The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 15-038

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

Appearances:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioner, William M. Meyer, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at Bay Ridge Preparatory School (Bay Ridge) for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

A student suspected of having a disability may be referred to a Committee on Special Education (CSE) for an individual evaluation and a determination of eligibility for special education programs and services (20 U.S.C. §1414[a][1][B]; 34 CFR 300.301[b]; 8 NYCRR 200.4[a]). 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's eligibility for special education and related services is at issue in this appeal. The parent sent a letter to the district dated May 23, 2012, indicating that she sought a public

placement for the student for the 2012-13 school year and requesting that the student be evaluated "to determine her placement" (Parent Ex. C).[1] The district conducted a psychoeducational evaluation of the student on July 17, 2012 (Dist. Ex. 2 at p. 1). The evaluation report indicated that the parent referred the student because Bay Ridge wanted the student to attend a special education program for the 2012-13 school year due to concerns over her "slow pace of execution" (id. at pp. 1, 3). At the time of the 2012 evaluation, the student was 14 years old and had recently completed the eighth grade at Bay Ridge, where she had attended since the second grade (id. at p. 1; Tr. pp. 76-77). The evaluation report indicated that the administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) yielded a full scale IQ of 112 (high average range), a verbal IQ of 121 (superior range), a nonverbal IQ of 103 (average range), and standard scores on various subtests including a fluid reading score of 121 (superior range), a knowledge score of 100 (high average range)[2] and a working memory score of 111 (high average range) (Dist. Ex. 2 at p. 1).

Regarding academic performance, the examiner found the student's skills to be average overall (Dist. Ex. 2 at p. 2). The examiner reported that the student fell in the average or above average ranges in math calculations, quantitative reasoning, reading comprehension, and writing skills (id. at pp. 2-3). According to the examiner, the student's sight reading ability was somewhat delayed and all of her fluency skills were below average (id.). Further, the examiner found that the student worked at a slow pace in reading and math (id. at p. 2). The examiner noted that the student worked and performed well on all tasks, but she worked at a slow rate which lowered her performance scores on timed tasks (id. at p. 1). The examiner further reported that it was not clear if the student's slow work pace interfered with her academic progress, as the student's report cards were not available at the time of the evaluation (id. at p. 3).

A CSE convened on August 3, 2012, and determined that the student was not eligible for special education services as a student with a disability (Dist. Ex. 1). The district sent the parent a notice of the August 2012 CSE's decision, which indicated that the district had "conducted a social history, psychoeducational evaluation, classroom observation, and other appropriate assessments or evaluations as necessary to determine [the student's] educational needs" (id. at p. 1). However, the district did not conduct a classroom observation (Tr. pp. 68-69). In addition,

[1] The parent's May 23, 2012 letter indicated that prior correspondence between the parent and the district was attached to the letter; however, no such attachments were included in the hearing record (Parent Ex. C). Nevertheless, the district concedes in its answer that the parent initially requested that the CSE convene to review the student's eligibility for special education programs and services in August 2011 (Answer ¶¶ 4-5). The parent's due process complaint notice alleged that the district thereafter conducted a social history interview with the parent in January 2012 (Parent Ex. A at p. 2). In addition, the student's uncle testified that he took the parent to an interview at the district in January 2012 (Tr. pp. 82-83). Although a report from the January 2012 interview is not included in the hearing record, the district admits that it conducted a social history interview with the parent in January 2012 (Answer ¶ 18).

[2] Although the evaluation report identified the student's standard score of 100 in the area of knowledge as "high average," it is generally accepted that a standard score of 100 falls in the average range.

although the attendance sheet from the August 2012 CSE meeting indicated that the parent attended the meeting via telephone (Dist. Ex. 1 at p. 2); the hearing record reflects that the parent did not attend or participate in the meeting (Tr. p. 54). Rather, the district school psychologist who conducted the July 2012 psychoeducational evaluation and served as the district representative, called the student's house during the CSE meeting and spoke with the student's sister (Tr. pp. 52-57).

The parent sent the district a letter on August 22, 2012, indicating her intention to place the student at Bay Ridge for the 2012-13 school year and to seek funding from the district for this placement (Parent Ex. B). The student attended the "Bridge" program at Bay Ridge for the 2012-13 school year (Tr. pp. 93-94; see Parent Exs. D; F; G).[3]

A. Due Process Complaint Notice

By due process complaint notice dated October 21, 2013, the parent requested an impartial hearing (Parent Ex. A). The parent challenged the August 2012 CSE's determination that the student was not eligible for special education programs and services as a student with a disability and contended that the district denied the student a free appropriate public education (FAPE) for the 2012-13 school year (id.). The parent alleged that the district failed to follow proper procedures in conducting an initial evaluation of the student, did not conduct an appropriate or sufficient evaluation, and denied the parent an opportunity to participate in the CSE meeting to determine the student's eligibility (id. at pp. 2-3). Regarding her claims that the initial evaluation was insufficient, the parent contends that the district delayed in evaluating the student after the parent initially referred the student for an evaluation, that the district did not conduct a classroom observation, and that the July 2012 psychoeducational evaluation was inaccurate (id. at p. 2). With respect to her claim that her ability to participate was significantly impeded, the parent alleged that the district failed to notify her of the August 2012 CSE meeting or ensure her participation therein, did not provide her with copies of the results of evaluations in her native language, and did not notify her of the CSE's determination that the student was not eligible for special education (id. at pp. 2-3). The parent also asserted that the district failed to comply with its child find obligation by not identifying the student as a student with a disability and developing an individualized education program (IEP) for him prior to the beginning of the 2012-13 school year (id. at p. 3). As relief, the parent sought direct funding for the costs of her unilateral placement of the student at Bay Ridge for the 2012-13 school year (id.).

[3] As discussed below, the hearing record reflects that the Bridge program is designed for students who require additional assistance with academic skills and provides various interventions and accommodations (Tr. p. 165; Parent Ex. F).

B. Impartial Hearing Officer Decision

After a prehearing conference on January 24, 2014, an impartial hearing convened on November 7, 2014, and concluded on February 6, 2015, after four non-consecutive hearing dates (Tr. pp. 1-355). In a decision dated March 2, 2015, the IHO agreed with the August 2012 CSE's determination that the student was not eligible for special education and related services and denied the parent's request for direct funding at Bay Ridge (IHO Decision). The IHO determined that the CSE had sufficient evaluative information to determine that the student was not eligible for special education (id. at p. 11). The IHO also determined that once the CSE determined the student was not eligible, the parent bore the burden of establishing that the student had a disability that adversely affected her academic performance and concluded that there was insufficient evidence in the hearing record to establish that "[the student's] academic performance was adversely affected by her learning style" (id. at pp. 9-10). The IHO found that the lack of a classroom observation, although a procedural violation, did not result in a denial of a FAPE because the district's evaluator "did the next best thing and requested the student's report card" (id. at p. 10). The IHO further found that the district's failure to provide the parent with a copy of the results of the July 2012 psychoeducational evaluation in her native language did not contribute to a denial of a FAPE because the parent was aware of the test results and it was not feasible for the district to find an interpreter in the parent's native language given the timing of the evaluation and the CSE meeting (id. at pp. 10-11). In addition, the IHO determined that the parent was not denied an opportunity to participate in the August 2012 CSE meeting because the parent was notified of the meeting and was given the opportunity to call into the meeting, but she did not call the CSE nor did she attempt to reschedule the meeting (id. at p. 11). Finally, regarding the parent's child find allegations, the IHO determined that these requirements were inapplicable because the district determined the student was not eligible for special education (id.).[4] The IHO denied the parent's request for the cost of tuition at Bay Ridge for the 2012-13 school year (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the student was not eligible for special education programs and services as a student with a disability as of the August 2012 CSE meeting. Initially, the parent asserts that the IHO applied an incorrect standard regarding the burden of proof and asserts that the district bore the burden of establishing that the student was not eligible for special education programs and services. The parent asserts that the August 2012 CSE should have found the student eligible for special education as a student with a learning disability. According to the parent, a disparity between the student's scores on cognitive and academic functioning tests was indicative of a learning disability. The parent also alleges that to the extent the IHO determined that there was insufficient information to determine the student's eligibility,

[4] With regard to a claim that the CSE lacked a regular education teacher, the IHO found that this issue was not raised in the parent's due process complaint notice (IHO Decision at p. 11).

the IHO should have ordered an independent educational evaluation, rather than dismissing the parent's claim.

The parent also raises a number of allegations regarding the evaluation process and her exclusion from participation in the August 2012 CSE's decision that the student was not eligible for special education. Regarding the district's initial evaluation of the student, the parent alleges that the district did not evaluate the student within the requisite timeframe, that the evaluation was insufficient because it did not include a classroom observation, and that the July 2012 psychoeducational evaluation failed to address the main area of concern with respect to the student's functioning, i.e., her pace of execution or processing speed. The parent argues that she was denied an opportunity to participate in the decision-making process because she was not provided with notice of the August 2012 CSE meeting, the district did not take steps to ensure her participation, and the district predetermined that the student was not eligible for special education. The parent alleges that she did not receive the procedural safeguards notice, prior written notice, or copies of the results of the district's evaluations of the student in her native language. The parent contends that the IHO erred in finding that it was not feasible to translate the results of the evaluation into the parent's native language and in finding that the participation of the student's uncle in the process ameliorated the district's failure to provide the parent with notices in the parent's native language. In addition, the parent asserts that the composition of the August 2012 CSE was raised in her due process complaint notice or, in the alternative, the district opened the door to this issue, and that the absence of a regular education teacher from the August 2012 CSE meeting was a procedural error.

The parent further contends that her placement of the student in the Bridge program at Bay Ridge for the 2012-13 school year was appropriate, that the student made progress during the 2012-13 school year, that equitable considerations weigh in the parent's favor, and that the parent demonstrated an inability to front the cost of the tuition at Bay Ridge, justifying an award of direct payment to Bay Ridge for the cost of the student's tuition for the 2012-13 school year.

The district answers, denying the allegations contained in the petition and asserting that the IHO was correct in affirming the CSE's determination that the student was not eligible for special education and related services, in finding that the parent had an opportunity to participate in the August 2012 CSE meeting, and in finding that the district did not commit any procedural violations that rose to the level of a denial of a FAPE. The district also asserts that although "the IHO used less than optimal language," the IHO properly placed the burden of proof on the district.

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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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]). 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]).

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. Preliminary Matters

1. Additional Evidence

The parent submits her post hearing brief as additional evidence. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 15-026; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO would be unable to render a decision]). However, according to State regulations, the record of an impartial hearing includes "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" (8 NYCRR 200.5[j][5][vi][b]). Additionally, rather than submitting a written post hearing brief, the district submitted its closing argument on the record (Tr. pp. 331-52). Accordingly, as the parent's post hearing brief should have been included in the hearing record, the district's closing argument is already a part of the hearing record, and the district does not object to the inclusion of the parent's post hearing brief, the parent's post hearing brief is accepted as part of the record on appeal.

2. Scope of Impartial Hearing

The parent appeals from the IHO's determination that her due process complaint notice did not include a claim that the August 2012 CSE lacked a regular education teacher. The parent alleges that CSE composition was raised as a claim in the due process complaint notice and that,

in the alternative, the district opened the door to the issue by questioning its own witness regarding the issue and by failing to object during cross-examination. Generally, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *2 [2d Cir. May 8, 2015]; B.M. v New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]).

Although the parent alleges that CSE composition was raised as an issue in her due process complaint notice, the due process complaint notice did not include any allegations regarding the lack of a regular education teacher and cannot be read to include any such claim (Parent Ex. A). Further, although the district submitted a copy of an attendance sheet from the August 2012 CSE meeting into evidence (Dist. Ex. 1 at p. 2), the district did not elicit any testimony regarding the participants in the CSE meeting and the district school psychologist only testified regarding the CSE participants during cross-examination (see Tr. pp. 52, 58-59). Accordingly, in this instance, the hearing record does not support a finding that the district agreed to an expansion of the issues. Additionally, although a prehearing conference took place almost a full year prior to the start of the hearing, the parent did not make any attempt to amend the due process complaint notice to include CSE composition as an additional issue. Therefore, CSE composition is outside the scope of the impartial hearing (see B.M., 569 Fed. App'x at 59; N.K., 961 F. Supp. 2d at 584-86).[5]

B. Evaluative Data and Parental Participation

The parent contests the IHO's determination that the student did not have a disability that affected her academic performance. The parent asserts that, based on the results of the district's July 2012 psychoeducational evaluation, the student should have been found eligible for special education programs and services as a student with a learning disability. In addition, the parent asserts that the August 2012 CSE lacked sufficient information regarding the student in order to

[5] In the due process complaint notice, the parent alleged that no staff from Bay Ridge was in attendance at the August 2012 CSE meeting (Parent Ex. A at p. 3); however, the parent did not allege that the August 2012 CSE was improperly composed and nonpublic school staff are not generally required members of a CSE (G.A. v. Haw. Dep't of Educ., 2011 WL 3861431, at *11 [D. Haw. Aug. 31, 2011]; see 20 U.S.C. §1414[d][1][B]; 34 CFR 300.321; 8 NYCRR 200.3[a][1]). Nevertheless, although the issue of CSE composition is outside the scope of the impartial hearing, the parent did raise the lack of evaluative information regarding the student's classroom performance as an issue in the due process complaint notice (Parent Ex. A at p. 2). Accordingly, the parent's argument that the presence of Bay Ridge staff at the August 2012 CSE meeting could have diminished the need for a classroom observation is considered below as part of the parent's argument that the CSE lacked sufficient evaluative information to make a determination as to the student's eligibility.

determine the student's classroom performance because the district failed to conduct a classroom observation.

Initially, the parent is correct that the IHO misallocated the burden of proof regarding the district's eligibility determination. Under State law, the burden of proof is placed on the 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]).[6] In this instance, the IHO determined that the parent "failed to meet [her] burden" of establishing that the student had a disability that adversely affected her educational performance (IHO Decision at p. 9). Additionally, the IHO referenced the lack of "[r]eliable objective evidence to establish that [the student's] academic performance was adversely affected by her learning style" (id. at pp. 9-10). In making these determinations, the IHO not only improperly shifted the burden of proof to the parent, but also applied an incorrect standard in determining whether the student was eligible for special education and related services as a student with a learning disability.

While many of the eligibility classifications require a determination that a student's condition "adversely affects [the student's] educational performance" (34 CFR 300.8[c][1][i], [3], [4][i], [5]-[6], [8], [9][ii], [11]-[13]; 8 NYCRR 200.1[zz][1]-[2], [4]-[5], [7], [9]-[13]), the learning disability classification does not contain a requirement expressed in such terms (34 CFR 300.8[10]; 8 NYCRR 200.1[zz][6]). Instead, consideration of whether a student has a specific learning disability must take into account whether the student achieves adequately for the student's age or meets State-approved grade-level standards when provided with learning experiences and instruction appropriate for the student's age (34 CFR 300.309[a][1]; 8 NYCRR 200.4[j][3]), and either the student does not make sufficient progress or meet age or State-approved grade-level standards when provided with a response to intervention process, or assessments identify a pattern of strengths and weaknesses determined by the CSE to be indicative of a learning disability (34

[6] Although, the IHO erred in placing the burden of proof on the parent, there are circumstances where a CSE's decisions may be afforded some deference (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; E.S. v. Ketonah-Lewisboro School Dist., 742 F.Supp.2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] . . . deference to the district and its trained educators"]; Z.D. v. Niskayuna Cent. School Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]); however, in order to receive any such deference the district must show that the CSE followed appropriate procedures, including a review of sufficient and appropriate evaluative information (see K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at *11 [S.D.N.Y. Apr. 9, 2015] [the CSE may rely on its own expertise after review of private school report]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd, 142 Fed. App'x 9 [2d Cir. 2005]; see also Rowley, 458 U.S. at 183 ["although the [IDEA] leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility"]).

CFR 300.309[a][2]; 8 NYCRR 200.4[j][3][i]).[7] Additionally, a CSE may consider whether the student exhibits "a severe discrepancy between achievement and intellectual ability" in certain areas, including reading fluency skills (8 NYCRR 200.4[j][4]).

In this instance, the July 2012 psychoeducational evaluation report indicated that the student's reading fluency was below average, while her passage comprehension was above average and her overall IQ was in the high average range (Dist. Ex. 2 at pp. 1-3). The examiner found that the student's academic skills were divided between above grade level reading comprehension and calculation skills, and below grade level decoding and fluency skills, which the examiner cited as being responsible for the student's "slow pace of execution" (Dist. Ex. 2 at p. 3).

The director of the Bay Ridge Bridge program testified that the discrepancy between the student's high cognitive scores and below average scores in reading fluency and math fluency was indicative of a learning disability (Tr. pp. 189-91). In contrast, the district school psychologist testified that the student's high cognitive abilities compensated for her below average fluency skills (Tr. pp. 25-26, 60-61). However, the district school psychologist testified that she did not have any information available regarding how the student functioned within the classroom environment, and noted in her report of the July 2012 psychoeducational evaluation that it was unclear whether the student's slow pace "interfere[d] with her academic progress" (Tr. p. 43; Dist. Ex. 2 at p. 3). To the contrary, the director of the Bay Ridge Bridge program had taught the student's eighth grade math class and was able to assess how the student functioned within the class, observing that the student struggled both with her slow pace of work and with reading comprehension (Tr. pp. 174-75, 178, 196-97).[8] Based on the above, the district should have been aware of the possibility that the student's weaknesses in reading fluency and math fluency may have been affecting her classroom performance (Dist. Ex. 2 at pp. 2-3). In particular, the July 2012 psychoeducational evaluation report indicated that "[i]t is not clear if the student's slow pace of performance interfere[d] with her academic progress as the report card was not available at the time of the evaluation" (id. at p. 3). Under these circumstances, prior to making a determination as to the student's eligibility, the district should have sought additional information regarding how the student functioned within the classroom.

[7] When determining whether a student should be classified as a student with a learning disability, a CSE must also create a written report documenting the student's achievement according to the above, along with other information, including: the basis for the CSE's determination, any relevant student behaviors, any relevant medical findings, the effects of other factors on the student's achievement, and whether the student has participated in a response to intervention program (34 CFR 300.311[a]; 8 NYCRR 200.4[j][5][i]). State Education Department guidance provides a form for CSEs to use in ensuring that a proper written record is maintained (see "Response to Intervention: Guidance for New York State School Districts," Office of P-12 Educ., Appendix B [Oct. 2010], available at http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf).

[8] The director of the Bay Ridge Bridge program explained that Bay Ridge teachers started noticing that the student had some difficulties when the student was in the sixth grade and that they became more pronounced by the seventh and eighth grades (Tr. p. 179).

When a student suspected of having a disability is referred to a CSE, the CSE must ensure that an evaluation of the referred student is performed, which must include at least a physical examination, an individual psychological evaluation (unless a school psychologist assesses the student and determines that such an evaluation is unnecessary), a social history, an observation of the student in the current educational placement, and other appropriate assessments or evaluations as necessary to ascertain the physical, mental, behavioral, and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[a], [b], [j][1]; see 34 CFR 300.301). The student must be "assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, vocational skills, communicative status and motor abilities" (8 NYCRR 200.4[b][6][vii]; see 34 CFR 300.304[c][4]).

Federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307–300.311; 8 NYCRR 200.[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability, State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i], [2]; see 34 CFR 300.308[a], 300.310).[9] In derogation of these mandated procedures, the August 2012 CSE did not have available to it a classroom observation of the student, and the student's teacher for the prior school year was not present (Tr. pp. 43, 59, 68-69; Dist. Ex. 1 at p. 2).[10]

Additionally, although a district cannot dictate that a student receive a response to intervention process if the student is attending a nonpublic school at the will of the parents, the district in this instance was still required to seek additional information regarding the student's progress and the type of instruction the student received in her nonpublic school ("Response to Intervention: Guidance for New York State School Districts," Office of P-12 Educ., at p. 47 [Oct. 2010], available at http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf). While the student's report card would have been one piece of useful information, the CSE could have

[9] In addition, as part of its initial evaluation of the student, to ensure that underachievement exhibited by a student suspected of having a learning disability is not due to a lack of appropriate instruction in reading or mathematics, the CSE must consider data that demonstrates that, prior to the referral process, the student was provided appropriate instruction in general education settings, delivered by qualified personnel, and data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of the student's progress during instruction, which was provided to the student's parents (8 NYCRR 200.4[j][1][ii]).

[10] The district school psychologist testified that the district could not conduct a classroom observation because the evaluation took place over the summer of 2012 and school was not in session (Tr. p. 69). However, the district admits that the parent requested an initial evaluation of the student in August 2011 (Answer ¶¶ 4-5) but provides no explanation as to why it did not conduct a classroom observation during the 2011-12 school year. Accordingly, the district's failure to conduct a classroom observation cannot be attributed to school not being in session.

documented that it requested additional information from the student's nonpublic school, such as teacher reports, classroom tests, standardized tests, and information from the parent (id.).

The IHO found that although the lack of a classroom observation and the absence of the student's regular education teacher from the August 2012 CSE were procedural violations, they did not rise to the level of a denial of a FAPE (IHO Decision at pp. 10-11). The IHO's finding was premised on her finding that the student's grades (as reported by the student's eighth grade math teacher) would not have changed the August 2012 CSE's determination that the student was not eligible for special education services (id. at p. 10). However, contrary to the IHO's supposition that a student's report card is "the next best thing" to a classroom observation, as explained above the CSE was required to consider the student's achievement in her regular education classroom, including not just her grades but also the type of instruction the student received and the progress the student made. In this instance, the August 2012 CSE lacked a classroom observation, any reports from the student's private school, input from the student's teacher, and even input from the parent. The August 2012 CSE did not have any information available to it as to how the student functioned within the classroom and was accordingly unable to make a reasoned determination as to the student's eligibility.[11]

Additionally, not only did the August 2012 CSE fail to gather information regarding the student's functioning within her nonpublic school environment, the CSE also failed to take appropriate steps to ensure the parent's participation in the decision-making process. As alleged by the parent, the IHO erred in determining that the parent was afforded the opportunity to participate in the August 2012 CSE meeting. There is insufficient evidence in the hearing record to support the IHO's conclusion that the parent's absence from the August 2012 CSE meeting "was of her own making" (IHO Decision at p. 11).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). In addition, federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and the use of "other methods" such as teleconferencing (34 CFR 300.322[a], [c]; 8 NYCRR

[11] The parent's contention that the IHO should have ordered an IEE to make up for the district's failure to conduct a classroom observation prior to the August 2012 CSE meeting is misplaced. Although the CSE lacked information regarding the student's functioning in the classroom, information regarding how the student functioned in class was available to the IHO, as two of the student's teachers testified during the hearing. Additionally, it is also unclear as to how a classroom observation conducted during the hearing, which took place during the 2014-15 school year, might have contributed to a determination of the student's eligibility for special education and related services during the 2012-13 school year. Were this action brought closer in time to the CSE's determination, a remand to the CSE with directions to follow the procedures set forth above may have been the best possible course of action; however, at this date there could be no value in directing the district to evaluate the student with regard to her eligibility for special education services in the distant past.

200.5[d][1]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

The district school psychologist testified that she spoke to the parent on the phone after she had completed the July 2012 psychoeducational evaluation in order to request that the parent provide the district with a copy of the student's report card (Tr. p. 28). The school psychologist explained that she did not discuss the date of the CSE meeting with the parent because "[t]hat was done by the clerical person" (Tr. p. 29).[12] The school psychologist further testified that the CSE held the August 2012 CSE meeting without the parent and called the parent toward the end of the meeting (Tr. pp. 31, 53-56). According to the school psychologist, the student's older sister answered the phone and told the school psychologist that her mother was at work, whereupon the school psychologist requested that the student's sister call the parent and have her call the CSE (id.). The school psychologist did not speak with the parent at any time during or after the August 2012 CSE meeting (Tr. p. 31). Additionally, the hearing record does not include any notice of the August 2012 CSE meeting addressed to the parent, or any other documentation indicating that the district made attempts to ensure the parent's participation in the meeting.[13]

Accordingly, as the August 2013 CSE lacked sufficient information regarding the student's achievement within her regular education class at Bay Ridge to make a reasoned determination as to the student's eligibility for special education and related services, the CSE also failed to conduct a sufficient initial evaluation, and the evidence does not support the district on the issue of whether it significantly impeded the parent's participation in the development of the IEP when there was insufficient basis in the record to conduct the CSE without the parent, the IHO's determination that the district offered the student a FAPE for the 2012-13 school year must be reversed.[14]

---

[12] The district school psychologist testified that the district's clerical person sent a notice of the CSE meeting to the parent (Tr. pp. 28-29); however, a copy of the meeting notice was not included as part of the hearing record.

[13] It should also be noted that the parent's native language is other than English (Tr. p. 49). However, there is nothing in the hearing record indicating that the district provided the parent with the procedural safeguards notice, the results of the July 2012 psychoeducational evaluation, or prior written notice of the CSE's determination that the student was not eligible for special education programs and services in the parent's native language, or that the district made an attempt to obtain a translator for the parent for the August 2012 CSE meeting, as required by State and federal regulations for a parent whose native language is other than English (see 34 CFR 300.322[e]; 300.503[c]; 300.504[d]; 8 NYCRR 200.4[b][6][xii]; 200.5[a][4], [d][5], [f][2]). Failure to provide the parent with any of the required information in her native language is a further indication that the parent was not afforded an opportunity to participate in the CSE process (see Application of a Student with a Disability, Appeal No. 15-001).

[14] Although procedural violations may only result in a denial of FAPE where they impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii];

C. Unilateral Placement

Having found that the district did not offer the student a FAPE for the 2012-13 school year, I must next determine whether the Bay Ridge Bridge program was an appropriate 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 offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). "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).

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).

---

34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]), in this instance the August 2012 CSE effectively excluded the parent from the CSE process altogether. Therefore, the district's exclusion of the parent from the CSE process was sufficiently extensive to result in a denial of FAPE on its own (see Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 659 [S.D.N.Y. 2005]). Accordingly, it is unnecessary to make a determination as to the student's eligibility for special education and related services as envisioned under the regulations. However, the district will be directed, if it has not done so already, to convene a CSE and follow the procedures discussed above to determine whether the student is a student with a disability eligible for special education and related services.

While the parent appealed from the IHO's failure to address the appropriateness of Bay Ridge in her decision, the district's answer does not include a response to the parent's allegations regarding Bay Ridge. Additionally, as noted above, the district did not offer sufficient evidence during the impartial hearing regarding the student's needs, particularly regarding the student's functioning within the classroom. Under these circumstances, the evidence submitted by the parent indicating the student's needs and the extent to which the parent's unilateral placement addressed those needs is all the more persuasive (see A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lay with the district]).

In addition to the July 2012 psychoeducational evaluation discussed above, Bay Ridge staff also considered informal educational testing conducted by a Bay Ridge psychologist, curriculum testing conducted at Bay Ridge, and input from the student's eighth grade teachers in determining the student's educational needs for the 2012-13 school year (Tr. pp. 171-77, 196-97, 199-200, 303-04; see Tr. pp. 189-90, 280). The director of the Bay Ridge Bridge program testified that a Bay Ridge psychologist conducted an "in-house evaluation" with the student in August 2012, subsequent to a review by Bay Ridge staff of the results of the July 2012 psychoeducational evaluation (Tr. pp. 199-200, 202-03, 227-28). The evaluation included many of the same tests that were given in the July 2012 psychoeducational evaluation and the results were similar to the results found by the district, with the exception of a passage comprehension subtest (Tr. pp. 200-01).[15] The director reported that results of curriculum testing conducted during the student's eighth grade year placed the student's decoding skills "around" the mid–to-end fifth grade level and her comprehension at the beginning fifth grade level (Tr. pp. 176-77). In addition, the director noted that the student struggled with comprehension and struggled with the pace of certain tasks (Tr. pp. 196-97).

According to the Bridge program director, the program is designed for students who need intensive help with academic skills related to language-based learning problems, such as reading comprehension, decoding, and reading fluency (Tr. p. 165). According to a Bay Ridge Bridge program brochure, the program offers student-centered classrooms, a variety of learning activities and interventions, and specially trained teachers (Parent Ex. F). The brochure also indicated that while courses cover the required New York State curriculum, pacing is individualized and content tailored to each student's level of comprehension (id.).

To address the student's processing speed issues and "slow pace of execution," which were identified as the reasons the student was initially referred for special education services, Bay Ridge presented materials at a slower pace in each of her academic classes, including modifying the

[15] According to the director of the Bay Ridge Bridge program, on the Bay Ridge evaluation the student scored in the mid-seventh grade level on passage comprehension; however, as part of the July 2012 psychoeducational evaluation, the student performed at an 11.3 grade equivalent in comprehension (Tr. p. 201; Dist. Ex. 2 at p. 3).

curriculum so that it was presented over a period of two years (Tr. pp. 288, 290, 293, 295; see Dist. Ex. 2 at pp. 1, 3). To address the student's needs relating to English language arts—including fluency, decoding, and comprehension—the student's English teacher explained that the student was provided with two different English classes; one that focused on reading and reading comprehension and one that focused on writing and vocabulary (Tr. pp. 279-80). She explained that much of the reading for the course was done in class with teacher guidance, teacher support with comprehension strategies, discussion, and "over-learning" activities (Tr. p. 288). The teacher also noted that the student had difficulty summarizing and analyzing texts, was slow at processing, tended to become easily overwhelmed when presented with a large amount of verbal material, and had difficulty recalling details and thus benefitted from check-ins, frequent repetition, clarification, visual support, and step-by-step guidance (Tr. pp. 278, 283).

According to the director of the Bay Ridge Bridge program, the student required extra direction and support in getting started and in making sense of what she needed to do (Tr. p. 171). To address the student's needs in initiating tasks and organization, the student's English teacher testified that the student benefitted from support services such as sentence starters, content discussions, word choice suggestions, graphic organizers, outlines, checklists, and "encouragement models," which provided the student with "a visual of what was expected of her" (Tr. pp. 277-78, 283). The teacher reported that she provided the student with support in initiating tasks, in assessing her progress on those tasks, and in planning for the next day (Tr. p. 283). Moreover, Bay Ridge provided the student with a planning and organization class at the end of the day where staff would go over homework and tests and answer student questions (Tr. p. 296).

Based upon the foregoing, the hearing record establishes that the Bridge program at Bay Ridge addressed the student's identified needs in fluency skills, decoding, comprehension, initiating tasks and organization, processing speed, and pacing by the provision of specially designed instruction and accommodations.

D. Equitable Considerations

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown 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, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]).

In this instance, the parent notified the district of her intention to place the student at Bay Ridge for the 2012-13 school year at district expense by facsimile on August 22, 2012 (Parent Ex. B). The IDEA allows that reimbursement may be reduced or denied if parents do not provide written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). Although the parent's letter did not state her concerns, under the circumstances of this case, where the district failed to follow prescribed procedures and declined to identify the student as a student with a disability, it is sufficiently apparent that the parent's concern was that the student was found ineligible for special education services. Additionally, the district does not rebut the parent's assertion that equitable considerations weigh in favor of granting the parent's requested relief and there is no reason appearing in the hearing record to find that the parent's actions warrant a reduction in reimbursement for the cost of the student's tuition at Bay Ridge on equitable grounds.

E. Relief

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406, 428 [S.D.N.Y. 2011]; see E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a 'direct-payment' remedy" and holding that "where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework"]).

Here, the parent has established a legal obligation to pay the student's tuition at Bay Ridge for the 2012-13 school year (Parent Ex. D; see E.M., 758 F.3d at 453). However, the parent has not submitted sufficient evidence to establish that she had insufficient financial resources to "front" the student's tuition costs for the 2012-13 school year. The hearing record includes a copy of a financial document purporting to establish the parent's income levels; however, the document contains inconsistencies (Parent Ex. H) and the parent did not testify during the hearing to explain her income or clarify the document. As the hearing record lacks reliable evidence establishing the parent's financial resources, or lack thereof, direct funding is not an appropriate remedy (see Mr. and Mrs. A., 769 F. Supp. at 428). Instead, the parent is awarded reimbursement for the costs of the student's tuition at Bay Ridge upon presentation to the district of proof of payment.

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE for the 2012-13 school year, that the parent's unilateral placement was reasonably calculated to meet the students educational needs, and that equitable considerations favor an award of reimbursement. I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 2, 2015, is modified by reversing those portions which found that the student was not eligible for special education and related services and that the district was not required to offer the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that, if it has not done so already, the district shall convene a CSE, including the student's current or recent teachers, and follow the procedures described in the body of this decision to determine if the student is eligible for special education and related services as a student with a disability; and

IT IS FURTHER ORDERED that, upon proof of payment, the district shall reimburse the parent for the cost of the student's tuition at Bay Ridge for the 2012-13 school year.

Dated: **Albany, New York**
May 29, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER