



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-234

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, Neha Dewan, Esq., of counsel

Law Offices of Regina Skyer & Associates, attorneys for respondent, Sonia Mendez-Castro, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Aaron School for the 2012-13 school year. The appeal must be dismissed.

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

According to the parent, the student demonstrated developmental differences at an early age (Tr. pp. 345-86). The parent testified that, during the student's early school history, the student was recommended to receive special education in general education classroom placements with integrated co-teaching (ICT) services or special class placements (Tr. p. 389).¹ However, the

¹ The parent testified that she did not recall the recommendations made for the student's program specifically for each year but that it "flip flopp[ed] through the years" between general education classroom placements with ICT services and special class placements (Tr. p. 389). Additionally, for the sake of clarity, this decision will refer to this placement on the continuum of services as a classroom providing ICT services even though the hearing record, at times, refers to the services as "collaborative team teaching" or "CTT" (see, e.g., Tr. pp. 7-12, 35, 52-56, 78-79, 92-93, 95, 140).

student never attended a district public school, as the parent placed the student at the Aaron School, where he has remained since first grade (Tr. p. 415).² The student underwent a private psychoeducational evaluation between August and December 2011, the report for which reflected the student had received diagnoses of an "autistic spectrum disorder," an "obsessional compulsive disorder," an anxiety disorder, and a disorder of sensory integration (Parent Ex. G at p. 17).

On January 14, 2012, the student's parents signed a contract enrolling the student at the Aaron School for the 2012-13 (eighth grade) school year (Parent Ex. I at p. 3).³ Payments consistent with the contract were made by the parent's mother on behalf of the student (Tr. pp. 426-27; see Parent Exs. F; J; K; M).

The CSE convened on March 19, 2012 to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Exs. 1 at p. 10; 2 at p. 1). At the time of the March 2012 CSE meeting the student exhibited high cognitive ability (superior range) (Tr. pp. 24, 96; Dist. Ex. 1 at p. 1; Parent Ex. G at pp. 4, 18) and average to superior academic ability (Tr. pp. 24, 181, 221; Dist. Exs. 1 at p. 1; 6 at p. 2; Parent Ex. G at p. 22); however, his classroom performance was affected by difficulties with inferential thinking, novel tasks, social relatedness, anxiety, rigidity and cognitive inflexibility, regulating his emotions and reactions to situations, obsessive compulsive behavior, sensory deficits including sensitivity to loud noise, auditory and visual perception issues, staying on task, and by the student's disruptive behaviors including calling out in class, yelling/screaming, and teeth grinding (Tr. pp. 96-98, 181-82, 186, 220-21, 322; Dist. Ex. 6 at pp. 4-8). Finding the student eligible for special education as a student with a speech or language impairment, the March 2012 CSE recommended that the student receive ICT services in a general education classroom five periods per week in mathematics, English language arts (ELA), social studies, and sciences (Dist. Ex. 1 at pp. 1, 6).⁴ The March 2012 CSE also recommended related services, including one 40-minute group speech-language therapy session per week in the general education classroom, one 40-minute group OT session per week in the general education classroom, one 40-minute group counseling session per week in the general education classroom, and one 40-minute individual counseling session per week in the provider's office (id. at pp. 6-7). The March 2012 IEP also indicated that the CSE had considered a special class in a community school for the student but rejected it as overly restrictive because, given the student's cognitive and academic potential, he should have full access to the general education curriculum and nondisabled peers (id. at p. 12; see Dist. Ex. 1 at p. 9). Minutes of the March 2012 CSE meeting reflected that, although the student was able to follow a general education curriculum, the student's parent and

² The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (Parent Ex. F; see 8 NYCRR 200.1[d]; 200.7).

³ The copy of the contract in the hearing record is on "Aaron Academy" letterhead; however, testimony by the Aaron School administrator indicated that the upper school is no longer referred to as Aaron Academy and, as of the 2012-13 school year, it is under the umbrella of the Aaron School and includes kindergarten through twelfth grades (Tr. p. 174). For ease of reference the school will be referred to as "the Aaron School."

⁴ Minutes of the March 2012 CSE meeting indicated that the CSE discussed changing the student's eligibility classification to a student with autism based on the 2011 psychoeducational evaluation; however, the parent preferred to maintain her son's eligibility classification as a student with a speech or language impairment (Dist. Ex. 2 at p. 2). The hearing record reflects that the student's classification as a student with a speech or language impairment is not in dispute in this appeal (Tr. pp. 383-85; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

his Aaron School teacher believed that the student required a small class setting (Dist. Ex. 2 at p. 2; see also Tr. p. 393; Dist. Ex. 1 at p. 11).

In a final notice of recommendation (FNR) dated July 31, 2012, the district summarized the special education programs and related services recommended in the March 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 3). By letter dated August 3, 2012, the parent informed the district that she disagreed with the March 2012 CSE's recommendation for ICT services because they were insufficient for the student; however, she requested information about and an opportunity to visit the assigned public school site (Parent Ex. C). The hearing record reflects that the parent did not receive a response from the district and, by letter dated August 22, 2012, the parent rejected the March 2012 IEP and assigned public school site (Tr. p. 404; Parent Ex. B). In her letter, the parent advised the district of her intention to place the student at Aaron School for the 2012-13 school year and seek funding from the district in the event that the district did not "cure the procedural and substantive errors in the development of [the student's] IEP and offer him an appropriate program consistent with his needs" (Parent Ex. B at pp. 1, 3). The letter also described the parent's concerns with the March 2012 IEP and requested transportation for the student to the private school in the event that the IEP "remain[ed] unremedied" (id. at pp. 2-3). According to the parent, she did not receive any response from the district regarding any of the concerns raised in her letter (Tr. p. 431-32).

The hearing record reflects that the student attended Aaron School for the 2012-13 school year, beginning in September 2012 (Parent Exs. E; N; O; P). At the end of September 2012, the parent visited a classroom with ICT services at the assigned public school site (the proposed class) (Tr. pp. 404, 424-26).

By letter dated October 9, 2012, the district responded to the parent's August 3, 2012 letter and acknowledged the parent's disagreement with the CSE's recommendations and, apparently in error, her request that the CSE reconvene to discuss the program recommendation made by the March 2012 CSE (Parent Ex. Q; see Parent Ex. C). The letter requested that the parent provide any updated materials regarding the student for the CSE to review prior to the CSE reconvening or prior to a discussion with the district regarding her concerns (Parent Ex. Q).

By letter dated October 12, 2012, the parent responded to the district, stating that she had not requested a new meeting, reiterating the purpose of her earlier letter (to inform the district of her disagreement with the recommendation for ICT services and to gain information about and an opportunity to visit the assigned public school site) and informing the district that she had since toured the school and received "answers to [her] questions" regarding the assigned public school site from a school administrator (Parent Ex. R). The letter also indicated that the parent was forwarding the student's end of year progress report from the Aaron School and that she was willing to meet with the district to discuss it (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated November 16, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see generally Parent Ex. A). Specifically, the parent alleged that the March 2012 CSE failed to conduct certain evaluations and was not properly composed because it lacked a required

regular education teacher (*id.* at pp. 2-3, 5). The parent further alleged that the March 2012 CSE deprived the parent the opportunity to meaningfully participate in the development of the student's IEP and predetermined its recommendations, in that the CSE "dismissed the parent's input and the professional's opinions regarding the nature of [] the student's disabilities," failed to "meaningfully review" the privately obtained evaluation, and failed to consider all of the placement options on the continuum (*id.* at pp. 3-6). The parent also alleged that the March 2012 CSE should have conducted a functional behavioral assessment (FBA) and developed a behavior intervention plan (BIP) for the student, and that the behavior strategies and supports in the March 2012 IEP were insufficient and could not be implemented in a typical ICT classroom (*id.* at pp. 5-6). The parent also alleged that the recommended general education classroom placement with ICT services was not appropriate because the student required more support than that setting could provide, the student would be too disruptive to other students in such a setting, and the evaluative information reviewed by the March 2012 CSE recommended a small class with a low student-to-teacher ratio, a small school, and a quiet structured environment (*id.* at pp. 3-4). Next, the parent alleged that the district's untimely assignment of a particular public school site in August 2012 "frustrated the parent's ability to make an informed decision about the appropriateness" of the recommended program (*id.* at pp. 6-7). The parent also asserted that the assigned public school site and the proposed classroom were not appropriate for the student for various reasons (Parent Ex. A at pp. 7-8). Lastly, the parent alleged that the Aaron School was reasonably calculated to provide the student with educational benefit and that equitable considerations weighed in favor of the parent's request for reimbursement (*id.* at pp. 7-9). As relief, the parent requested reimbursement for the costs of the student's tuition at the Aaron School for the 2012-13 school year (*id.* at p. 9).

B. Impartial Hearing Officer Decision

After two prehearing conferences, held on January 3 and January 22, 2013, an impartial hearing convened on May 8, 2013 and concluded on September 12, 2013, after three days of proceedings (*see* Tr. pp.1-435).⁵ In a decision dated November 14, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the Aaron School was an appropriate unilateral placement for the student, equitable considerations weighed in favor of the parent's requested relief, and the parent was entitled to reimbursement of the costs of the student's tuition at the Aaron School for the 2012-13 school year (*see* IHO Decision at pp. 18-28).

Initially, the IHO found that March 2012 CSE was not properly composed and that the failure to include a general education teacher at the March 2012 CSE meeting was a procedural error, noting that a regular education teacher would have been an "essential member of the CSE" in light of the recommendation for ICT services in a general education classroom (IHO Decision at p. 22). The IHO further found that the March 2012 CSE's failure to conduct an FBA, in conjunction with the lack of a regular education teacher at the meeting "buttress[ed]" the parent's argument that the district failed to offer the student a FAPE (*id.* at p. 25). The IHO also found that the CSE's recommendation of ICT services was not appropriate because the hearing record showed that the student required more support, such as a small special education school, with a "high teacher to student ratio in a structured environment with sensory support throughout the day" (*id.*).

⁵ The hearing record contains two documents titled "Pre-hearing Conference Summary," dated January 3 and January 22, 2013, respectively. Neither of these documents received an exhibit identifier, nor were they formally entered into the record during the impartial hearing (*see* Tr. pp. 1-435).

The IHO found that the student's greatest area of need was in the social/emotional realm and the student's anxiety and distractibility could not be managed in the "large classroom setting" of a general education classroom with ICT services (id.). The IHO also noted that the student required "a challenging academic program taught by trained teachers who [were] flexible and able to employ compassionate strategies to deal with his emotional meltdowns and to facilitate his social interactions" (id.).

The IHO also determined that the parent satisfied her burden to establish that the Aaron School was an appropriate unilateral placement for the student, finding that the Aaron School was not overly restrictive, provided adequate related services, and provided a program tailored to meet the student's individual "academic, social and emotional" needs, and that the student made progress during his attendance at the Aaron School (IHO Decision at pp. 26-27). Turning to equitable considerations, the IHO determined that equitable considerations weighed in favor of the parent's request for relief because the hearing record indicated that, although the parent "made known her preference for the Aaron School," she attended the March 2012 CSE meeting, provided the CSE with reports from the unilateral placement and a recent psychological evaluation, and was fully engaged in the meeting and cooperative with the CSE (id. at p. 27). Consequently, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at the Aaron School for the 2012-13 school year (id. at p. 28).

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 the Aaron School was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief.

Initially, the district asserts that the lack of a regular education teacher at the March 2012 CSE meeting did not deny the student a FAPE because the recommendation for "placement in an ICT setting" did not constitute an "entirely general education environment" and, therefore, a general education teacher would not have contributed any additional information beyond that which the special education teacher could provide. The district asserts that, even if the lack of a general education teacher at the March 2012 CSE meeting constituted a procedural error, there was no basis in the hearing record to conclude that such inadequacy impeded the student's right to a FAPE, particularly given that the parent "was provided the opportunity to participate in the decision-making process." The district further asserts that the March 2012 CSE's failure to conduct an FBA or develop a BIP did not rise to the level of a denial of a FAPE in this instance because the student's problematic behaviors did not include aggression towards others or self-injurious behavior, the CSE had a "comprehensive understanding" of the student's behaviors, and the CSE developed specific annual goals and management needs to address the student's behavior in the recommended ICT placement (Pet. ¶¶ 37-39). The district also argues that the IHO erred in finding that the March 2012 CSE's recommendation for ICT services was not appropriate for the student. The district contends that the ICT services were appropriate for the student because such an environment addressed both the student's noted cognitive abilities, as well as his social/emotional deficits, and allowed him to learn social skills by modeling typically developing peers in the least restrictive environment (LRE).

Regarding the parent's unilateral placement, the district contends that IHO erred in finding the Aaron School to be an appropriate unilateral placement because it was too restrictive in that it afforded the student no opportunities to integrate with typically developing peers, the parent failed to demonstrate that the program provided specially designed instruction, and the Aaron School did not provide sufficient related services. Lastly, with respect to equitable considerations, the district asserts the parent did not seriously consider placing the student in a public school, as demonstrated by the timing and content of the parent's contract with the Aaron School, and that the parent gave insufficient notice of her intention to unilaterally place the student at public expense. The district requests an order vacating the IHO's decision.

In an answer, the parent responds to the district's allegations and generally seeks to uphold the IHO's decision in its entirety. The parent asserts that the lack of a regular education teacher at the March 2012 CSE meeting rose to the level of a denial of a FAPE because a regular education teacher could have discussed accommodations required for the student to be successfully placed in a general education setting. The parent further asserts that the failure to conduct an FBA or develop a BIP denied the student a FAPE the student required a BIP even in the more supportive setting at the Aaron School. The parent asserts that her participation in the March 2012 CSE meeting was impeded by the failure of the March 2012 CSE to adopt the descriptions of the student's needs and placement recommendations as set forth in the available evaluative information. The parent also argues that the IHO correctly found that the March 2012 CSE's recommendation for ICT services was not appropriate for the student because, although the student was intellectually capable, he had great social/emotional needs that that could not be met in such a setting. The parent next asserts that the IHO correctly found that the Aaron School was an appropriate unilateral placement for the student, in that it addressed the student's identified special education needs. Lastly, the parent asserts that equitable considerations favored reimbursement because the district's actions must also be weighed, the parent did not frustrate the CSE process but rather cooperated with it, and she provided the district with adequate notice of the unilateral placement. The parent seeks to uphold the IHO's decision in its entirety.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school

districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the

"results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Composition of the March 2012 CSE

Turning first to the composition of the March 2012 CSE, the parties agree that a regular education teacher was not in attendance (see Pet. ¶¶ 31, 33; Answer ¶¶ 27-29; see also Tr. p. 68; Dist. Ex. 1 at p. 13). However, the district asserts that the IHO erred in finding that a regular education was a necessary attendee or that the absence thereof supported a finding that the district failed to offer the student a FAPE. 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]).

Here, a review of the hearing record demonstrates that the attendees at the March 2012 CSE meeting included the parent, a district special education teacher, a district school psychologist

(who served as the district representative), an additional parent member, and the student's classroom teacher from the Aaron School (Dist. Exs. 1 at p. 13; 2 at p. 1). Further, the hearing record demonstrates that the March 2012 CSE both considered and recommended ICT services in a general education classroom for mathematics, ELA, social studies, and sciences (Dist. Ex. 1 at p. 6; see Tr. pp. 68-69;). The school psychologist testified that no regular education teacher participated in the March 2012 CSE meeting solely because this CSE had no regular education teachers on staff (Tr. pp. 68-69).⁶ As noted above, the student's classroom teacher from the Aaron School for reading and humanities for the 2011-12 school year participated in the March 2012 CSE meeting; however, the record does not indicate whether she was certified as a regular education teacher (Tr. pp. 21-22; Dist. Ex. 6 at p. 1). In this case, given that the March 2012 CSE recommended ICT services in a general education classroom, the failure to ensure the attendance of a regular education teacher was a departure from federal and State regulations. Nonetheless, the hearing record does not provide a basis upon which to conclude that this procedural inadequacy, standing alone, impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

B. March 2012 IEP

1. Consideration of Special Factors—Interfering Behaviors

The parent asserts that the March 2012 CSE's failure to conduct an FBA or develop a BIP resulted in a failure to offer the student a FAPE. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H., 361 Fed. App'x at 161; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [2008]).

⁶ This testimony strongly suggests that administrative convenience was prioritized above the IDEA's procedural charge to convene a properly composed CSE. I remind the district that a regular education teacher "of the student" must be available to participate at a CSE meeting in which a student was recommended to receive ICT services in the general education environment (8 NYCRR 200.3[a][1][ii]; see 20 U.S.C. § 1414[d][1][B][ii]; 34 CFR 300.321[a][2]; 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"]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], at p. 22, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, the "student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although state regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234, at *4). The Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP otherwise addresses the student's problem behaviors (*id.*).

To address the student's behavioral needs, the March 2012 IEP included a recommendation for one 40-minute individual and one 40-minute group counseling session per week (Dist. Ex. 1 at p. 7). The March 2012 IEP also contained two annual goals that addressed the student's ability to regulate his emotions and manage his tendency to overreact during frustrating and challenging activities, through the use of a self-monitoring plan to be utilized daily by both himself and his teacher, and to generalize the self-monitoring skills and strategies learned in counseling to less familiar contexts (*id.* at pp. 4-5). The management needs identified in the March 2012 IEP further addressed the student's behavioral needs by recommending supports, such as: reminders to remain focused on assignments; the provision of opportunities for verbal processing with the teacher when stressed; clearly explained directions; short breaks to calm down; teacher prompting to use social scripts in order to increase his confidence regarding social interactions; and the use of a self-

monitoring system during moments of frustration to help the student recognize what has made him upset, what he was expecting to happen, and how he helped himself to feel better (*id.* at pp. 2-3).

As noted above, the student's classroom performance at the time of the March 2012 CSE meeting was affected by difficulties with inferential thinking, novel tasks, social relatedness, anxiety, rigidity and cognitive inflexibility, regulating his emotions and reactions to situations, obsessive compulsive behavior, sensory deficits including sensitivity to loud noise, auditory and visual perception issues, staying on task, and by the student's disruptive behaviors including calling out in class, yelling/screaming, and teeth grinding (Tr. pp. 96-98, 181-82, 186, 220-21, 322; Dist. Ex. 6 at pp. 4-8). As the hearing record reflects that the student exhibited behaviors that impeded his learning, the March 2012 CSE should have comported with State regulations and conducted an FBA and developed a BIP for the student.

However, the hearing record reflects that the parent consulted with a private cognitive behavior therapist and that she, the student's father, the student, and Aaron School staff—including the student's social worker (who was the student's group counselor and taught his social skills class) and the student's teachers—collaborated with the private therapist to develop a self-monitoring plan for the student that evolved over time as the student's needs changed (Tr. pp. 225, 280-81, 313, 371-778, 396-98; see Dist. Ex. 8 at pp. 1-2).

The self-monitoring plan, which was being implemented at the time of the March 2012 CSE meeting (Tr. pp. 282-83; see Dist. Ex. 6 at p. 8), consisted of a chart that the student utilized to document the class period, whether he had demonstrated specific appropriate behaviors, and any triggers which he perceived as contributing to his inappropriate behavior (Tr. p. 373; Dist. Ex. 8 at pp. 1-2). Specifically, the hearing record contains two sample monitoring plan charts which reflected statements of the appropriate behaviors that the student would respond to, for example: "I checked my silliness guidelines," "I interacted appropriately with friends," "I did not overreact," "I was on task," and "I maintained an appropriate volume" (Dist. Ex. 8 at pp. 1-2). The hearing record reflects that the chart was to be filled out by the student every 10 minutes using a plus or a minus to indicate whether he had demonstrated each of the behaviors and that the student could also document triggers or information related to anything that may have contributed to his inappropriate behaviors such as, "Tired today," "Excited for the weekend," or the initials of another student whom he felt was triggering him (Tr. pp. 373-75; Dist. Ex. 1 at p. 4). The student's social worker testified that information that the student provided in the triggers section allowed both she and the student's private therapist to use the information to determine what caused the student to engage in behaviors and to process the situation with the student afterwards (Tr. p. 351). Additionally, the monitoring chart also included a list of appropriate and inappropriate humor for the student to refer to and use as a guide and listed the student's goal to "practice using humor appropriately so [he] can fit into the world of a maturing teen" (Dist. Ex. 8 at p. 1).

Testimony by the parent indicated that although the student had made a lot of progress over time, and was now able to utilize the chart independently, at the time of the CSE meeting, the student's teachers were also monitoring the student's behavior (Tr. p. 395). Consistent with this testimony, the management needs section of the student's March 2012 IEP, as well as one of the goals on the IEP, reflected that the self-monitoring plan was to be utilized by the student on a daily basis to improve his ability to regulate his emotions and manage his tendency to overreact during frustrating and challenging activities, and the IEP further noted that the student would record his

behavior at 10-minute intervals and compare his self-monitoring to his teacher's observations at the end of each period (Dist. Ex. 1 at pp. 3-4).

Although the parent correctly alleges that there was no FBA or behavior plan in the IEP, in line with State regulations, which describe an FBA as a process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment (8 NYCRR 200.1[r]), the monitoring plan reflected information as to why the student engaged in certain behaviors, including a chart on which the student documented the triggers and circumstances that contributed to the student's behaviors (Tr. pp. 373-75; Dist. Ex. 8). Testimony by the student's history teacher at the Aaron School (Aaron School teacher) indicated that at the time of the March 2012 CSE, the student did not require a BIP because the monitoring plan was working and was the most effective plan implemented thus far in helping to manage the student's outbursts and anxieties (Tr. pp. 236-37, 282-83; Dist. Ex. 6 at pp. 8-9). Testimony by the student's Aaron School social worker indicated that there were several versions of the monitoring plan wherein "slightly different behaviors" were targeted throughout the year (Tr. pp. 372-73). She further testified that if the student mastered a behavior, it would be removed from the plan and a behavior that the student was currently exhibiting put in its place (Tr. p. 351).

Based on the description of the monitoring plan, its implementation by both the student as well as by his teachers, and considering the ongoing modifications that were made to the plan as the student's needs changed, in conjunction with the behavioral goals, management strategies and counseling services, the student's behavioral needs were adequately addressed in the March 2012 IEP. As such, under the specific facts of this case, the lack of an FBA and BIP does not rise to the level of a denial of a FAPE.

2. Integrated Co-Teaching Placement

Turning to the district's argument that the ICT placement was appropriate for the student, a review of the hearing record establishes, for the reasons set forth below, that the IHO correctly determined that the CSE's recommendation for ICT services in a general education classroom placement was not appropriate because the hearing record shows that the student required more support than such a placement could provide.⁷ The hearing record demonstrates that the ICT program as designed in the student's March 2012 IEP was not reasonably calculated to provide the student with educational benefits because the ICT services provided in the general education classroom would not have provided the student with sufficient support to address his social/emotional needs.

State regulations define ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that school personnel assigned to a classroom providing ICT services shall

⁷ To the extent that the parent asserts that her participation at the March 2012 CSE meeting was impaired by the failure of the CSE to follow the available evaluative information and recommendations regarding the student's needs and what would constitute an appropriate placement, this argument presents more as a challenge to the substantive result reached by the CSE in recommending ICT services in a general education placement and the parent's contentions are addressed as such herein.

"minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]).

While the district maintains that ICT services in a general education setting were appropriate for the student because of his cognitive abilities and he was functioning on grade level academically, a review of the hearing record reveals that the district did not recognize the extent of the student's social/emotional deficits and needs, or their impact on the student's ability to function in the classroom. At the time of the March 2012 CSE meeting, although the student exhibited high cognitive ability (superior range) and average to superior academic ability (Tr. pp. 24, 96, 181, 221; Dist. Exs. 1 at p. 1; 6 at p. 2; Parent Ex. G at pp. 3-5, 17, 18, 22), his classroom performance was affected by difficulties with inferential thinking, social relatedness, novel tasks, anxiety, rigidity and cognitive inflexibility, regulating his emotions and reactions to situations, obsessive compulsive behavior, sensory deficits including sensitivity to loud noise, auditory and visual perception issues, distractibility and staying on task, and by the student's disruptive behaviors including calling out in class, yelling/screaming, and teeth grinding (Tr. pp. 96-98, 181-82, 184-86, 220-21, 246-47, 322; Dist. Ex. 6 at pp. 4-8).

The hearing record reflects that at the time of the CSE meeting, due to the extent of his social/emotional needs, the student required significant levels of support to function at the Aaron School even in a special class setting (Tr. pp. 174-75, 317-21; Dist. Ex. 6). Specifically, the December 2011 Aaron School progress report reflected that, in addition to the self-monitoring plan that the student utilized to increase his accountability and responsibility for his actions, the student also used a self-monitoring system called the FEAR plan during frustrating moments to help him to recognize what had made him upset, what he was expecting to happen, and how he helped himself feel better, as well as verbal and nonverbal teacher prompts in order to help regulate his emotions during difficult academic situations (Dist. Ex. 6 at p. 8).⁸ The progress report indicated that while the student understood communication skills learned through role play, he often struggled to generalize these skills to unstructured settings during the school day (*id.* at p. 7). With regard to math class, the report reflected that the student's greatest challenge was his consistently high stress level (*id.* at p. 5). Despite that the student "clearly understood novel concepts with great ease and rapidity, he often required intensive one-on-one teacher support when exposed to new material, both to reassure him that he [was] on the right track and to help him maintain his focus to the task at hand" (*id.*). The report further reflected that although the student rarely had difficulty grasping new math concepts, on the occasion that he did, he became "agitated and aggressive, grimacing, throwing small objects and shouting at teachers and peers" (*id.*). The student was also reported to demonstrate difficulty and unwillingness to integrate socially into the math class in that he was initially too nervous to join the class for whole group math games (*id.*). In "MST" class, the report reflected that the student struggled with "independently answering open-ended questions and creating hypotheses for various experiments" and with giving and taking constructive criticism (*id.*).⁹ The student had trouble making hypotheses because he feared being wrong and he became nervous and needed to correct an incorrect prediction before moving on to the next task, and when asked to make improvements to an assignment, the student would resist

⁸ The FEAR plan is described in the hearing record as a plan used by the student in "challenging situations" to calm himself down (Tr. pp. 326-27).

⁹ According to the district representative at the March 2012 CSE meeting, MST stands for math, science and technology (Tr. p. 38).

doing so and required teacher support and the use of his "checklist strategy or his FEAR plan" to maintain focus on his work (id.).

The hearing record also reflects that although the student had made progress in this area, his ability to function in the classroom was affected by difficulty with pragmatic language skills (Parent Ex. G at pp. 11-12). The 2011 private psychoeducational evaluation report indicated that the student was not yet able to sustain an extended conversation; elaborate with specific, relevant details or with information he thought his listener might like to hear; sustain an active interest in what someone else is saying; had a very limited ability to use language for play interactions (socio-dramatic play) or to express feelings; had extremely underdeveloped understanding and use of multiple word meanings, figurative expressions, and idiomatic expressions; and did not reliably recognize another person's need for help and offer assistance (id.).

The 2011 private psychoeducational report also noted that the student exhibited neuropsychological difficulties related to social perception including understanding logical social cause-effect relationships, social inferencing, reading affect on faces and recalling faces (Parent Ex. G at p. 14). Consistent with this, the student's Aaron School teacher and parent testified with regard to the student's difficulty reading facial expressions and social cues, understanding innuendos, determining when it was appropriate to laugh and joke with friends and when he should be serious; and understanding when he had done something that impacted his peers or classmates in any way (Tr. pp. 222, 403). Testimony by the student's teacher and social worker from the Aaron School reflected that the student wanted to fit in among his peer group and, in an effort to be funny and accepted, he exhibited silly behaviors, used inappropriate humor, jokes, and loud laughing, and at these times, needed guidance and reminders to use appropriate behaviors (Tr. pp. 236-37, 250, 320).

The hearing record reflects that the student's most prevalent area of deficit was his anxiety, which manifested itself in many ways, including worrying about doing the right thing, what his peers thought about him, how he would perform on a test or quiz, whether he would get a project done on time, making sure his peers were happy and whether he had asked enough questions about their day, the trajectory of the rest of the day once his schedule had been changed, worrying whether there would be a fire drill that day, or that he would either stand out by doing too well on his assignments or not do his best because he was not trying hard enough, and creative assignments (Tr. pp. 111, 184-86, 220, 221-22, 288, 318-21, 403; see Parent Ex. G at p. 14).¹⁰

The hearing record further reflects that the student's anxiety often resulted in his overreaction to events in the classroom. For example, testimony by the guidance counselor at the Aaron School indicated that the student may be concerned that his interaction with a peer was not appropriate and ask aloud "was I just very mean?", until someone responded and indicated that he behaved appropriately or explained "that was not how that happened" and he was then able to calm down (Tr. pp. 190-91). The guidance counselor also indicated that if the student was not able to

¹⁰ The hearing record reflects that the student was sound sensitive and that in addition to being sensitive to loud talking, the student became overwhelmed and anxious if the environment became too loud or chaotic or when there was an unexpected noise (Tr. pp. 44, 54-55, 185, 192-93, 194). The Aaron School social worker testified that the student often worried about an upcoming fire drill and would walk around the building holding his ears and that this would impact his socialization and his ability to focus in class because he was "so caught up about if and when this fire drill was going to happen" (Tr. pp. 185-86, 321).

calm down, he would go outside the classroom and speak to the assistant teacher or the social worker (Tr. p. 191). Testimony by the student's social worker at the Aaron School further described a cycle wherein the student would become very anxious about something, become very upset because he had gotten anxious, and then begin screaming, grinding his teeth, storm out of the room, and significantly overreact to the situation (Tr. pp. 322, 341-42). At that point the student was sent to the social worker, who would work with the student to "verbally practice things, calm down," and "get the student to a better place" (Tr. p. 322). She further testified that the student would express guilt regarding how he had acted, that the student was very hard on himself, and that he required assistance in order to return to the classroom (*id.*). The social worker and the student's Aaron School teacher also testified that the more severe overreactions which resulted in the student leaving the classroom occurred approximately twice per week, although less severe overreactions occurred more frequently, approximately once or twice per class period, although not necessarily every day (Tr. pp. 293, 340-42). Notably, and consistent with the above, the 2011 private psychoeducational report also reflected that the student exhibited several overreactions during the evaluation process, wherein his mood changed "in an instant," from relaxed and focused during tasks he felt sure about, to "angrily screaming and yelling and grinding his teeth, or [the student] would grow anxious and panicky" when he felt frustrated, failed a test item, accidentally did not adhere to a rule, or was going to be timed (Parent Ex. G at pp. 2-3).

In addition to the social/emotional difficulties that affected the student's ability to function in the classroom, the December 2011 progress report also reflected that the student had difficulty getting started on assignments, was easily distracted, could lose focus when working on assignments, and benefitted from individual teacher support and reminders to remain focused on assignments and tasks during class (Dist. Ex. 6 at p. 4; *see* Tr. pp. 400-02). Consistent with this, and in contrast to the district school psychologist's belief that the student was not "overly" distractible (Tr. p. 75), testimony by the student's Aaron School teacher during the 2012-13 school year, the private psychologist who conducted the 2011 private psychoeducational evaluation, the guidance counselor at Aaron School, and the parent, indicated that the student was easily distracted by both internal and external stimuli including environmental noise such as a classmate tapping his pencil, the sound of a computer turning on, other peoples' conversations, a cluttered visual environment, and by thoughts that he became "caught up in" that prevented him from attending to what was occurring (Tr. pp. 156, 198, 204-05, 247, 401). Additionally, and consistent with the 2011 private psychoeducational evaluation, testimony by the student's Aaron School teacher indicated that the student also exhibited obsessive compulsive behaviors that affected him in the classroom (Tr. p. 309; Parent Ex. G at p. 3).

In conclusion, based on the above, the hearing record demonstrates that the student would not be able to benefit from instruction in a general education classroom with ICT services. Such a setting would not provide sufficient support to address the student's extensive social/emotional and attentional needs, as the nature of the general education class setting, containing a greater number of students, more social interaction, more noise, and more distractions than the student experienced in his classes at the Aaron School, would likely exacerbate the student's anxiety and other social/emotional deficits. Accordingly, although the district appropriately addressed the student's behavioral needs, by failing to provide additional supports to address his social/emotional needs, the district failed to offer the student a FAPE for the 2012-13 school year.

C. Unilateral Placement at the Aaron School

The district contends that the parent's unilateral placement at the Aaron School was not appropriate for the student because the hearing record does not show that the school provided instruction specially designed for the student, the school did not provide the student with the amount and type of related services that were recommended on the student's IEP, and because the school not the student's LRE because it failed to offer sufficient interactions with typically developing peers. However, for the reasons set forth below I concur with the IHO that the Aaron School was reasonably calculated to enable the student to receive educational benefits because the school addressed the student's principal areas of need in the social/emotional and sensory realms, provided adequate related services, and that LRE considerations do not outweigh the benefits afforded the student so as to make his placement at the Aaron School inappropriate.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

1. Academic and Social/Emotional Needs

As described in detail above, the hearing record reflects that the student demonstrated strong academic abilities but that his academic performance was affected by deficits related to his multiple diagnoses and most significantly his social/emotional needs. Although the district asserts that there was insufficient evidence that the student's program was specially designed to meet his needs, as described below the hearing record demonstrates that the student's needs were addressed appropriately at the Aaron School.

By way of background, the student's Aaron School classes for the 2012-13 school year ranged from three to nine students, and were typically staffed with two to three adults, including a teacher and an assistant teacher, a speech pathologist, or a counselor, although the student received reading instruction in a group of three students with one teacher (Tr. pp. 238-39, 256-57; 260-63, 265, 267-68; Parent Ex. P). Testimony by the Aaron School teacher indicated that the second instructor in the student's history and English classes was a speech pathologist (Tr. pp. 231, 233-34; see also Parent Ex. P at p. 1). She further testified that at the Aaron School, grouping was based on the individual students' levels and needs—for example, the student's reading group contained three students because all three students were generally on the same level and needed the same level of individualized support (Tr. p. 266).

To address the student's rigidity, anxiety, and social interaction deficits, the hearing record reflects that student began each day with a 15-minute advisory class wherein he worked with two advisors to organize his day and preview any schedule changes for that day (Tr. pp. 254-55; Parent Ex. S). The advisory class was also a time for the student to socialize with the students in the class (Tr. p. 255).

With regard to academic classes, the Aaron School teacher testified that in the student's history class, she collaborated with the speech pathologist to make sure the language of the course was accessible to all students, to assist students with organizational skills necessary for writing tasks such as supporting their use of organizers and outlines, and to facilitate partner work, making sure students were communicating and working together collaboratively (Tr. pp. 231-32). The

Aaron School teacher testified that the school staff worked with the student on his writing goals, understanding cause and effect relationships, and perspective taking because the student was very "black and white" and had difficulty "find[ing] the gray" (Tr. p. 232; see also Parent Ex. E at p. 1). She testified that with regard to English, the student worked on figurative language, metaphors, similes, analysis of drama and poetry, and on creating his own stories, as the student had difficulty with open ended or creative based activities, particularly writing his own creative stories (Tr. pp. 233-34). The Aaron School teacher indicated that this type of assignment, which does not have "just one right answer," created anxiety in the student and that he shut down at times and was unable to do the work or required 1:1 support, and needed constant feedback and support to understand that it is "okay if he doesn't put all of the information in there or if he gets something slightly wrong or if there's two answers for something" (Tr. pp. 234-35). Within the context of his math class, which addressed algebra and concepts including factoring, polynomials, and quadratic equations, the Aaron School staff worked with the student on accepting when he got an answer wrong and trying to decrease the amount of time that it took him to get past that and move on to the next problem (Tr. p. 235). With regard to science, his teachers worked with him on planning and implementing larger projects, working collaboratively with peers and on keeping things in perspective (Tr. p. 237). The student's rigidity impacted his ability to work on long projects independently but he worked with the teacher to break down the steps and develop a timeline, and then created a project where he made a hypothesis and used the scientific method to analyze a song (Tr. p. 238). With regard to reading, the Aaron School teacher testified that the staff utilized organizers that made information very concrete for the student to assist him in understanding point of view and identifying character motivation (Tr. pp. 239-40).

The Aaron School also developed academic goals and objectives for each semester to address the student's specific needs in each of the core academic subjects including English, math, science, social studies (history), and reading and writing, as well as in art, physical education and health class (Parent Exs. E at pp. 1-2; N at pp. 1-2).

The hearing record reflects that in addition to academic classes, the student also participated in art, gym, health, a core skills class, and a forum class (Tr. p. 240). The Aaron School teacher testified that the core skills class was taught by a social worker or school psychologist along with a speech pathologist, and was designed to work on all types of social skills, such as understanding reputation and different types of relationships, and developing strategies to manage emotions (Tr. p. 240; see also Tr. pp. 178, 313, 315).¹¹ She indicated that the forum class was essentially like group counseling wherein a group of students met with one of the counselors to work on social skills and interacting with peers, to enhance their ability to communicate and work through challenging situations, essentially taking what was done in the more instructional setting of the core skills class and applying it to real life situations that are happening in the students' lives, in the forum class (Tr. pp. 241-42). The Aaron School teacher added that topics that are taught within those classes are shared with the other teachers so that all of the skills and strategies can be applied in all of the classes in both structured and unstructured settings (Tr. p. 242). Goals and objectives for each semester were also developed to address the student's specific needs in the areas of core skills and counseling (Parent Exs. E at p. 2; N at p. 2).

¹¹ Testimony by the Aaron School social worker indicated that the core skills class was also referred to as the social skills class (Tr. p. 315).

The self-monitoring plan that was described above in detail also demonstrates that the program at the Aaron School was specifically designed for the student. As noted above, the monitoring plan was created in collaboration with the student's private therapist, his parents, his teachers and providers and was modified as needed to more specifically address pertinent behaviors as they changed over time. Testimony by the student's social worker at the Aaron School indicated that there were periods of time where the teaching staff would observe the student to really see how he was doing on the current behaviors included in his plan and adapt it as needed to more accurately address his needs (Tr. p. 324). The hearing record reflects that the student himself provided feedback at one point that he felt he no longer needed to monitor his volume as it had improved (Tr. pp. 323-24, 398).

Although not directly challenged by the district, the hearing record also reflects that the Aaron School addressed the student's inappropriate behaviors with strategies specifically designed to address his particular needs. For example, the social worker's testimony reflected strategies that she utilized to address the student's social/emotional and behavioral needs including providing reminders to use "expected" (appropriate) behaviors when he was off task or demonstrating silly behaviors, reminders to keep things in perspective, providing a seat at the back of the room for privacy to write and express himself without feeling people were looking over his shoulder, alleviating anxiety by reminding the student that his work was for his teacher's eyes only, providing opportunities to take a break outside the classroom, and verbally processing a situation with her so he could return to class and be successful, for example, by expressing his guilt over how he had acted in order to calm down and get the student back to a more regulated state (Tr. pp. 320, 322, 331-32, 333; Parent Ex. P at pp. 7-8). As noted above, the student also utilized a FEAR plan during the 2012-13 school year during his more severe overreactions (Tr. p. 323) and utilized his self-monitoring plan to provide himself with feedback on his behavior every ten minutes throughout his day in every class (Tr. pp. 323-24). The hearing record reflects that the self-monitoring plan had been successful in improving the student's ability regulate his emotions and manage his frustration tolerance as demonstrated by data recorded on his self-monitoring plan, documenting his on-task performance and overreactions throughout the day (Parent Ex. P at p. 7).¹² The social worker testified that over the course of the 2012-13 school year, she saw a decrease in the student's overreactions, silliness, and loudness, that the student was able to recover and calm down more quickly, and that the student demonstrated an increase in his overall sense of self-awareness (Tr. pp. 325, 327, 328; see also Parent Ex. P at pp. 7, 8). In addition, the hearing record reflects that the social worker constantly collaborated with the student's private counselor, the Aaron School teachers and staff, and the student's parents regarding the student (Tr. pp. 316, 324, 329, 335).

In light of the above, I find that the Aaron School provided a program specially designed for the student and that the student's needs were addressed appropriately at the Aaron School.

¹² I note that the student's behavior during the January 2012 classroom observation by the district appeared to be quite disruptive in that he called out approximately nine times within the 45-minute observation, and while this might suggest that the monitoring plan was not effective, testimony by the Aaron School teacher indicated that the student's less severe overreactions normally occurred much less often: once or twice per class period and not necessarily every day (Tr. pp. 73-74, 293). I also note that the Aaron School teacher and social worker testified that the student also displayed more severe overreactions, estimated to occur twice per week, which were not exhibited during the observation (Tr. pp. 293, 303-04, 341; see Dist. Ex. 5).

2. Sensory Needs

As described in detail above, the hearing record reflects that the student exhibited sensory processing needs, most notably sensitivity to loud or unexpected noise and distractibility (Tr. pp. 43-44, 156; Dist. Ex. 1 at p. 2). To address this, the Aaron School's setting of three to nine students per class provided an environment that supported the student's need for a structured, controlled, and less distracting setting than that of a larger class (Tr. pp. 247, 256-67; see Tr. pp. 154-56). Additionally, testimony by the Aaron School administrator indicated that the teachers were all aware of the student's sound sensitivity and worked with the student to reassure him when there was a fire drill planned and his social worker also addressed this in more depth in the student's counseling session (Tr. pp. 185-86). In addition to the OT services that were provided to the student at the Aaron School in part to address his sensory needs, testimony by the Aaron School teacher also indicated that at times, school staff provided the student with sensory tools or the opportunity to do some exercises in the hallway to address his distractibility and help redirect him back to task (Tr. p. 254). In light of the above, I find that the student's sensory needs were appropriately addressed at the Aaron School.

3. Related Services Needs

The hearing record reflects that the Aaron School provided related services to the student including counseling, speech-language therapy, and OT (Tr. p. 244). Similar to the recommendation in the March 2012 IEP, OT and speech-language therapy were provided to the student at the Aaron School within the classroom setting (push-in) and counseling services were provided both in and out (pull-out) of the classroom setting (Tr. pp. 269-70; Dist. Ex. 1 at pp. 6-7).

Testimony from the Aaron School teacher indicated that the occupational therapist came into the classroom for 45 minutes approximately once per week to check in (Tr. pp. 270-71). She testified that "push-in" services were not necessarily direct, individualized therapy for the student, but rather consisted of strategies and techniques that were developed by the occupational therapist that would help the student and other students within the context of the classroom and that were applied in the classroom by the head and assistant teachers, after meeting with and being trained by the occupational therapist (id.). Accordingly, the implementation of the student's OT services at the Aaron School did not deviate significantly from the recommendation for one 40-minute group session per week contained in the March 2012 IEP (Dist. Ex. 1 at p. 7).

With regard to speech-language therapy, the Aaron School teacher testified that the speech pathologist pushed into or functioned as a staff member in two of the student's classes each day and that speech-language therapy was being provided in a group setting within the classroom (Tr. p. 271). Again, this implementation of speech-language services is similar if not greater than the one 40-minute group session recommended in the March 2012 IEP (Dist. Ex. 1 at p. 6).

With regard to counseling services, the Aaron School teacher testified that the student received one pull-out counseling session per week in addition to the core skills and forum classes that each met once per week (Tr. p. 272). Testimony by the student's social worker indicated that in addition to seeing the student for counseling in a group of two students, she, along with a speech pathologist, also facilitated his core skills class, which addressed various communication skills, how to maintain age appropriate relationships, how to initiate conversation, and navigate the social

world (Tr. pp. 313, 315, 317-18, 319; Parent Ex. P at p. 7). Her testimony indicated that in the core skills class students performed role plays, watched video clips, and did creative assignments, for example, where students would create a comic strip about conversations that they might have with another person (Tr. p. 318). The social worker's testimony indicated that the student did "okay" in the class; he was able to complete independent activities such as worksheets, however with regard to the role plays, the student always demonstrated a "big fear of standing out," and required much assistance, guidance, and coaching to be calm and comfortable in front of the class (Tr. p. 318). She added that given the right supports, the student was able to be successful and act out some of the role plays "in a great way" (Tr. p. 319). Testimony by the student's social worker also indicated that she provided additional support to the student by coming into the class whenever he was faced with a challenging social or academic situation (Tr. pp. 320-21, 331).

Although the district alleges that the Aaron School did not provide the amount of related services mandated in the IEP, the hearing record shows that while, as described above, the services were provided in a somewhat different manner, the Aaron School provided a similar level of related services to the student and actually provided more frequent services in speech-language therapy and counseling than was recommended in the March 2012 IEP (compare Tr. pp. 269-72 with Dist. Ex. 1 at pp. 6-7). Despite the difference in provision of related services, the hearing record supports the conclusion that the Aaron School adequately and appropriately provided for the student's related services needs.

4. LRE Considerations—Access to Typically Developing Peers

Although the district maintains that the Aaron School was not in the student's LRE, the hearing record does not support this contention. The district asserts that the Aaron School was not an appropriate placement for the student because the student population is composed entirely of students with disabilities and the Aaron School was thus "overly restrictive" for the student. Although the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at *19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]), parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (D.D.-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]). Testimony by the district representative reflected that the CSE believed that because the student had so much potential and would likely attend college, the student should prepare for that by integrating with typically developing peers so that he could learn to function and manage in that environment (Tr. p. 36). However, based on the description in the hearing record of the extent of the student's social/emotional needs, despite his cognitive potential, the student was not ready for placement in the less restrictive ICT classroom without other supports to address his significant social/emotional and related behavioral needs. I note that the parent's testimony reflected that every student in the ICT classroom was a source of distraction to the student and that his difficulty reading facial expressions, understanding sarcasm and irony, and determining when someone is joking or serious resulted in anxiety and impacted his ability to have relationships with other students (Tr. pp. 400, 402, 403). While I do not disagree that the student

could have benefited from some access to typically developing students as models of socially appropriate behavior, the hearing record demonstrates that the student continued to require the level of support and structure that was provided by a special class setting such as that at the Aaron School.¹³ Furthermore, I note that the hearing record reflects that the Aaron School population could have provided for some appropriate social models for the student (Tr. p. 132). Testimony by the student's private counselor indicated that in her experience with the students at the Aaron School, there are students who have very different profiles than the student in the instant case, who have skills in social development and could serve as social models for the student (Tr. pp. 131-32). Under the circumstances of this case, considering that the district failed to adequately provide for the student's social/emotional needs, the weight of the evidence shows that even if the Aaron School may not have maximized the student's interaction with nondisabled peers, in this instance LRE considerations do not weigh so heavily as to preclude the determination that the parent's unilateral placement of the student at the Aaron School for the 2012-13 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

D. Equitable Considerations

Having found that the district failed to offer the student a FAPE for the 2012-13 school year, and concurred with the IHO's conclusion that the Aaron School was an appropriate unilateral placement, the final criterion for a reimbursement award is that the parent's 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, 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 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]).

Contrary to the district's allegation that equitable considerations should preclude relief in this instance because the parent had no intention of enrolling the student in a public school, a review of the hearing record reveals otherwise. Initially, there is nothing in the hearing record to show that the parent engaged in conduct designed to obstruct the CSE process or its ability to

¹³ For example, even if the district had placed the student in a special class setting, under Newington the district would still be required to mainstream the child to the maximum extent appropriate in complying with its LRE mandate (Newington, 546 F.3d at 120), but while LRE is a factor to consider, it need not always be a dispositive factor with respect to whether a parental unilateral placement is appropriate.

provide the student with a FAPE (see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 249 [S.D.N.Y. 2010]). Rather, the hearing record shows that the parent attended the March 2012 CSE meeting along with staff from the Aaron School, shared the student's most recent Aaron School progress report and a recent private psychoeducational evaluation, and actively participated in the meeting, including raising specific concerns with the district's recommended ICT placement (see Tr. pp. 39, 390-96; Dist. Exs. 2; 6; Parent Ex. G). Although the parent executed a contract with the Aaron School on January 14, 2012, securing the student's attendance at the school for the 2012-13 school year, and subsequently made payments under that contract, the parent also expressed a willingness to consider a public school placement and visited the recommended public school site once it was identified (Tr. pp. 404-08; Parent Exs. I; M). Additionally, the parent investigated a large number of potential school placements for the student, both public and private, prior to her initial decision to place the student at the Aaron School (Tr. pp. 388). As the IHO found, although the parent "made known her preference for the Aaron School . . . at no point did she make an Aaron School placement an absolute condition," and as such, equitable considerations nonetheless favored reimbursement (IHO Decision at p. 27).

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 v. Cranston Pub. Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

With respect to the district's allegations about the adequacy of the parent's 10-day notice, the hearing record also shows that the parent timely notified the district of her unilateral placement of the student at the Aaron School (see Parent Exs. B; C). After receiving the July 2012 FNR, the parent wrote the district and stated that although she felt the recommendation of an ICT placement was not appropriate for the student, she wished to have more information on the recommended school site (Parent Ex. C). On August 22, 2012 the parent sent a lengthy letter to the district detailing numerous concerns with the conduct of the March 2012 CSE meeting and the substance of the March 2102 IEP, and gave the district notice of her intention to unilaterally place the student at the Aaron School at public expense (Parent Ex. B). I find this notice adequate and decline to reduce or modify the IHO's tuition reimbursement order on this basis (20 U.S.C. § 1412 [a][10][C][iii][I]; see 34 CFR 300.148 [d][1]).

VII. Conclusion

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 February 14, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER