that the IHO erred in finding that the January 2012 CSE was properly composed because the CSE failed to include a regular education teacher.[5]

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)

[5] Although the IHO did not specifically address the allegation in the parents' due process complaint notice that the January 2012 CSE was not properly composed due to the absence of an additional parent member, the district briefly noted in its petition that this issue must similarly be dismissed (see IHO Decision at pp. 1-18; Parent Ex. A at p. 4). The parents, however, did not offer additional allegations or argument related to the absence of an additional parent member in the answer or cross-appeal. Accordingly, the parents have abandoned the issue regarding the absence of an additional parent member by failing to identify such issue in the answer or cross-appeal in any fashion or make any legal or factual argument as to how such issue would result in a failure to offer the student a FAPE. Therefore, this issue will not be further addressed (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v, New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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 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, 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. January 2012 CSE Composition

The parents assert that the IHO erred in finding that the January 2012 CSE was properly composed based on the conclusion that the district special education teacher, dually certified in general education, also served as the regular education teacher at the January 2012 CSE meeting (IHO Decision at p. 8). The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

In this case, a review of the hearing record demonstrates that the attendees at the January 2012 CSE meeting included both parents, a district special education teacher (who also acted as the district representative), a district school psychologist, a Winston Prep teacher, and a dean from Winston Prep (Dist. Ex. 1 at p. 15). The hearing record further reflects that the attendance page included with the January 2012 IEP did not reflect any CSE member's signature in the space provided to document the attendance of a regular education teacher (id.). The school psychologist testified that the special education teacher at the January 2012 CSE meeting was also a certified regular education teacher (see Apr. 26, 2013 Tr. pp. 55-56). On this basis, the IHO concluded that the individual who served as the both the special education teacher and the district representative at the January 2012 CSE meeting also served as the regular education teacher (IHO Decision at pp. 4, 8). However, the hearing record is inconclusive as to whether or not the special education teacher fulfilled the role of the regular education teacher at the January 2012 CSE meeting. Moreover, the hearing record reflects that the district did not establish that the regular education teacher was a teacher "of the student" (see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). In fact, the school psychologist testified that the special education teacher had not been teaching in

any classroom during the two years she was assigned to the CSE (Apr. 26, 2013 Tr. p. 132). Based on the foregoing, the hearing record does not support the IHO's conclusion that the attendance of the special education teacher, who by virtue of holding a dual certification as a regular education teacher, in this circumstance, comported with the requirements of federal and State regulations (see Application of the Dep't of Educ., Appeal No. 12-058; Application of a Student with a Disability, Appeal No. 11-008; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 9-137; see 20 U.S.C. § 1414[d][1][B][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]).

Here, the absence of a regular education teacher at the January 2012 CSE meeting constitutes a procedural inadequacy, which, standing alone, does not rise to level of a denial of FAPE. However, given that the January 2012 CSE recommended ICT services in a general education classroom for ELA, social studies, and science, the failure to ensure the attendance of a regular education teacher—in conjunction with the deficiencies explained more fully below—It is possible that the lack of a regular education teacher may have contributed in some fashion to the district's failure to offer the student a FAPE for the 2012-13 school year which is further described below, but the evidence is not sufficiently clear what the regular education teacher would have offered with regard to the calculus in this instances (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013] [describing a "general education environment with [ICT] services" as a placement "somewhere in between a regular classroom and a segregated, special education classroom"]). Nevertheless, the lack of the regular education teacher is considered in the aggregate with the remaining deficiencies identified below.

B. January 2012 IEP

1. ICT Services and SETSS

The district asserts that the IHO erred in finding that the January 2012 CSE's recommendations for ICT services in ELA, social studies, and science, and SETSS in mathematics, were not sufficient to meet the student's needs. In addition, the district argues that the ICT services allowed the student to receive "'small group instruction,' and 'peer modeling,' in addition to support in the form of a special education and a general education teacher in the classroom." The parents argue that the January 2012 IEP did not indicate that the student required a small class, small group or individualized instruction, other than the recommendation for SETSS. In addition, the parents contend that the January 2012 CSE's recommendation for ICT services was not consistent with the weight of the information available to the CSE at that time, which indicated that the student required a "full-time small class setting to manage his attentional issue and allow for meaningful education progress." A review of the hearing record supports the IHO's determination, and the district's arguments must be dismissed.

State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities who receive ICT services within a class may not exceed 12 students, and an ICT classroom must be staffed, at a minimum,

with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][1]-[2]). However, neither federal or State statutes nor regulations define SETSS.[6]

Initially, the hearing record does not support the IHO's finding that a recommendation of SETSS for mathematics, by default, indicated that the January 2012 CSE recommended a general education setting for that subject. In testimony, the school psychologist described SETSS as a resource room program provided as a pull-out service in a small group (Apr. 26, 2013 Tr. p. 107).[7] Similarly, the evaluator who conducted the privately obtained psychological evaluation reviewed by the January 2012 CSE recommended that the student "be provided with a resource room for math instruction in which he receives 5 hours per week of [SETSS]" (Dist. Ex. 7 at p. 5). State regulation clearly describes the purpose of a resource room program as "supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]). Thus, a resource room program is not confined to supplementing the instruction of students who solely attend a general education setting as presumed by the IHO, and the recommended ICT services in a general education setting could not be precluded from serving as the "default" placement for the student's mathematics instruction.

However, the school psychologist also testified that the January 2012 CSE intended SETSS for mathematics to constitute the student's primary instruction in that subject rather than as supplemental instruction, and she did not "think" that the student would receive any other mathematics instruction, other than with SETSS (Apr. 26, 2013 Tr. pp. 169-70). Consistent with the school psychologist's recollection, the January 2012 IEP specifically identified the major subject areas for which the student would receive ICT services (ELA, social studies, and sciences) and SETSS (mathematics) (Dist. Ex. 1 at p. 8). Thus, it appears that the January 2012 CSE recommended ICT services in a general education setting for a majority of the student's subject areas, and, for all practical purposes, an 8:1 special class setting for mathematics instruction through the recommendation for SETSS.[8] However, regardless of the interpretation applied, the special education programs and related services recommended by the January 2012 CSE were not appropriate to meet the student's needs and were not reasonably calculated to enable him to receive educational benefits.

The hearing record shows that the student demonstrated difficulties with reading, executive functions, organization, math, writing, language skills, and attention (Apr. 26, 2013 Tr. pp. 71-72, 92-95, 108; Apr. 29, 2013 Tr. pp. 217, 332, 334; Dist. Exs. 2 at pp. 2, 4-5; 5 at pp. 1-3; 7 at pp. 1-

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[6] In this case, the January 2012 CSE's use of the "SETSS" label to describe a special education service not otherwise defined resulted in a significant ambiguity and caused confusion to be experienced not only by the parents, but also by the school psychologist and the IHO (IHO Decision at p. 12; Apr. 26, 2013 Tr. pp. 107, 169-70; Apr. 29, 2013 Tr. p. 469). Any lack of clarity in the terminology in an IEP, especially when such terminology has not already been pre-defined among the inclusive list of options already set forth in State regulations tends to weigh against finding in a district, not for it, thus it would behoove a district to carefully explain it use of such terminology to both parents and administrative hearing officers.

[7] This description is consistent with other sources indicating that SETSS has been provided as a pull-out service from a general education setting in a group of up to eight students (see B.W. v. New York City Dep't of Educ., 716 F. Supp. 2d 336, 340 [S.D.N.Y. 2010]).

[8] According to the January 2012 CSE meeting minutes, the student would receive SETSS in an 8:1 student-to-teacher ratio (Dist. Ex. 10 at p. 2).

5; 8 at p. 2; 9 at p. 1).[9] The IHO concluded that the January 2012 CSE's program recommendations for ICT services were in contrast to the recommendation of the private evaluator and input from the parent and the Winston representatives that the student required a small class size, noting specifically that the "ICT program, which could contain 30 or more students, did not meet that description, especially with the failure to include anywhere in the IEP that [the student] needed small-group and individual instruction" (IHO Decision at pp. 11-12).[10]

The district school psychologist testified that ICT services allowed for small group instruction, differentiated instruction, and peer modeling (Apr. 26, 2013 Tr. p. 109). The school psychologist testified that the January 2012 CSE based its recommendation for ICT services with SETSS for mathematics on the student's needs, including his "strong skills in many areas," and on the understanding that such a program would offer small group instruction and the support of two teachers, who would implement the student's individualized strategies as outlined in the student's IEP (Apr. 26, 2013 Tr. p. 112). Further, the school psychologist testified that the ICT services with SETSS would support the student in earning a Regents diploma (id.). According to the school psychologist, the ICT services provided in a general education setting, together with SETSS for mathematics, constituted the student's LRE (Apr. 26, 2013 Tr. p. 113). In contrast, the Winston Prep dean testified that the student required a small class size throughout the day that was able to provide individual instruction due to the student's deficits in executive functions, attention, organization, memory, processing, written expression, math skills, and abstract thinking (Apr. 29 2013 Tr. pp. 217, 257-58). The parents also testified that the student required small group instruction due to his difficulties with mathematics, reading, writing, attention, and organization (Apr. 29, 2013 Tr. pp. 332, 371-72).

The private psychologist, in the 2011 psychological evaluation, indicated that the student demonstrated average to above average cognitive skills (Dist. Ex. 7 at p. 2). The evaluation further indicated that the student demonstrated delays in executive functions, organization, receptive language, mathematics, written expression, sequencing, visual processing, short-term memory, graphomotor skills, attention, and concentration (id. at pp. 2, 5). An administration of the Woodcock Johnson Test of Achievement (WJ-III ACH) to the student revealed an average performance in the areas of letter word identification, passage comprehension, writing fluency and a low average performance in word attack, calculation, applied problems, and writing samples (id. at p. 10). The student's skills fell within the well below average range in math fluency, as compared to same age peers (id.). Based upon the testing results, the private psychologist recommended that the student attend a class of limited size with the full-time support of a special education teacher, five hours per week of SETSS in the area of mathematics, supplemental instruction in writing from a speech-language therapist, and extended time on tests (id. at pp. 5-6).[11]

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[9] The hearing record also reflects that the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD) (Apr. 26, 2013 Tr. p. 108).

[10] To the extent that the IHO indicated in the "Findings of Fact" that the "[m]anagement needs section of the IEP" did not "mention" the student's need for "small group instruction and individualized attention," it is the January 2012 CSE's overall failure to identify and include the student's need for small group instruction and individualized attention in the IEP that resulted in the district's failure to offer the student a FAPE, and not the January 2012 CSE's failure to incorporate this information within a specific section of the student's IEP.

[11] To be clear, I decline to simply accept in isolation the private psycholgist's statement that a "class of limited size" was required, and certainly the evaluation report provides other valuable insights, all of which must be

According to the student's Level 1 vocational assessment-parent interview, the parents expected the student, upon graduation from high school, to live independently at college (Dist. Ex. 3 at p. 2). The 2011 psychoeducational update, reviewed by the January 2012 CSE, indicated that the student demonstrated average decoding, reading comprehension, and spelling skills, but below average skills in written language, calculation, math fluency and qualitative concepts (Dist. Ex. 5 at p. 2). With respect to social/emotional functioning, the school psychologist indicated that student was "cooperative" and "easy-going" but that projective testing showed "some indications of anxiety" (id. at p. 3).

The district school psychologist testified that the January 2012 CSE discussed the student's present levels of academic achievement, social/emotional functioning, and health and physical development, including input from the parents (Apr. 26, 2013 Tr. pp. 67-83). The student's present levels of performance in the January 2012 IEP reflected information provided by the Winston Prep teacher, including grade level estimates of the student's decoding skills (eighth grade), reading fluency skills (seventh grade), reading comprehension skills (seventh grade), writing content and writing mechanics skills (fifth grade), spelling skills (sixth grade), and math computation and problem solving skills (fifth grade) (Dist. Ex. 1 at p. 2). With respect to the present levels of social development, the January 2012 IEP indicated that the student developed and maintained friendships (id.). The January 2012 IEP also indicated that the student was motivated but that, due to his delays in executive functions and academics, he struggled with school work (id. at p. 3).

The hearing record reflects that the student demonstrated strong skills in several areas, including cognition and social skills (see Dist. Exs. 5 at pp. 2-3; 7 at pp. 2-5). Consistent results across evaluations, including standardized testing, as well as input from the January 2012 CSE members—including the parents and the Winston Prep teacher—revealed that the student exhibited difficulties with mathematics (see, e.g., Dist. Ex. 7 at p. 5). However, with respect to the student's reading skills, the hearing record presented conflicting information. The 2011 psychoeducational update, reviewed by the January 2012 CSE, indicated that the student demonstrated average skills in decoding and reading comprehension (Dist. Ex. 5 at p. 2). The 2011 private psychological evaluation indicated that the student demonstrated average skills in letter-word identification and passage comprehension and low average word attack skills (see Dist. Ex. 7 at p. 9). However, within the classroom setting, the Winston Prep teacher viewed the student's reading skills as well below grade level (Dist. Ex. 1 at p. 2). Specifically, the Winston Prep teacher reported, as indicated in the student's present levels of performance, that the student exhibited decoding skills on the eighth grade level and reading fluency and reading comprehension at the seventh grade level (id.). The student's January 2012 IEP indicated that, when the student was in tenth grade, the student's reading skills were at the seventh grade level (id. at p. 12). The hearing record does not contain that shows why the student's reading abilities, as assessed by standardized measures, were average overall, but that the Winston Prep teacher reported that the

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considered. The private evaluator did not provide a maximum class size in the report for the CSE to consider. Often what is considered "small" or "limited" in terms of class size is very much in the eye of the beholder who opts to use such imprecise terms. None of the evidence in the hearing record indicates that small class size alone constitutes special education within the meaning of the IDEA (see Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]; Gagliardo v. Arlington Cen. Sch. Dist., 489 F.3d 105, 115 [2d Cir. 2007]) [indicating that tuition reimbursement may not be appropriate when "the chief benefits of the chosen [private] school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]).

student was two to three years below grade level in reading (see Dist. Exs. 1 at p. 2; 5 at p. 2; 7 at p. 9). However, the January 2012 IEP reported the student's reading level, as described by the Winston Prep teacher, and the accuracy of the student's present levels of performance are not in dispute in this proceeding (see Dist. Ex. 1 at p. 2).

Additionally, the student's annual goal related to reading indicates that the student's critical reading skills would improve "using texts written on instructional reading level" (Dist. Ex. 1 at p. 5). In light of the student's seventh to eighth grade reading skills, it is unclear how the student would make progress toward this annual goal in an 11th grade ICT class or how the student would access the curriculum presented in a 11th grade ICT class with the limited accommodations indicated on his January 2012 IEP.

Where, as here, the student was already attending a special class setting in a non-public school and the district accepted and used his Winston Prep teacher's report regarding his progress in his reading skills and on the IEP, it is unclear why district then reduced the level of support to ICT services alone. Also, based on the consensus in the hearing record regarding the student's delays in mathematics, a resource room program—although not recommended by the January 2012 CSE—may have been appropriate to address the student's needs in this area, instead of SETSS; however, the hearing record reveals that the student also required direct specialized reading instruction modified to align with his seventh to eighth grade reading levels and to address his significant needs in reading comprehension, sight word vocabulary, and decoding.

Based on all of the foregoing, the evidence contained in the hearing record fails to establish that the district's recommended educational program, consisting of ICT services together with SETSS for mathematics instruction, speech-language therapy, and the additional accommodations and supports recommended by the January 2012 CSE, was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

2. Transition Services

The district asserts that the IHO erred in finding that the January 2012 CSE failed to incorporate the results of the student's vocational assessment into the January 2012 IEP and that the transition goals and services were brief and general and bore no resemblance to the student's stated plans for the future (see IHO Decision at pp. 5, 12).

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills, as well as transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when

appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]).

The parents testified that the January 2012 CSE did not discuss transition services or activities, but indicated that they provided input at the January 2012 CSE meeting regarding the student's interests in music and poetry and his desire to attend college (April 29, 2013 Tr. pp. 363-65). According to the school psychologist, the parents also provided input regarding the student's post-secondary goals and interests during the January 2012 CSE meeting, including the student's desire to attend college and become a teacher (Apr. 26, 2013 Tr. pp. 144-46, 176). The minutes of the January 2012 CSE meeting indicated that the student would like to become a teacher of "disadvantaged kids" (Dist. Ex. 10 at p. 2). The January 2012 CSE also discussed that the student planned to earn a high school diploma (Apr. 26, 2013 Tr. p. 145).

The vocational interview of the parents elaborated that the student appeared interested in a job "working with young people" and that to reach his goals, the student needed to work on his skills in reading, writing, and mathematics, as well as financial management, time management, organization, self-advocacy, and problem solving (Dist. Ex. 3 at pp. 1-2). The vocational evaluation of the student also reflected the student's interest in pursuing a career in education (Dist. Ex. 6 at p. 1).

However, much of the information provided by the parents and as reported in the vocational evaluation of the student and the vocational interview of the parents was not included in the transition plan (compare Dist. Ex. 1 at pp. 4, 10, with Dist. Exs. 3; 6; see also Apr. 26, 2013 Tr. pp. 136-139). With respect to the student's transition related needs and long-term adult outcomes, the January 2012 IEP reported only that the student would attend a post-secondary educational program and would be competitively employed (Dist. Ex. 1 at p. 4). The transition services listed on the January 2012 IEP indicated that the student would be provided with academic instruction to learn time management, organization, and self-advocacy skills, and would receive community experience by "developing appropriate relationships with resources in the community" (id. at pp. 4, 10). The January 2012 IEP did not list any service or activity relating to the development of employment or other post-school adult living objectives, acquisition of daily living skills, or otherwise specified the results of the functional vocational assessment (Dist. Ex. 1 at p. 10). Furthermore, although required by State regulations, the transition plan neglected to designate the party responsible for implementing each transition service and the applicable time frame for such implementation (i.e., whether the service would be provided in the fall, spring, or summer) (Dist. Ex. 1 at p. 10).

Explaining the transition services included in the January 2012 IEP, the school psychologist testified that the transition services addressed time management skills because such skills were important in both college and job settings, which the student planned to pursue (April 26, 2013 Tr. pp. 103-04). She further explained that the community activities contemplated by the January 2012 IEP included "being able to go to the Department of Motor Vehicles to apply for a license, [or] making a doctor's appointment" (April 26, 2013 Tr. p. 104). With respect to the omitted information on the January 2012 IEP relating to the district or agency responsible for providing the transition services, the school psychologist testified that such information was not the responsibility of the CSE, but rather would be filled in by the student's future school (id.).

Based on the foregoing, the transition plan developed by the January 2012 CSE contains deficiencies, which, by themselves, constitute technical defects that would not render the transition plan or the January 2012 IEP, as a whole, inappropriate such that it denied the student a FAPE. However, under the circumstances of this case, the deficiencies in the transition plan—when aggregated with other defects in the development of the student's January 2012 IEP—contribute to a finding that the district impeded the student's right to a FAPE, impeded the parent's opportunity to participate in the decision making process regarding a provision of FAPE, or otherwise caused a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013] [observing that a deficient transition plan is a procedural flaw]; K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 822-26 [E.D. Pa. 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In sum, the violation State regulations through the lack of a regular education teacher at the CSE meeting, failing to establish with evidence at the impartial hearing that the SETSS for math and ICT services were appropriate in light of the description of the student in the IEP, and the violation of State regulations regarding transition services, in the aggregate, persuades me that the January 2012 IEP was not reasonably calculated to enable the student to receive a FAPE.

C. Challenges to the Assigned Public School Site

The district contends that no legal authority exists to support the IHO's conclusion that the district was obligated to present evidence at the impartial hearing about the actual classroom where the student would have been placed at the assigned public school site as a basis upon which to conclude that the district failed to offer the student a FAPE (see IHO Decision at pp. 12-13).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins

attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]).

In view of the forgoing, the parents cannot prevail on the claims that the district would have failed to implement the January 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's April 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the January 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Apr. 29, 2013 Tr. p. 410; Parent Exs. B; D; E). In a case in which a

student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP. However under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above and it would be inequitable to allow the parents to challenge the IEP services through information they acquired after the fact. Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, as such, there is no basis for concluding that it failed to do so. Accordingly, the IHO's findings relating to the classes at the public school site must be overturned and cannot be relied upon as a basis for finding that the district failed to offer the student a FAPE.

D. Unilateral Placement

Turning to whether the parents met their burden to establish that Winston Prep was an appropriate unilateral placement for the student during the 2012-13 school year, the district asserts that Winston Prep was too restrictive, did not provide speech-language therapy mandated for the student, and that the student did not make progress at the private school. A review of the hearing record does not support the district's arguments.

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. at 14; 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], abrogated on other ground, Schaffer v. Weast, 546 U.S. 49 [2005]; see also Educ. Law § 4404[1][c]). "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 that "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]; Educ. Law § 4401[1]; 34 CFR

300.39[a][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 hearing record indicates the Winston Prep middle and high school programs consisted of approximately 197 students in 6th through 12th grade (Apr. 29 2013 Tr. p. 214). Typically, classes at Winston Prep contained up to 12 students grouped together according to similarity of individual student needs (Apr. 29 2013 Tr. p. 213). According to the hearing record, Winston Prep served students with learning disabilities, dyslexia, nonverbal learning disabilities, as well as students who had difficulties with executive functions and receptive and expressive language (Apr. 29, 2013 Tr. p. 215).

1. Related Services

With respect to the provision of speech-language therapy at the unilateral placement, the IHO held that although Winston Prep did not offer the related service, the teachers worked with the student on his expressive and receptive language skills throughout the day (IHO Decision at p. 14). However, as noted by the IHO, in order to establish the appropriateness of a unilateral placement to address a student's needs, the parents need not show that the placement provides every special service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9; see IHO Decision at p. 14).

The Winston Prep dean testified that although the student did not receive speech-language therapy, Winston Prep teachers addressed the student's language needs throughout the day, including during focus sessions (Apr. 29, 2013 Tr. pp. 259-60).[12] Specifically, the dean explained that the teachers addressed the student's receptive and expressive language skills by assisting the student with listening skills and responding in a more complex manner (Apr. 29, 2013 Tr. pp. 259-60). Moreover, the dean testified that the teachers assisted the student with maintaining attention and decreasing impulsivity, which in turn addressed the student's language needs regarding listening and responding to teachers and classmates in an appropriate manner (id.). The dean further testified that speech-language instruction was built into the program and was addressed throughout the day for the student (Apr. 29, 2013 Tr. pp. 261-62, 266). The dean stated that to address the student's expressive language needs, the teachers modeled language, simplified language, and taught students how to elaborate on their ideas; to address the student's receptive language skills, the teachers provide whole group instruction in listening skills, including a focus on details and appropriate responses (Apr. 29, 2013 Tr. p. 266). The dean described the student's language needs, indicating the student's demonstrated auditory processing delays (Apr. 29, 2013 Tr. pp. 324-25). To address these delays, the teachers instructed the student at a slower pace to ensure comprehension, checked-in with the student, used repetition and review, modeled language,

[12] All students at Winston Prep participated in the focus program, which consisted of a teacher providing 40 minutes per day of 1:1 instruction to a student to assist him or her with skill deficits (Apr. 29, 2013 Tr. pp. 213-14). The focus program assisted the student with academics, organization, homework planning, and self-advocacy (Apr. 29, 2013 Tr. pp. 219-20, 249-51).

focused on vocabulary development, provided note-taking techniques, and assisted the student to communicate using details (Apr. 29, 2013 Tr. pp. 324-25). In addition, according to the winter 2013 Winston Prep progress report, the student's literature and writing class targeted "building [the student's] personal lexicon" through "systematic vocabulary instruction," paired with practice activities, daily review, and weekly assessments (Parent Ex. J at pp. 3-4). According to the dean, when a student demonstrated a severe speech-language deficit, Winston Prep would pair the student with a speech-language pathologist (Apr. 29, 2013 Tr. pp. 302-03, 326). Based on the foregoing, the hearing record establishes that the student's speech-language needs were addressed at Winston Prep without the need to specifically provide the student with speech-language therapy as a related service.

2. Progress at Winston Prep

The district also asserts that the IHO erred in finding that the student made progress at Winston Prep (IHO Decision at p. 13). A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B., 2013 WL 1277308, at *2; D. D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 492 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364). Evidence of the student's progress at Winston Prep, is a relevant factor to be considered; however, the Second Circuit has explained that evidence of progress is not by itself sufficient to establish that a unilateral placement is appropriate (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]; see also Application of the Bd. of Educ., Appeal No. 11-078; Application of the Dep't of Educ., Appeal No. 11-051).

The Winston Prep dean testified regarding the student's progress during fall 2012 (Apr. 29, 2013 Tr. pp. 230-31). Specifically, he indicated that the student showed improvement in mathematics problem solving and self-advocacy skills, including asking for assistance regarding mathematics problems (id.). The dean stated that the student's grades were sometimes lower due to his difficulties with homework (Apr. 29, 2013 Tr. p. 230). The Winston Prep dean testified that the student demonstrated progress in his literature class, particularly in the areas of reading, written expression, and grammar (Apr. 29, 2013 Tr. pp. 242-43). The dean testified that, although the student's grades were "kind of mixed," the student demonstrated progress in history class, including progress in the area of study skills (Apr. 29, 2013 Tr. pp. 245, 249). According to the dean, the student developed better organizational skills in science class (Apr. 29, 2013 Tr. pp. 248-49).

The fall 2012 Winston Prep report card indicated that the student achieved final grades of C- in literature, writing, history, and science, and a grade of C in mathematics (Parent Ex. G).[13] The dean testified the student's grades reflected the student's inconsistent performance with

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[13] According to the hearing record, teachers based the student's grades on his progress, participation, and commitment (Apr. 29, 2013 Tr. p. 252).

homework and independent classwork, rather than the student's development of skills in these classes (Apr. 29, 2013 Tr. pp. 253-54). The dean further testified that Winston Prep attempted to address the student's difficulties with homework, including allowing him time to make up missed homework assignments and teaching the student organizational strategies so he could better manage homework demands; however, the student demonstrated limited progress in the area of homework completion due to inconsistent implementation of strategies and delays regarding attention and executive functions (id.).

The student's Winston Prep winter 2013 progress report indicated that the student demonstrated "significant progress" in academics during the fall semester (Parent Ex. J at p. 1). Specifically, the progress report stated that the student improved in the areas of independent problem solving skills and self-advocacy (id.). For example, at the beginning of the 2012-13 school year the student demonstrated difficulties with classwork and homework, but through teacher intervention, such as discussion, self-reflection, and a mandatory study hall, the student's grades "improved significantly" (id.). Moreover, the student increased his willingness to address his deficits in executive functions and developed organizational and problem solving strategies (id.). With respect to writing skills, the student's written summaries gradually improved, reflecting his understanding of more complex themes in stories and his improvement in structure, organization, and grammar (id. at p. 2). The report also indicated that the student developed higher level critical thinking skills, and demonstrated progress in academic problem solving, reading comprehension, and written expression, but needed to continue developing in these areas (id. at pp. 2-3). In the area of mathematics, the student showed improvement regarding mathematical strands of numbers and operations, algebra, ratios, equivalent ratios, and rates as well as associative, commutative, and distributive properties (id. at p. 4). Overall, the student improved regarding his independent work skills, willingness to work, class participation, self-advocacy, and work habits (id. at p. 5). The history teacher noted that the student's grades fluctuated during the semester and described his work as inconsistent (id. at p. 6).

While the district attempts to highlight the student's grades as an indication that he did not make progress, not only are such grades not dispositive on the issue of progress, but based on all of the above, the hearing record demonstrates that the weight of the evidence supports a finding that the student made progress during the 2012-13 school year at Winston Prep.

3. Restrictiveness of Unilateral Placement

Finally, the district asserts that the student did not require a setting as restrictive as Winston Prep. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 552 [S.D.N.Y. 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].

Although the student may not have had opportunities to interact with nondisabled peers during the school day, the hearing record indicates that Winston Prep addressed the student's academic and social needs (see Apr. 29, 2013 Tr. pp. 214-215; Parent Ex. J at pp. 1-7). With respect to social/emotional functioning, the hearing record reflects the student demonstrated age appropriate social skills (Dist. Exs. 1 at p. 2; 5 at p. 3). Additionally, the student's present levels

of social development, set forth in the January 2012 IEP, reflected that the student developed and maintained friendships (Dist. Ex. 1 at p. 2). According to testimony, the student demonstrated progress in the area of social skills while at Winston Prep (Apr. 29, 2013 Tr. p. 411).

Thus, while Winston Prep may not have maximized the student's interaction with nondisabled peers, in this instance, it does not weigh so heavily as to preclude a determination that the parents' unilateral placement of the student at Winston Prep for the 2012-13 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

E. Equitable Considerations

Having determined that Winston Prep was an appropriate placement for the student for the 2012-13 school year, the next issue to consider is whether equitable considerations support the parents' request for reimbursement of the student's tuition costs. The district argues that equitable considerations militate against an award of tuition reimbursement because the parents had no intention of considering a public school site.

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 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. 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]; see also Frank G., 459 F.3d at 363-64; M.C., 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, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; M.C., 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Initially, it is relevant that prior to the 2011-12 school year, the student attended a district public school through ninth grade (see Apr. 29, 2013 Tr. pp. 332-33). During the 2010-11 school year, the parents referred the student to the CSE but, according to the parents' testimony, no evaluation of the student was completed by the district despite the parents' repeated requests (see Apr. 29, 2013 Tr. p. 332). As a result, the parents obtained private evaluations of the student, which were completed in May 2011, and provided them to the district (id.; see Parent Ex. 7). The parents testified that there was a meeting with the district subsequent to the evaluations but that the CSE did not convene until January 2012 (Apr. 29, 2013 Tr. pp. 337-38). Thus, the hearing record shows that the district did not develop an IEP for the student prior to the beginning of the 2011-12 school year.[14] The student attended Winston Prep for the 2011-12 school year (Apr. 29, 2013 Tr. p. 338).

Furthermore, the hearing record indicates that the parents attended the January 2012 CSE meeting, fully cooperated during the annual review process, and sent multiple correspondence to the district expressing their concerns about the delay in receiving information about a public school site, the recommendations in the January 2012 IEP, and the appropriateness of the assigned public school site (Parent Exs. B- C; N-Q). Although the parents signed the enrollment contract with Winston Prep for the 2012-13 school year prior to visiting the assigned public school site, the parents repeatedly requested an FNR so that a visit to the public school site could be scheduled before the end of the 2011-12 school year (see Parent Exs. N-Q). Moreover, the parents testified to a subjective belief that they could withdraw the student from Winston Prep without financial penalty if the district offered the student an appropriate public school site and that such withdrawal could occur after the date specified in the contract based on a verbal agreement with Winston Prep (Apr. 29, 2013 Tr. pp. 425, 427-28; see Parent Ex. E at p. 2). The parents visited the public school site and informed the district that it was not appropriate, but expressed that they would be "happy to look at any other schools" that the district might recommend (Dist. Ex. 11; Parent Ex. D).

The district asserts that conversations between the parents and Winston Prep regarding the 2012-13 school year took place prior to the January 2012 CSE meeting, evidencing the parents' intent to reenroll the student at Winston Prep regardless of the January 2012 CSE's recommendations. On the contrary, however, the testimony cited by the district indicates that the referenced conversations "probably" took place in August 2012, several months after the student's January 2012 IEP was developed (see May 14, 2013 Tr. pp. 563-64).

Based upon the evidence contained in the hearing record, the parents acted reasonably under the circumstances of this case and cooperated with the district in good faith to develop an appropriate IEP for the student. The parents did nothing to hinder the district from developing an appropriate IEP. While the parents did not include a specific request to reconvene the CSE in their letters to the district (see Parent Exs. B; D), they were not required to do so and it does not weigh against them. However, the district did little, equitably speaking, to better its position, such as by

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[14] Although the parents requested no relief relating to the 2011-12 school year, the district's conduct leading up to the 2012-13 school year at issue is relevant for the purpose of equitable considerations.

voluntarily holding an additional CSE meeting (or offering to modify the IEP without a meeting) to increase the chances of satisfactorily addressing the contents of the parent's concerns with the IEP.[15] Had the district done so and the parents then refused appropriate corrections to the IEP, the district's argument that the parents did not intend to enroll the student in a public school might have been more convincing. Therefore, equitable considerations weigh in favor the parents overall and justify an award of tuition reimbursement under the circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *8-*9 [S.D.N.Y. Jan. 3, 2013]; B.R., 910 F. Supp. 2d at 679-80; R.K. v. New York City Dep't of Educ., 2011 WL 1131522, at *4 [E.D.N.Y. Mar. 28, 2011]).

F. Relief

The district alleges that the IHO erred in finding that the parents were legally obligated to pay Winston Prep for the student's 2012-13 school year tuition and thus entitled to the relief requested. With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[16] Since the parents selected Winston Prep as the unilateral placement, and their financial status is at issue, I assign to the parents the burden of production and persuasion with respect to whether they have the financial resources to "front" the costs of Winston Prep and whether they are legally obligated for the student's tuition payments (Application of the Dep't of Educ., 12-132; Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the

[15] To be clear, a CSE is not required, under state regulations, to reconvene simply because a parent provides 10-day notice identifying concerns; however, when a parent has provided a 10-day notice window—which was envisioned as providing public schools with an opportunity to cure deficiencies in the IEP—and the district makes no attempt at all, such inaction does nothing to enhance a district's position in the weighing of equitable factors.

[16] The Court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning relief (Forest Grove, 557 U.S. at 244 n.11; see 20 U.S.C. § 1415[i][2][C][iii]).

Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, the hearing record reflects that the parents executed an enrollment contract with Winston Prep for the student's attendance during the 2012-13 school year (Parent Ex. E at p. 1). A handwritten notation on the contract, accompanied by two sets of initials, one of which belonged to the parent, indicated that the terms of the contract were modified to reflect that the student would only attend Winston Prep from September 2012 until January 2013 (id.). An initialed handwritten notation also indicated that the annual tuition would be "prorated" for the semester that the student attended (id.). The district asserts that the lack of evidence as to when the handwritten modifications were made, accompanied by the lack of knowledge exhibited by parties to the contract as to how much tuition the parents were ultimately obligated to pay, supported a finding that the parents were not, in fact, obligated to pay tuition to Winston Prep. On the contrary, the hearing record supports the IHO's conclusion that the parties exhibited an intent to be bound by the modified contract and that the specific amount of tuition was not indefinite because it could be "determined objectively based on pro-rata calculation" of the days the student was enrolled at Winston Prep versus the total days in Winston Prep's school year (IHO Decision at p. 16; Apr. 29, 2013 Tr. pp. 186-88, 414-15, 554-57, 572, May 14, 2013 Tr. pp. 583-84).

Despite the lack of payment of a non-refundable deposit and the parties' failure to execute a superseding contract incorporating the amended terms of the agreement, the evidence in the hearing record supports a conclusion that the parties intended the contract to be legally binding. While entering into a sham contract is insufficient to establish the necessary legal obligation to obtain direct funding, at least one Court appears to have held that conduct after document is executed is of little relevance (A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *7-*8 [S.D.N.Y. Sept. 23, 2013] [finding that parent was entitled to direct funding despite delaying pursuit of her due process claims in the manner called for by the contract]). While the hearing record reveals that the parents never made a payment to Winston Prep for the student's tuition or for an enrollment fee, the Winston Prep executive director and headmaster testified that the school expected to collect the tuition owed (Apr. 29, 2013 Tr. pp. 188-89, 199; May 14, 2013 Tr. p. 559). The parents also testified that they remained obligated to pay the tuition (Apr. 29, 2013 Tr. p. 415). The Winston Prep executive director further indicated his belief that the parents verbally agreed to a payment plan with the Winston Prep business office and that Winston Prep allowed such verbal agreements with similarly situated families (Apr. 29, 2013 Tr. pp. 189, 204-05). The executive director also explained that the parents' participation in the impartial hearing process was a factor considered by the school in delaying enforcement of the terms of the enrollment contract (Apr. 29, 2013 Tr. p. 192). The parents, as well as the Winston Prep headmaster, indicated that the details of such a payment plan would be deferred and ultimately depended on the results of the impartial hearing (Apr. 29, 2013 Tr. pp. 417, 424; May 14, 2013 Tr. p. 558). Moreover, the executive director emphasized that, as a result of the long business relationship between the parents and Winston Prep—based in part on the attendance of the of the student's sibling—Winston Prep had "every reason to expect that [the parents would] fulfill their obligations under the contract" (Apr. 29, 2013 Tr. pp. 189, 194, 200-02, 205).

Thus, based on the foregoing, the evidence sufficiently supports the conclusion in this case that the parents remained "legally obligated" to pay the tuition at Winston Prep (Mr. and Mrs. A., 769 F. Supp. at 406). Under the circumstances of this case, equitable considerations do not

preclude the parents' claim for relief in the form of direct funding of the student's tuition at Winston Prep for that portion of the 2012-13 school year under the factors described in Mr. and Mrs. A.

VII. Conclusion

In summary, the hearing record supports the IHO's ultimate determination that the district failed to offer the student a FAPE for the 2012-13 school year, to the extent indicated in the body of this decision, that Winston Prep was appropriate, and that equitable considerations weighed in favor of the parents' requested relief (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). In addition, I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated July 31, 2013, is modified to the extent indicated in the body of this decision.

Dated: **Albany, New York**
November 29, 2013

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JUSTYN P. BATES
STATE REVIEW OFFICER