The University of the State of New York

The State Education Department
State Review Officer
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No. 14-082

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, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Jean Marie Brescia, Esq, of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for a portion of the costs of their unilateral placement of the student for the 2013-14 school year. The parents cross-appeal from the IHO's determination to reduce the award of tuition reimbursement. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student demonstrates difficulties with attention, social skills, sensory regulation, pragmatic language, and fine and gross motor skills (see Dist. Exs. 9; 12-13; 15-16; Parent Exs. D; P; Q; T).[1] According to a neurodevelopmental evaluation conducted in December 2012, the

[1] The hearing record contains multiple duplicative exhibits (compare Dist. Exs. 5; 12; 22-23, with Parent Exs. P; Q; CC; DD; HH). For purposes of this decision, only Parent exhibits were cited in instances where both a Parent

student received a diagnosis of Asperger's syndrome and has received interventions since he was three years old (Dist. Ex. 15 at pp. 1, 4; see Tr. p. 590).

The parents initially requested a CSE meeting to discuss special education programs and services for the student by letter dated April 25, 2013 (Parent Ex. G at p. 1).[2] In response, the district provided the parents with a notice of initial referral along with a preschool site evaluation list (Parent Ex. H). The district informed the parents that they were required to initiate the evaluation process and have their chosen evaluator provide the district with the parents' signed consent for evaluations by May 21, 2013 (Tr. p. 597; Parent Ex. H). Initially there was some confusion as to whether the student was eligible for an evaluation under the Committee on Preschool Special Education (CPSE) based on the student's aging into the auspices of the CSE for the 2013-14 school year (Parent Exs. J-O). However, the parents arranged for and had the student evaluated on May 21, 2013 (Tr. p. 601;Parent Ex. P at p. 1).[3]

The CPSE convened on August 13, 2013, to conduct the student's initial review and found the student eligible for special education programs and services as a preschool student with a disability (Parent Ex. C at p. 2). The August 2013 CPSE recommended that the student receive 15 hours per week of individual special education itinerant teacher (SEIT) services, two 45-minute sessions per week of individual speech-language therapy, three 45-minute sessions per week of individual occupational therapy (OT), one 45-minute session per week of individual counseling, and one 45-minute session per week of counseling in a group of 2 (id. at p. 12). The August 2013 CPSE IEP indicated "N/A" as the start date for the recommended services; however, it did indicate that the student was eligible for 12-month services (id. at pp. 12-13).

The CSE also convened on August 13, 2013, to develop the student's IEP for the 2013-14 school year (Parent Ex. CC). Finding the student eligible for special education programs and services as a student with autism, the August 2013 CSE recommended a general education setting with integrated co-teaching (ICT) services in the areas of math, English language arts (ELA), social studies, and science (id. at pp. 1, 11).[4] The August 2013 CSE also recommended three 30-minute sessions per week of individual OT, two 30-minute sessions per week of speech-language therapy in a small group (3:1), one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of individual counseling (id. at p. 11).

On August 19, 2013, the parents rejected the program discussed during the August 2013 CSE meeting (Parent Ex. DD at p. 1). The parents asserted that the program was not appropriate for the student because it was not in the student's least restrictive environment (LRE), did not

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and District exhibit were identical. I remind the IHO that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] At the time the parents referred the student for special education, the student was attending a private preschool with the support of a full-time 1:1 special education itinerant teacher (SEIT), all at the parents' expense (Tr. pp. 457, 591-92; Dist. Ex. 12 at p. 2).

[3] During summer 2013, the student attended a camp with the support of a SEIT (Tr. p. 359).

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

include parent counseling and training, and did not provide for sufficient 1:1 support, related services, or interventions to address the student's behavioral needs (id.). The parents noted that they had not yet received a notice indicating the particular public school site to which the student had been assigned; however, the parents indicated that they visited their local public school at the suggestion of district staff and registered the student (id.). On August 27, 2013, the district sent a final notice of recommendation to the parents, indicating the student's local school as the public school to which the student was assigned for the 2013-14 school year (Dist. Ex. 20). For the 2013-14 school year, the parents enrolled the student in, and the student attended, a nonpublic parochial school (the NPS) (Parent Ex. BBB at p. 2).[5]

A. Due Process Complaint Notice

By due process complaint notice, dated September 3, 2013, the parents enumerated 74 allegations in support of their claim that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. A at pp. 3-9). The parents amended their due process complaint notice on September 19, 2013, and on October 3, 2013 (see Parent Exs. B; PP).[6]

The parent alleged that the district failed to offer the student a FAPE because, among other things: the district failed to timely locate, identify, and evaluate the student, resulting in a denial of FAPE for July and August 2013; the August 2013 CSE did not include a general education teacher; the district failed to conduct its own assessments of the student; a social history report was not available at the CSE meeting; the CSE failed to consider private evaluation reports; the district failed to conduct an FBA and develop a BIP for the student; the annual goals included in the August 2013 IEP did not address all of the student's needs, did not indicate objective methods of measurement, and were not individualized or based on appropriate assessments; the August 2013 IEP did not provide for parent counseling and training; the CSE predetermined the student's IEP and did not allow the parents to meaningfully participate in its development; the CSE did not consider 1:1 support and did not address the student's "need for consistent 1:1 [applied behavioral analysis] ABA support throughout the school day"; the recommended related services were inadequate to meet the student's needs; the CSE did not consider the student's LRE in making its recommendation and the recommendation for ICT services was not in the student's LRE; the CSE did not recommend "extended-day" services; the CSE failed to recommend any ABA interventions; the CSE failed to recommend 12-month services; and the CSE did not recommend any testing accommodations (Parent Ex. PP at pp. 3-8). The parents also raised numerous objections to the particular public school site to which the student was assigned to attend by the district for the 2013-14 school year (id. at pp. 8-9). The parents objected to the procedures used by the district to select a public school site, the timeliness of the district's notification to the parents

[5] The Commissioner of Education has not approved the NPS as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[6] Both amendments were accepted by the IHO and parties agreed that the October 3, 2013 due process complaint notice delineates the parents' complaints to be addressed at the impartial hearing (IHO Decision at p. 3 & n.1; Tr. p. 134).

indicating the location of the assigned public school, and asserted that the assigned school could not implement the August 2013 IEP (id.).

As relief, the parent requested public funding for the costs of: tuition for the student's attendance at the NPS for the 2013-14 school year, 34 hours per week of 1:1 teacher services, three 45-minute sessions per week of speech-language therapy, three 45-minute sessions per week of OT, one and one-half hours per week of social skills intervention, one and one-half hours per week of ABA therapy, four hours per month of parent counseling and training, compensatory services for services the student was entitled to and did not receive during July and August 2013, and compensatory services for any services the student was entitled to receive pursuant to pendency and did not receive (Parent Ex. PP at p. 10).

B. Impartial Hearing Officer Decision

After prehearing and evidentiary conferences held on September 20, 2013, October 29, 2013, November 6, 2013, and December 4, 2013, and a pendency hearing held on September 25, 2013, an impartial hearing convened on January 10, 2014, and concluded on March 14, 2014, after four hearing dates (Tr. pp. 1-669; September 20, 2013 Tr. pp. 1-5). The IHO issued an interim decision, dated October 4, 2013, identifying the student's services pursuant to pendency based on the August 2013 CPSE IEP (Interim IHO Decision).[7] In a decision dated May 6, 2014, the IHO determined that the district did not offer the student a FAPE for the 2013-14 school year (IHO Decision at pp. 11-14). Before concluding that the district denied the student a FAPE, the IHO resolved a number of issues raised by the parents in the district's favor (id. at pp. 10-11). In particular, the IHO determined that the August 2013 CSE was "duly constituted," that the lack of parent counseling and training on the IEP did not, standing alone, constitute a denial of a FAPE, and that the evaluative data available to the CSE was sufficient despite the lack of a social history report (id.). The IHO also found that the parents' allegations related to the assigned public school site were speculative (id. at p. 14).

In determining that the student was denied a FAPE for the 2013-14 school year, the IHO found that the lack of parent counseling and training and the lack of an FBA and BIP were procedural errors, and that the recommendation for ICT services and the failure to provide for 12-month services rendered the IEP substantively inappropriate (IHO Decision at pp. 11-14). Specifically, the IHO determined that the student exhibited behaviors that interfered with learning, for which the district should have conducted an FBA and developed a BIP (id. at pp. 11). Regarding the CSE's recommendation for placement in a general education class with ICT services, the IHO determined that such a placement was not adequate to meet the student's needs as there was no evidence before the CSE indicating the student could be successful without the support of a SEIT (id. at pp. 12-13).

The IHO then analyzed the combination of services provided by the parents as a unilateral placement and found that the unilateral placement was appropriate to meet the student's needs (IHO Decision at pp. 14-21). Specifically, the IHO found that the student's teacher and service providers coordinated with each other in providing strategies, the providers implemented a

[7] Neither party appealed from the IHO's interim decision on pendency and it has therefore become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

behavior plan including a rule chart and reinforcement system, the student was provided with sufficient levels of OT and speech-language therapy, and the student made progress in the placement (id. at pp. 15-17, 19-21). Although the IHO acknowledged that the quantity of SEIT services provided to the student "may be overly restrictive," the IHO found that it was not unreasonable for the parents to provide the student with full-time SEIT services considering the student had never been without SEIT support (id. at pp. 17-18). However, the IHO limited the parent's request for speech-language therapy services to one and one-half hours per week and determined that the parents should not be reimbursed for a weekend social skills play group or after-school ABA services they obtained for the student (id. at pp. 20-23). The IHO also determined that although the student required services to be provided on a 12-month basis, services provided during the summer could be limited to 15 hours of SEIT support, OT, and speech-language therapy (id. at p. 21).

Regarding equitable considerations, the IHO determined that although the parents cooperated with the district, they were not "open" to a district placement (IHO Decision at pp. 22-23). The IHO determined that because the parents did not request SEIT services during the August 2013 CSE meeting and did not inquire about obtaining supports for the student in a district general education class, the parents did not have any "real interest" in a public school placement (id.). Based on these considerations, the IHO reduced the parents' request for reimbursement at the NPS by 25 percent (id. at p. 23). Prior to applying the reduction, the IHO first reduced the parents' award by six percent, noting that the parents acknowledged that six percent of the school day at the NPS was devoted to religious instruction (id. at pp. 23-24). The IHO directed that the district reimburse the parents for the remaining tuition at the NPS; 15 hours of SEIT services per week during summer 2013, and reimburse or directly fund 90 minutes of speech-language therapy per week and three 45-minute sessions of OT per week for the 12-month 2013-14 school year, and 34 hours of SEIT services per week for the 10-month 2013-14 school year (id. at pp. 24-25).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district did not offer the student a FAPE for the 2013-14 school year, that the parents' unilateral placement was appropriate, and that equitable considerations were only a partial bar to the parents' request for reimbursement. The district asserts that the IHO erred in finding that the lack of parent counseling and training and the lack of an FBA and BIP were procedural violations that led to a procedurally inappropriate IEP. The district also contends that the IHO erred in determining that the August 2013 CSE's failure to recommend 12-month services contributed to the substantive inappropriateness of the IEP, asserting that the student did not exhibit regression to the extent that 12-month services were required. In addition, the district asserts that the IHO erred in finding that an "ICT class" would not have been appropriate for the student and that the CSE should have considered placement in a general education class with the support of a SEIT. The district contends that the CSE did not have to adopt the private evaluators' recommendations for 1:1 SEIT support, that the student would have received sufficient supports from the special education teacher in an ICT class, and that an ICT class was the student's LRE. Conversely, the district argues that the parents' unilateral placement was inappropriate because the NPS did not provide any special education services, the all day 1:1 SEIT support the student received was "overly restrictive," and the SEIT support was unnecessary because the SEITs provided only "minimal interventions."

As to equitable considerations, the district agrees with the IHO's finding that the parents never intended on enrolling the student in a public school setting; however, the district asserts that the IHO should have "barred reimbursement in whole" rather than reduce it by 25 percent. The district further contends that reimbursement for all of the relief awarded to the parents should be reduced, instead of just the costs of the student's tuition at the NPS. In the alternative, the district alleges that the IHO should have limited the parents' request for SEIT services to 15 hours per week because the parents agreed to 15 hours per week as part of the student's August 2013 CPSE IEP and as pendency for the 2013-14 school year.

The parents answer, denying the district's material allegations and interposing a cross-appeal from the IHO's determinations rejecting the parents' claims regarding the assigned public school as speculative and reducing the parents' request for tuition reimbursement based on equitable considerations.[8] The parents contend that the IHO was correct in finding that the district's failure to recommend 1:1 support and 12-month services in the August 2013 IEP resulted in a denial of FAPE for the 2013-14 school year and that the services provided by the parents were appropriate.[9] In addition, the parents contend that the CSE did not consider placement of the student in a general education class with SEIT support, asserting that such failure resulted in a recommendation that was not within the student's LRE, and further arguing that a classroom providing ICT services is not the same as a "mainstream" classroom. The parents also contend that the IHO erred in reducing their request for tuition reimbursement, asserting that they cooperated with the August 2013 CSE and that the IHO's findings regarding the parents' lack of intent to enroll the student in a public school were against the weight of the evidence.

The district answers the parents' cross-appeal, denying the parents' claims and arguing that the IHO properly limited the award of tuition reimbursement. The district also contends that the award of reimbursement for SEIT services should be reduced because the level of 1:1 SEIT services provided by the parents was unreasonable considering the student's high cognitive functioning.

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

[8] The parents explicitly do not cross-appeal from the IHO's determinations awarding a lesser amount of speech-language therapy than the parents requested, denying reimbursement for after-school ABA therapy and a social skills program, and reducing the award of tuition reimbursement at the NPS based on time spent in religious instruction (Petition n.1). In addition, the parents do not cross-appeal from the IHO's determinations that the August 2013 CSE was properly composed and that the evaluative data available to the CSE was sufficient despite the lack of a social history report. Accordingly, as the IHO's determinations on those issues are adverse to the parents and they have not been appealed, they are deemed waived (M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 325 [E.D.N.Y. 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]).

[9] The parents also note the IHO's findings that the lack of an FBA and BIP and the lack of parent counseling and training were procedural violations. The parents contend that those violations contributed to a denial of FAPE.

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit"

(Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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. Compensatory Education and 12-Month Services

Addressing first the IHO's determination that the parents were entitled to reimbursement for 15 hours per week of SEIT services provided during July and August 2013 as well as reimbursement for speech-language therapy and OT during the same period (IHO Decision at p. 21), although the district correctly asserts that the IHO did not refer to the award for services during July and August 2013 as a compensatory education award, the parents' demand for such services was phrased as a request for compensatory education. In the due process complaint notice, the parents requested such services as compensatory education for "educational services that [the student] was entitled to but did not receive during July and August 2013" (Parent Ex. PP at p. 10). Additionally, an award of services for July and August 2013 is necessarily an award of compensatory education, as the parents did not and are not challenging the services recommended in the August 2013 CPSE IEP and the student was a preschool student with a disability through August 2013 (see Educ. Law §§ 3202[1]; 4410[1][i] [a student is a preschool student "through the month of August of the school year in which the child first becomes eligible to attend school"; 8 NYCRR 200.1[mm][2]). Accordingly, although not explicitly treated as a compensatory education award by the IHO, the parents' request for reimbursement for services provided during July and August 2013 was a request for compensatory education and is treated as such herein.[10]

The August 2013 CPSE recommended that the student receive 15 hours per week of 1:1 SEIT services during the summer (Parent Ex. C at pp. 12-13). However, by the time the CPSE met on August 13, 2013, most of summer was already over. The parents referred the student to the district for special education programs and services on April 25, 2013 (Parent Ex. G at p. 1). The district responded providing the parents with a notice of initial referral (Parent Ex. H). The notice included contact information for approved evaluation sites, a consent to evaluation form, and directions for completing the evaluation process (id.).[11] After receipt of the parents' consent to evaluate, the district had 60 calendar days to hold a CPSE meeting to determine the student's eligibility and develop an IEP for the student (8 NYCRR 200.16[e]). In this instance, the hearing record does not indicate when the parents' written consent to evaluate was delivered to the district; however, the district's letter directed the parent to bring the written consent to the evaluation site and the student was evaluated on May 21, 2013 (see Parent Ex. H at p. 2; Parent Ex. P at p. 1). Under these circumstances, the district was required to develop an IEP for the student by no later than July 20, 2013 but did not do so until August 13, 2013. The district was also required to

[10] To the extent that the IHO found the August 2013 CSE IEP inappropriate for failing to recommend 12-month services (IHO Decision at pp. 13-14), such finding was erroneous as the student was a pre-school student with a disability until the end of August 2013 (see Educ. Law §§ 3202[1]; 4410[1][i]). As the student was not eligible for services through the CSE until September 2013, and the CPSE was responsible for providing the student with services through August 2013 (Educ. Law § 4410; 8 NYCRR 200.1[mm]; 200.16), the CSE's failure to recommend services prior to that time cannot contribute to a denial of FAPE. Additionally, the CPSE recommended 12-month services (Parent Ex. C at p. 13).

[11] For preschool students, parents are entitled to select an approved evaluator and the district has 60 calendar days from receipt of the parents' written consent to evaluate to arrange for an evaluation of the student by the parents' chosen evaluator (8 NYCRR 200.16[c][1], [2]).

implement the student's IEP within the shorter of 60 school days from the date of the consent for evaluation or 30 school days from the date of the IEP (see 8 NYCRR 200.16[f][1]).

Although the district asserts that the evaluations were timely conducted, the district has not indicated when it received the parents' written consent for an evaluation and has not set forth an argument as to when the CPSE would have been required to implement the IEP. In addition, the August 2013 CPSE recommended that the student receive 15 hours per week of 1:1 SEIT services, as well as related services including speech-language therapy and OT (Parent Ex. C at p. 12). The August 2013 CPSE IEP further indicated that the student required such services during the summer (id. at p. 13). Under these circumstances, the district may be held accountable for the delay in providing services in accordance with the CPSE's recommendation and the hearing record does not support a departure from the IHO's determination that the parents are entitled to reimbursement for the costs they incurred in providing the student with 15 hours of SEIT services, speech-language therapy, and OT during July and August 2013. In this case, "[r]eimbursement merely requires [the district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" (Burlington, 471 U.S. at 370-71).

B. ICT Services

The district contends that the August 2013 CSE's recommendation for ICT services was appropriate and that the IHO erred in finding the August 2013 IEP did not include sufficient supports for the student. In contrast, the parents assert that all of the evidence in the hearing record supports the IHO's determination that the student required at least some 1:1 SEIT support in order to benefit from instruction in a classroom providing ICT services.

Prior to discussing the program recommended by the August 2013 CSE, a brief description of the student's functioning, as known to the CSE from the evaluative information available to the CSE, is warranted. At the time of the August 2013 CSE meeting, the student exhibited average to high average cognitive abilities and overall average academic abilities; however, he demonstrated difficulties with attention, socialization, sensory processing, and pragmatic language (see Dist. Exs. 9; 12-13; 15-16; Parent Exs. D; P-Q; T). The hearing record reflects that the August 2013 CSE had recent evaluations available to it, which were conducted in May 2013 as a part of the student's initial evaluation as a preschool student and were arranged for by the parents from a list of evaluators approved by the district (Tr. pp. 597-600; Parent Exs. H; P; T; see Dist Exs. 9; 16; Parent Exs. Q; S). In addition, the August 2013 CSE had private evaluation reports provided by the parents prior to the CSE meeting, including a 2012 neuropsychological evaluation, a December 2012 neurodevelopmental evaluation, and a December 2012 OT evaluation (Parent Ex. X; see Tr. pp. 157-59, 166, 608-10). The parent and the student's service providers also participated in the August 2013 CSE meeting, contributing information regarding the student's educational needs (Tr. pp. 162-63, 175, 637-38).

Based on the evaluative reports available to the August 2013 CSE, the student demonstrated needs in the areas of attention, socialization, sensory processing, and pragmatic language (see Dist. Exs. 9; 11-13; 15-16; Parent Ex. T). Specifically, the December 2012 neurodevelopmental evaluation report indicated the student's attention was variable, the student responded to redirection, and he was energetic to the extent he benefited from brief play breaks (Dist. Ex. 15 at p. 2). The neurodevelopmental evaluation also indicated the student demonstrated

weakness in the area of pragmatic language, including sometimes raising unrelated topics during conversations (id. at pp. 2, 4).[12] The December 2012 OT evaluative report detailed the student's difficulties with sensory regulation, distractibility, and attention (Dist. Ex. 13 at pp. 2; 5-7; Parent Ex. X at p. 38).[13] The OT report indicated the student's difficulties with sensory regulation might result in the student's inability to "maintain a quiet body," maintain attention, and follow instructions (Dist. Ex. 13 at pp. 5-7). The OT report indicated the student's gross and fine motor delays—resulting from difficulties with sensory processing, visual-perceptual, and bilateral integration—would interfere with his ability to engage in some classroom and playground activities (Parent Ex. X at p. 38). The report also indicated the student engaged in off-task behaviors but responded well to a token system (Dist. Ex. 13 at p. 2).[14]

Consistent with the above, a 2012 neuropsychological evaluation report noted the student's difficulties with pragmatic language, self-directed behavior, perseverative behavior, attention, impulsivity, and eye contact (Dist. Ex. 12 at pp. 2-3). According to results of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), conducted as part of the neuropsychological evaluation, the student's processing speed standard score of 83 fell within the low average range and working memory standard score of 74 fell within the borderline range, indicating a "significant weakness" in attention, concentration, and memory (id. at pp. 5-6). The neuropsychological evaluation also noted the student exhibited variable attention and concentration, which negatively affected his performance on tasks (id. at p. 4).[15]

The evaluations conducted in May 2013 also reflected the student's deficits in the areas of attention, social skills, sensory regulation, and pragmatic language (Dist. Ex. 16; Parent Exs. P-Q; T). A May 2013 educational evaluation noted the student's difficulties with attention, social skills, including poor eye contact, and pragmatic language, such as making off-topic comments during tasks (Parent Ex. P at pp. 2, 5).[16] A May 2013 psychological evaluation indicated the student perseverated on items and topics of interest to him and required frequent redirection to maintain attention (Parent Ex. T at p. 2). A May 2013 speech-language evaluation reflected that the student demonstrated delays in expressive communication and pragmatic language (Dist. Ex. 16 at pp. 2-4).

Most significantly, a May 2013 classroom observation reflected that the student exhibited delays in attention, social skills, sensory processing, and pragmatic language in his preschool class

[12] Based on the student's needs as described above, the evaluator recommended a mainstream kindergarten class with SEIT support until such support could be systematically faded (Dist. Ex. 15 at p. 4).

[13] The December 2012 OT evaluation report included in the hearing record is missing pages 16-19 (Dist. Ex. 13); however, a copy of the report is also included as a part of an August 2013 facsimile from the parents to the district (Parent Ex. X). Consequently, references to the missing pages are made to Parent Ex. X pages 37-40.

[14] To address the student's delays related to sensory processing, perceptual skills, and motor skills, the occupational therapist recommended three 45-minute sessions per week of individual OT (Parent Ex. X at p. 38).

[15] The neuropsychologist recommended a structured classroom setting with "a behaviorally trained SEIT" (Dist. Ex. 12 at p. 8).

[16] The educational evaluation report noted the student used three to six word phrases throughout the assessment to communicate and followed three-step unrelated commands (Parent Ex. P at pp. 3-4).

(Dist. Ex. 9). During the observation, the student's preschool class included nine students with four adults and the student's 1:1 SEIT (id. at p. 1). The observation report reflects that the student demonstrated difficulties with attention, social skills, following directions, remaining seated, sensory processing, and distractibility (id. at pp. 1-2). The report indicated that the student required "constant directions from his SEIT to pay attention, turn around and stop the sounds he was making" during an activity (id. at p. 1). The report further noted that the student required the SEIT's assistance at all times as the student was unable to engage socially or maintain attention when the SEIT attempted to allow the student to make decisions independently (id.). The student also engaged in behaviors, including constant activity with hands, squinting his eyes, rolling his eyes, shaking himself, and flapping his hands (id. at p. 2; see Tr. p. 560). The observation report indicated that the student "exhibited the inability to work independently and needed constant adult intervention" (Dist. Ex. 9 at p. 2). Specifically, the observation report indicated that the student required "constant and consistent supervision" by a professional who could "function as a shadow to him" (id.).

The August 2013 CSE recommended a general education setting with ICT services during math, ELA, social studies, and science (Parent Ex. CC at p. 11). State regulation defines ICT services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In addition, State regulation requires that personnel assigned to each class providing ICT services "shall minimally include a special education teacher and a general education teacher," and each such class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]).

The district argues that because the student was high functioning cognitively, 1:1 SEIT support would have been overly restrictive for the student. The district special education teacher who attended the August 2013 CSE meeting testified that she believed a general education class with ICT services was appropriate for the student because it would "expose him to the grade level curriculum" and the special education teacher in such a class would be able to address the student's difficulties with socialization and attention and would make modifications within the class (Tr. pp. 193-94). The special education teacher acknowledged that ICT services would be a "big change" from having a SEIT, but believed the student would "get the support that he needed through the special education teacher" (Tr. p. 194).

However, the special education teacher did not explain her rationale for this belief and on appeal the district does not point to any information within the evaluative data available to the CSE to support its claim that the student would have received sufficient support in the recommended program. Instead, the district argues that the CSE was not required to adopt the recommendations contained in the evaluative information for a full time 1:1 SEIT.[17] While the district is correct that the CSE is not required to adopt the recommendations contained in private evaluations, the CSE

[17] To the extent that the district asserts that the role of the student's SEITs at the NPS was not academic and was only to make sure that the student "does his work and has appropriate social interactions," the student was not yet attending the NPS at the time of the August 2013 CSE meeting and therefore the information regarding how the student functioned in his general education classroom with the support of his SEITs at the NPS was not before the August 2013 CSE and consequently cannot be utilized to support the appropriateness of the recommendation (see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013]).

must consider the evaluative information before it (see T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013]). As noted by the IHO, although the student may not have needed 1:1 support to the extent requested by the parents, all of the evaluative information available to the CSE indicated that the student needed more support than was offered in the August 2013 IEP. The district's failure to explain the CSE's rationale for recommending an ICT placement with reference to the available evaluative information is especially troubling in this instance as none of the district CSE members had personally worked with or observed the student (see P.L. v. New York Dep't of Educ., 2014 WL 4907496, at *13-*15 [E.D.N.Y. Sept. 29, 2014]; cf. M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10-*11 [S.D.N.Y. Mar. 31, 2014]).[18]

Additionally, while the district maintains that ICT services in a general education setting were appropriate for the student because of his average cognitive and academic abilities, such a position fails to account for the student's attention, social, sensory, and language needs. Even though the August 2013 CSE was aware of and included some of the student's needs in the areas of attention, socialization, sensory regulation, and language in the IEP, the IEP did not include accommodations and strategies to address those needs (Parent Ex. CC at pp. 2-4). The only management needs included in the IEP were that the student required related services and a "highly structured classroom" to address his behavioral needs (see id.).[19] Moreover, the evaluative information reflected that the student responded well to redirection, a token system, sensory integration techniques, and sensory breaks, but the August 2013 CSE did not include any such accommodations or strategies in the IEP to support the student (see Dist. Exs. 5; 13 at p. 2; 15 at p. 2; Parent Ex. X at p. 38).

Accordingly, in consideration of the district's failure to present sufficient evidence to support its position and the general lack of supports provided to the student within the program set forth in the August 2013 IEP, the hearing record presents no reasons to disturb the IHO's ultimate conclusion that the student required additional support to receive an educational benefit and the CSE's failure to offer such support resulted in a denial of FAPE (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *7-8 [S.D.N.Y. Jan. 3, 2013], aff'd, 552 Fed. App'x 81 [2d Cir. 2014]).

[18] As the student had not yet attended a classroom environment without 1:1 SEIT support, and had previously only been in a preschool or a camp setting with the support of a 1:1 SEIT, this matter presents the difficult question as to how a CSE can ascertain the extent to which a student is capable of instruction without the support of a 1:1 SEIT when the student has never attended such a setting and it has never been attempted by the student's private providers. However, if, after conducting a review of the existing evaluative data, the August 2013 CSE determined that it needed additional information—such as a further observation of the student—to determine the extent to which the student required additional supports to function within a general education setting, the CSE could have identified such evaluations for the district to administer (see 8 NYCRR 200.4[b][5][i]-[iii]).

[19] Although the August 2013 IEP indicated the student did not require a BIP, the August 2013 CPSE IEP indicated that the student's behaviors impeded learning and he did require a BIP (compare Parent Ex. C at p. at p. 6, with Parent Ex. CC at p. 4). Additionally, while the August 2013 IEP included annual goals related to behavior, as discussed above, it did not include any strategies or interventions—other than a structured classroom (Parent Ex. CC at pp. 4, 7-8, 10). Under these circumstances, the district's failure to develop a BIP for the student may have also contributed to the district's failure to develop an appropriate program (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. Appx. 2, 6-7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]).

C. Unilateral Placement

Having determined that the district did not offer the student a FAPE for the 2013-14 school year, I next address the appropriateness of the parent's unilateral placement. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). 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 parents were awarded reimbursement for a package of services obtained for the student for the 2013-14 school year, including (1) tuition at the NPS, (2) 34 hours per week of 1:1 ABA SEIT services;[20] (3) 90 minutes per week of 1:1 speech-language therapy; and (4) three 45-minute sessions per week of 1:1 OT (IHO Decision at p. 24).[21] The IHO thoroughly reviewed the NPS and the student's related services in finding them to be appropriate (IHO Decision at pp. 14-22).

Initially, the district objects to the parents' placement of the student at the NPS and asserts that the NPS is not an appropriate placement because it did not provide special education services or academic instruction. Pertinently, the parents need not show that their unilateral placement provides every service necessary to maximize the student's potential; but rather, must demonstrate that the placement provides education instruction specially designed to meet the student's unique needs (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9). In this instance, the parents rejected the district's program, at least in part, due to the district's supposed failure to recommend a program in the student's LRE (Parent Ex. DD). Considering the student's ability to participate in a general education classroom, the parents' decision to place the student at the NPS in a general education classroom with the support of 1:1 SEIT services was not unreasonable, as such a placement allowed the student access to his nondisabled peers and the parents arranged for the student to be provided the supports recommended by the available evaluations and the professionals who worked with the student (see Dist. Ex. 9 at p. 2; 12 at p. 8; 15 at p. 4; Parent Ex. RRR).

In addition, the district challenges the restrictiveness of the unilateral placement, asserting that the provision of full time 1:1 SEIT services is not the student's LRE. Although the restrictiveness of a parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122), parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement

[20] The district asserts that a portion of the student's SEIT support (15 hours per week) was provided by the district pursuant to pendency and should therefore not be considered in determining the appropriateness of the unilateral placement. Although one district court has found that services provided by a district should not be considered in determining the appropriateness of the unilateral placement (K.S. v. New York City Dep't of Educ., 2012 WL 4017795, at *8-*9 [S.D.N.Y. Aug. 8, 2012]; but see F.O., 976 F. Supp. 2d at 522-23 [district's provision, pursuant to pendency, of 1:1 paraprofessional at private school negated need for private school to provide one and did not render private school inappropriate]), in this instance, considering that the student did not require full-time 1:1 support, the removal of a portion of the 1:1 services from consideration would not result in a finding that the parents' unilateral placement was inappropriate to meet the student's needs.

[21] Originally the parents also requested reimbursement for an additional 45 minutes per week of speech-language therapy, after-school ABA therapy, and a weekend social skills program; however, as discussed above, the parents do not cross-appeal from the IHO's decision denying those requests and they are therefore not considered as a part of the parents' unilateral placement on appeal.

(D.D-S. v. Southhold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. 2012], cert. denied 135 S. Ct. 443 [2014], citing Frank G., 459 F.3d at 364-65). The district has a valid concern regarding the restrictiveness of the provision of full time 1:1 SEIT services,[22] as 1:1 services can create dependence and the State Education Department has stated that promoting and maximizing student independence is an important goal ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ., Special Educ. Field Advisory, at pp. 1-2 [Jan. 2012], available at http://www.p12.nysed.gov/specialed/ publications/1-1aide-jan2012.pdf [stating that the assignment of a 1:1 aide can be "unnecessarily and inappropriately restrictive"]). However, in this instance, the student's SEIT provider explained that one of the SEIT's goals was to fade out the services and outlined a plan as to how the SEITs were fading out those services over time (Tr. pp. 339-41; see Parent Ex. SS at p. 3). As discussed above, and as noted by the IHO, although the student may not have required full-time 1:1 SEIT support in order to receive an educational benefit, such services assisted the student in participating in a general education environment and accordingly does not in this instance render the parents' chosen placement inappropriate.[23]

D. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable,

[22] LRE concerns as they relate to 1:1 services may become a prominent factor if the evidence shows that the 1:1 services are provided in a manner that unnecessarily imposes limitations on the student's interaction with nondisabled peers. However, such concerns will not factor as heavily in the analysis of a parent's unilateral placement as they will in the analysis of whether a district has offered a FAPE in the LRE.

[23] The district does not assert that the student could function in a general education environment without supports and there is no clear answer as to whether a general education classroom with the support of a 1:1 SEIT, or a general education classroom with the support of ICT services, is considered less restrictive (see M.W., 725 F.3d at 144 [describing a classroom with ICT services as being "somewhere in between a regular classroom and a segregated, special education classroom"]; see also R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] [holding that "[t]he requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement . . ., with the goal of integrating children with disabilities into the same classrooms as children without disabilities"], citing 34 CFR 300.114).

possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]).

Here, the IHO conducted a cogent analysis and reached a factual conclusion that the parent never intended to send the student to school other than the NPS; therefore, the IHO concluded that equitable considerations warranted a reduction in tuition reimbursement (IHO Dec. at pp. 22-23). However, the IHO overlooked a recent decision from the Second Circuit, holding that parents' "pursuit of a private placement [i]s not a basis for denying the[m] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). Additionally, the IHO's reliance on the fact that the parents did not request a general education setting with the support of a SEIT during the August 2013 CSE meeting is misplaced. The parents timely notified the district of their intention to reject the August 2013 IEP and place the student in a nonpublic school at district expense (Parent Ex. DD). One of the reasons indicated in the parents' notice was that the offered program was not in the student's LRE (id.). Additionally, the district was aware the student had a SEIT in preschool and, as discussed above, the evaluative information available to the CSE included recommendations for a general education classroom with the support of a SEIT (Tr. pp. 183, 194; Dist. Ex. 9 at p. 2; 12 at p. 8; 15 at p. 4). Under these circumstances, the portion of the IHO's reduction of tuition reimbursement that relates to the parents' intentions and conduct at the CSE meeting must be reversed.

Finally, to the extent the district now contends on appeal that the total cost of the unilateral placement was unreasonable, it made no attempt to develop this argument during the impartial hearing and there is consequently no basis appearing in the hearing record to support a specific reduction to the award of reimbursement for the costs of the student's unilateral placement. Although the district argues that the student's 1:1 SEITs provided only minimal intervention services, it adduced no evidence to rebut the parents' case and makes no particularized argument regarding the qualifications (and the attendant costs) necessary to provide appropriate services to the student. Accordingly, the district cannot establish, absent some argument based on the hearing record, that the IHO erred by not reducing reimbursement on the basis that the overall cost of the unilateral placement was unreasonable because the student's needs could have been met with a specific lesser level of services (see E.M., 758 F.3d at 461 [noting that one of the factors to be considered when granting reimbursement is whether the cost of the services unilaterally obtained was reasonable]; M.H., 685 F.3d at 254-55 n.12 [leaving open the possibility that less than total reimbursement may be warranted if the district identifies "particular services provided by [the unilateral placement] that the district considered unnecessary to the provision of a FAPE (and for which reimbursement was therefore not required)"], citing Carter, 510 U.S. at 16; C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011] [holding that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options)"]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996] [holding that "parents will not be able to seek reimbursement unless the cost of the private services is reasonable . . . [and t]he appropriate amount thus bears a relationship to the quantum of services that the state would have been required to furnish"]).

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports the IHO's determination that the district denied the student a FAPE for the 2013-14 school year and that the NPS was an appropriate unilateral placement for the student; however, the IHO's determination that equitable considerations warranted a reduction of the relief granted is reversed.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 6, 2014, is modified, by reversing the portion of the decision which determined that tuition reimbursement should be reduced as a result of the parents' conduct at the CSE meeting and their intention to unilaterally place the student; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the costs of the student's unilateral placement for the 2013-14 school year to the extent specified in this decision, to the extent it has not already done so.

Dated: **Albany, New York**
March 24, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER