



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-028

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Gina M. DeCrescenzo, PC, attorneys for petitioners, Gina M. DeCrescenzo, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Robert Louis Stevenson School (RLS) for the 2013-14 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

The student had been attending RLS since February 2011 (Tr. pp. 18, 77, 80).¹ On February 15, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (Parent Ex. H at pp. 1, 10). Finding the student eligible for special education as a student with an other health-impairment, the February 2013 CSE recommended placement in a general education classroom with integrated co-teaching (ICT) services for mathematics, English language arts

¹ The Commissioner of Education has not approved RLS as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

(ELA), social studies, and sciences (id. at pp. 1, 5, 10-11).² The February 2013 CSE also recommended that the student receive individual counseling services once per week and group counseling services (5:1) three times per week (id. at p. 6).³ In addition, the February 2013 CSE recommended two annual goals, targeted to address the student's management/organization needs and her ability to cope with and manage anxiety, as well as testing accommodations consisting of extended time (time and a half), a separate room, revised test directions, and on-task focusing prompts during testing (id. at pp. 3-5, 7-8).

By undated letter sent on or about February 23, 2013, the parents informed the district that they had concerns about the conduct and behavior of the district special education teacher who attended the February 2013 CSE and who served as the district representative (Parent Ex. G; see Parent Exs. F at p. 1; H at p. 13). The parents requested that the district place a copy of their letter in the student's "CSE file" (Parent Ex. G).

By letter dated April 12, 2013, the parents summarized the substance of a voice message from the district special education teacher that, if the parents desired, the CSE could reconvene (Dist. Ex. F at p. 1). The parents further summarized the substance of their responsive phone call to the district on March 12, 2013 that they wanted the CSE to reconvene and requested a CSE meeting notice (id.). However, the parents informed the district that they had "not received a new appointment to meet with the CSE" (id.).

By letter dated May 28, 2013, the parents informed the district that that, because the district had not yet proposed a "placement" for the student, they intended to sign an enrollment contract and pay a deposit to ensure a seat for the student at RLS for the 2013-14 school year (Parent Ex. E at p. 1). The parents also stated that they would "consider" enrolling the student in an "appropriate program and/or placement" recommended by the district but that, if no such program and placement were offered, they would seek public funding for the costs of the student's tuition at RLS for the 2013-14 school year (id.). Finally, the parents requested a copy of the IEP developed by the February 2013 CSE, which they had not yet received (id.).

On May 29, 2013, the parents entered into a registration contract with RLS in which they agreed to be responsible for the costs of the student's tuition for the 2013-14 school year (Parent Ex. D). The contract contained a provision by which the parents would be released from their financial obligations under the contract in the event that they accepted a public school placement from the district (id.).⁴

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

³ The February 2013 IEP failed to specify the duration of the weekly counseling sessions recommended for the student (Parent Ex. H at p. 6). The district is reminded that State regulations provide that the IEP shall describe recommended program and services by setting forth, among other things, the "anticipated frequency, duration and location . . . for each of the recommended programs and services" for the student (8 NYCRR 200.4[d][2][v][b][7] [emphasis added]).

⁴ The registration contract also noted under "[s]pecial [c]onditions" that "psychotherapy" was "required" for the student (Parent Ex. D).

By final notice of recommendation (FNR) dated July 31, 2013, the district summarized the ICT and counseling services recommended in the February 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (Parent Ex. C). The FNR also provided contact information for an individual who could arrange a site visit for the parents (id.).

By letter dated August 16, 2013, the parents informed the district that, in response to receiving the FNR, they attempted to contact the assigned public school site to schedule a visit but "reached only voice mail boxes" and were ultimately informed that no staff would be at the school site until the end of August (Parent Ex. B). The parents indicated that they would attempt to schedule a visit to the school site in September but that, in the meantime, they had "no alternative" but to place the student at RLS for the 2013-14 school year and to seek public funding for the costs of the student's tuition (id.).

By letter dated August 29, 2013, the parents informed the district that, in a telephone conversation with the parents' educational advocate, the assistant principal of the assigned public school site indicated that the assigned school was "phasing out" and "not accepting any new students" (Parent Ex. A). Therefore, because the district failed to offer a placement for the student for the 2013-14 school year, the parents stated that they "unilaterally placed" the student at RLS and intended to seek public funding for the costs of the student's tuition (id.).

A. Due Process Complaint Notice

By due process complaint notice dated October 29, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year on both substantive and procedural grounds (Parent Ex. M at pp. 1-6). The parents alleged, among other things, that: (1) the district denied them an opportunity to participate in the development of the student's February 2013 IEP; (2) the February 2013 CSE was improperly composed, in that CSE members were either absent from the meeting or did not meet certain criteria under State regulations; (3) the district failed to convene a new CSE meeting in response to the parent's request; (4) the district special education teacher was "belligerent and hostile" at the February 2013 CSE meeting; (5) the February 2013 CSE engaged in impermissible predetermination in developing the student's IEP; (6) the February 2013 CSE did not conduct appropriate evaluations; (7) the February 2013 CSE did not consider, or rely on, the available evaluative information; (8) the student's present levels of performance were not appropriately identified in the student's February 2013 IEP; (9) the February 2013 IEP did not address the student's social/emotional and health/physical needs; (10) the annual goals listed in the February 2013 IEP were not sufficient; (11) the February 2013 CSE recommended a class size and staffing ratio that were too large for the student to obtain individualized instruction and academic benefit; (12) the February 2013 CSE failed to recommend a 12-month educational program, which the student required; and (13) the transition plan recommended by the CSE was not adequate (id. at pp. 2-6). In addition, the parents alleged that the district failed to assign the student to an appropriate public school site because the FNR identified a school site which was being "phased out" and "not accepting new students" and the district failed thereafter to assign the student to attend a different public school site (id. at p. 6).

Next, the parents alleged that the student's unilateral placement at RLS was appropriate to address her special education needs and that the student made progress at RLS (Parent Ex. M at p. 6). The parents also alleged that equitable considerations weighed in favor of their request for relief because they always cooperated with the district in good faith and provided the district with appropriate notice of their intention to unilaterally place the student (id.). As relief, the parents requested that the IHO order the district to pay for the costs of the student's tuition at RLS, as well as the costs of the student's related services, for the 2013-14 school year (id. at p. 7).

B. Impartial Hearing Officer Decision

An impartial hearing was conducted on December 16, 2013 (Tr. pp. 1-131). At the beginning of the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2013-14 school year (Tr. p. 4; see also IHO Decision at pp. 2, 9).⁵ By decision dated January 8, 2014, the IHO accepted the district's concession that it failed to offer the student a FAPE for the 2013-14 school year but found that RLS was not an appropriate unilateral placement for the student (IHO Decision at pp. 9-11). In support of her conclusion, the IHO found that: (1) RLS failed to address any of the student's diagnoses or her needs; (2) the "student's disabilities as described by the parent, neurologist and teachers [were] vague and not apparent"; (3) the student's disabilities [did] not seem to impact her ability to achieve good grades; (4) the parents failed to produce specific information describing RLS's "therapeutic services"; (5) there was no evidence that the student received counseling on a regular basis and that the counseling provided at RLS was generalized to the entire student population and not tailored to meet the specific needs of the student; (6) there was no indication in the hearing record that RLS allowed the student to take her examinations with extended time in a distraction-free environment or that RLS offered tutoring services to the student; (7) RLS did not offer a therapeutic day school setting or extended time in a distraction-free environment, as recommended by the student's private psychiatrist; (8) RLS did not offer related services; (9) the parent did not credibly testify regarding what she disclosed to the interviewer during a social history report regarding the student's psychiatric evaluation; and (10) despite having requested the parents to produce psychiatric evaluations (and information regarding student's visits to the psychiatrist), the parents failed to produce that information to the IHO (id. at pp. 9-11).⁶ The IHO "acknowledged" that "the student ha[d] made academic progress as indicated in the student's report cards" (id. at p. 11). Nevertheless, based on the foregoing enumerated reasons, the IHO denied the parents' request for the costs of the student's tuition and related services.⁷

⁵ The district chose not to produce any documentary evidence or call any witnesses to testify at the impartial hearing (Tr. pp. 1-2, 4).

⁶ Contrary to the IHO's finding that the parent failed to produce "documents such as the psychiatric evaluations etc.," the IHO cited the subject documents, which were provided to the IHO after the impartial hearing but before the IHO issued her decision (compare IHO Decision at p. 10, with IHO Decision at pp. 4-6, 9-11; see generally IHO Exs. I-IV).

⁷ Because the IHO found that the parents' unilateral placement was not appropriate for the student, the IHO did not reach the question of whether equitable considerations weighed in favor or against an award of tuition reimbursement (see IHO Decision at pp. 8-11).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn the IHO's determination that RLS was not an appropriate unilateral placement for the student for the 2013-14 school year. Specifically, the parents argue that (1) the educational program at RLS effectively addressed the student's specific disabilities and needs; (2) RLS was particularly well suited for students who have internalizing disorders, such as the student; (3) the student benefited from her instruction at RLS and made unqualified progress academically, socially, and emotionally; (4) the IHO erred in finding that the student's disabilities were vague and not apparent, in that such finding ignored the student's undisputed diagnoses; (5) the IHO failed to consider testimony describing the therapeutic environment of RLS and its benefit to the student; (6) the IHO erred in finding that the student did not receive counseling services because RLS had several persons on staff qualified to provide counseling services and used an advisory system, whereby all RLS teachers received significant training to serve as effective advisors, and because the student used RLS's counseling services a few times per month and received weekly counseling from her private psychiatrist, who communicated with RLS staff regularly; (7) the IHO erred in finding that RLS offered an educational program contrary to the recommendations of the student's private psychiatrist; and (8) the IHO's application of a negative credibility finding to the parent's testimony bore no relation to any relevant issues before the IHO.

The parents also argue that, although not addressed by the IHO, equitable considerations weighed in favor of the parents' request for relief because the parents: fully cooperated with the district throughout the process of developing the student's February 2013 IEP; participated at the February 2013 CSE meeting; requested, in writing, that the CSE reconvene; and notified the district that they were willing to enroll the student in an appropriate district public school. In addition, the parents argue that, to the extent that they executed a registration contract with RLS on May 29, 2013, they did so to secure a seat for the student in the event the district failed to offer an appropriate placement and that their deposit was fully refundable if the student was placed in a district school.

In an answer, the district responds to the parents' petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that RLS was not an appropriate unilateral placement for the student. In pertinent part, the district argues that the parents did not present any testimony or documentary evidence at the impartial hearing that demonstrated how RLS addressed the student's special education needs. As an example, the district notes that there was no indication that RLS supported the student's need for testing with extended time. Further, the district argues that the student's January 2013 educational evaluations from RLS failed to indicate that the student had any special education needs and failed to set any goals with regard to her special education needs. In addition, the district argues that RLS did not offer the student any related services and, in particular, counseling. More specifically, the district asserts that (1) RLS's advisors did not have a background in counseling, social work, or psychology; (2) RLS did not address the student's unique counseling needs or the academic and behavioral skills that the student needed to acquire; (3) even if RLS did provide counseling, such counseling was not provided on a weekly basis in a 1:1 setting, which the student required; and (4) the counseling that the student received outside of school, which was funded by the parents, should not be considered when examining the appropriateness of the unilateral placement. The district also argues that RLS was

overly restrictive because the student was high functioning and RLS included a majority of student that had IEPs or required special education services.

Regarding equitable considerations, the district argues that (1) the parents never intended to enroll the student in a district public school, as evidenced by their execution of a registration contract with RLS on May 29, 2013; (2) the parents' 10-day notice letter to the district was untimely and failed to specify any concerns with regard to the February 2013 IEP; and (3) the IHO's adverse credibility finding relating to certain portions of the parents' testimony should contribute to a finding that equitable considerations do not support the parents' claims. Furthermore, the district asserts that the parents' claim for relief in the form of direct funding of the student's tuition at RLS should be precluded as a result of the parents' failure to establish that they lacked the financial resources to "front" the costs of tuition.

In a reply, the parents aver that they were not required to establish an inability to pay tuition in order to receive an award of prospective funding for the student's tuition at RLS for the 2013-14 school year.⁸

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 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a

⁸ Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the district's allegations to which the parent replied did not assert a procedural defense to the State-level appeal (see Answer ¶¶ 39-60). Accordingly, those portions of the parents' reply are beyond the scope of the State regulations and will not be considered.

district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 14; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025). 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, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

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—Unilateral Placement

In this case the district conceded that it did not offer the student a FAPE for the 2013-14 school year; consequently, the next issue is whether the parents' unilateral placement of the student at RLS during the 2013-14 school year was appropriate. For the reasons that follow, the evidence in the hearing record supports the IHO's finding that the parents did not meet their burden to establish that RLS provided the student with instruction and services specially designed to meet her unique needs and, therefore, that RLS was not an appropriate unilateral placement for the student for the 2013-14 school year.

A. The Student's Needs

In this instance, although the student's needs—as identified in certain evaluations and assessments in the hearing record—are not directly in dispute, a discussion thereof provides context for the discussion of the remaining issue; namely, whether the student's unilateral placement at RLS was appropriate.

In the present case, during the impartial hearing, the IHO requested that the parties offer evidence that described the student's needs (Tr. pp. 47, 52, 55, 113, 116-17, 123-24). At some point after the impartial hearing concluded but before the IHO issued her decision, the parents provided the IHO with the requested evidence (see IHO Decision at pp. 4-6, 9-11; see generally IHO Exs. I-V). Under the circumstances of this case—where the district conceded that it failed to offer the student a FAPE for the 2013-14 school year and elected not to enter into the hearing record any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs—the district has effectively abandoned any opportunity to assert at either the impartial hearing or on appeal its position regard the student's special education needs and the extent to which the unilateral placement either addressed or failed to address those needs (Tr. pp.1-2, 4). The IHO was well within the bounds of her authority to require the parties to provide her with detailed information regarding the student's needs so she could perform her function of rendering a determination regarding whether RLS was appropriate for the student. Accordingly, although the hearing record includes information about the student's needs, any challenge by the district of the extent that RLS staff relied upon evaluation reports or assessments of the student to identify the student's needs and develop the student's educational program and those evaluation reports or assessments were not sufficiently accurate or complete for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and

not the parents (see 34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]; A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).⁹ Thus, the question of whether RLS was an appropriate unilateral placement in the instant case is principally determined by whether the program provided "educational instruction specially designed to meet the unique needs of [the student]" (Rowley, 458 U.S. at 188-89; see Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 365). The evidence in the hearing record submitted by the parents in this case was sufficient to identify the student's unique individual needs; however, as further described in the next section, they did not successfully show that the services at RLS sufficiently addressed those needs for the 2013-14 school year.

The evidence in the hearing record includes a November 2010 neuropsychological evaluation,¹⁰ a December 2010 social history report completed by the district, a January 2011 psychiatric evaluation, a January 2012 psychiatric evaluation, as well as a letter from the student's private psychiatrist (see generally Parent Exs. J; L; IHO Exs. I-III).¹¹

The November 2010 neuropsychological evaluation was conducted as a result of a referral from the student's psychiatrist, due to the student's academic difficulties, inattentiveness, organizational problems, and the parents' concern that she was "underperforming given her intellectual ability" (IHO Ex. III at p. 1). The purpose of the evaluation was to assess the student's current cognitive and social/emotional functioning (id.). The evaluator reported that the student had difficulty with concentrating in class, multistep directions, organization of school materials, and social skills (id. at p. 3). In addition, the evaluator indicated that the student was pleasant and cooperative but was also easily distracted and overwhelmed by certain visual stimuli, frequently needed redirection, and had difficulty transitioning back to tasks (id.). The evaluator also stated that the student was functioning in the high average range of intelligence as measured by the Wechsler Intelligence Scale for Children-Fourth Edition (WISC- IV) but that, due to her distractibility, this might have been an underestimate of her actual ability (id. at p. 6). Further, the student displayed "significant cognitive rigidity" and "great difficulty with executive function" (id. at pp. 7-8). Finally, the evaluator indicated that the student was inattentive to auditory stimuli but within the normal range for visual stimuli and that she was functioning above the normal range in reading non-verbal cues during social interactions (id.). The evaluator recommended, among other things, that the student would benefit from: a daily planning template at school and a homework planner; large assignments chunked into smaller units; visual cues and daily lists to assist with homework; cellphone and computer reminders to help with time management; scheduled breaks throughout the school day; strategies to cope with cognitive rigidity, including modeling, practice,

⁹ Moreover, because a "private placement need not provide . . . an IEP for the disabled student," RLS had no duty to conduct the tests or evaluations typically relied upon by a district to develop an IEP (Frank G., 459 F.3d at 364).

¹⁰ The parents testified that the student also received a psychiatric evaluation in 2010; however, a 2010 psychiatric evaluation was not included in the hearing record (see Tr. pp. 80, 100-02).

¹¹ The hearing record also includes January 2013 and a November 2013 progress reports from RLS, as well as the student's academic transcript from RLS; however, the progress reports and the transcript do not set forth the student's educational or related service needs (see generally Parent Ex. I; IHO Exs. IV; V).

feedback, generalization, and scripts for social scenarios; support for managing emotions; and testing accommodations (id. at p. 9).

In addition, the district completed a social history report in December 2010, at which time the student attended a ninth-grade general education classroom in a district public school (Tr. pp. 106-12; see Parent Ex. L at p. 1). The social history report indicated that the student had never responded to her name being called and had difficulties in the areas of fine motor, gross motor, organization, attention, and speech skills (Parent Ex. L at p. 1). In addition, the parent reported to the evaluator that the student's grades had decreased, that she was not performing to her potential, and that she had difficulties initiating friendships (id.). Finally, the social history report indicated that the parent believed the student would benefit from academic support, special education teacher support services (SETSS), occupational therapy (OT) to address her fine motor skills, physical therapy (PT) to address her limited ambulation, and speech-language therapy to address her social skills (id. at p. 3).

The January 2011 psychiatric evaluation, completed by the student's private psychiatrist, indicated that the student presented for the evaluation due to "poor peer relationships, social cognition deficits, anxiety, mood dysregulation, and academic difficulty" (IHO Ex. I at p. 1). The parent reported to the evaluator that, during infancy, the student did not babble or maintain a consistent gaze (id.). The student exhibited motor development delays, which may have been affected by her severely pronated feet, hypotonicity, and limb length discrepancy (id.). The parent reported that the student did not work well in groups and preferred solitary play (id.). Although the student was interested in other children, she was not capable of reciprocity (id.). The student's academic functioning was described as average; however, the parent opined that her achievement was not commensurate with her ability, as the student displayed a full scale IQ of 151 (id.). According to the report, the student exhibited difficulty with concentration, attention, disorganization, following directions or multiple step processes, initiating work, anxiety, communication, and social skills (id. at pp. 1-2). In addition, the student exhibited inflexibility, low frustration tolerance, and mood dysregulation (id. at p. 2). The evaluator opined that diagnoses of Asperger's disorder, attention deficit hyperactivity disorder (ADHD), and generalized anxiety disorder were supported based upon chart review and interviews with the student and parent (id. at p. 4). The evaluator recommended that the student continue to receive therapy and begin pharmacological treatment (id. at p. 5). In addition, the evaluator recommended that the student be placed in a therapeutic day school setting with a small class size due to her need for constant redirection, emotional and structural reinforcement, continual reinforcement and follow up for all classroom assignments and homework, and daily monitoring of her academic progress (id.). The evaluator also stated that "behavior skills" were recommended to help the student decrease her level of frustration, as well as daily tutoring, testing accommodations of extended time and a non-distracting environment, and an electronic organizer to assist with executive functioning (id.).

The January 2012 psychiatric evaluation added that the student had been enrolled in RLS since February 2011 (IHO Ex. II at p. 2).¹² The report stated that the student continued to exhibit symptoms of anxiety, low frustration tolerance, difficulty initiating and maintaining friendships,

¹² Although the January 2011 and January 2012 psychiatric evaluations were written over a year apart, much of the same information is contained verbatim therein (compare IHO Ex. I, with IHO Ex. II).

and difficulty reading social cues; however, the evaluator indicated that she had shown marked improvement in her ability to sustain eye contact (id.). In addition, the student reported to the evaluator that she had achieved more consistent grades, become more social with other students, less depressed, more focused in class, and had greater concentration when doing homework (id.). Further, the student reported that it was easier to initiate work and that the smaller class size was more manageable for her (id.). Finally, the student contended that, since attending RLS, episodes of low frustration tolerance with mood dysregulation had become less frequent (id.). The evaluator recommended that the student continue her current therapeutic academic placement (id. at p. 5).

The hearing record also includes a January 31, 2013 letter from the student's private psychiatrist (see Parent Ex. J). In the letter, which is addressed "to whom it may concern," the student's psychiatrist indicated that he had been treating the student since January 2011 (id.). The psychiatrist stated that the student received diagnoses of Asperger's Disorder, ADHD (inattentive type), and generalized anxiety disorder (id.). The psychiatrist further stated that, at the time, the student received individual psychotherapy, family therapy, and psychopharmacological treatment (id.). The psychiatrist further stated that the student was "psychiatrically stable" and recommended that she continue in her current academic placement (id.). Specifically, he contended that the student required a highly structured, small class of ten students maximum in order to progress in school (id.). He further stated that the student required "constant" redirection, frequent reinforcement, daily monitoring of academic progress, daily tutoring, and behavioral "skills" in order to help the student decrease frustration (id.).

The RLS clinical director testified that the student had "difficulties establishing social relationships" and friendships, trusting others, establishing eye contact, and otherwise "attending to the nuances of social interaction" (Tr. p. 61). She further testified that the student was "reluctant" to changes and transitions in her daily schedule (id.). The student also exhibited difficulties related to ADHD, including deficits in "attention, concentration, focusing, and staying on task [and] organiz[ed]" (id.). The clinical director indicated that student struggled with executive functioning (id.).

B. Specially Designed Instruction

The parents argue that, contrary to the IHO's findings, the hearing record contains sufficient evidence describing how the educational program at RLS effectively addressed the student's specific disabilities and needs. State regulation defines specially designed instruction as "adapting, as appropriate, to the needs of an eligible student . . . the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). In this instance, while the hearing record includes a sufficiently comprehensive description of the student's needs, there is sparse information as to the manner in which RLS offered specially designed instruction to the student. On the contrary, the hearing record contains only a broad, nonspecific description of RLS, which sets forth the instruction utilized by the school for every student enrolled.

The RLS clinical director testified that RLS was a college preparatory institution with a therapeutic component and featured classes consisting of eight to ten students (Tr. p. 15). The clinical director stated that the students who attended the school were very bright but had

encountered "some sort of difficulty along the way" (*id.*). The clinical director indicated that she was familiar with the student in this case, as she had previously provided direct guidance to the student, supervised the student's advisors, observed the student, and been in contact with the parents of the student (Tr. pp. 17-18). The clinical director opined that the student was similar to the other students at RLS in that many of the students at RLS were fragile and had internalizing disorders, rather than acting out behaviors, and required much support (Tr. p. 19). The clinical director also stated that the students at RLS possessed very high levels of cognitive ability and did not struggle academically (Tr. p. 20).

According to the RLS clinical director, the school used an "advisory model" whereby each student was assigned to a teacher who became the primary contact person for that student (Tr. pp. 26-27). The advisor then met with his or her assigned students three times a day and assisted in all aspects of a student's functioning, ranging from problem solving, organization, social issues, and academics (Tr. p. 27). The clinical director further explained that the advisors at RLS were all teachers, some of whom had teaching certifications, and that the advisors received "significant" training and mentoring in order to work effectively with the students at the school (Tr. p. 40). The clinical director further testified that the advisors completed updates on each student's progress twice a month and summarized such progress at the end of the year in an advisor summary report (Tr. pp. 46-47).

The clinical director explained that the student attended six classes each day, one of which was an elective (Tr. p. 28). The curriculum was designed to prepare the student for college level work (Tr. p. 30). The student received no related services at RLS but the student was able to access mental health professionals at the school on an as-needed basis, and the student received therapy with her "outside clinicians" (Tr. pp. 30-31, 46, 69-70). The clinical director stated that the counselors at the school, who she supervised, consisted of a psychology intern, a psychologist who was not yet certified, and a "mental health counselor" who worked mostly with the senior class students (Tr. pp. 39-40, 69). With respect to the student's individual social struggles, the clinical director testified that the staff at RLS "continually g[ave] her feedback about . . . different ways of approaching a particular situation socially," and provided scaffolding relating to "that part of her development" (Tr. p. 38).

However, despite the overall setting described above and provided to all of the students at RLS, there is a scarcity of evidence in the hearing record that would support a finding that RLS provided the student with specially designed instruction to meet her needs. Specifically, there is no evidence in the hearing record that the student received instruction to meet her needs as identified by the evaluative information outlined above (see Parent Ex. J; L; IHO Exs. I-III). Although the student attended a small class of no more than 10 students at RLS, consistent with the recommendations of the student's private psychiatrist, there is no evidence in the hearing record that the student's other identified needs were being met; specifically, the student's need for "constant" redirection, frequent reinforcement, daily monitoring of academic progress, daily tutoring, and behavioral "skills" in order to help the student decrease frustration (see Parent Ex. J at p. 1; IHO Exs. I at p. 5; II at p. 5; IV at p. 9). For example, there is no information in the RLS educational evaluations regarding the utilization of such supports or strategies at RLS (compare Parent Ex. I at pp. 1-6, and IHO Ex. V at pp. 1-6, with Parent Ex. J at p. 1, and IHO Exs. I at p. 5; II at p. 5; IV at p. 9). Moreover, the January 2013 and November 2013 RLS educational evaluations do not identify individualized goals or strategies used by the student's teachers to

accommodate her individual needs (see generally Parent Ex. I; IHO Ex. V). There is also no evidence in the hearing record of instruction or supports designed to address the student's physical development needs. Finally, the hearing record does not include any formal or specific data regarding improvements in the student's functioning related to her primary areas of need; specifically, the student's needs in the areas of social/emotional functioning, attention, and organization.

C. Counseling

Regarding the district's assertion that RLS was not an appropriate unilateral placement for the student because it failed to provide counseling to the student, "parents need not show that a private placement furnishes every special service necessary to maximize their child's potential" (Frank G., 459 F.3d at 365). Moreover, as explained above, central to the educational program at RLS is the advisor system, whereby each student meets with an advisor, who is supervised by a licensed psychologist, individually up to three times a day and once a week in a group setting (see Tr. pp. 26-28). Further, the hearing record shows that the student also received private counseling funded by her parents, which is noted as a special condition on the RLS registration contract for the 2013-14 school year (see Parent Ex. D). The parent testified that the lack of weekly counseling at RLS was not problematic because the student could, in fact, access counseling services at the school, as needed (Tr. p. 100). Under the circumstances of this case, the hearing record does not support a conclusion that RLS was not an appropriate unilateral placement on the ground that it did not provide formal counseling to the student, especially since the student received private counseling services (see C.L. v. Scarsdale Union Free Sch. Dist., 2014 WL 928906, at * 10 [2d Cir. Mar. 11, 2014] [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *27 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522 [E.D.N.Y. March 28, 2011]; M.N. v. New York City Dept. of Educ., Region 9 (Dist. 2), 700 F. Supp. 2d 356, 367 [S.D.N.Y. 2010] [quoting Cerra and upholding an educational placement without related services where it was nevertheless "likely to produce progress, not regression"]).

D. Progress

In support of their argument that RLS was appropriate for the student, the parents argue that the student made significant progress during the previous school year at RLS. A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D. D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82, 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 491-92 [S.D.N.Y. 2013]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364). A finding of progress is nevertheless a relevant factor to be considered in determining whether the unilateral

placement is appropriate for the student (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]).

Here, an independent review of the hearing record reveals that the IHO correctly acknowledged that the student made academic progress during the 2012-13 school year (IHO Decision at p. 11). For example, the clinical director of RLS testified that the student had made progress in all areas at the school (Tr. pp. 22-26). Specifically, the student had progressed in her ability to trust others, make eye contact, and establish friendships (Tr. p. 22). The clinical director reported that the student took more risks to answer questions, gained confidence in herself, became more able to accept feedback from teachers, became less rigid in her thinking and more organized, and was more easily redirected when distracted (Tr. pp. 22-25). The clinical director explained that the school helped the student with social difficulties by providing feedback to her regarding how to approach social situations (Tr. pp. 37-38). Furthermore, the student's January 2013 and November 2013 RLS educational evaluation, the student earned letter grades consisting of "As" and "Bs" and received largely positive teacher comments regarding her improved confidence, participation, and preparation (Parent Ex. I at pp. 1-6; IHO Ex. V at pp. 1-6; see also IHO Ex.).

The parent testified that the student made progress at RLS (Tr. pp. 82-84). Specifically, the parent stated that the student attained grades consisting mostly of "As" and "Bs" for the first year at RLS and made "immediate" improvement in her social and emotional functioning (Tr. pp. 82-83). The parent stated that the student had continued to make progress in her ability to trust others and take risks (Tr. p. 83). The parent also stated that the student had made some gradual improvement in her organization skills and that, since the start of the 2013-14 school year, the student had been doing "really well" (Tr. pp. 83-84). The parent asserted that the student was thriving academically, was more able to approach adults to ask for help, was more receptive to assistance, and had shown improvements in her organization outside of school as well (Tr. pp. 84-85).

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

It is understandable why the parents selected a placement such as RLS, which offered the type of environment that resulted in social and academic progress. However, the student's progress at RLS, alone, does not overcome the lack of evidence in the hearing record establishing that RLS provided the student with specially designed instruction to address her needs. Accordingly, the IHO correctly found that the parents did not meet their burden to establish that RLS's educational program provided the student with educational instruction specially designed to meet her unique

needs (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365; see also Rowley, 458 U.S. at 188-89). Rather, it appears that the student's placement at RLS provided her with "the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115).

E. Least Restrictive Environment

Finally, the district raises on appeal the issue of whether RLS was overly restrictive and failed to afford the student adequate mainstreaming opportunities. Although the restrictiveness of the unilateral placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (C.L., 2014 WL 928906, at *7; Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F.Supp.2d 529, 549 [S.D.N.Y. 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]), parents are not held as strictly to the standard of placement in the LRE as school districts (C.L., 2014 WL 928906, at *8; 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, 700 F.Supp.2d at 552 [S.D.N.Y. 2010]; W.S., 454 F. Supp. 2d at 138; Pinn, 473 F. Supp. 2d at 482-83. Here, as cited by the district, the clinical director of RLS testified that approximately 60 percent of the students attending the private school had IEPs (Tr. pp. 42-43). Whether or not this percentage could properly be characterized as maximizing the student's interaction with nondisabled peers, in this instance, had RLS provided specially designed instruction to the student to address her needs, the level of the student's interaction with nondisabled peers would not have weighed so heavily as to preclude the determination that the parent's unilateral placement of the student at RLS for the 2013-14 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

In view of the foregoing, because an independent review of the hearing record does not support a finding that RLS provided the student with specially designed instruction uniquely tailored to her special needs for "constant" redirection, frequent reinforcement, daily monitoring of academic progress, daily tutoring, and behavioral "skills" in order to help the student decrease frustration, the parents have not met the second criterion for an award of tuition reimbursement. Therefore, the necessary inquiry is at an end and the issue of whether equitable considerations supported the parents' claim need not be addressed (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80).

VII. Conclusion

The hearing record supports the IHO's determination that the parents' unilateral private placement at RLS was not appropriate due to insufficient evidence. Accordingly, I uphold the IHO's decision that determined that RLS was not an appropriate unilateral placement for the student for the 2013-14 school year and that denied the parents' tuition reimbursement and/or direct funding for the 2013-14 placement of the student at RLS. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
April 18, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**