The University of the State of New York

The State Education Department
State Review Officer
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No. 13-198

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, Alexander Fong, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Maria C. McGinley, 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 which ordered the district to reimburse the parents (the parents) for their son's tuition costs at the McCarton School (McCarton) for the 2012-13 school year, after-school instruction using an applied behavior analysis methodology (ABA instruction), and after-school occupational therapy. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been the subject of prior administrative appeals related to the 2009-10 and 2010-11 school years, and as a result, the parties' familiarity with the student's educational history and prior due process proceedings is assumed and will not be repeated here in detail (Application of Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-032).[1]

[1] On October 16, 2012, the United States District Court for the Southern District of New York found in favor of the district, upon judicial review of Application of a Student with a Disability, Appeal No. 11-032 (F.L. v. New York City Dep't of Educ., 2012 WL 4891748 [S.D.N.Y. Oct. 16, 2012]). Judicial review of the decision of the SRO in Application of the Dep't of Educ., Appeal No. 12-103, has also been sought (F.L. v. New York City Dep't of Educ., No. 13-cv-4350 [S.D.N.Y.]).

On June 13, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Parent Ex. C). The June 2012 CSE determined that the student was eligible for special education and related services as a student with autism (id. at p. 1).[2] The CSE recommended a 12-month school year program consisting of placement in a 6:1+1 special class in a specialized school for math (10 times per week), English language arts (ELA) (10 times per week), social studies (2 times per week), and science (2 times per week) (id. at pp. 15-17, 19). The CSE also recommended that the student receive related services consisting of speech-language therapy and occupational therapy (OT) (id. at p. 16). In addition, the CSE recommended the student receive supplementary aids and services in the form of an individual behavior management support plan and a full-time 1:1 individual crisis management paraprofessional (id. at pp. 16, 20).[3] The CSE further recommended that the student "not participate in any regular classes, extracurricular or other nonacademic activities with nondisabled peers" (id. at p. 2).[4]

By letter to the district dated June 15, 2012, the student's mother indicated that the district had yet to provide her with a written copy of the IEP created at the June 2012 CSE meeting and that she had not received a final notice of recommendation (FNR) from the district identifying the particular public school site to which the student had been assigned for the upcoming school year (Parent Ex. B at p. 1). As a result, the student's mother indicated that she planned to enroll the student in McCarton for the 2012-13 school year and that she intended to seek public funding of the student's tuition and costs related to his after-school services, as well as for transportation, and compensatory services (id.).[5]

On July 15, 2012, the student's mother entered into an enrollment contract with McCarton in which she agreed to be responsible for the costs of the student's tuition for the 2012-13 school year (Parent Ex. L).[6]

A. Due Process Complaint Notice

By second amended due process complaint notice dated August 31, 2012, the parents requested an impartial hearing (Parent Ex. A at pp. 31-43).[7] Additionally, the parents invoked their rights pursuant to pendency (stay put) in accordance with an unappealed July 30, 2008 IHO decision, which included the costs of tuition at McCarton, as well as ten hours per week of ABA instruction and two hours per week of OT (collectively, after-school services), all as part of a 12-month program (id. at p. 32; see also Parent Ex. II at p. 10). The parents enumerated more than

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (IHO Decision at p. 2; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The June 13, 2012 IEP developed by the CSE included a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) (Parent Ex. C at pp. 20-24).

[4] The hearing record does not indicate that the CSE informed the parents of the public school site to which the district assigned the student and at which it intended to implement his IEP for the 2012-13 school year.

[5] The hearing record indicates that the student has continuously attended McCarton since September 2002 (Parent Ex. P at p.1; see Tr. p. 346).

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

[7] The parents initially filed a due process complaint notice dated June 28, 2012 (Parent Ex. A at pp. 2-14), which was superseded by amended due process complaint notice dated July 11, 2012 (id. at pp. 17-29).

100 allegations of defects related to the provision of a free appropriate public education (FAPE) during the 2012-13 school year and with regard to the appropriateness of the June 2012 IEP and the assigned public school site (Parent Ex. A at pp. 33-42).[8]

Relevant to this appeal, the parents alleged that the student's unilateral placement consisting of McCarton and the after-school services was appropriate to address his special education needs (Parent Ex. A at pp. 32, 42). They further maintained that they cooperated with the district in good faith and provided appropriate notice of their intention to unilaterally place the student at public expense and, therefore, no equitable considerations existed that would preclude or diminish an award of relief (id.). As a remedy, the parents sought, among other things, tuition reimbursement for McCarton for the 2012-13 school year, in addition to reimbursement for the costs of after-school ABA instruction and after-school OT (id. at pp. 42-43).

B. Impartial Hearing Officer Decision

After a prehearing conference held March 22, 2013 and a hearing related to pendency held April 17, 2013, by interim decision dated April 23, 2013, the IHO found that McCarton, in conjunction with the student's after-school services comprised of ten hours per week of ABA instruction and two 45-minute sessions per week of OT, constituted the student's pendency placement (Interim IHO Decision at p. 2).

The impartial hearing was thereafter reconvened on the merits on May 9 and concluded on July 11, 2013, after three hearing dates (Tr. pp. 38-400). On the first day of the impartial hearing, the district conceded that it had not offered the student a FAPE (Tr. pp. 52-53; see Tr. p. 8).[9] In a decision dated September 13, 2013, the IHO directed the district to reimburse the parents for the cost of the student's tuition at McCarton; up to 8 hours of after-school ABA instruction; and up to 2 hours per week of after-school OT for the 2012-13 school year (IHO Decision at pp. 9-10).

Regarding the parents' unilateral placement, the IHO found that the combined McCarton educational program and after-school ABA instruction and OT (the combined program) were reasonably calculated to provide the student with educational instruction specifically designed to meet the student's unique needs (IHO Decision at pp. 5-7). The IHO concluded that the student had made meaningful progress at McCarton, which provided him with individualized instruction and addressed his needs (IHO Decision at pp. 6-7). In addition to finding that the student required and received 1:1 instruction, the IHO found that the 1:1 educational program was not overly restrictive because there was nothing in the hearing record to suggest that the student would benefit from interaction with typically developing peers (id. at p. 6). Next, the IHO found that in light of the student's difficulty in retaining and generalizing skills, the student's after-school services were "an important and necessary component of his educational program" (id. at p. 7). With regard to

[8] In addition to the requirement that parents "state all of the alleged deficiencies in the IEP in their initial due process complaint," in cases involving, for example, in excess of 100 itemized allegations, each allegation should include "a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem" (8 NYCRR 200.5[i][iv]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187-88 n.4 [2d Cir. 2012]).

[9] The district chose not to produce any documentary evidence or call any witnesses to testify at the impartial hearing (see, e.g., Tr. pp. 2, 26, 41, 223, 320).

the after-school services that the student received, the IHO found that the student required "consistent, intensive services" in order to prevent regression (id.; see Tr. pp. 273-74).

With regard to equitable considerations, the IHO found that there was nothing in the hearing record that would preclude or limit tuition reimbursement on equitable grounds (IHO Decision at p. 7). In addition to finding that the district failed to raise any specific issues or factors that would preclude reimbursement on equitable grounds, the IHO determined that the parents cooperated with the district and participated in the IEP development process; provided the CSE with documents that the CSE could use in developing the student's IEP; and provided the district with appropriate and timely notice of their rejection of the CSE's recommendations and of their intent to seek reimbursement for the McCarton placement and after-school services (id. at pp. 7-8). Lastly, the IHO noted that the CSE's acknowledged failure to offer the student a FAPE and placement in a timely manner "tips the equitable scales decidedly in the [p]arents' favor" (id. at p. 8).

IV. Appeal for State-Level Review

The district appeals, and argues that McCarton was not an appropriate unilateral placement for the student and that equitable considerations would preclude relief in this matter. The district first argues that McCarton was an inappropriate educational program and placement for the student. In support of its position, the district contends that McCarton's program was not the least restrictive environment (LRE) for the student because it provided all instruction in a 1:1 setting and because the upper school at McCarton had a total of 14 students, all of whom were disabled. Thus, the district argues that McCarton did not provide the student with any opportunities for mainstreaming and that the student needed to be placed with higher functioning peers. The district also asserts that McCarton did not provide the student with sufficient daily academic services, as he received no more than two-and-a-half hours of academic instruction out of the eight-hour school day. Similarly, the district asserts that McCarton did not provide the student with appropriate levels of related services. The district further argues that McCarton did not meet the student's academic and vocational needs because the student required more focus on academics and work-related skills. The district also contends that McCarton was an inappropriate placement because the student failed to make progress on many of the goals and short-term objectives in the program that McCarton created for the student.

Second, the district argues that it should not be required to reimburse the parents for the cost of the student's after-school ABA and OT because these services are unnecessary and inappropriate. Specifically, the district argues that because the after-school services focused on generalization of skills learned and maximization of the student's education, they may provide a benefit to the student but were not necessary for him to receive educational benefits. Further, the district argues that the student did not require the after-school services to prevent regression because McCarton provided the student with a 12-month educational program so that the student could avoid regression of his skills. With regard to the student's after-school OT, the district argues that the student should have received OT at McCarton during the school day instead of after school at extra expense. The district also argues that if the student required a combined 10 hours per week of after-school ABA instruction and OT to make progress at McCarton, McCarton's educational day program was not appropriate to meet the student's needs. Finally, the district argues that the parents' witnesses testimony that the student "requires home services is not credible" (Pet. ¶ 44).

Third, the district argues on appeal that equitable considerations do not favor the parents' request for reimbursement of the costs of the combined program. In support of its position, the district contends that the hearing record demonstrates that the parents had no intention of sending the student to a public school because, several months prior to the CSE meeting, the parents paid to McCarton the majority of the student's tuition for the 2012-13 school year, indicating an intent to keep the student at McCarton. Further, the district argues that the testimony of the student's mother that she would "definitely consider" a public school placement was not credible because the parents indicated their intention to accept no placement other than a 1:1 placement providing ABA instruction. Finally, the district requests that the IHO's award of reimbursement for the costs of the student's tuition and after-school services be vacated or, in the alternative, that the amount of the reimbursement awarded be reduced "by an equitable amount" to reflect the degree to which the combined program maximized the student's potential.

The parents submit an answer, admitting and denying the allegations raised in the petition. In pertinent part, the parents maintain that McCarton was an appropriate placement for the student, the student required the after-school services, and equitable considerations support their request for relief. The parents argue that McCarton, coupled with the after-school services, formed an appropriate unilateral placement for the student. The parents submit that McCarton is appropriate to address the student's educational needs, because the student requires a 1:1 setting, without which he would not effectively acquire new skills. The parents claim that McCarton addresses the student's behavioral needs through use of a written behavior plan. The parents further assert that the hearing record reflects that the student made progress across a variety of domains at McCarton. Further, contrary to the district's assertions, they allege that the student's need for additional after-school services did not render McCarton inappropriate and that the student requires those services to generalize and retain skills. Lastly, the parents submit that equitable considerations support their request for relief, in part, because the student's mother was amenable to the possibility of placement of the student in a district program, and she fully cooperated with the district. As a remedy, the parents request an order dismissing the district's appeal and affirming the IHO's decision.

V. Applicable Standards

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).

A private school placement must be "proper under the Act" for parents to be entitled to public funding (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), that is, the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by

the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14; 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 grounds by Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 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 the special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

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. Unilateral Placement for the 2012-13 School Year

In this case, because the district has conceded that it did not offer the student a FAPE for the 2012-13 school year, I need not address this issue, and I turn first to the disputed issue of whether the parents' placement of the student at McCarton, combined with after-school ABA instruction and OT, for the 2012-13 school year was appropriate in this case. For the reasons that follow, the evidence in the hearing record supports the IHO's finding that the combined placement provided the student with instruction and services specifically designed to meet his unique needs and was an appropriate placement for the student for the 2012-13 school year.

1. The Student's Needs

In this case, an examination of the district's challenge to the appropriateness of the student's placement at McCarton would typically involve a review of the evaluative information and assessments of the student that were available to the CSE at the time that the CSE developed the student's IEP for the 2012-13 school year. Here, however, not only did the district concede that it did not offer the student a FAPE for the 2012-13 school year, the district also chose not to enter into the hearing record any evaluative information on or assessments from the student's records at all, thus abandoning its foremost opportunity to put forth its own viewpoint of the student's special education needs and the extent to which the unilateral placement either addressed or failed to address those needs (Tr. pp. 2, 26, 41, 52-53, 223, 320). Accordingly, to the extent the reports and assessments relied upon by McCarton in developing the student's educational program were not sufficiently accurate or complete for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and not the parents (see 34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]; A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).[10] Moreover, because a "private placement need not provide . . . an IEP for the disabled student," McCarton had no duty to conduct the tests or evaluations that underlie a successful IEP (Frank G., 459 F.3d at 364). Thus, McCarton's appropriateness as a unilateral placement is principally determined by whether the combined program provided "educational instruction specially designed to meet the unique needs of [the student]" (Rowley, 458 U.S. at 188-89; see Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 365). As discussed below, the evidence in the hearing record produced by the parents in this case was sufficient to identify the student's unique individual needs and to satisfy their burden as to the appropriateness of their unilateral placement of the student for the 2012-13 school year.

[10] Although of little relevance in this case, if an IHO is faced with concern over whether a student's special education needs can be addressed in a unilateral placement and there is a lack of evidence on the issue, the IHO is vested under federal and State law with the discretionary authority to order an independent educational evaluation of the student at district expense (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Application of the Bd. of Educ., Appeal No. 12-033).

By way of background, the student's educational needs were identified by a number of individuals who testified during the impartial hearing including the student's lead therapist at McCarton, the former director of McCarton, the student's after-school occupational therapist and ABA therapist, who was a board certified behavior analyst (BCBA), the student's McCarton speech-language pathologist, and the student's mother (see, e.g., Tr. pp. 63, 67-69, 164-65, 189, 267-68, 336, 360-62).[11] According to the student's lead therapist at McCarton, the ability to remain on task was a "core deficit area" for the student and he required "constant reminders" to help him focus and direct his attention to the task at hand (Tr. p. 67). The lead therapist attributed the student's difficulty with remaining on task, in part, to response latency and noted that the student's inability to stay focused for long periods of time impeded his ability to work at a desk, in group settings, and in the community (Tr. pp. 68-69, 72). Academically, the lead therapist described the student as needing literacy skills, including reading comprehension and vocabulary expansion (Tr. p. 68). The lead therapist also identified the student's safety awareness as an area of concern (Tr. p. 67). The lead therapist further reported that the student needed strategies to support self-regulation (Tr. p. 68). According to the lead therapist, the student engaged in "tantrum" behavior that included self-injurious behavior, loud screaming, stomping, yelling, inconsolable crying and at times, property damage (Tr. pp. 77-78, 104). The lead therapist reported that at times the student needed to be removed from the room, and at-issue behaviors often escalated if intervention was not provided (Tr. pp. 77, 104).

The student's speech-language pathologist reported that the student demonstrated a language processing delay and required "quite a bit of time" before he would process an answer (Tr. pp. 285; Parent Ex. H at p. 2; see also Tr. pp. 289-90). The speech-language pathologist testified that the student usually "default[ed]" to using one or two-word phrases during spontaneous speech and engaged in "a lot of stereotypy" which distracted him from language tasks (Tr. pp. 286, 312-13; Parent Ex. H at pp. 1-2).

With respect to the student's physical development, the student's school-based occupational therapist indicated in a report dated January 17, 2013, that the student presented with decreased sensory processing, fine motor, visual perceptual, and motor planning skills, as well as a limited ability to perform activities of daily living (ADLs) independently (Parent Ex. P at p. 1).

The former director of McCarton, who was familiar with the student, testified that the student had some verbal ability but that he also had "articulation" difficulties (Tr. p. 336). He stated that the student was able to ask for things that he wanted, but not in a conversational manner (id.). According to the former McCarton director, the student had difficulty understanding multi-step directions (id.). He reported that the student was able to work for approximately 20-minute periods but at a certain point the student would become frustrated (Tr. pp. 336, 362). He indicated that the student required access to frequent breaks (Tr. p. 336). The former director testified that the student also required 1:1 instruction primarily due to his processing problems and difficulty with skill retention (id.). He reported that although the student could briefly demonstrate a skill quickly, the student required direct repetitive practice in order for the skill to "become firmly in his repertoire" (Tr. p. 337). While the former McCarton director described the student as "independent" with basic self-care needs, which included dressing and feeding himself, the former

[11] The occupational therapist who provided the student with after-school OT services testified that she was the McCarton School's director of OT (Tr. pp. 227-229).

McCarton director noted that the student required teacher direction to complete these activities because he lacked "self-initiation" (Tr. p. 336).

The parent's testimony echoed the service providers' narrative and description of the student's needs; to wit, that the student had "limited speech," experienced difficulty expressing himself when frustrated, and exhibited some independence—although safety concerns necessitated "constant supervision" (Tr. p. 361). The parent further testified that the student benefitted from OT and yoga, which helped to calm him, and opined that the student had an "attention deficit" (Tr. p. 362).

The student's after-school BCBA testified that the student had difficulty generalizing and attaining skills across settings, people, and presentation of stimuli (Tr. p. 165). The student's after-school occupational therapist cited the student's cognitive and motor planning deficits as impacting the student's OT and programming (Tr. p. 235).

2. Appropriateness of the Unilateral Placement

As noted above, for the 2012-13 school year the parents unilaterally placed the student in a center-based program at McCarton where he received instruction using ABA methodology, as well as related services of speech-language therapy and OT (Tr. pp. 63-64, 100-01, 120). In addition, the parents arranged for the student to receive eight hours per week of after-school ABA instruction, delivered in the student's home and surrounding community, and 90 minutes per week of after-school OT services, delivered in a clinic/community setting (Tr. pp. 259, 373-74).[12]

Consistent with what the hearing record indicates about the student's needs, as summarized above, a review of the hearing record establishes that the student's educational program and services received at McCarton during the 2012-13 school year were appropriate and specially designed to address his unique needs.

According to the hearing record, the upper school at McCarton is a behavior-based educational program for students with autism (Tr. p. 328). The school places an emphasis on incorporating behavior therapy, OT and speech-language programming into a comprehensive program designed to promote students' community independence and transition to adulthood in a way that supports independent living (Tr. p. 328). For the 2012-13 school year, 14 students were enrolled in the upper school, which is made up of three classrooms (Tr. pp. 64, 338). The student was placed in a class that included four other students—all between the ages of 13 and 15—where he received 1:1 (staff-to-student ratio) support, individual and co-treated instruction in speech and OT sessions, and group instruction for some classes (Tr. pp. 63-64; Parent Ex. J at p. 1).

During the 2012-13 school year the student attended McCarton from 8:45 a.m. to 4:45 p.m. each day and received between 1 hour and 45 minutes and 2 hours and 30 minutes of academic instruction, along with two 45- minute sessions of individual OT, two 45-minute sessions of group OT and two 45-minute sessions of speech-language therapy each week (Tr. at pp. 120-21, 230,

[12] Although the student's mother testified that the student received two hours per week of after-school occupational therapy, the occupational therapist reported that she provided the student with two 45-minute sessions of OT per week (Tr. pp. 230, 245, 373; see Parent Ex. V at pp. 13-17, 19-27, 29, 32-35, 37-39).

Parent Exs. H at p. 1; U).[13] According to the student's lead therapist, the student was taught using discrete trial training, natural environment teaching, graduated guidance and prompt fading, and total task forward training (Tr. p. 88-89).

To address the student's educational needs, McCarton developed an IEP for the student for the 2012-13 school year (Parent Ex. J). The McCarton IEP included goals and objectives for the following "domains": academics, safety, small group instruction, behavior support, community, managing day-to-day living, work-related skills, leisure/recreation, sexuality and sexual safety, transitioning skills, and self-advocacy/self-determination (id. at pp. 2-17).

The McCarton IEP included approximately 15 annual goals and 67 short term objectives which targeted, among other things, the student's reading comprehension, written communication skills, expressive language, and math skills (academic); abilities to recall and dial important phone numbers, cross the street without assistance, and demonstrate what to do when lost (safety); abilities to attend to a lesson for 30-minutes, monitor on task behavior, and follow one-step instructions presented in a group (small group instruction); self-manage behavior using a token economy; maintain near zero rates of tantrums; and reduce hand tapping, tensing, and non-contextual vocalizations (behavior support); eat neatly by holding utensils appropriately, demonstrate appropriate restaurant skills, and remain quietly in a designated area of the community (community); use a personal appearance checklist to determine if clothing/hair is out of place or dirty, follow a simple three to five step recipe, follow a safety checklist when preparing meals, and do own laundry (managing day-to-day living); complete an activity schedule for 5-10 activities, work independently, and increase productivity (work-related skills); engage in leisure/recreation sampling individually and with another person/people in the home environment and community (leisure/recreation); receptively identify body parts, independently use a community restroom, and demonstrate appropriate places to be naked (sexuality and sexual safety); line up on request and wait appropriately in line, and work independently in a dyad (transitioning skills); and request more time with a desired item/activity when interrupted and politely made to stop an undesirable activity (self-advocacy and self-determination) (Parent Ex. J at pp. 2-17).

With respect to the student's speech-language needs, the hearing record shows that for the 2012-13 school year McCarton established a number goals and objectives for the student that targeted his weaknesses in receptive, expressive, and pragmatic language (Parent Ex. I; see Parent Ex. H at p. 1). More specifically, the receptive language goals targeted, among other things, the student's ability to follow multi-step and conditional directions, expand his receptive vocabulary, distinguish between "wh" questions and follow directions given over the phone (Parent Exs. H at p. 2; I at p.1-3). With respect to expressive language skills, the McCarton speech-language goals included, among others, goals and objectives related to labeling new vocabulary, improving syntax, answering "how" and "why" questions, using grammatically correct sentences, and answering questions pertaining to the immediate environment for safety (Parent Exs. H at p. 2-3; I at p. 3-6). In addition, pragmatic language goals and objectives addressed the student's ability to use a politeness marker ("excuse me") and to follow transactional cues at a store, such as handing money to the cashier when told the amount, taking change on pragmatic cue, and responding to a greeting (Parent Exs. H at p. 3; I at pp. 6-7).

[13] In addition to academic instruction, the student's classroom schedule included time devoted to job readiness, daily living instruction, community programs, leisure skills electives, science, and health, among other things (Parent Ex. U).

In addition to educational and speech-language goals, McCarton also developed OT goals and objectives for the 2012-13 school year that targeted the student's deficits in motor planning, functional motor skills, and fine motor development (Parent Ex. G). Among other things, the goals and objectives addressed the student's dressing skills, manual dexterity and fine motor endurance, self-feeding skills, food preparation skills, community independence, typing and handwriting, independent use of a safety checklist while cooking, participation in a hand strengthening protocol, and social skills while eating (Tr. pp. 234-35; Parent Ex. G).

Lastly, McCarton developed three positive behavioral support plans, with accompanying intervention plans, as an ongoing means of managing the student's behavior (Parent Exs. E, F, O). The behavior plans addressed the student's delayed echolalia, stereotypic hand movements, tantrums, and off-task behavior and supplemented the behavior objectives found in the McCarton IEP (Parent Exs. E; F; O; see Parent Ex. J at pp. 7-8).

As previously noted, in addition to the center-based program at McCarton, the student's unilateral placement also included eight hours of after-school ABA instruction provided by two ABA therapists, one of whom was a BCBA (Tr. pp. 162, 165-166, 370-71, 373, 383-84; Parent Ex. W). According to the BCBA, the after-school ABA therapists worked with the student to develop increased independence at home and generalize skills learned and acquired at school to home and community settings (Tr. p. 165). The BCBA testified that she used the Assessment of Functional Living Skills (AFLS) to assess the student's abilities and formulate goals for the student's home program (Tr. pp. 173-77; Parent Ex. JJ at p. 1).[14] The resultant goals targeted the student's language, leisure skills, chores, public eating, and basic mobility, as well as academics needed for functional life skills (Tr. pp. 169-71; Parent Ex. JJ). The BCBA indicated that the student's goals and ABA programs would be worked on in natural environments (Parent Ex. JJ at p. 1).

In addition to after-school ABA instruction, the student also received 90 minutes per week of OT services delivered in a clinic setting (the McCarton Center) and in the surrounding community (Tr. pp. 229, 233-34, 259). According to the after-school occupational therapist, the OT goals worked on outside of school were similar to those goals addressed in school, the idea being to increase the student's independence and ability to generalize skills to community and other settings (Tr. p. 241). The occupational therapist indicated that the after-school (weekend) OT sessions began with the therapist helping the student develop and follow a leisure time schedule and moved on to the student performing exercises in the gym, followed by work on personal hygiene or community based skills (Tr. p. 234).

To the extent that the district asserts that the student's unilateral placement did not provide the student with sufficient daily academic services, or meet the student's vocational needs, the hearing record shows that the McCarton IEP included both academic and work-related goals and objectives and the student's classroom schedule included designated periods for academic instruction and job readiness (Parent Exs. J at pp. 2-5, 11-12; U). The classroom schedule also reflects that a significant portion of the day was allocated for work on ADL goals and daily living

[14] The "Skills Tracking System" for the AFLS was entered into evidence (Parent Ex. KK). The tracking system includes skills categories and numbered skills within each category, but does not list or describe the skills that correspond to the numbers (Parent Ex. KK).

instruction, areas of need for the student (Parent Ex. U). The remainder of the student's classroom schedule consisted of community programs, leisure skills and electives, and school chores (id.).

The hearing record shows that the BCBA and occupational therapist who provided the student with after-school services coordinated with staff from the student's center-based McCarton placement in a number of ways. The student's lead therapist at McCarton testified that the student's "home team" was in contact with the student's therapists at the school and that the parties regularly exchanged emails in which they sought feedback and brainstormed strategies that pertained to both environments (Tr. pp. 102, 122-23, 125). He noted that someone from the school went home with the student on a weekly basis for the purpose of ensuring generalization and also to help problem solve and program for the student (Tr. p. 103). In addition, the student's after-school BCBA indicated she met with the director of McCarton as well as the McCarton school team "to develop a home program that [was] consistent with the goals [the student] [wa]s working on at school" (Tr. pp. 166-67). She testified that she had the opportunity to observe the student in his McCarton classroom and communicated regularly with the school team via email (Tr. pp. 167-169).

The student's after-school occupational therapist testified that, as director of OT for McCarton, she supervised the student's school-based occupational therapist and co-treated the student on a biweekly basis with the therapist (Tr. pp. 230-31). She also observed the student in the classroom setting at McCarton and throughout the school (Tr. p. 228). The student's after-school occupational therapist further noted that she met with the student's school-based team both formally and informally, met with the student's after-school BCBA on a weekly basis, and exchanged weekly e-mails with the student's mother, as well as spoke with her in person prior to the after-school (weekend) OT sessions (Tr. pp. 250-51).

Accordingly, in view of the evidence in the hearing record detailed herein, the parents have established that the student's unilateral placement for the 2012-13 school year at McCarton, combined with the after-school services of ABA instruction and OT, was appropriate and that the educational instruction was designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365).

3. Progress

In support of its argument that McCarton was not appropriate for the student, the district argues that the student did not make significant progress towards many of the goals and short-term objectives contained on his McCarton IEP and that the majority of the short-term objectives were not begun. A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 [S.D.N.Y. Mar. 19, 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. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23

[N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).[15] However, a finding of progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]. The hearing record, for the reasons stated below, establishes that the student made progress in several domains during the 2012-13 school year.

Here the student's second quarter progress report, dated February 2013, shows that the student made some progress toward his McCarton IEP goals during the first half of the 2012-13 school year (Parent Ex. MM). While the numerical ratings suggest that the student's progress was limited, the accompanying narratives more fully described the gains made by the student (id.; see Tr. pp. 91, 110-12). According to the February 2013 progress report, McCarton data indicated a significant decrease in the student's tantrums, stereotypy, and non-contextual vocalizations, as well as improvement in his ability to attend in a group lesson (Parent Ex. MM at pp. 1, 7, 8). The progress report also showed that the student made progress toward the following objectives, among others: determining the weather for the day and choosing appropriate clothing; increasing his mean length of utterance; self-managing his behaviors using a token economy; appropriately expressing feelings and opinions and generating alternative solutions to problems; and recalling and identifying a source of unusual sensation (id. at pp. 3, 5, 7, 10, 11, 15). The student also learned to recall and dial emergency contact numbers and identify walk/don't walk signs in context (id. at p. 6). The progress report noted that once the student learned a skill, it was generally maintained, and the prompts required to teach the skill were able to be faded (id. at p. 1). According to the January 2013 OT progress report, the student had mastered the ability to complete some ADLs with maximum assistance and was working toward completing the same skills with moderate assistance (Parent Exs. G; P).

The student's speech-language pathologist reported that staff took data on the student's speech-language programs and his program was adjusted if the data showed that it was "not clicking" (Tr. pp. 290-92). According to the speech-language pathologist, by December 2012 the student had gained "a better sense" of being able to answer yes and no and to provide staff with an idea of his emotional and physical state (Tr. p. 295; Parent Exs. H; I). The speech-language pathologist reported that the student had also made gains in his ability to follow multi-step directions throughout the school, understand new vocabulary, and use pronouns (Tr. pp. 295-300). In addition, the speech-language pathologist indicated that the student progressed to using 5-7 words in a "grammatically-sound" manner (Tr. p. 296). According to the speech-language pathologist, the student was moving along the hierarchy of speech and language development and was better able to advocate for himself with respect to his wants, needs and discomfort (Tr. pp. 296, 300).

In addition to the McCarton progress reports, the student's lead therapist described how the student's maladaptive behaviors had decreased as a result of the behavior support plans that were

[15] The Second Circuit has also found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that, although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

put into place and opined that the student had made "great progress" toward his McCarton IEP goals (Tr. pp. 71-84; 104). According to the lead therapist, much of the student's progress was attributable to his self-advocacy, which had significantly improved, and which had great implications for the student in school and in life (Tr. pp. 104-105).

The student's after-school BCBA testified that the student had made "a significant amount of meaningful progress at home" since July 2012 (Tr. p. 192). She reported that the student was able to type the date and a list of desired activities, a skill designed to teach the student to self-manage his downtime when the therapists were not present (Tr. pp. 192-93). The after-school BCBA also reported that the student was talking more clearly and with increased volume (Tr. p. 193). The student's after-school occupational therapist also opined that the student was making meaningful progress toward his goals (Tr. pp. 24, 248-49). She reported that for each of the student's goals daily treatment notes and data collection were recorded (Tr. pp. 246-49).

With regard to the district's argument that many of the goals and objectives were not worked on during the first two quarters of the school year,[16] the lead therapist explained that some of the student's goals were "full year" goals that needed to be task analyzed and the steps broken down into smaller, teachable steps (Tr. p. 112). He further explained that a particular goal on the student's McCarton IEP was put on hold because the student ran into difficulty with it and therefore staff shifted their focus to working on prerequisite skills (Tr. pp. 115-17). The lead therapist described various reasons as to why a goal would be marked a "1" ("not applicable during this grading period") on a student's progress note (Tr. p. 145). Moreover, a review of the McCarton IEP shows that staff did not intend to address a number of the student's goals until the second or third quarter of the 2012-13 school year (Parent Ex. J at pp. 2-3, 5-6, 8-10, 12-16).

4. Least Restrictive Environment

Finally, the district argues that McCarton was not an appropriate placement for the student because its 1:1 ABA program was overly restrictive and did not afford the student adequate mainstreaming opportunities. Even if it is possible that the student could benefit from a less restrictive setting, and the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (Frank G., 459 F.3d at 364; Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; 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]. Here, while McCarton might not have maximized the student's interaction with nondisabled peers, in this instance, it does not weigh so heavily as to preclude the determination that the parent's unilateral placement of the student at McCarton for the 2012-13 school year was appropriate

[16] The district's argument that a unilateral placement is inappropriate because private IEP goals were not addressed during a portion of the school year proceeds from a faulty assumption, insofar as a unilateral placement need not meet State standards such as producing an IEP (see Carter, 510 U.S. at 14).

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).[17] Moreover, given the student's significant behavioral and sensory needs, the district has failed to produce any evidence in this case indicating that the student does not require 1:1 instruction to learn new skills or that the student would obtain greater educational benefit from a less restrictive setting.[18]

B. Equitable Considerations and Relief

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; M.C. v. Voluntown, 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"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise 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]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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

[17] I note in this regard that the district's recommended placement in a specialized school would not have provided the student with access to the general educational environment or nondisabled students, and that the June 2012 IEP explicitly stated that the student would "not participate in any regular classes, extracurricular or other nonacademic activities with nondisabled peers" (Parent Ex. C at p. 2). Furthermore, the district rejected the possibility of offering the student a placement in a community school on the basis that it would "not provide the appropriate level of support for the student to meet IEP goals" (id. at p. 20).

[18] Nevertheless, because the student has been placed in the same 1:1 setting for over ten years, I note that the student might benefit from greater exposure to non-disabled peers in a less-restrictive future placement (Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-032).

statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Turning to the issue of whether equitable considerations bar tuition reimbursement and/or funding of the after-school services provided to the student, the IHO found that there was no evidence in the hearing record that would weigh against the parent's request for tuition reimbursement and that the CSE's acknowledged failure to offer the student a FAPE for the 2012-13 school year weighed in favor of tuition reimbursement (IHO Decision at p. 7-8). On appeal, the district does not cite to any evidence in the hearing record that would call into question the IHO's findings that the parents fully cooperated with the CSE; participated and cooperated in the IEP development process; provided the CSE with copies of progress reports and other documents that the CSE needed to consider in developing the student's educational program; and provided adequate and timely notice of their intent to unilaterally place the student at McCarton (id. at pp. 7-8; see also Tr. pp. 252, 302, 376-77; Parent Exs. B at p. 1; K at p. 1; Q at pp. 1-2). Thus, based upon the evidence contained in the hearing record, I find that the parents acted reasonably under the circumstances of this case and that the hearing record contains no indication that they did not cooperate with the district in good faith to attempt to develop an appropriate IEP for the student. Therefore, equitable considerations do not bar 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. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 679-80 [S.D.N.Y. 2012]; R.K. v. New York City Dep't of Educ., 2011 WL 1131522, at *4 [E.D.N.Y. Mar. 28, 2011]).

Having determined that McCarton was an appropriate placement for the student for the 2012-13 school year and that equitable considerations do not bar an award of tuition reimbursement, the inquiry in this case does not end there, because the IHO awarded up to eight hours of ABA instruction and two hours of OT services per week (IHO Decision at pp. 9-10). Courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see Mr. and Mrs. A v. New York City Dept. of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see also Forest Grove v. T.A., 557 U.S. 230, 239-40 [2009]).

While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact

proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA requires"]). Similarly, "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are per se [reimbursable]; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA" (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]).

Moreover, in this case, the parents assert that the student requires after-school services to generalize the skills learned at school (see, e.g., Answer ¶ 35; see also IHO Decision at p. 7). Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). Upon review of the hearing record, I find that the student's after-school program focused on generalization of skills that the student learned at school, which weighs heavily against a finding that the after-school program was designed to address the student's educational needs in, and receive educational benefits from, his school-based program.

Here, the weight of the evidence in the hearing record reveals that the purpose of the after-school services was for the generalization of skills to other environments outside of school. For example, regarding the necessity of the after-school services, the student's lead therapist indicated that the McCarton placement was able to meet the student's special education needs (Tr. p. 126). However, he also indicated that he only knew the student with the after-school program and stated that he could not opine whether the student's needs could be met without the after-school services (Tr. pp. 136-37).

The student's after-school BCBA testified that the student required ABA instruction, in addition to the McCarton program, because of his difficulty generalizing and retaining skills (Tr. pp. 172, 189). The BCBA opined that the student's academic gains in school would be much slower without the after-school program but testified that the student would "possibly" be able to make gains without the after-school services (Tr. pp. 208). However, the BCBA later opined that without any after-school services, the student would not be able to retain the skills he was learning at school and would not be able to be independent in his home or community (Tr. p. 212).[19]

The former director of McCarton also indicated the student needed the additional after-school services to assist in generalization and to teach skills that were "relevant across his life time" (Tr. p. 337-38). He added that without the after-school services, the student's acquisition of

[19] I also note that the hearing record does not support the conclusion that the student is currently able to function independently, either at home or in his community; rather, the student's program is designed to increase his level of independence (see, e.g., Tr. pp. 88, 92-93, 103, 165, 170, 172).

skills might be limited to the school setting because the student had difficulty generalizing and maintaining skills across environments (Tr. pp. 349, 355).[20]

The student's after-school occupational therapist also testified that the after-school services were "absolutely necessary" for the student to generalize skills outside of the school setting (Tr. pp. 242, 274). The occupational therapist opined that removing the after-school services might lead to regression, although she further reported that the student had suffered no regression to "her knowledge" (Tr. pp. 268-70).

In view of the foregoing and the hearing record as a whole, the weight of the evidence does not support the conclusion that the after-school services for which reimbursement was awarded by the IHO were required under the IDEA to assist the student to benefit from special education, and I conclude that an appropriate remedy for the district's failure to offer the student a FAPE does not require the district to reimburse the parents for after-school services designed for the purpose of the generalization of skills (see Luke P., 540 F.3d at 1152-53; L.B. v. Nebo Sch. Dist., 379 F.3d 966, 979 n.18 [10th Cir. 2004] [whether the student required the entirety of the home-based services to succeed in the private placement is an appropriate equitable consideration]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996] ["The appropriate amount (of reimbursement) thus bears a relationship to the quantum of services that the state would have been required to furnish"] [emphasis added]; J.P. v County Sch. Bd., 447 F. Supp. 2d 553, 591 [E.D. Va. 2006], rev'd on other grounds 516 F.3d 254 [4th Cir. 2008] [the district "must reimburse the parents for the reasonable costs of educating (the student) at the (private school) and any related services and accommodations that would have been covered under the IDEA had (the district) provided (the student) with an appropriate education"] [emphasis added]).[21] 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). While I can understand that the parents may believe these services were highly desirable for their son, it does not follow that the district must be made responsible for them. The IDEA 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]).

Finally, I note that the district has been required to fund the student's combined placement at McCarton and the after-school services for the entirety of the 2012-13 school year as a result of its obligation to provide the student with his pendency (stay-put) placement for the duration of these and prior proceedings, the underlying basis for which was described in the interim decision issued by the IHO (Interim IHO Decision at p. 2). In addition to the interim order on pendency, the parents indicate in their answer that the costs for the student's combined program for the 2012-13 school year have been paid or were expected to be paid pursuant to the student's pendency entitlement (Answer at p. 4 n.5). As all of the reimbursement relief sought by the parent has been achieved by virtue of pendency, I find that the parties' dispute regarding the 2012-13 school year is no longer a live controversy and has been rendered moot, the discussion of the parties' arguments on the merits above has been rendered academic, and the dispute at issue "is not capable of

[20] However, the McCarton progress report indicated that the student "easily maintained" skills once learned and that prompts required to teach the skills were "easily faded" (Parent Ex. MM at p. 1).

[21] This is not to imply that, in every instance in which a parent provides services which are not strictly necessary for the student to attain educational benefit, reimbursement will be improper (see Bd. of Educ. v. Gustafson, 2002 WL 313798, at *6 [S.D.N.Y. 2002] ["Receiving more services than required does not automatically mean that full tuition reimbursement should be denied."]).

repetition because each year a new determination is made based on [the student's] continuing development" (M.S. v. New York City Dept. of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]).

VII. Conclusion

The hearing record supports the IHO's determinations that the district failed to offer the student a FAPE, that the parents' unilateral private placement at McCarton was appropriate, and that equitable considerations weighed in favor of tuition reimbursement. However, the IHO improperly reimbursed the parents for the student's after-school ABA therapy and OT by finding that those services were necessary for generalization and for the student to receive an educational benefit from McCarton. Accordingly, I annul so much of the impartial hearing officer's decision as reimbursed the parents for the student's after-school ABA therapy and OT and otherwise affirm the IHO's determination that McCarton was an appropriate placement for the student for the 2012-13 school year. 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.

IT IS ORDERED that the impartial hearing officer's decision, dated September 13, 2013, is modified, by reversing the portion that ordered the district to reimburse the parents for eight hours per week of home-based ABA services and two hours per week of occupational therapy for the 12-month 2012-13 school year; and

IT IS FURTHER ORDERED that the district shall pay directly to McCarton, pursuant to the student's pendency entitlement, the student's tuition costs for the 2012-13 school year, to the extent that such tuition costs have not already been paid by the parent; and

IT IS FURTHER ORDERED that, to the extent that the parent has paid any portion of the student's tuition costs at McCarton for the 2012-13 school year, the district shall reimburse the parent for such costs upon the submission of proof of payment to the district.

Dated: **Albany, New York**
December 13, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER