The University of the State of New York

The State Education Department
State Review Officer
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No. 14-012

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

Appearances:
Courtenaye-Jackson Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, of counsel

Educational Advocacy Services, attorneys for respondent, Jennifer A. Tazzi, 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 the costs of the student's tuition at the School for Children with Hidden Intelligence (SCHI) 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

In this case, the student's educational history and needs were recently described at length in a previous State-level decision and will not be repeated here in detail (see Application of a Student with a Disability, Appeal No. 12-212); however, as a result of that proceeding, the undersigned directed the district to pay 75 percent of the costs of the student's tuition at SCHI for the 2011-12 school year, which was a unilateral placement made by the parent (id.). The Commissioner of Education has not approved SCHI as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

While the student was attending SCHI, on May 18, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Joint Ex. a at

p. 15; see also Tr. p. 11). Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the May 2012 CSE recommended a 12-month school year program in a 12:1+4 special class placement in a specialized school (id. at pp. 1, 10-12, 15, 17).[1] The May 2012 CSE also recommended related services consisting of four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 10-11). The May 2012 CSE further recommended 1:1 direct nursing services for the student, as needed (id. at p. 11). In addition, the May 2012 CSE developed annual goals and short-term objectives to address the student's needs in the areas of pre-academic concepts, play, and socialization skills; receptive and expressive language skills; feeding and oral motor skills; fine and gross motor skills; and health skills (id. at pp. 4-9). Finally, the May 2012 CSE recommended special transportation accommodations, including an air conditioned mini-bus and limited travel time (id. at p. 15).

In a letter dated June 13, 2012 and sent by facsimile on June 18, 2012, the parent notified the district that since it had not offered the student a "placement" for the 2012-13 school year, she intended to enroll the student at SCHI and would seek reimbursement for the costs of the student's tuition upon determining that the assigned public school site, if offered, was not appropriate (see Parent Ex. E at pp. 1-2). The parent indicated that although the June 13, 2012 letter represented a "10 day notice letter," if she received a letter "recommending" a "specific public school," she would make every effort to observe the assigned public school site (id. at p. 1). In addition, the parent indicated that if she found that the assigned public school site was appropriate, she would notify the district regarding whether she intended to enroll the student at the assigned public school site (id.).

In a final notice of recommendation (FNR) dated June 28, 2012, the district summarized the special education programs and related services recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Joint Ex. b at p. 1).

On July 1, 2012 the parents signed an enrollment contract with SCHI for the student's attendance during the 2012-13 school year beginning July 1, 2012 (see Parent Ex. J at pp. 1-2).

On July 31, 2012, the parent returned the FNR to the district with a handwritten notation, dated July 31, 2012, indicating that she visited the assigned public school site (see Joint Ex. b at p. 1). Based upon the visit, the parent rejected the assigned public school site because it was not appropriate for the student "socially/emotionally [and] behaviorally" (id.). The parent noted that the assigned public school site could not address the student's "severe behavioral issues" because there were "too many" students (id.). The parent further noted that the student required "1:1 to be controlled," and the student could become "very anxious, overwhelmed and tempremental (sic)," which required "constant supervision" (id.). In addition, unlike the students at the assigned public school site, the student could be violent (id.). The parent also indicated that the behavior modification system available at the assigned public school site was "not sufficient," and therefore,

[1] The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

the student would attend SCHI and she would request an impartial hearing to seek tuition reimbursement for the 2012-13 school year (id.).

Due Process Complaint Notice

By due process complaint notice dated April 30, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at p. 1). The parent asserted that the May 2012 CSE was not properly composed, and the May 2012 IEP failed to include annual goals to address toilet training or the student's "aggressive and interfering behaviors" (id. at p. 2). The parent also asserted that the May 2012 CSE failed to conduct a functional behavioral assessment (FBA) and create a behavioral intervention plan (BIP) for the student (id.). In addition, the parent indicated that the May 2012 CSE developed the annual goals without parent participation, and the annual goals were generic and not specifically tailored to meet the student's needs as discussed at the May 2012 CSE meeting (id.). The parent also alleged that the May 2012 IEP did not specify the nursing treatment the student required (id.). The parent further asserted that the district did not provide the student with an appropriate "special education placement" and contended, upon information and belief, that the assigned public school site would not be appropriate because the other students were not similar to the student either "socially" or "emotionally" (id.). Finally, the parent indicated that she timely advised the district of her intention to place the student at SCHI (id.). As relief, the parent requested an order directing the district to reimburse her for the costs of the student's unilateral placement at SCHI for the 2012-13 school year, and for the district to provide the student with round-trip transportation (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

On June 25, 2013, the IHO attempted to conduct a prehearing conference, however, neither party appeared (see Tr. pp. 1-4).[2] On August 8, 2013, the parties proceeded to an impartial hearing, which concluded on October 31, 2013, after three days of proceedings (see Tr. pp. 5-198). In a decision dated December 13, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for relief (see IHO Decision at pp. 6-14).

Initially, the IHO found that, contrary to the parent's arguments, the May 2012 CSE was properly composed, the parent participated in the development of the annual goals in the May 2012 IEP, the May 2012 CSE team relied upon sufficient and recent evaluative information concerning the student's development and needs, the 12:1+4 special class placement was appropriate and would provide the student with "small group instruction and individual instruction and attention" throughout the school day, the failure to conduct an FBA or develop a BIP did not constitute a

[2] Neither party provided any reason why they failed to appear before the IHO, and there is no information in the hearing record describing why the matter did not proceed on the next scheduled hearing date in July 2013. Given the relatively high number of times that I have addressed IDEA due process proceedings in a State-level review in which an IHO has failed to rule on an issue related to a FAPE that was presented by the parties or has impermissibly reached a FAPE claim that was not raised, I commend the IHO for attempting a prehearing conference. The parties are fortunate that the IHO did not impose sanction on either or both of them for failure to appear without explanation.

procedural violation, and the May 2012 IEP adequately addressed the student's nursing needs (see IHO Decision at pp. 8-11).

However, even though the IHO concluded that the failure to conduct an FBA or develop a BIP in this case did not constitute a procedural violation, the IHO found that the May 2012 IEP did not include sufficient annual goals to address the student's social/emotional and behavioral issues or to address the student's toileting needs, and therefore, the district failed to offer the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 10-11). The IHO noted that although the May 2012 CSE discussed the student's behaviors as well as the behavior interventions used at SCHI in the classroom to address the behaviors, the May 2012 IEP failed to include any annual goals, modifications, or techniques to address the student's individual behavioral needs (see id.). The IHO also rejected testimonial evidence suggesting that the student's behavioral and toileting needs would be addressed programmatically (id.).

Turning to the issue of the appropriateness of the parent's unilateral placement of the student at SCHI, the IHO determined that SCHI was an appropriate placement because the student received educational instruction designed to meet his unique needs, and the evidence in the hearing record indicated he made progress in various areas (see IHO Decision at pp. 11-13). In so finding, the IHO noted that SCHI provided the student with "1:1 teaching" and "all of his related services," including swallowing therapy, feeding therapy, and nursing services to address his individual needs (id. at p. 12). The IHO also noted that SCHI designed an individualized toilet training plan for the student (id.). With respect to his behavior issues, the IHO noted that SCHI addressed the student's behavior through management techniques specifically designed for the student, and SCHI used methods to help him control his frustration level (id.).

Concerning the issue of equitable considerations, the IHO found no evidence to warrant either reducing, or altogether barring, the parent's requested relief (see IHO Decision at p. 13). Consequently, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at SCHI, upon proper proof of payment, and to directly pay SCHI for the remaining balance of the costs of the student's tuition at SCHI for the 2012-13 school year (id. at pp. 13-14).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in determining that it failed to offer the student a FAPE for the 2012-13 school year, that SCHI was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief. The district argues that, contrary to the IHO's finding, even if the student exhibited behavioral issues, the May 2012 IEP fully and adequately identified and addressed such needs. In addition, the district contends that, contrary to the IHO's finding, the annual goals in the May 2012 IEP addressed the student's behaviors. The district also argues that the May 2012 IEP properly addressed the student's toilet training needs, and further, that the student's toileting needs would have been adequately addressed through the student's program.

The district also argues that the IHO erred in finding that SCHI was an appropriate unilateral placement for the student. Specifically, the district contends that SCHI did not toilet train the student, and moreover, the technique employed at SCHI with regard to toilet training caused the student to regress in this area. The district also asserts that SCHI did not focus on

academics, and therefore, SCHI did not provide the student with educational instruction specially designed to meet his needs. The district further asserts that the staffing ratio in the student's classroom at SCHI was unduly restrictive and did not afford the student with sufficient opportunities to socialize with other students in the classroom. Finally, the district argues that the IHO erred in concluding that equitable considerations weighed in favor of granting the parent's requested relief of tuition reimbursement.

In an answer, the parent responds to the district's allegations, and argues to uphold the IHO's decision in its entirety. In addition, although the parent agrees with the IHO's ultimate conclusion regarding the district's failure to offer the student a FAPE, the parent also argues that the district's failure to conduct an FBA and develop a BIP—combined with the failure to address the student's behavioral needs in the May 2012 IEP—resulted in a failure to offer the student a FAPE for the 2012-13 school year.[3]

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.,

[3] As noted above, the IHO's decision included several additional findings adverse to the parent, including the following: the May 2012 CSE was properly composed, the parent participated in the development of the annual goals in the May 2012 IEP, the May 2012 CSE team relied upon sufficient and recent evaluative information concerning the student's development and needs, the 12:1+4 special class placement was appropriate and would provide the student with "small group instruction and individual instruction and attention" throughout the school day, and the May 2012 IEP adequately addressed the student's nursing needs (see IHO Decision at pp. 8-11). However, since neither the parent nor the district has appealed IHO's findings indicated herein, these determinations have become final and binding on both parties and will not be addressed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR

300.320[a][4]; 8 NYCRR 200.4[d][2][v]; 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. May 2012 IEP

1. Consideration of Special Factors—Interfering Behaviors

The district contends that, contrary to the IHO's finding, the May 2012 IEP adequately addressed the student's behavioral needs as described in the May 2012 IEP, and further, that the May 2012 IEP included annual goals to address the student's behavioral needs. The parent asserts that based upon the evidence in the hearing record—such as the description of the student's problematic behaviors in the May 2012 IEP, an April 2012 classroom observation report, and testimonial evidence—the IHO correctly found that the May 2012 CSE knew about the student's interfering behaviors and failed to include adequate annual goals, modifications or techniques in the May 2012 IEP to address those behaviors. A review of the hearing record does not support the district's contentions, and therefore, there is no reason to disturb the IHO's finding.

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. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; 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., 569 F. Supp. 2d at 380).

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," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).[4] "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "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]).

Although State regulations call for the procedure of using an FBA when developing a BIP, 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 F3d 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 addresses the student's problem behaviors (id.).

In this case, the parties do not dispute that the district did not conduct an FBA or develop a BIP; however, as noted above—and as the IHO properly concluded in her decision—the district's failure to conduct an FBA does not, by itself, automatically render the IEP deficient, and in this

[4] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). This is especially true under the circumstances of this case where the hearing record indicates that at the time of the May 2012 CSE meeting, the student was attending SCHI, and thus conducting an FBA to determine how the student's behavior related to the student's school environment at SCHI would have at the very least diminished, or nearly inconsequential, value where, as here, the May 2012 CSE was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; Cabouli, 2006 WL 3102463, at *3; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. Aug. 5, 2013]).

instance, the May 2012 IEP must be closely examined to determine whether—in the absence of an FBA—the May 2012 IEP otherwise addressed the student's behaviors (C.F. v. New York City Dep't of Educ., 2014 WL 814884, at *8 [2d Cir. Mar. 4, 2014]).

Initially, it appears that neither party disputes that the May 2012 IEP described the student's interfering behaviors or that the May 2012 CSE knew about the student's interfering behaviors (see Pet. ¶ 33; Answer ¶ 28). Nevertheless, the district special education teacher who attended the May 2012 CSE meeting testified that based upon teacher report, the May 2012 CSE knew that the student "cooperated" unless he was upset, and when upset or frustrated, the student could become "impulsive and throw things and bang his [head] or throw stuff on the floor" (Tr. pp. 19-20, 30-31).[5] The district special education teacher explained, however, that in a 12:1+4 special class placement in a public school, the student would be instructed at an "instructional level"—not at his frustration level—and as a result, "those behaviors should not occur, and they would be addressed by the teacher and the four para[professionals]" in the program (Tr. pp. 30-31; see Tr. pp. 32-33, 50-51). In addition, the district special education teacher testified that the teacher report did not indicate that the student engaged in any "aggressive or violent behaviors or a need for crisis management throughout the day one-to-one," and thus, the May 2012 CSE, upon a lengthy discussion, did not recommend the services of a 1:1 paraprofessional for the student as requested by the parent at the meeting (Tr. pp. 30-32; see Tr. pp. 47-49). The district special education teacher further testified that while she believed the student had a BIP "written in" his IEP at SCHI programmatically, neither the parent nor the parent's advocate attending the May 2012 CSE meeting requested the development of a BIP for the student, and based upon the information provided about the student's behaviors, the May 2012 CSE did not recommend the development of a BIP (Tr. pp. 32-33; see Tr. pp. 47-52).

In developing the student's May 2012 IEP, the district special education teacher testified that the May 2012 CSE relied upon a "combination of written report and the teacher's oral presentation" (Tr. p. 36). Within the present levels of performance, the May 2012 CSE described the student's social development (see Joint Ex. a at pp. 1-2; see also Tr. pp. 35-36). In particular, the May 2012 IEP indicated that the student frustrated "easily" and would "throw things, bang his head or throw himself on the floor;" the student was "very impulsive;" the student became "upset easily" when asked to do a non-preferred task; and the student demonstrated "many perseverative, self-stimulatory behaviors, such as spinning a pen or flipping a spoon" (Joint Ex. a at p. 2). In addition, the May 2012 IEP indicated that the student required "much prompting and reinforcement to follow class rules and directions" and had "very poor skills in his ability to cope with frustration" (id. at p. 1). The May 2012 IEP further indicated that according to the student's speech-language provider, he was "often distracted," and he had difficulty expressing his "wants and needs" and was "easily frustrated" (id.).[6]

[5] The district special education teacher characterized the student's behavior as "good" based upon a notation in the April 2012 classroom observation report, which described the student's "[c]ooperation with authority figures" as "good unless upset" (Tr. pp. 34-35; Dist. Ex. 3 at p. 1).

[6] The May 2012 IEP noted that his parent was concerned with his ability to "interact appropriately with peers," his "balance, equilibrium and walking," his toilet training, and his progress in school (id. at pp. 1-2).

The parent testified that she agreed with the description of the student's social development in the May 2012 IEP, noting specifically that it was "extremely true of his behavior" (Tr. p. 176; see Joint Ex. a at p. 2). She also testified that because the student's behaviors were "difficult in the classroom," she thought a "behavior modification plan within the classroom" would be appropriate, but it was not included in the May 2012 IEP (Tr. p. 172). With respect to the annual goals in the May 2012 IEP, the parent testified that she believed the student's behavior was "really really important to [her] and a problem for the school and it [was not] addressed" (Tr. p. 173). In explaining why she did not agree with the May 2012 CSE's recommendation for a 12:1+4 special class placement, the parent additionally testified that the student was "very impulsive," became "temperamental," threw things, and could "hurt himself" (Tr. pp. 176-77).

On appeal, the district contends that the May 2012 CSE addressed the student's identified behaviors through the annual goals in the May 2012 IEP, which targeted areas of frustration for the student. However, the district special education teacher testified that the May 2012 CSE did not develop a BIP because the student's behaviors could be addressed in the 12:1+4 special class placement and there was "no corrective management para[professional] that would have necessitated goals in that area" (Tr. pp. 47-48). Based upon a review of the annual goals in the May 2012 IEP and the district special education teacher's testimony, the district's argument on appeal is without merit.

Among the 11 annual goals and 36 short-term objectives included in the May 2012 IEP, two short-term objectives arguably address the student's behavior: for example, to improve the student's play and socialization skills, the May 2012 CSE included a short-term objective targeting the student's ability to "use words in place of tantrumming when frustrated" (Joint Ex. a at p. 6). In addition, to improve the student's fine motor skills, the May 2012 CSE included a short-term objective targeting the student's ability to "sit on a chair and complete a 5-10 minute table top activity without exhibiting oppositional behaviors given no more than 3 verbal and tactile cues" (id. at pp. 8). However, even if these two short-term objectives were considered in tandem with other short-term objectives in the May 2012 IEP—as argued by the district—that are directed toward the student's ability to share with peers, improve verbal requests and rejection skills, and answer "Wh" questions, such limited annual goals and short-term objectives do not suffice to meet the student's individual needs in this regard, particularly in the absence of either an FBA or BIP (see R.E., 694 F.3d at 190).

Notwithstanding the absence of annual goals and short-term objectives to adequately address the student's behaviors, the May 2012 IEP is also deficient because the May 2012 CSE also did not recommend any additional supports or services, such as the assistance of a shared or individual paraprofessional, a related service to address the student's behavioral needs, or strategies within the management needs section of the May 2012 IEP (see Joint Ex. a at pp. 1-3, 10-12, 16-17). Notably, the May 2012 IEP indicates that the student's "physical management needs c[ould] be met in the recommended program" and does not identify any specific strategies to be employed to address those needs (Joint Ex. a at pp. 2-3). Similarly, the May 2012 IEP does not include any strategies to address the student's academic or social/emotional management needs (see id. at pp. 1-2).

Moreover, the evidence in the hearing record does not support the district special education teacher's opinion that the student's behaviors would either be extinguished by teaching at the

student's instructional level, as opposed to his frustration level, or that the student's behaviors would be adequately addressed programmatically in the recommended 12:1+4 special class placement (see Tr. pp. 15-54, 166-90; Dist. Exs. 2-3; 5; Parent Exs. A-B; D-J; L-N; Joint Exs. a-b). Therefore, under these circumstances, the district should have considered—in accord with State regulations and guidance—conducting an FBA to determine why the student engaged in the identified behaviors and to determine whether the student required a BIP (8 NYCRR 200.1[r]). In addition, the district's failure to conduct an FBA in this case cannot be rescued by the May 2012 IEP, as it failed to otherwise address the student's behavior needs, and therefore, the hearing record supports the IHO's conclusion that such deficiencies resulted in a failure to offer the student a FAPE for the 2012-13 school year.

2. Toilet Training

Next, the district contends the May 2012 IEP properly addressed the student's toilet training needs, and further, that the student's toileting needs would have been adequately addressed through the student's program at the public school. The parent rejects the district's arguments. A review of the hearing record indicates that while the failure to include annual goals directed at the student's toileting needs in the May 2012 IEP may not, alone, result in a failure to offer the student a FAPE, the absence of such annual goals contributes to an overall determination that the district failed to offer the student a FAPE for the 2012-13 school year.

In this case, the district special education teacher who attended the May 2012 CSE meeting testified that the May 2012 IEP did not include annual goals for toilet training because such annual goals were only required if a student was provided with a toilet training paraprofessional (see Tr. pp. 37-39). She further testified that in this case, the student did not require a toilet training paraprofessional because toilet training was provided to many students in the class programmatically (as part of the program), and as such, annual goals were not necessary (see Tr. pp. 38-39). The district special education teacher also testified that as part of the student's program, the teacher and four paraprofessionals—as well as any supplementary aides—in the classroom would take care of the student's toilet training needs (see Tr. p. 39). In addition, the district special education teacher testified that the notation in the May 2012 IEP, which indicated that the student's "physical management needs c[ould] be met in the recommended program," applied to the student's toilet training needs being addressed programmatically (see Tr. pp. 50-51; Joint Ex. a at pp. 2-3). A review of the May 2012 IEP indicates that although the parent's concern that the student was not yet toilet trained appeared in the IEP, the IEP did not include any annual goals or management needs to address toilet training (see Joint Ex. a at pp. 1-9).

At the impartial hearing, the parent testified that although she understood at the time of the May 2012 CSE meeting that toilet training was "programmatic," her "only concern" related to "who" would implement and monitor it and whether the teacher would "know" that toilet training was "important," especially if it was not included in the May 2012 IEP (Tr. pp. 173-74).

Under the circumstances, while I think it is unlikely that the teacher or paraprofessionals within the recommended 12:1+4 special class placement would not recognize or would affirmatively fail to address the student's toilet training needs in the absence of specific guidance documented within the May 2012 IEP, retrospective testimony that addressing such an important need is "programmatic" is insufficient, and the May 2012 IEP should have included annual goals

to address the student's identified needs in the area of toilet training (K.L. v. New York City Dep't. of Educ., 530 Fed.Appx. 81, 87 [2d Cir. Jul. 24, 2013] [noting that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed", quoting R.E., 694 F.3d at 187]).

VII. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year, the next issue to address is whether the parent's unilateral placement of the student at SCHI was appropriate.

A. Applicable Standards

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. The Student's Program at SCHI

The district contends that the IHO erred in finding that SCHI was an appropriate unilateral placement. The district argues that SCHI did not successfully toilet train the student, and SCHI did not provide the student with educational instruction specially designed to meet his needs or enable the student to make progress because SCHI did not focus on academics.

Contrary to the district's contentions, the hearing record reflects that SCHI addressed the student's toilet training needs and the student did not regress in his toileting skills while attending SCHI. The student's classroom teacher at SCHI (SCHI teacher) during the 2012-13 school year testified that, admittedly, initial attempts to toilet train the student did not prove successful (see Tr. pp. 100-03, 107-08). The SCHI teacher also testified that she consulted with a school psychologist to get his "thoughts" about the "best approach" to use for toilet training the student (Tr. pp. 107-08, 120). The SCHI teacher stopped the original toilet training method used with the student, and moved toward maintaining the student's social exposure to toilet training by reading books to him about the subject; she also began researching other methods of toilet training (see Tr. p. 108). In addition, the SCHI teacher testified that the student had the assistance of a one-to-one aide during the school day at SCHI to assist him with toileting (see Tr. pp. 103-04, 113-14). Therefore, although the hearing record indicates that the student did not accomplish toilet training at SCHI during the 2012-13 school year, SCHI's ongoing efforts to engage the student in the process through social exposure and books and to find a toilet training method individualized to his needs does not lead to the conclusion that SCHI was not appropriate or that the student experienced a regression of his toileting skills.[7]

[7] While not argued by the district on appeal with respect to whether SCHI was appropriate, the hearing record also establishes that SCHI adequately addressed the student's behavior needs during the 2012-13 school year through the use of "behavior management techniques within the classroom for [the student] specifically," which included the following: teaching the student in "small incremental steps" to manage his frustration; providing the student with "incentives and rewards" for completing tasks; providing the student with breaks during an activity that he perceived as challenging; and the use of a communication board to allow the student to choose a preferred

Next, a review of the hearing record does not support the district's contention that SCHI was not appropriate because the SCHI program did not focus on academic instruction. While the district correctly noted that the student's schedule at SCHI during the 2012-13 school year reflected one 30-minute period per day devoted to literacy and one 30-minute period per week devoted to science, the student's schedule also reflected a daily, 15-minute circle time; four 45-minute periods per week of direct instruction; a daily, 25-minute group lesson; and two 30-minute periods per week of computer (see Parent Ex. F at p. 1; see also Tr. pp. 108-09). The SCHI teacher also testified that the student's school day included dramatic play sessions, art, gym, music, playground or sensory time, and specialized reading (see Tr. p. 109). In addition, the SCHI teacher testified that during direct instruction, the student worked on pre-academic skills, language concepts, pre-reading skills, and pre-mathematics skills in a "very individualized setting" (id.). The SCHI teacher created the student's programs, and at times, SCHI used "ABA and discrete trial programming" with the student, which the behavior consultant created (Tr. pp. 110, 114-15, 134).[8]

2. Progress

In contrast to the district's argument, the hearing record reflects that the student made progress in several areas. With respect to the student's progress at SCHI, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 [S.D.N.Y. Mar. 19, 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at *5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).[9] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

activity or even to select a task the teacher wanted the student to do (Tr. pp. 105-06). According to the SCHI teacher, the student became frustrated during a "skill or activity" he felt was challenging, and the student would "lie on the floor or throw things" (Tr. p. 105). She also noted that SCHI utilized a behavior consultant to review the student's programs (see Tr. p. 110).

[8] While not described in the hearing record, the acronym "ABA" typically refers to "applied behavior analysis" (see generally Application of a Student with a Disability, Appeal No. 14-008).

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

The hearing record reflects that SCHI collected data throughout the school year in order to assess the student's progress and that SCHI assessed the student's progress toward his annual goals three times per year (see Tr. p. 125). With regard to academic progress, the SCHI teacher testified that during the 2012-13 school year the student learned "all" of his colors and shapes; "all" of the upper and lowercase letters of the alphabet, as well as their corresponding sounds; the student was "exposed to and learned blending CV [consonant vowel] words;" the student gained phonemic awareness skills; and the student learned how to "do" patterns, which he required as a prerequisite for counting (Tr. pp. 125-26). In addition, the SCHI teacher testified that the student learned to count from 1 through 10, and although not yet at full mastery, the student continued to work on counting from 10 through 20 (see Tr. p. 126). The student also learned many different language concepts, including the "difference between a boy and a girl, and wet and dry, and clean and dirty" (Tr. pp. 125-26). She further testified that with regard to expressive language skills, the student used longer sentences (see Tr. p. 126). The SCHI teacher also indicated that at the school year progressed, the student became a "little bit more engaged and available to learn" and demonstrated less frustration (id.).

In addition, the student's speech-language pathologist during the 2012-13 school year testified that he "[d]efinitely" made progress (Tr. pp. 151-52, 155). By the end of the 2012-13 school year, the student increased his sentence length from one and two-word utterances to three and four-word utterances; he improved in his comprehension of specific vocabulary and concepts, for example, wet and dry; the student could "answer basic who, what, where questions;" he could follow one-step to two-step directions; and he could communicate with peers within his class (Tr. pp. 155-59). With respect to feeding skills, the student's therapist indicated that he made progress in his ability to chew food (see Tr. pp. 137-41). The student's occupational therapist during the 2012-13 school year also testified that the student made progress in his endurance and in strengthening his upper body (see Tr. pp. 163-64).

3. LRE Considerations

Finally, in further support of its contention that SCHI was not appropriate, the district asserts that the staffing ratio in the student's classroom at SCHI was unduly restrictive and did not afford the student with sufficient opportunities to socialize with other students in the classroom.

Initially, the district's assertions must be rejected because the restrictiveness or LRE of a placement—whether recommended by a school district or selected as a unilateral placement by the parent--does not refer to the student-to-adult ratio in the particular classroom. In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education

needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc], 200.4[d][4][ii][b]; see 34 CFR 300.116). As such, to the extent that the district asserts that SCHI was not appropriate due to its restrictiveness based upon arguments related to the student-to-teacher staffing ratio in the student's classroom, such arguments misconstrue LRE principles and are therefore, misplaced.

In any event, while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (Frank G., 459 F.3d at 364; Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F.Supp.2d 529, 552 [S.D.N.Y. 2010]; W.S., 454 F. Supp. 2d at 138; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]. Here, while SCHI might not have maximized the student's interaction with nondisabled peers, in this instance, it does not weigh so heavily as to preclude the determination that the parent's unilateral placement of the student at SCHI for the 2012-13 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). This is especially true under these circumstances where the district's own recommended placement of the student in a 12:1+4 special class placement in a specialized school precluded the student's participation with nondisabled peers (see Joint Ex. a at p. 14 [noting in the May 2012 IEP that due to the "nature of the program recommendation," the student was "unable to participate with non-disabled students"]).

Accordingly, consistent with the IHO's finding, the evidence in the hearing record supports a finding that SCHI was an appropriate unilateral placement for the student for the 2012-13 school year.

VIII. Equitable Considerations

Having found that the district failed to offer the student a FAPE for the 2012-13 school year and that SCHI was an appropriate unilateral placement, the final issue to address is whether equitable considerations weigh in favor of the parent's requested relief.

A. Applicable Standards

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb.

4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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 evidence in the hearing record reveals otherwise. Initially, the hearing record contains no evidence that the parent engaged in conduct that obstructed the CSE process or the CSE's ability to provide the student with a FAPE (see Tr. pp. 15-54, 166-90; Dist. Exs. 2-3; 5; Parent Exs. A-B; D-J; L-N; Joint Exs. a-b). Further, as noted by the IHO, although the parent signed a contract with SCHI prior to visiting the assigned public school site, the contract contained a clause releasing the parent from additional payment obligations if she enrolled the student in a district public school pursuant to an IEP (see IHO Decision at p. 13; Parent Ex. J at p. 2). Therefore, in accord with the IHO's finding, equitable considerations do not bar the parent from relief in the present case.

VII. Conclusion

Upon review of the entire hearing record and as described above, the IHO properly concluded that the district failed to offer the student a FAPE for the 2012-2013 school year, that SCHI was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for tuition reimbursement. As such, I have considered the parties' remaining contentions and find that I need not reach them in light of my conclusions herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 10, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER