The University of the State of New York

The State Education Department
State Review Officer
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No. 15-034

Application of the BOARD OF EDUCATION OF THE PITTSFORD CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Harris Beach, PLLC, attorneys for petitioner, David W. Oakes, Esq., of counsel

Patrick E. Tydings, Esq., attorney for respondents

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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the School of the Holy Childhood (Holy Childhood) for the 2012-13 and 2013-14 school years. The appeal must be sustained.

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

This appeal arises from a decision of an IHO that was issued after remand (see Application of a Student with a Disability, Appeal No. 14-053). Therefore, the parties' familiarity with the factual and procedural history of the case, the IHO's decision, and the issues presented for review on appeal is presumed and they will not be repeated in detail (see id.). Briefly, the student has received several diagnoses, including a global developmental delay and partial agenesis of the corpus collosum (Parent Ex. 21 at p. 3). With respect to the student's educational history, the hearing record shows that the student attended a 6:1+1 special class in a board of cooperative educational services (BOCES) program from kindergarten through the 2011-12 school year (Tr. p. 105; Parent Exs. 1 at p. 1; 21 at pp. 3, 9). At all times relevant to this appeal, the parties do not dispute that student was eligible for special education as a student with multiple disabilities (see

34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]). In a letter dated May 1, 2012, the parents informed the district that the student had been accepted at Holy Childhood and requested the district's "cooperation and approval for her to attend" the school (Parent Ex. 31 at p. 1).[1]

The CSE convened on May 31, July 5, and September 6, 2012 to develop and amend the student's IEP for the 2012-13 school year (see Dist. Exs. 8 at p. 1; 13 at p. 1; 16 at p. 1). After the July 5, 2012 CSE meeting, the parties agreed to modify the IEP to provide related services and transportation to the student during summer 2012 at Holy Childhood (Dist. Ex. 15). For the remainder of the 2012-13 school year, the September 2012 CSE recommended a 12:1+4 special class placement in a district high school, in conjunction with the services of a 1:1 aide, related services, and supports for school personnel (Dist. Ex. 8 at pp. 1, 13-16).[2] The parents disagreed with the recommendations included in the September 2012 IEP and, as a result, the student attended Holy Childhood for the remainder of the 2012-13 school year (Tr. pp. 153-54; Dist. Ex. 9 at p. 4).

The CSE convened on June 13, 2013 to develop an individualized education services program (IESP) for the student for summer 2013 (Tr. pp. 155-57; Dist. Exs. 17 at pp. 1, 11-13; 19 at pp. 1-2).[3] The parents agreed with the recommended summer program and the student attended Holy Childhood in July and August 2013 (Tr. pp. 159-65; Dist Ex. 19 at p. 1).

By due process complaint notice, dated July 19, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years (Dist. Ex. 1 at pp. 1-5). For relief, the parents requested reimbursement for the student's tuition costs at Holy Childhood for the 2012-13 school year and district placement of the student at Holy Childhood for the 2013-14 school year (Dist. Ex. 1 at pp. 2).

On August 12, 2013, the CSE met to develop an IEP for the remainder of the 2013-14 school year (Dist. Exs. 19 at pp. 2-4; 20 at p. 1). The August 2013 CSE recommended a 12:1+4 special class placement at a district high school, along with the services of a 1:1 aide, related services, and supports for school personnel (Dist. Ex. 20 at pp. 1, 15-17). The student continued to attend Holy Childhood during the 2013-14 school year (Tr. pp. 453).

A. Previous Proceedings

On October 16, 2013, the parties proceeded to an impartial hearing, which concluded on October 18, 2013, following three days of proceedings (see Tr. pp. 1-622). In a decision dated

[1] Holy Childhood has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 136, 496; see 8 NYCRR 200.1[d], 200.7).

[2] The May 31 and July 5, 2012 IEPs were superseded as a result of the September 2012 IEP, which became the operative IEP for purposes of the administrative proceedings (see generally Dist. Exs. 8; 13; 16; see also McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215). Consequently, this decision will refer to the September 2012 IEP as the IEP at issue for the 2012-13 school year.

[3] Although the June 2013 IESP included services for the remainder of the 2013-14 school year, the hearing record shows that members of the CSE understood the recommendation to be limited to the summer 2013 (Tr. pp. 159-63; Dist. Ex. 17 at pp. 1, 11; 19 at p. 1).

March 17, 2014 (IHO Decision I), the IHO determined that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years, that Holy Childhood was an appropriate unilateral placement for the student, and that no equitable considerations warranted a denial or reduction of tuition reimbursement (see IHO Decision I at pp. 9-16).

Upon appeal by the district, by decision dated May 22, 2014, I vacated the IHO's decision and ordered the matter remanded to the IHO to make determinations on the merits of the specific claims set forth in the parents' due process complaint notice (Application of the Bd. of Educ., Appeal No 14-053).

B. Impartial Hearing Officer Decision

Following remand, in a decision dated February 2, 2015 (IHO Decision II), the IHO again found that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years (see IHO Decision II at p. 12). Initially, the IHO noted that, had the student been appropriately grouped with other students in the proposed classrooms at the district high school, he would have found the 12:1+4 special class placement recommended for the student's 2012-13 and 2013-14 school years appropriate (id. at pp. 4-5). The IHO also deemed the provision for a 1:1 aide in the student's IEPs appropriate to assist the student in managing transitions (id. at p. 11). However, the IHO concluded that the recommendation that the student attend school "in a general education environment" to be inconsistent with the student's needs related to safety, wandering, and bolting, notwithstanding the inclusion of a 1:1 aid in the student's IEP (id. at p. 9). The IHO reasoned the large population at the "[d]istrict school" would exacerbate the student's "propensity to bolt," which was triggered by distraction and noise (id.). Moreover, the IHO found that the student was "not able to handle typical peer relationships and . . . would be at risk for emotional harm in a general education setting" (id. at p. 10). Thus, the IHO concluded that, given the student's unsafe behaviors, anxiety, and emotional, physical, and sensory needs, she required a "small school setting" (id. at pp. 10-11, 12).

The IHO also addressed the parent's claims relating to the composition of the proposed classrooms at the particular district high school location identified by the district for the student to attend for the 2012-13 and 2013-14 school years (IHO Decision II at pp. 3-9). While acknowledging that State regulations providing that the age range of students in certain special classes should not exceed 36 months did not apply to a 12:1+4 special class, the IHO nonetheless found that, since the "actual profile" of the students in the proposed 12:1+4 special class at the district high school did not demonstrate characteristics consistent with the regulatory definition of a 12:1+4 special class—namely, students whose programs consist primarily of habilitation and treatment—that the exception to the grouping requirement did not apply (id. at pp. 3-5).[4] Finding that the "age disparity among the students" in the proposed 12:1+4 classrooms for both the 2012-13 and 2013-14 school years exceeded 36 months, the IHO determined that this constituted a procedural violation but that such violation did not result in a denial of a FAPE (id. at pp. 4-5). However, turning to functional grouping requirements of State regulations, the IHO concluded that the proposed 12:1+4 special class at the district high school consisted of students with needs dissimilar to those of the student and that, therefore, the student would not "be able to meaningfully

[4] In so finding, the IHO determined that the proposed classroom consisted of students who were "actively engaged in academics and [who] had acquired social skills" (IHO Decision II at p. 5).

interact with any of her classmates" (id. at pp. 7-9). In so finding, the IHO noted "that the [s]tudent's levels of educational performance were far below that of the others in the recommended classes" (id. at p. 8). On this basis, the IHO found that the "recommended program was not reasonably calculated to confer an educational benefit" (id. at p. 9).

Turning to the appropriateness of the unilateral placement, the IHO determined that Holy Childhood offered the student a setting in which the student could "develop peer relationships with students at a similar age level[,] with similar social levels of functioning," and with similar cognitive and academic levels (IHO Decision II at pp. 13, 16). The IHO further noted that the student benefited from the structure of the academic environment, onsite counseling or crisis intervention, music therapy, and access to a therapeutic pool at Holy Childhood (id. at pp. 14-15, 16). To address the student's transition needs and wandering behaviors, the IHO found that Holy Childhood also employed "an 'always within eyesight'" policy (id. at p. 15).

With respect to equitable considerations, the IHO determined that any assertions by the district regarding the adequacy of the parents' notice of their intent to unilaterally place the student was not developed in the hearing record (IHO II Decision at p. 17). In any event, the IHO found that any deficiency in the notice was excused, as compliance would have resulted in "serious emotional harm" to the student (id.). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Holy Childhood for both the 2012-13 and 2013-14 school years (id. at p. 17).

IV. Appeal for State-Level Review

The district appeals seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years, that Holy Childhood was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief. The district argues that the IHO failed to consider any of the district's evidence. Next, the district makes 37 assertions of error with regard to individual factual findings of the IHO. In addition, the district sets forth a statement of facts, the crux of which centers broadly around the following propositions: the recommended 12:1+4 special class placement in the district high school constituted the student's least restrictive environment (LRE) for the 2012-13 and 2013-14 school years and the district high school would have appropriately implemented the student's IEPs and would not have violated State regulations relating to grouping. In addition, the district indicates that Holy Childhood was not the student's LRE and that the parents failed to meet their burden to show that Holy Childhood offered the student specially designed instruction. Furthermore, the district argues that the parents provided untimely and inadequate notice to the district of their intent to unilaterally placement the student at Holy Childhood.

In an answer, the parents respond to the district's petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school year, that Holy Childhood was an appropriate unilateral placement, and that equitable considerations weighed in favor of their requested relief.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with

disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. September 2012 and August 2013 IEPs

With regard to the September 2012 and August 2013 IEPs, there is no dispute between the parties regarding the sufficiency of the evaluative information reviewed by the CSE or the present levels of performance, management needs, annual goals, or related services included in the IEPs (Tr. pp. 72, 176-77, 239-40, 407-08; see Tr. p. 183; see generally Dist. Exs. 1; 8; 20).[5] The hearing record reflects that the area of disagreement was whether the student should attend a 12:1+4 special class at the district high school or attend Holy Childhood (Tr. pp. 72, 179-80, 182-83, 240, 407-08, 427; Dist. Ex. 1 at pp. 2, 4). Specifically, the parents were concerned about the student's safety and the size of the district high school (Tr. pp. 74-75, 114-15, 182-83, 200-01; see Tr. pp. 463-65, 468-71, 489, 583-85, 587; Dist. Exs. 1 at p. 4; 19 at p. 3). As described below, the hearing record reflects that the September 2012 and August 2013 IEPs appropriately addressed these concerns.

In addition to the CSE's recommendation for placement in the small, highly structured environment of a 12:1+4 special class, the September 2012 and August 2013 IEPs provided for a full time 1:1 aide to assist the student throughout the school day (Tr. pp. 280, 431; Dist. Exs. 8 at p. 14; 20 at p. 15).[6] Consistent with such recommendation, the IEPs documented the student's need for 1:1 assistance with academic activities to maintain her attention to tasks and to motivate her during challenging tasks (Dist. Exs. 8 at pp. 6- 8; 20 at pp. 5-8). The IEPs also documented the student's need, at times, for intense assistance to participate in activities, as well as her need for a high degree of supervision to address personal safety and social issues, including her need to develop problem solving skills related to safety, danger awareness, including stranger danger awareness, and social judgement (social behavior/teen issues) across all settings (Dist. Exs. 8 at pp. 6-8; 20 at pp. 6-8). Most notably, the IEPs documented the student's history of running out of the classroom or away from "special" services and further noted that she continued to be a flight risk (Dist. Exs. 8 at p. 8; 20 at p. 9).

Moreover, to further address the student's safety needs, the September 2012 IEP also reflected that the student had a behavior intervention plan (BIP) in place at the time of the CSE meeting (Dist. Ex. 8 at p. 8). A review of the May 11, 2012 BIP indicated that, among other things, it addressed "bolting from adult supervision" and the student's self-injurious behaviors (Parent Ex. 33 at pp. 1, 2, 4-7).[7] In addition, the September 2012 IEP included an annual goal which addressed the student's ability to understand the difference between safe and unsafe scenarios in a variety of settings including community safety and personal safety (Dist. Ex. 8 at p. 11).

Similarly, the August 2013 IEP indicated that a current functional behavioral assessment (FBA) and a BIP would be completed if the student returned to the district (Dist. Ex. 20 at p. 10).

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[5] In addition, the hearing record does not reflect that the student's needs changed between the September 2012 and August 2013 CSE meetings (see generally Dist. Exs. 7; 8; 18; 20).

[6] State regulations provide that a 12:1+4 special class placement is designed for students "with severe multiple disabilities, whose programs consist primarily of habilitation and treatment" (8 NYCRR 200.6[h][4][iii]).

[7] The hearing record reflects that the term "bolting" was used throughout the hearing to describe the student's running out of the classroom or away from an area or person (see Tr. pp. 75, 121, 189, 251, 317, 348-49).

This IEP also included two annual goals with corresponding short-term objectives related to the student's safety needs: one that addressed the student's ability to read and respond appropriately to safety information such as street signs, warning labels on products, self-care instructions on labels and tags, and storage and cleaning instructions on packages of household cleaning and laundry items; and one that addressed the student's ability to learn and then use, cause and effect problem solving strategies for safety situations and appropriate behavior (id. at pp. 11, 12, 13).

In addition, the parents have not specifically objected to the 12:1+4 special class placement recommended by the CSEs; rather, their concern appears directed more at the distinction between the public school and nonpublic school placements (including, as discussed below, their concerns about the student's exposure to nondisabled peers at the district high school). Notwithstanding the parents' preference, courts have not been open to arguments regarding the relative superiority of a nonpublic placement (see Walczak, 142 F.3d at 132; R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed Appx 572, 2014 WL 5463084 [2d Cir Oct. 19,2014]; J.L. v. City Sch. Dist., 2013 WL 625064, at *10-*11 [S.D.N.Y. Feb. 20, 2013]; M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]). As discussed further below with regard to LRE considerations, while the parents preferred Holy Childhood to the district public school, once the CSE determined the 12:1+4 special class placement in the district high school to be appropriate, it was not required to consider a nonpublic school placement for the student (B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, *15-*16 [E.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, *7-*8 [S.D.N.Y. Mar. 19, 2013]).

Thus, the foregoing supports a finding that the CSE's recommendations for a special class, a 1:1 aide during the entire school day, as well as a BIP and relevant annual goals, adequately addressed the student's need for 1:1 support and the parents' concerns related to the student's safety, behavioral, and emotional needs (Tr. pp. 74-76, 114-15, 182-83, 200-01, 410, 413-14, 463; Dist. Exs 1 at p. 4; 8 at pp. 4-8, 10-11, 13, 14; 13 at pp. 3-7, 9; 19 at p. 3; Parent Ex. 33).

B. Least Restrictive Environment and Other Considerations

The district appeals the IHO's conclusion that "a general education environment" was inconsistent with the student's needs (IHO Decision II at p. 9) and argues that the district high school constituted the student's LRE. Indeed, the crux of the parties' dispute regarding the 2012-13 and 2013-14 school years has revolved around the question of whether the student could be educated in a district high school, as opposed to the parents' preferred nonpublic school.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the

nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see M.W., 725 F.3d at 143-44; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see M.W., 725 F.3d at 144; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In fashioning a test to assess a student's placement in the LRE, the Court acknowledged that the IDEA's "'strong preference'" for educating students with disabilities alongside their nondisabled peers "'must be weighed against the importance of providing an appropriate

education'" to students with disabilities (Newington, 546 F.3d at 119, citing Walczak, 142 F.3d at 122, and Briggs v. Bd. of Educ. of Conn., 882 F.2d 688, 692 [2d Cir. 1989]; see Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 295 [7th Cir. 1988]). In recognizing the tension created between the IDEA's goal of "providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow," the Court explained that the inquiry must be fact specific, individualized, and on a case-by-case analysis regarding whether both goals have been "optimally accommodated under particular circumstances" (Newington, 546 F.3d at 119-20, citing Daniel R.R., 874 F.2d at 1044).

With respect to the first prong of the Newington analysis, there is no real dispute that the student should not be educated in a general education classroom, even with the use of supplemental aids and services (see Dist. Ex. 1 at p. 2). The issue in this case is whether, under the second prong, the district has recommended a program where the student is included in school programs with nondisabled students to the maximum extent appropriate. As described below, a review of the hearing record reveals that the 12:1+4 special class in the district high school would have provided the student with access to her general education peers to the maximum extent appropriate.

The hearing record shows that, prior to the 2012-13 school year, the student attended a BOCES educational program that did not offer access to nondisabled peers (see Tr. p. 109). However, it appears that the parents agreed the student should have some access to nondisabled peers, as the hearing record shows that the student had some mainstreaming opportunities as part of the program at Holy Childhood (Tr. p. 523).[8] The student's September 2012 and August 2013 IEPs offer little detail regarding the degree to which the student would participate in nonacademic or extracurricular activities with nondisabled peers (Dist. Exs. 8 at p. 16; 20 at p. 18). In the section designated thereof, the September IEP indicates that the student would not participate in general education or general physical education (Dist. Ex. 8 at p. 16). The minutes of the September 2012 CSE meeting reflected that discussion took place at the CSE meeting regarding the student's opportunities for access to regular education peers in the district program, including comments by the district CSE coordinator that, at the district program, the student "would observe typical developing peers in the building" and that the district program would provide the student with "more opportunities to develop with peers in a typical school setting during the day" (Dist. Ex. 9 at pp. 2, 3; see also Tr. pp. 230-31, 392-93). The August 2013 IEP offers a similar description of the student's nonparticipation in general education and physical education but further notes that, due to her related services, she would "also have reduced opportunities to participate in electives" (Dist. Ex. 20 at p. 18). Indeed, given the recommended educational program, the student would have very little, if any, room in her schedule to participate in nonacademic or extracurricular activities with nondisabled students (Dist. Exs. 8 at p. 13; 20 at p. 15). Furthermore, any participation or interaction by the student with nondisabled peers would be with the support of the 1:1 aide (see id.).

[8] Testimony by the principal of Holy Childhood indicated that nondisabled high school students visited Holy Childhood and participated in activities with the disabled students, for example, music, athletics, plays, and lunch (Tr. p. 523). It is unclear whether comments attributed to the principal in the minutes of the September 2012 CSE meeting about "alliances in the community" referred to these aspects of the program at Holy Childhood (Dist. Ex. 9 at p. 2).

Elaborating upon the access to nondisabled peers described in the IEPs, the district learning specialist and the district inclusion coordinator, both of whom attended the September 2012 and August 2013 CSE meetings, testified that students in the 12:1+4 special class program at the district high school ate lunch or participated in recreation time in the same area as the nondisabled students (Tr. pp. 26, 87; see Dist. Exs. 8 at p. 2; 20 at p. 2).[9] The learning specialist indicated that the school encouraged students to eat in the same area for the social opportunities and to model others students' behaviors (Tr. pp. 26-27).

Testimony by the district inclusion coordinator indicated that the CSE made the recommendation to move the student from the 6:1+1 special class in the BOCES program to the 12:1+4 special class at the district high school, as opposed to Holy Childhood, because the district high school would offer the student the "least restrictive environment where she would be able to grow socially and have vocational opportunities and integration opportunities with nondisabled peers within her home school community" (Tr. p. 137; see Tr. p. 111). She further testified that disabled students who attended the district high school, including those in the 12:1+4 special class participated in extracurricular activities and after-school clubs, such as a games group and functions, with adult support (Tr. pp. 130-31, 193; see Tr. pp. 231-32).[10]

The district inclusion coordinator and the CSE coordinator also described a "reciprocal program" or "reverse integration" program at the district high school, wherein regular education peers worked on projects in small groups or socialized with the disabled students (Tr. pp. 184-85, 232-33). Testimony by the behavioral consultant for the district, who attended the September 2012 CSE, indicated that the district 12:1+4 program also incorporated a Together Including Every Student (TIES) program, in which nondisabled students volunteered to participate in a variety of activities with students from a 12:1+4 special class and worked with the coordinator of the TIES program to determine how to successfully include the student as much as possible in the school community setting (Tr. pp. 324-25; see Dist. Exs. 8 at p. 2; 20 at p. 2). She noted that it was "very customized depending on each student's need" (Tr. p. 324).

Based on the above, the hearing record shows that the September 2012 and August 2013 CSEs reached an appropriate balance to address the student's special education needs while providing her with some access to nondisabled peers, with appropriate support, which was a similar level of access available at the parents' preferred nonpublic school. Thus, the hearing record demonstrates that the student's placement in the district high school would have provided the student with access to her general education peers to the maximum extent appropriate (Newington, 546 F.3d at 120).

Finally, to the extent the parents' concerns were directed to the "bricks and mortar" of the specific district high school location identified for the student to attend, and not the IEP itself, such a challenge is generally relevant to whether the district properly implemented a student's IEP,

[9] Testimony by the district learning specialist indicates that learning specialist means special education teacher (Tr. pp. 17-19).

[10] The district inclusion coordinator indicated that the district special education office typically authorized extra time for an adult paraprofessional to stay with a disabled student after school and that an aide or support for extracurricular activities was automatically provided as part of the district's obligation Section 504 of the Rehabilitation Act (Tr. pp. 131-32).

which is speculative when the student never attended the recommended placement (e.g., R.E., 694 F.3d at 195; see R.B. v New York Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576-77, 2014 WL 5463084 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).[11] Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). In any event, as to the IHO's determination that the district high school was too big for the student to handle, testimony by the district inclusion coordinator indicated that the district school had enough staff and adults to monitor students that were out in the hallways and in the classroom, and that the setting could be controlled (Tr. pp. 180-81). Her testimony further indicated that other students with safety needs similar to those of the student also attended the district high school, and that the district staff were "very able to directly handle" such needs (Tr. pp. 183-84).

Similarly, the IHO's determinations regarding the age range and functional grouping restrictions of the district's class that the student did not attend must be reversed. The hearing record indicates that, had the student attended the particular classrooms in the district high school, there would indeed have been a greater age range than the 36 months and a functional grouping of more than three years, which is disallowed in State regulation for most special classes (see Tr. pp. 22-23, 36-38, 76-79, 233-236; see also 8 NYCRR 200.6[h][5], [7]). However, in this case, the student's IEP recommended a 12:1+4 special class and, as such, was specifically exempt from the age range and functional grouping restrictions (Tr. pp. 369-70; see 8 NYCRR 200.6[h][4][iii], [5], [7]).[12] Moreover, some information about a particular public school is inherently speculative (see R.E., 694 F.3d at 187, 192 [noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP]). Generally, the identification of the particular students in a proposed classroom is the same type of information as the identification of a specific teacher of the classroom, to the extent that, like a teacher, a district cannot guarantee that a particular student will not relocate or otherwise become unavailable (see R.E., 694 F.3d at 187; M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10

[11] The Second Circuit has established that "'educational placement' refers to the educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *22 [S.D.N.Y. Mar. 31, 2015]; K.M. v New York City Dep't of Educ., 2015 WL 1442415, at *2 [S.D.N.Y. Mar. 30, 2015]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167; see also Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]).

[12] Even assuming that the student did attend the proposed classroom and the State regulation relating to grouping applied to the recommended special class, the remedy for a violation of functional grouping requirements would be for the CSE to provide to the district, the student's teachers, and the parents a description of the range of the achievement in reading and mathematics, and the general levels of social and physical development of all the students in the class, as well as their management needs, by November 1 of that school year (8 NYCRR 200.6[h][7]).

[E.D.N.Y. 2013] [claims regarding the composition of a proposed class are speculative as the district cannot guarantee the composition of the class that the student would have attended]).

Based upon the foregoing, the evidence in the hearing record demonstrates that a 12:1+4 special class placement in a district public high school was reasonably calculated to enable the student to receive educational benefits in the LRE for the 2012-13 and 2013-14 school years.

D. Unilateral Placement

Even assuming for the sake of argument that the district had failed to offer the student a FAPE for either school year in question, the hearing record does not support a finding that Holy Childhood was an appropriate unilateral placement for the student. 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 offer 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 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; Frank G., 459 F.3d 356, 364; 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).

Holy Childhood is described in the hearing record as a small, State approved school for intellectually disabled students, ages 5 to 21 (Tr. pp. 496, 497). The school provides both classroom and community based experiences and focuses on, among other things, students' transition into adulthood (Tr. pp. 500, 505).

Although the parents and staff at Holy Childhood were clearly concerned with the student's safety had she attended the district high school, despite the CSE's recommendation for a 1:1 aide, they did not believe that the student required full time 1:1 supervision at Holy Childhood (Tr. pp. 503-04, 511). Testimony by the principal of Holy Childhood indicated that she did not believe the student should have a 1:1 aide at Holy Childhood because the student needed to learn independence (Tr. pp. 503-04, 511; see Tr. pp. 517-18). She testified that the student had relied on adults for her entire school career and that they were working with her to learn independence skills and, for example, to ask a friend, instead of an adult, if she needed help (Tr. p. 511). Her testimony indicated that, in order to maintain supervision for the student, staff always kept the student within eyesight, for safety purposes (Tr. pp. 505, 517-18; see also Tr. pp. 176, 545; Dist. Ex. 20 at p. 9). However, the hearing record reflects that the student exhibited significant behaviors such that merely keeping the student within "line of sight" was not adequate to ensure her safety and the safety of others.

The hearing record shows a private behavior specialist developed a "behavior support plan" for the student (revised May 11, 2012) that reflected that the student exhibited frequent, potentially or actually dangerous behaviors (Parent Ex. 33 at pp. 1-7; see Tr. p. 133).[13] Identified target behaviors included: noncompliance and refusal to follow routines and adult directions, which occurred daily to several times per day; bolting from adult supervision, which occurred weekly on average; physical aggression, including kicking, hitting, biting, pinching, etc., which was infrequent at that time; and self-injurious behaviors, including cutting or attempts to cut skin with paper or "sharps," swallowing or attempts to swallow objects large enough to induce choking, and skin and lip picking and biting (Parent Ex. 33 at p. 1).[14] The behavior plan also indicated that the

[13] A January 7, 2013 letter from the student's private behavior specialist to the student's teacher at Holy Childhood indicated that the behavior plan did not need revisions at that time (Parent Ex. 39 at p. 2; see generally Parent Ex. 33).

[14] The behavior plan reflected that the student's self-injurious behaviors had decreased to some extent and that the student had not attempted to swallow a large object in the past year (Parent Ex. 33 at p. 6). The behavior plan further reflected that the student's cutting and choking behaviors were noted to occur when no one else was present (id. at p. 1).

student could become agitated, tantrum, and flop in a dangerous area, such as the parking lot, and ultimately require two adults to remove her to a safe location (id. at p. 3).

This description of the student's behaviors supports the conclusion that close proximity to the student would be necessary to prevent and respond to the student's behaviors to ensure both her safety and that of her peers and others. Notably, the behavior plan indicated that the student should be closely supervised at all times due to her self-abusive and bolting behaviors and further indicated that, when in community settings, the student should be kept within arm's length of the supervising adult and, when possible, two adults should accompany her (Parent Ex. 33 at pp. 2, 4, 7). The behavior plan also indicated that, due to her history of behavior difficulties on the school bus, she should have a 1:1 monitor to ensure her safety there (id. at p. 5). Furthermore, although the behavior plan indicated that the student's attempts to cut with paper continued on a daily basis but "sharps" were locked away (id. at p. 1), it seems unlikely that line of sight supervision would adequately protect the student from hurting herself with items that she could access when she wandered. In addition, the behavior plan indicated that the student had been "creative" in identifying objects that could also be used to puncture or cut her skin (id. at p. 7).

Moreover, testimony by staff at Holy Childhood also supported that line of sight supervision was not sufficient to ensure the student's safety and the safety of others. Testimony by the principal of Holy Childhood indicated that the student had exhibited behaviors, including insubordination, aggression, and escape (Tr. p. 506). Her testimony reflected that the student had a history of leaving the classroom or a given area (bolting), either to escape from a hard social situation or to pursue something she preferred (Tr. pp. 502-03).[15] The principal and the student's teacher at Holy Childhood indicated that the student fixated upon and sought out electronic devices, such as an iPad, computer, or cell phone, as well as the music room, including the music teacher, and boys (Tr. pp. 502-03, 538-39). The principal added that the student was "at the stage where she loves boys, so she will go anywhere where those boys are and is inappropriate when she does so" (Tr. p. 509). The social worker at Holy Childhood testified that the student "ha[d] a difficult time making safe choices" and that this was "probably the most significant issue that [they] deal with" (Tr. p. 559). For example, the social worker indicated that there were times when the student went into work areas that were "not safe for her or appropriate for her to be in" (id.). In addition, the teacher and the principal also indicated that the student could be physically aggressive, had hit adults, and that they sometimes had to clear the hallway if the student was being aggressive with staff (Tr. pp. 506-07, 541).

In conclusion, considering the extent of the student's aggression and self-injurious behaviors, wandering or bolting, inappropriate behavior with boys, and difficulty making safe choices, as described in detail above, maintaining line of sight with the student did not constitute a sufficient degree of supervision or support to ensure the student's safety and the safety of others. Therefore, the hearing record does not support a finding that Holy Childhood was an appropriate unilateral placement.

[15] Consistent with this, the August 2013 IEP reflected that the student was reported to wander in order to avoid doing a task and that she had gravitated to unoccupied rooms two to three times per week (Dist. Ex. 20 at pp. 7, 9).

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2012-13 and 2013-14 school years and that Holy Childhood was not an appropriate unilateral placement for the student, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations supported an award of tuition reimbursement (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 30, 66 [2d Cir. 2000]). I have considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 2, 2015, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years and that Holy Childhood was an appropriate unilateral placement; and

IT IS FURTHER ORDERED that the IHO's decision, dated February 2, 2015, is modified by reversing that portion which ordered the district to reimburse the parents for the costs of the student's tuition at Holy Childhood for the 2012-13 and 2013-14 school years.

Dated: **Albany, New York**
April 9, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER