The University of the State of New York

The State Education Department
State Review Officer
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No. 18-118

Application of the BOARD OF EDUCATION OF THE NEW HYDE PARK-GARDEN CITY PARK UNION FREE 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:
Lamb & Barnosky, LLP, attorneys for petitioner, by Robert H. Cohen, Esq. and Lauren Schnitzer, Esq.

Thivierge & Rothberg, PC, attorneys for respondents, by Christina D. Thivierge, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at The Gersh Academy (Gersh) for the 2017-18 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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 in this case initially received special education and related services at home through the Early Intervention (EI) program until he transitioned to the Committee on Preschool Special Education (CPSE) for the 2014-15 school year (see Parent Ex. D at p. 1). As a preschool student with a disability for both the 2014-15 and 2015-16 school years, the student attended a 6:1+2 special class placement at a Board of Cooperative Educational Services (BOCES) where he also received related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), consultation services, and applied behavior analysis (ABA) instruction (id.; see generally Dist. Exs. 12-17; 19-20; 22).

On May 12, 2016, a CSE convened to conduct a review for the student's transition from receiving CPSE (preschool) services to receiving CSE (school-age) services and to develop an IEP

for the 2016-17 school year (kindergarten) (see Dist. Ex. 2 at p. 1; see generally Dist. Exs. 1; 6-7). Finding the student eligible to receive special education and related services as a student with autism, the May 2016 CSE recommended a 6:1+2 special class placement together with related services consisting of the following: four 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, one 60-minute session per month of individual parent counseling and training services, and three 90-minute sessions per week of home-based behavior intervention services (see Dist. Ex. 2 at pp. 1, 13-14). [1]

At that time, the May 2016 CSE noted in the student's IEP that the "current district program d[id] not provide the level of support this student require[d]" and therefore, the CSE indicated that "application[s] w[ould] be made to other district based programs" (Dist. Ex. 2 at p. 2).[2] The CSE further noted that the student was a "good candidate for [a] district based program that provide[d] a higher level of discrete trial instruction that [was] overseen by a B[oard] C[ertified] B[ehavior] A[analyst]" (BCBA) (id.). The parents requested that the district "also apply to two approved private settings" (id.). The CSE explained that the "continuum of services from less restrictive to most restrictive must be explored first," and to accomplish this, the district would "send packet applications to local public schools to see if they ha[d] an appropriate setting" (id.). However, if "these programs c[ould not] meet [the student's] needs appropriately, application[s] to approved private settings w[ould] be made" (id. at pp. 2-3).

Consistent with the remarks in the May 2016 IEP, in June 2016 the district sent applications to several programs for the student's attendance during the 2016-17 school year but none of those programs had an appropriate placement for him (see generally Tr. pp. 210-13; Dist. Exs. 30-31; 40). Unable to find a location within which to implement the student's May 2016 IEP, the parents unilaterally placed the student in a nonpublic school beginning in September 2016; however, in mid-October, the nonpublic school abruptly closed due to a "financial issue with getting the school started" (Dist. Ex. 33 at p. 1; see Tr. pp. 213-17). In an email to the district dated October 17, 2016, the parents advised that they had a "tour and screening at Gersh Academy" and were awaiting a response regarding the student's "acceptance" (Dist. Ex. 33 at p. 1).[3]

On October 21, 2016, the student's IEP was amended without a CSE meeting to reflect the recent closure of the nonpublic school the student was attending, and to document the CSE's recommendation to provide the student with "home services while actively searching for a new approved school program" (Dist. Ex. 3 at pp. 1, 11-12; see Tr. pp. 216-18). On October 28, 2016,

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

[2] During the 2016-17 school year, the district had the following programs in place for students with "extensive needs:" two 8:1+2 special class placements that "utilized ABA strategies" designed predominantly for students with autism, and between four to five 12:1+1 special class placements typically for students with "severe language delay[s]" or for "severe learning disabled" students (Tr. pp. 221-24). According to the district director of special education services' (director's) testimony, these "intensive needs program[s]" existed within the district for 15 to 17 years prior to the 2016-17 school year (see Tr. pp. 195-96, 221-22, 224).

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

a CSE convened to "review[] the parent's recent visit to [a State-approved nonpublic school] for a possible placement" for the student (Dist. Ex. 4 at p. 1). The IEP reflected that the student had been "parentally placed" in a nonpublic school "with an agreement from the district to pay for tuition" because the CSE "did not have an appropriate program to offer at the start of the school year and the parents had refused placement at BOCES" (id.). The CSE also noted in the IEP that the State-approved nonpublic school recently visited by the parents found the student "appropriate for their setting," but further noted that the school could not "give the CSE an exact start date" for the student—indicating that it could be within "two weeks" or within "two months" (id. at pp. 1-2; see Tr. pp. 218-20). Next, the CSE reflected in the IEP that the parents "presented a letter from Gersh Academy indicating an immediate availability pending district approval to pay for a 1:1 aide" (Dist. Ex. 4 at p. 2). The CSE indicated that it would "not formally place a 1:1 aide on the IEP until an approved private school [was] secured and deemed necessary for this student to be successful in that environment" (id.).

Because the district could not "pin down a start date" for the student at the State-approved nonpublic school discussed at the October 2016 CSE meeting, the district reached an agreement with the parents—which was reduced to writing and signed by the parties—to "pay for the student's attendance at Gersh while the school district continued to explore [S]tate approved placements" (Tr. pp. 220-21).[4] Despite its continued efforts during the 2016-17 school year, the district was unable to locate an "appropriate [S]tate approved out-of-district placement" for the student (id.).[5]

During the winter of the 2016-17 school year, the district made the decision to expand its intensive needs programs to include a 6:1+3 special class placement in addition to the two already existing 8:1+2 special class placements for students with intensive needs (see Tr. pp. 222, 224-25). The district made this decision, in part, because "there were three students" attending an 8:1+2 special class placement for intensive needs in the district that had "more significant management needs" and required a "much more structured ABA program"—meaning "[n]ot just [an] ABA strategies class, but an ABA program" (Tr. pp. 224-25). As a result, the district "discussed starting a smaller ratio intensive needs program" and began developing a 6:1+3 special class placement (id.).

On or about March 28, 2017, the parents—together with an educational consultant—visited the district to discuss the 6:1+3 special class placement being developed and observe a classroom space (see Tr. pp. 102-03; 1327-28, 1341-44, 1355-56, 1482-86, 1524-31).[6] At that time although no students were in the classroom, the parents had the opportunity to observe the classroom, the "arrangement of space," and "what the setting looked like," and thereafter, engaged in a "lengthy

[4] The parties' agreement specifically noted, however, that Gersh would "not be considered a pendency placement" (Tr. p. 221).

[5] The student remained at Gersh through the conclusion of the 2016-17 school year (see Tr. pp. 225-26).

[6] The parents' educational consultant—who holds State certifications as a school psychologist and a school district administrator—conducted an evaluation of the student over the course of three days in February and March 2017 (see Tr. pp. 1327-28, 1341-44; see generally Dist. Ex. 21).

conversation with regards to the program" with the district special education teacher—who was assigned to teach the class—and the director (Tr. pp. 102-03, 1355-58).

On May 19, 2017, a CSE convened to conduct the student's annual review and to develop an IEP for the 2017-18 school year (first grade) (see Dist. Exs. 5 at p. 1; 11 at pp. 1-2). Finding that the student remained eligible to receive special education and related services as a student with autism, the May 2017 CSE recommended a 12-month school year program, which for July and August 2017 consisted of a 6:1+1 special class placement (daily, five hours per day); five 30-minute sessions per week of individual speech-language therapy; four 30-minute sessions per week of individual OT; one 120-minute session per day of individual, home-based behavior intervention services; and one 120-minute session per week of individual, home-based parent counseling and training services (see Dist. Ex. 5 at pp. 1, 18).[7] With regard to the remainder of the 2017-18 school year—from September 2017 through June 2018—the May 2017 CSE recommended a 6:1+3 special class placement (daily, four and one-half hours per day) with the following related services: five 30-minute sessions per week of individual speech-language therapy; four 30-minute sessions per week of individual OT; two 30-minute sessions per week of individual PT; one 120-minute session per week of individual, home-based behavior intervention services; one 120-minute session per week of individual, home-based parent counseling and training services; five 60-minute sessions per year of parent counseling and training services in a small group; and the services of a full-time, individual aide (id. at pp. 1, 17). In addition, the May 2017 CSE recommended that the student participate in adapted physical education (12:1+2 special class) and alternate assessment (id. at pp. 17, 19).

At the impartial hearing, the parents testified that the district "offered to pay for the Gersh program" for summer 2017, but they sent the student to a camp for students with special needs, which he attended the previous summer (Tr. pp. 1494-96).

By letter dated August 21, 2017, the parents notified the district of their intentions to "continue to send" the student to Gersh and to seek reimbursement or direct funding for the costs of the student's tuition and expenses from the district, as well as transportation for the student's attendance at Gersh for the 2017-18 school year (Dist. Ex. 34). The parents also noted in the letter that the district indicated at the May 2017 CSE meeting that "it did not have a program available for [the student] for the summer" (id.). The director responded via letter dated August 23, 2017 (see Dist. Ex. 35 at p. 1). The director indicated that the district would provide the student with transportation to attend Gersh, having received the request "prior to the April 1st deadline" (id.). In addition, the director addressed "some of the inaccuracies in the [parents'] letter" (id.). For example, the director noted that while the CSE indicated at the May 2017 meeting that it "would support [the parents'] placement at Gersh Academy for the summer of 2017, as the 6:1:3 special

[7] Although the May 2017 IEP appeared to identify a "school/agency provider of services during July and August," this is the only instance within the entire hearing record where this particular "school/agency" was referenced (compare Dist. Ex. 5 at p. 18, with Tr. pp. 1-1730; Parent Exs. A-D; F-Z; Dist. Exs. 1-32; 34-38; 40). Additionally, within the meeting information comments section of the May 2017 IEP, the CSE indicated that because the 6:1+3 special class placement would not "start in the district until September and therefore there would be no placement for this student [as of] July 1," the CSE would "make application for a summer program to other schools, or the district would be willing to have an agreement outside of the CSE to maintain this student at Gersh for the summer 2017 prior to the transition" into the district's recommended program (Dist. Ex. 5 at p. 4).

class in district was not starting until September 5, 2017," the parents' attorney advised that they chose to place the student in a "private camp for students with disabilities for the summer" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 11, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (see Parent Ex. A at p. 1). More specifically, the parents alleged that the district, at the May 2017 CSE meeting, "admitted that it could not offer [the student] a 12-month program and offered to maintain [the student's] placement at Gersh" and to then move the student into the district's program for September (id. at p. 3). The parent also alleged that CSE members—including Gersh staff, a neuropsychologist, the parents' educational consultant, and the parents—"all expressed serious concerns" about transitioning the student into the district's program, "which did not exist yet" (id.). Relatedly, the parents noted that they did not have "sufficient knowledge of the non-existent program to make an informed decision" (id.). The parents also noted concerns about the student "work[ing] mainly with an aide who only had a high school diploma and minimal training in ABA," and thus, the parents "expressed concern about the quality of instruction" as well as the "level of behavioral support" he would receive (id.). Next, the parents indicated that the district's use of a "padded redirection room for [students] who exhibit[ed] maladaptive behaviors" was not appropriate for the student (id.). The parents also "expressed concern" that the student's transition from Gersh to the district's program "would cause regression," which the district "acknowledged" (id.).

Next, the parents listed several allegations upon which to conclude that the May 2017 IEP was "procedurally and substantively defective" (Parent Ex. A at pp. 3-6). Among other things, the parents alleged that the district's recommended program was an "experimental program which did not exist," and therefore, the parents were "deprived of the opportunity to learn about the recommendation and make an informed decision" about the student's "placement in advance of the school year" (id. at p. 3). Similarly, the parents asserted that the district's program was not appropriate because the student—who had "intensive educational needs including intensive behavioral needs"—required a "well established ABA program, not an untested start-up program" (id.). The parents also asserted that the district "could not implement summer programming for [the student] as it did not have a summer class available" and that the district indicated that "extended school year programming must be provided at another location" (id. at p. 4).

Additionally, the parents alleged that the district's 6:1+3 special class placement was "new and would begin in September 2017," which was contrary to the director's description of the district's "intensive needs program" as having been in existence for either "14" or "17" years (Parent Ex. A at p. 4). The parents further noted that the district's recommended program would "remove" the student from his current setting at Gersh, the student would be "trapped in one room with no outlet to enjoy interactions with staff members (as [was] the case at Gersh)," and the district proposed to move the student to a new program after acknowledging that the student had been "transitioned between several different schools in the past several years" (id.).

With respect to the May 2017 CSE process and May 2017 IEP, the parents alleged the following: the May 2017 IEP failed to offer any annual goals, supports, or services to assist the student's transition to the district's program; the May 2017 CSE impermissibly engaged in predetermination of the student's placement in the 6:1+3 special class and failed to consider the

full continuum of placements for the student—including placement in a State-approved nonpublic school or placement at Gersh; the May 2017 CSE failed to conduct an FBA and develop a BIP; the May 2017 IEP failed to otherwise address the student's behaviors; the May 2017 CSE improperly claimed it would conduct an FBA of the student and develop a BIP for the student at an "undetermined later date," and would continue to use a BIP for the student developed at Gersh; the May 2017 IEP failed to make "provision for BCBA services or behavioral intervention in school"; the May 2017 CSE "copied" annual goals from Gersh, which were "designed to be implemented in Gersh's program and teaching strategies," thus, the annual goals in the IEP could not be "carried over" to the district's program; the May 2017 CSE failed to evaluate the student for assistive technology despite noting in the IEP that he "needed a device to address his communication needs" without identifying a device; the May 2017 IEP failed to include related service recommendations for the "first week and last week of the school year"; the May 2017 CSE failed to treat the student's then-current providers and his parents as "equal IEP" team members and failed to "meaningfully consider the opinions and recommendations" of non-district CSE members; the May 2017 IEP failed to include any recommendations for round-trip, special education transportation to Gersh "for the first week of school"; the students in the proposed classroom exceeded the 36-month age range; and the May 2017 IEP elevated district policy over the student's individual needs (id. at pp. 4-6).

As relief, the parents requested reimbursement or direct funding of the costs of the student's tuition and expenses at Gersh for the 2017-18 school year (see Parent Ex. A at p. 6).

B. Events Post-Dating the Due Process Complaint Notice

On October 17, 2017, the parents—together with their educational consultant—visited the district's 6:1+3 special class placement recommended by the May 2017 CSE (see Dist. Ex. 36 at p. 1; see also Tr. pp. 104-05, 1497; Dist. Ex. 5 at pp. 1, 17). During this visit, the parents had the opportunity to observe students engaging in "discrete trial teaching" in the classroom; the district special education teacher testified at the impartial hearing that the parents observed the classroom for approximately 45 minutes, and then engaged in a "15-minute conversation afterwards" wherein the parents asked questions and expressed some concerns about the program (Tr. pp. 104-19; see Tr. pp. 1497-1502, 1524-34, 1547-48, 1632-71, 1675-91, 1693-98; see generally Parent Exs. P-Q). In a letter to the district dated October 20, 2017, the parents described their visit to the 6:1+3 special class placement and expressed some of the same concerns about the program that they expressed to the district special education teacher (compare Dist. Ex. 36, with Tr. pp. 104-19). In particular, the parents indicated that the grouping of the students observed in the classroom were not similar to the student with respect to grade levels (i.e., second and third graders "older" than the student), communication abilities and levels ("verbal" versus "nonverbal"), the other students' abilities to attend longer and "respond to verbal prompts," and the other students did not wear diapers (Dist. Ex. 36 at p. 1). In addition, the parents indicated that the "classroom supplies were also geared to second and third grade students," which exceeded the student's levels (id.). The parents also noted that the classroom did not have "appropriate sensory toys" for the student's learning, and that the "small manipulatives" observed in the classroom would be a "dangerous hazard" for this student who suffered from "Pica" (id. at pp. 1-2).[8]

[8] The hearing record refers to pica as "the mouthing or eating of inedible objects" (Tr. p. 109).

Next, the parents expressed concern that another nonverbal student in the classroom used a picture exchange communication system (PECS), which had proved to be an "ineffective teaching aid" for this student (Dist. Ex. 36 at p. 2). The parents also described observing "classroom staff reinforcing and rewarding students for engaging in maladaptive and inappropriate behaviors" and that classroom staff did not "collect[] data regarding maladaptive behavior for any of the students in the class, despite all three students having [BIPs]" (id.). In addition, the parents reported that the classroom staff provided "no redirection" for self-injurious behaviors, and the classroom teacher could not "answer" questions asked regarding how staff addressed self-injurious behaviors (id.). The parents further reported in the letter that the students in the classroom received "1:1 instruction by aides who were not required to have any qualifications beyond a high school diploma and a few days of training from the school BCBA (who was absent from school during [the parents'] visit)" (id.). According to the parents, the classroom teacher was "unaware of proper ABA discrete trial skill maintenance programming" and when shown a "program book," the parents noted that it "lacked any procedures for decreasing prompting strategies" and the students observed were "entirely prompt dependent" (id.). The parents indicated that the student would "regress in a program that d[id] not systematically and properly implement ABA techniques, run by individuals who [were] not appropriately and highly trained in ABA" (id.).

As a final point, the parents expressed concerns about the "cubicles" where the students received "1:1 instruction," describing the furniture configuration within the cubicles as "restrain[ing] students between the wall and table" and noting that the classroom lights were "off for the entirety of [their] visit" (Dist. Ex. 36 at pp. 2-3).

C. Impartial Hearing Officer Decision

On October 24, 2017, the IHO appointed to the case held a prehearing conference (see Tr. pp. 1-18). At that time, the parents' attorney stated their intention to amend the due process complaint notice based upon the parents' observation of the placement and program (see Tr. pp. 4-5). In an amended due process complaint notice dated October 30, 2017, the parents repeated, verbatim, the allegations set forth in the September 2017 due process complaint notice and thereafter incorporated nearly verbatim the concerns expressed about the placement and program set forth in their October 20, 2017 letter to the district (compare Parent Ex. A, and Dist. Ex. 36, with Parent Ex. B).

On December 18, 2017, the parties proceeded to the impartial hearing, which concluded on June 21, 2018, after 11 days of proceedings (see Tr. pp. 1-1730). In a decision dated September 5, 2018, the IHO concluded that the district failed to offer the student a FAPE for the 2017-18 school year, that Gersh was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 28-38). As a result, the IHO ordered the district to reimburse the parents for the costs of the student's tuition and expenses ($110,000.00) at Gersh for the 2017-18 school year (id. at p. 38).

In finding that the district failed to offer the student a FAPE for the 2017-18 school year, the IHO initially determined that, for the parents to "prevail" in this matter, the IHO was required to find that the district could "not fully implement the ABA program recommended" by the May 2017 CSE (IHO Decision at p. 31). In this regard, the IHO noted that the "program discussed at the meeting and presented to the [p]arents as an ABA [p]rogram [was] not even described as such" in the student's IEP (id.). More specifically, the IHO indicated that while the May 2017 IEP

reflected that "ABA strategies [were] used," "that [was] not what [the student] need[ed] or else the 8:1:2 class would [have] be[en] theoretically appropriate" (id.).

Next, the IHO found that, "[i]n addition to the IEP not being appropriate to confer educational benefit upon [the student] it [was] uncontroverted that the placement recommendation was speculative and not sufficient to meet [the student's] needs" (IHO Decision at p. 31). Based upon the evidence in the hearing record and the "evidence available" to the May 2017 CSE, the IHO determined that "there was no well-established and structured full time ABA program" at the district within which to implement the student's IEP (id. at pp. 31-32). Moreover, the IHO noted that the "IEP which was written d[id] not sufficiently describe the program being described at the meeting which purportedly would have been available in the [f]all of 2017" (id. at p. 32).

Turning to an analysis of more specific issues, the IHO determined that the parents were unable to "properly assess what they were being told" about the district's special class placement and relatedly, that the district failed to "recommend a full time ABA program" and failed to "create what was being described" (IHO Decision at pp. 32-35). The IHO also found that the district failed to sustain its burden to establish that the 6:1+3 special class could provide the student with the ABA he required to "make meaningful progress" (id. at p. 35). This was due, in part, to the IHO finding that in light of the student's "intensive educational needs including intensive behavioral needs," he required a "more sustained intensive full time ABA program which he was recommended for and received at Gersh" (id.).

Next, the IHO concluded that the district failed to sustain its burden to establish that the 6:1+3 special class was appropriate to meet the student's needs because it was, in the IHO's words, "not a well-established program" and "not what it was purported to be as described" to the parents (IHO Decision at p. 35). In addition, the IHO found that the 6:1+3 special class recommended by the May 2017 CSE did not exist at the time of the meeting, and the "program being recommended would not be available at the start of the [12]-month school year deemed necessary for [the student], on July 1, 2017" (id.). As such, the district did not have a "viable placement" for the student on the "first day of his [12]-month school year" and could not implement a summer program (id.).

Next, the IHO addressed the parents' concerns that the district's recommended program would remove the student from his program at Gersh (see IHO Decision at pp. 35-36). The IHO noted that while the hearing record failed to contain any evidence that the student would "be harmed by being removed from the Gersh program if a viable ABA [p]rogram was available to him," the hearing record also lacked evidence that the district's recommended placement was a "viable alternative to Gersh in a less restrictive setting" (id. at p. 36). The IHO also addressed the parents' claim that the CSE predetermined the student's placement and failed to consider the full continuum of placements (id.). Here, the IHO found that the evidence in the hearing record supported the predetermination allegation, "despite the fact that the program being described was not available or sufficiently developed to meet [the student's] needs" (id.).

Thereafter, the IHO summarily addressed several other issues raised, and noted, overall, that the parents' "remaining claims [were] redundant, [or] immaterial to the conclusion that the placement was not appropriate and/or unfounded" (see IHO Decision at pp. 36-38). For example, the IHO noted that the district "appropriately reserved conducting [a functional behavior assessment (FBA)] and creating a [behavior intervention plan (BIP)]" until such time that the

student attended the recommended placement at the district (id. at p. 36). The IHO also found that although the "lack of training of the classroom aides was not dispositive of this matter, . . . a well-established and appropriate ABA program would have included appropriately trained individuals" with more than a "professional development day's worth of ABA instruction" (id.). Next, the IHO noted that the district's "program did not have the sufficient support of a BCBA" and the students in the proposed special class exceeded the 36-month age range (id.). The IHO also found, however, that the annual goals developed at the May 2017 CSE meeting were "not found to be inappropriate," noting further that the CSE members—including Gersh staff, the parents, and the parents' consultants—worked "collaboratively to come to consensus on the goals" (id.). With regard to the district's rationale for not recommending Gersh for the 2017-18 school year, the IHO found that the CSE's inability to recommend Gersh because it was not a State-approved nonpublic school to be unavailing and failed to allow for parental participation (id. at p. 37). Thus, the IHO concluded that the district's decision to not recommend Gersh "was not based upon a solid foundation that it could offer [the student] an appropriate program designed to provide the student with educational benefit" (id. at pp. 37-38).

In light of the foregoing, the IHO concluded that the district failed to offer the student a FAPE for the 2017-18 school year, the parents' unilateral placement of the student at Gersh was "an appropriate ABA program to meet the student's needs," and equitable considerations "balance[d] in favor of an award for tuition reimbursement" (IHO Decision at p. 38).

IV. Appeal for State-Level Review

The district appeals, arguing initially that the IHO failed to apply the appropriate legal standard to determine whether the district failed to offer the student a FAPE for the 2017-18 school year. The district also argues that the IHO's conclusion with regard to whether it offered the student a FAPE was based upon the parents' unsupported speculations. The district thereafter contends that the IHO erred in finding that the district impermissibly engaged in predetermination of the student's placement. Next, the district asserts that the IHO incorrectly characterized the issue to be decided as whether the recommended program was "'too new' or was 'well-established,'" rather than whether the student's IEP was reasonably calculated to enable him to make progress in light of his circumstances. The district also asserts that the IHO improperly relied upon the parents' speculation about whether the district's recommended placement and program was an "'ABA program'" or whether the IEP failed to recommend "that type of program" as a basis upon which to conclude that the district failed to offer the student a FAPE. Next, the district contends that the IHO erred in finding that the testimonial evidence supported the parents' speculation that the district would be unable to implement the student's IEP as described to the parents. Additionally, the district argues that the IHO erred in finding that the "IEP failed to offer a FAPE because the recommended program was to commence in September 2017," noting that the evidence in the hearing record established that the district "complied with the IEP's requirement for extended year services by agreeing to pay for the [s]tudent to remain at Gersh over the summer as there were no available appropriate State approved placement for July and August." Based upon these reasons, the district seeks to overturn the IHO's finding that it failed to offer the student a FAPE for the 2017-18 school year.

With respect to the appropriateness of the parents' unilateral placement, the district argues that the IHO failed to engage in any legal analysis to conclude that Gersh was appropriate to meet

the student's needs. The district similarly argues that the IHO failed to engage in any legal analysis to conclude that equitable considerations weighed in favor of the parents' request for relief.[9]

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision in its entirety.[10] The district, in a reply to the parents' answer, responds to the parents' arguments.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the

[9] The district attaches additional documentary evidence to the request for review for consideration on appeal (Req. for Rev. Exs. 1-2).

[10] To the extent that the parents assert as affirmative defenses in their answer that the district failed to develop an FBA or create a BIP, and the district failed to create appropriate and measurable annual goals in the areas of OT and speech-language therapy, the IHO found in favor of the district on these two issues and thus, the parents were required—as the aggrieved party—to assert such challenges in a cross-appeal under State regulation (see IHO Decision at p. 36; compare Answer at ¶¶ 39-41, with 8 NYCRR 279.2[d]-[e]; 279.4[f]; 279.8[c]). Consequently, the issues argued in the parents' answer will not be reviewed on appeal.

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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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]), 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]).[11]

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

[11] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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).

VI. Discussion

A. Preliminary Matters—Additional Documentary Evidence

As noted, the district attaches two documents to its request for review as additional evidence for consideration on appeal (see Req. for Rev. Exs. 1-2). The parents object to the consideration of the additional evidence identified as exhibit 2—which the district claims to be a copy of the parents' amended due process complaint notice—because it is not the document actually submitted by the district as additional documentary evidence. Rather, exhibit 2 is a copy of a letter, dated July 6, 2017, sent to the district indicating that its request for an age variance for the 6:1+3 "Primary Intensive Needs special class" for the 2017-18 school year had been granted; the parents object to its consideration as it was available at the time of the impartial hearing and the district did not seek to submit the same into evidence at that time.[12] The parents contend that to consider exhibit 2 on appeal subverts the five-day disclosure rule for evidence at the impartial hearing and precludes the parents from cross-examination with regard to this document.

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. 08-030; Application of a Student with a Disability, Appeal No. 08-003; 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 is unable to render a decision]). Given that the documentary evidence—namely, exhibit 2—submitted by the district was available at the time of the impartial hearing and it is not now necessary in order to render a decision, I decline to exercise my discretion to consider the evidence on appeal.

B. May 2017 IEP—Implementation

At the outset, the parties' dispute over FAPE now centers on the permissibility of claims involving the prospective implementation of the student's programming in conformance with the IEP as set forth in State regulations, and there is no longer a dispute about the appropriateness of

[12] The parents do not express any objections to consideration of the additional evidence identified by the district as exhibit 1—to wit, it is a copy of the IHO's decision in this case (see generally Req. for Rev. Ex. 1).

the May 2017 IEP's design. Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[13]

Generally, parents are entitled to participate in determining the educational placement of a student with a disability (34 CFR 300.116[a]; 300.327; 300.501[c]); however, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New

[13] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Relying on this, in part, as a backdrop, the IHO concluded that the district's 6:1+3 special class placement—which the May 2017 CSE recommended for that portion of the 2017-18 school year from September 2017 through June 2018—was not a "well-established and structured full time ABA program . . . where the student's IEP could be fully implemented" (IHO Decision at pp. 31-32). While the district appeals the IHO's finding, as explained more fully below, a review of whether the IHO erred in this regard is unnecessary because ultimately, the district failed to sustain its burden to establish that it was factually capable of implementing the 6:1+1 special class placement and related services—which the May 2017 CSE recommended for summer 2017 (July and August 2017)—resulting in a determination that the district failed to offer the student a FAPE for the 2017-18 school year.

1. 12-Month School Year Services

The district argues that the IHO erred in finding that the "IEP failed to offer [the student] a FAPE because the recommended program was to commence in September 2017." The district asserts that the IHO's conclusion was unsupported by any evidence in the hearing record, and moreover, the district established that it complied with the IEP's summer programming requirements by "agreeing to pay for the [s]tudent to remain at Gersh" because there were "no available State approved placements for July and August." The parents contend that the district's willingness to pay for the student to attend Gersh during summer 2017 did not satisfy its obligation to implement the student's IEP. In addition, the parents argue that the district cannot claim it was precluded from recommending Gersh for the 2017-18 school year, and then "fall back on Gersh as a means to implement the same IEP."

The IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE for the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). State regulation defines substantial regression as a "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school

year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106).[14]

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Moreover, an implementation claim is a narrow inquiry into the actual delivery of the program and services recommended in the student's IEP, rather than the appropriateness of the recommended program and services or the student's progress thereunder. It has been held that an implementation claim must be closely examined to ensure that it involves nothing more than implementation of services already spelled out in an IEP (Polera v. Bd. of Educ., 288 F.3d 478, 489 [2d Cir. 2002] [reviewing the relevant claim and noting that the district's alleged failure to provide services was "inextricably tied to the content of the IEPs and therefore . . . much more than a failure of implementation"]; Donus v. Garden City Union Free Sch. Dist., 987 F. Supp. 2d 218, 231 [E.D.N.Y. 2013]; see also Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 682 [S.D.N.Y. 2011]).

Here, neither party disputes that the student required a 12-month school year program to prevent substantial regression, and consistent with this need, the May 2017 CSE recommended a 12-month school year program for the student, which for July and August 2017 consisted of a

[14] Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

6:1+1 special class placement (daily, five hours per day); five 30-minute sessions per week of individual speech-language therapy; four 30-minute sessions per week of individual OT; one 120-minute session per day of individual, home-based behavior intervention services; and one 120-minute session per week of individual, home-based parent counseling and training services (see Dist. Ex. 5 at pp. 1, 18).[15] At the May 2017 CSE meeting, the CSE—acknowledging that the 6:1+3 special class placement would not be available until September 2017—indicated that it could "make application for a summer program to other schools, or the district would be willing to have an agreement outside of the CSE to maintain this student at Gersh for the summer 2017" (Dist. Ex. 5 at p. 4; see Dist. Ex. 11 at p. 1). At the impartial hearing, the parents testified that the district did offer to "pay for the Gersh program" for summer 2017 (Tr. p. 1495). However, the parents opted to send the student to a summer camp for students with disabilities, which the student had also attended during the summer 2016 (Tr. pp. 1495-96).

Generally, the IDEA contemplates that districts may not be able to address the needs of every student in public placements and may need to place some students in private placements at public expense in order to provide such students with a FAPE (Burlington, 471 U.S. at 369-70). However, the IDEA does not endow state or local educational agencies with regulatory authority over nonpublic schools, but instead requires state and local educational agencies to ensure that students placed in nonpublic schools by the educational agencies receive a FAPE (Responsibility of SEA, 71 Fed. Reg. 46598-99 [Aug. 14, 2006]; see 34 CFR 300.2[c][1]; 300.146; Z.H. v. New York City Dep't of Educ., 107 F. Supp. 3d 369, 375 [S.D.N.Y. 2015]; Letter to Stockford, 43 IDELR 225 [OSEP 2005]). The IDEA provides that when a district places or refers a student with a disability to a nonpublic school in order to meet its obligation to provide the student with a FAPE, "the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies" (20 U.S.C. § 1412[a][10][B][ii]).[16]

Because of the State's obligations involving students placed in private facilities by public agencies, districts are only authorized to contract with nonpublic schools which have been approved by the Commissioner of Education (Educ. Law § 4402[2][b][1], [2]; see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2nd Cir. 1988] [noting that pursuant to the IDEA a district can only place a student in a nonpublic school that meets State educational standards, including the requirement for approval by the Commissioner of Education], abrogated in part by Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]).[17] The State maintains a list of in-State and out-of-State approved nonpublic schools (see 8 NYCRR 200.1[d], 200.7; see "Approved Private, Special Act, State-Operated and State-Supported Schools in New York State," Office of Special

[15] To be clear, the parents did not allege that the summer 2017 services recommended in the May 2017 IEP were not appropriate to meet the student's needs (see generally Parent Exs. 1-2).

[16] Whether a "State or public agency contracts with a private school to meet IDEA requirements is an issue between the State or public agency and the private school" (Letter to Stockford, 43 IDELR 225 [OSEP 2005]).

[17] State law limits the circumstances under which a district may contract with an approved nonpublic school to provide special services or programs to a student with a disability in order to meet its obligations to provide the student with a FAPE (see Educ. Law §§ 4401[2][e]-[h]; 4402[2][a], [b][1], [2]).

Educ., available at http://www.p12.nysed.gov/specialed/privateschools/home.html; see also Soc. Servs. Law § 483-d[2]).

Although a particular nonpublic school may meet the Commissioner's criteria for approval to provide special education programs and services to students with a disability, it is the individualized needs of a student with a disability that will ultimately "determine which of such services shall be rendered" by an approved nonpublic school (Educ. Law § 4402[2][a]).[18] Moreover, it must be ascertained whether a particular nonpublic school will meet the IDEA's mandate 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).[19]

In support of its contentions on appeal, the district relies, in part, on the Second Circuit's holding in T.M. v. Cornwall Central School District, 752 F.3d 145 (2d Cir. 2014), and on guidance provided in Letter to Myers, 16 IDELR 290 (OSEP 1989) in its reply memorandum of law. In response to the parents' contention that the district should have offered a 6:1+3 during the summer and not just the 10-month school year, the district generally argues that the T.M. does not require that a student receive summer services "in the same setting as the school-year program" (Dist. Reply Mem. of Law at p. 7). The district's point that a disabled student need not required per se to receive the same services throughout the year in order to receive an appropriate placement, but that point fails to address the fact that the district was incapable of implementing the IEP provisions for summer 2017 because it did not have a program of its own to in which to implement the student's IEP and it did not locate another program elsewhere.

The district's defense to this glaring inadequacy is that by offering to provide the parents with funding for Gersh for summer 2017, the district should be found to have satisfied its responsibility to provide a FAPE for summer 2017. Relying on Letter to Myers in its memorandum of law, the district asserts that if a student was "placed in an in-district program that d[id] not provide services over the summer, the [d]istrict [was] required 'to purchase a private school

[18] State regulation also provides that "no contract for the placement of a student with a disability shall be approved for purposes of State reimbursement unless the proposed placement offers the instruction and services recommended on the student's IEP" (8 NYCRR 200.6[j][2]).

[19] In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North 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 300.114; 300.116). In this case, neither party disputes that the student cannot be educated in regular education classes in a district public school with nondisabled peers; rather, as discussed below, the dispute is whether the student's placement at NECC is "as close as possible" to his home.

placement, if there was no available public placement'" (id. at p. 7; Letter to Myers, 16 IDELR 290 [OSEP 1989]). OSEP noted that "if a determination [was] made that a private school placement [was] the appropriate placement in which to implement an IEP for [summer] services, Federal funds c[ould] be used to pay for the services in that situation" (Letter to Myers, 16 IDELR 290 [OSEP 1989]). The T.M. Court and OSEP appear to be in accord on this point insofar as the Court noted that the crafters of the IDEA and its predecessor statute never intended that state and local educational agencies would be the sole providers of special education services and, consequently, the "school district need not itself operate all of the different educational programs on this continuum of alternative placements" and notably, that the "continuum may instead include free public placement at educational programs operated by other entities, including other public agencies or private schools" (T.M., 752 F.3d at 15). In T.M., the Cornwall School District argued that state law, as a practical matter, effectively prevented Cornwall from offering the student services in a mainstream setting during the summer in an unapproved nonpublic setting, and that because nondisabled children do not typically attend public schools in the summer, there are virtually no public or State-endorsed general education settings for special education students to attend during the summer (at least within any reasonable geographic distance from Cornwall). In that context, however, the Second Circuit rejected Cornwall's argument that State law "prohibited it from offering [the student] a placement in a private . . . program" (T.M., 752 F.3d at 16). The Second Circuit thereafter noted, without deciding, that even if the district correctly construed its obligations under this State regulation—to wit, 8 NYCRR 200.7—as limiting its ability to place the student in a private school program because the Commissioner of Education did not approve "certain private educational programs to receive public special education funds," it did not relieve the district of its LRE obligations (T.M., 752 F.3d at 16 n.8).

The problem with the district's argument is that while T.M. and Letter to Myers are consistent with the well-known and unremarkable proposition that public agencies may find it necessary to place a student in a nonpublic setting from time to time in order to provide the student with appropriate services (and, in some circumstances, even to effectuate the IDEA's LRE requirement), these authorities did not create a no-holds-barred franchise to start funding any available seat for a student at unapproved private school whenever it appears as though the services anticipated in the student's IEP will not be as easy to deliver as initially hoped.

Letter to Myers itself indicates that federal funds may be used to support a private placement, but only "if a determination is made that a private school placement is the appropriate placement in which to implement an IEP" (Letter to Myers, 16 IDELR 290). There is no evidence that the CSE engaged in that inquiry at all. There is also no indication that district could require Gersh to adhere to the student's IEP as developed by the May 2017 CSE, much less any notion that Gersh would agree to adhere to state educational standards (see 8 NYCRR 200.6[a][3] [noting that "a student with a disability shall be provided the special education specified on the student's IEP to be necessary to meet the student's unique needs"]).

In this case, the district also failed to adequately address the issue the Second Circuit deftly avoided in T.M. but which was nevertheless a factor in this case: to wit, the import of State regulation, 8 NYCRR 200.7, as limiting the district's ability to place the student at Gersh because the Commissioner of Education has not approved Gersh to receive public special education

funds.[20] The precise State regulation at issue describes program standards for the education of students with disabilities being "educated in private schools and State-operated or State-supported schools" (8 NYCRR 200.7). Notably, the hearing record is devoid of any evidence that the district or Gersh took any actions whatsoever under State regulation to seek approval from the Commissioner of Education that would allow the May 2017 CSE to recommend Gersh as a location to implement the student's summer services as recommended in the IEP (see generally Tr. pp. 1-1730; Parent Exs. A-Z; Dist. Exs. 1-32; 34-38; 40). State regulation contains the procedures for a school board to seek approval from the Commissioner to place a child in a private school (8 NYCRR 200.6[j]; see e.g. Application of the Bd. of Educ., Appeal No. 99-022 [noting a school board's use of the State application process seeking approval to place a student in a private summer program]; Lafko v. Wappingers Cent. Sch. Dist., 75 A.D.2d 926, 927 [3rd Dept. 1980] [upholding the Commissioner's authority to deny a request for approval of a child's individual placement at a private school due to the district's failure to adhere to the Education law and the approval procedures]). In this case, merely offering to pay for private schooling at Gersh for summer 2017—without following the procedures to ensure that Gersh would adhere to the student's IEP and provide educational services in accordance with State standards, and without following the State's approval procedures—is an inadequate basis to conclude that the district provided the student with a FAPE. Absent such evidence, the hearing record supports the IHO's determination that the district was not capable of implementing the summer services recommended for July and August 2017.

Given that 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; Newington, 546 F.3d at 118-19), and that the purpose of summer services is to prevent substantial regression, the district's failure, in this case, to establish that it was capable of implementing the summer services in the student's IEP constitutes a denial of a FAPE (see Houston Indep. Sch. Dist., 200 F.3d at 349 [holding that the failure to implement substantial or significant provisions of the IEP constituted more than a de minimis failure to implement all elements of the IEP]).

At this juncture, I note the district asserts that if I conclude that—notwithstanding T.M. and the Letter to Myers—it failed to offer the student a FAPE with regard to the summer portion of the 2017-18 school year, the equitable remedy—according to T.M.—would be "to only award tuition reimbursement for the summer months at issue" and since the parents did not "pay tuition for a unilateral placement at Gersh," the parents would not be entitled to any relief (Dist. Reply

[20] State regulation defines an approved private school as a "private school which conforms with the requirements of Federal and State laws and regulations governing the education of students with disabilities, and which has been approved by the commissioner for the purpose of contracting with public schools for the instruction of students with disabilities" (8 NYCRR 200.1[d]).

Mem. of Law at pp. 7-8).[21] This is a matter that will be discussed below in the context of equitable considerations.

VII. Unilateral Placement—Applicable Standards

Having concluded that the district failed to offer the student a FAPE for the 2017-18 school year, the next inquiry is whether the parents' unilateral placement of the student at Gersh for the 2017-18 school year was appropriate. The district initially argues that the IHO failed to engage in any legal analysis upon which to conclude that Gersh was an appropriate unilateral placement.[22] Next, the district contends that Gersh was not an appropriate unilateral placement because it failed to employ State-certified teachers; Gersh was overly restrictive; and Gersh could not implement the CSE's recommendations in the IEP for OT, weekly parent counseling and training services, and home-based behavior intervention services.[23] Additionally, the district argues that Gersh failed to provide the services as recommended by the parents' own evaluators or consultants: to wit, 40 hours per week of ABA with "highly qualified [BCBA] level therapists"; 15 hours per week of home-based ABA instruction by a "board certified ABA therapist"; or 15 hours per week

[21] The Second Circuit also held that even if the district failed to recommend summer services in the LRE for a student, the "student still will not be entitled to reimbursement unless he finds a private alternative [summer services] placement, proves that alternative placement was appropriate, and proves that equitable considerations favor reimbursement" (T.M., 752 F.3d at 16). Moreover, upon remanding the matter of relief to the district court, the Second Circuit further explained that if warranted, an "award need not include tuition reimbursement for the entire year covered by the . . . IEP," and if the "LRE violation here affected [the students'] [summer services] program in July and August 2010, for instance, it may be appropriate to award him tuition reimbursement only for that period" (T.M., 752 F.3d at 16).

[22] The district is correct, the IHO merely states the conclusion that Gersh is appropriate and completely fails to analyze how Gersh addresses the student's unique needs. While the IHO's is deficient in this respect, I will exercise my discretion to undertake the needed analysis for the first time on appeal in order to prevent the inevitable delays that would occur if the matter were remanded to the IHO for a determination.

[23] Because a parents' unilateral placement need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14), the district's argument on this point is without merit and will not be further addressed. In addition, given that Gersh need not have its own IEP for the student, it is unclear—upon reading the request for review and the supporting memorandum of law—what authority the district relies upon in arguing that Gersh was required to implement the student's May 2017 IEP and that the failure to do so results in a determination that Gersh was not appropriate to meet the student's needs (see Req. for Rev. ¶¶ 43-45; Dist. Mem. of Law at pp. 25-26). Thus, the district's argument has no merit and will not be address herein.

of home-based behavior intervention services.[24] As explained below, overall the evidence in the hearing record supports a finding that Gersh was an appropriate unilateral placement for the student for the 2017-18 school year.

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). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). 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. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d at 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207 [identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][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; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; see also Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

[24] Similarly unclear within the district's pleadings is any legal authority to support the finding that Gersh was not appropriate to meet the student's needs because it did not "provide the services that the [p]arents are demanding of the [d]strict and d[id] not provide many of the services or programming recommended by their consultants" (Dist. Mem. of Law at p. 26; see Req. for Rev. ¶¶46-48). The hearing record does not support the district's contention that the parents demanded that the consultants' recommendations be provided to the student or recommended in the May 2017 IEP (see generally Tr. pp. 1-1730; Parent Exs. A-Z; Dist. Exs. 1-32; 34-38; 40). Thus, to the extent that the district appears to argue these facts as a basis upon which to conclude that the student's unilateral placement at Gersh was not appropriate because the parents' decision to unilaterally place the student at Gersh did not ameliorate substantive deficiencies of the May 2017 IEP, the district's argument is not supported by the evidence in the hearing record and must be dismissed (cf., Berger, 348 F.3d at 523 [indicating that a "unilateral placement cannot be regarded as 'proper under the Act' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient"]).

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).

A. The Student's Needs

In this instance, the sufficiency of the present levels of performance and individual needs section of the May 2017 IEP are not at issue, but a review thereof facilitates the discussion of the issue to be resolved—namely, whether Gersh was an appropriate unilateral placement to address the student's needs.

With respect to the student's basic cognitive and daily living skills, the present levels of performance and individual needs section of the May 2017 IEP reflected that the student's scores on several nonverbal reasoning tests were "extremely low and indicative of substantial cognitive delays" (Dist. Ex. 5 at pp. 5-8; see Dist. Ex. 21 at pp. 6-9, 16). The May 2017 IEP further reflected that, during testing, the evaluator noted that the student demonstrated difficulties following directions, interfering behaviors, and language limitations; in the classroom, the student presented with overall "low academic skills" (see Dist. Ex. 5 at p. 8; see Dist. Ex. 21 at pp. 16-17). The student's "language limitations" prevented the evaluator from "being able to validly administer cognitive subtests with substantial language demands" (Dist. Ex. 5 at p. 8).

Next, the present levels of performance and individual needs section of the May 2017 IEP noted that the student required "maximal physical redirection, maximal verbal prompts, maximal physical prompts, and verbal praise" to assist the student with performing to his "current potential"; additionally, the IEP noted that the student "benefit[ted] significantly through the use of a token board system" and "timed movement breaks" (Dist. Ex. 5 at p. 8). The May 2017 IEP also reported that the student "struggle[d] with transitioning to and from the classroom" (id.). At that time, the student was working on "basic reading, writing, and math skills as well as attending and using eye contact" and could perform "independent work for 30 seconds" (id.). According to the May 2017 IEP, the student also exhibited "[t]ask avoidance behaviors and self[-]stimulatory behaviors" to avoid "instruction of non-preferred tasks" and the student's behaviors could "impede on his

learning and social skills due to his limited attention" (id.). The May 2017 IEP indicated that the student was not toilet trained (id.).

With respect to speech-language development, the present levels of performance and individual needs section of the May 2017 IEP described the student as "nonverbal," "imitating some sounds," and that his "ability to respond [was] inconsistent" (Dist. Ex. 5 at p. 9). To engage in speech-language therapy, the student required "maximum support" as he displayed "difficult behaviors when he bec[a]me[] frustrated due to increased demands or when he bec[a]me[] excited" (id.). According to the May 2017 IEP, the student's expressive language consisted of "vocalizations . . . characterized by vocal play/jargon consisting of varied vowels, consonants, and some intonations using . . . syllable patterns" (id.). The student's therapy "focused on the use of total communication strategies to support his expressive language," and included the use of "signs, gestures, pictures, and 'I want' sentence strips to help him label or request items in play based activities" (id.). The May 2017 IEP noted that during speech-language therapy, the student's "decreased joint attention and focus . . . significantly impeded his performance" (id.). The May 2017 IEP also reflected that the student required "ABA strategies and a significant level of prompting in order to demonstrate success with engagement in daily activities and every day interactions" (id.).

Turning to the student's social development, the May 2017 IEP reported that the student was "not interested in interacting with his peers or playing appropriately with toys" (Dist. Ex. 5 at pp. 9-10). At that time, the student was "very self-directed" and did not engage socially with others (id. at p. 10). However, according to the IEP, the student was "showing improvement with staying seated in his chair longer during morning meeting," but he did "not use language when he participated[d]" and could become "irritated in group activities when not a preferred activity" (id.). The student required "constant redirect to remain on task and maximal assistance through verbal and physical prompts" (id.). The May 2017 IEP also described the student's ability to transition as "inconsistent" (id.).

With respect to physical development, the present levels of performance and individual needs section of the May 2017 IEP reflected that the student had "good gross motor skills" and he enjoyed "sensory exploration activities"; however, the student continued to exhibit "low endurance and f[e]ll[] asleep in school" (Dist. Ex. 5 at p. 10). According to the IEP, the student participated in PT to "address delays in overall muscle strength, balance, endurance, jumping, gait, and ball skills" (id.). The student participated in OT to "increase his ability to process sensory information, increase his attention span, fine motor planning skills, upper body strength, and visual perception/motor skills" (id.). At that time, the student required "maximum verbal and tactile cues to participate and cooperate in therapist directed activities" during OT (id.). "When presented with non-preferred activities [the student] bec[a]me[] frustrated and immediately bit[] the top of his hand or [exhibited] other behaviors"; however the May 2017 IEP also reflected that the student could "remain attentive for a few seconds with preferred activities" (id.). According to the May 2017 IEP, the student presented with "sensory defensiveness to visual and auditory input," as well as "tactile defensiveness" (id.). The student also engaged in "self[-]stimulating and self[-]directed behaviors" (id.). In addition, the May 2017 IEP reported that the student was "very distractible during fine and gross motor tasks" and did "not seem interested in any type of coloring or writing activity" (id.).

Finally, the May 2017 IEP included strategies to address the student's management needs, noting in particular that the student required "an intensive, small teacher-to-student ratio program in a highly structured and routinized environment"; the student required the "use of ABA strategies, including discrete trial instruction and a token economy to learn"; the student required "gestures, modeling and hand over hand manipulation to learn and complete tasks"; and to "[e]mphasize and praise any intention [by the student] to communicate" (Dist. Ex. 5 at p. 11).

B. Specially Designed Instruction

Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

During the 2017-18 school year at Gersh, the student attended a 6:1+1 classroom with a 1:1 aide, and received the following related services: five 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (see Tr. pp. 595-96, 726, 735, 896, 1104, 1112; Parent Ex. J at p. 6). The clinical director at Gersh testified that when she began working with the student, he completed the ABLLS, staff reviewed baseline data, and the clinical director worked with the classroom teacher to determine the student's goals and program (see Tr. pp. 1015-17, 1021-22). Results of these assessments indicated to the clinical director that the student needed to work on improving daily living and functional communication skills, as well as basic academic and fine-motor skills (see Tr. pp. 1022-23). The clinical director testified that she reviewed the student's existing FBA and BIP, which did not need to be changed because the BIP was working for him (see Tr. pp. 1036-37).

The education coordinator at Gersh testified that staff in the student's class used individual ABA methods including discrete trial (see Tr. pp. 703, 729).[25] Specifically, in the morning students received 90 minutes of discrete trial instruction (see Tr. pp. 704, 1023). During this time, students sat in a circle in individual cubbies "with a camera in the middle with a BCBA on the other end to give that feedback if needed," while the students worked toward their IEP goals (see Tr. pp. 704-05, 783, 1024).[26] In the afternoon, students participated in group lessons and then completed "independent" work toward their respective programs and IEP goals (Tr. p. 705). The educational coordinator testified that in the afternoon, students received "[a]t least" 90 minutes of discrete trial instruction (Tr. pp. 748-49). Additionally, although not necessarily discrete trial work, students received "ABA methodology" or ABA approaches, such as a token system, throughout the day (Tr. pp. 749, 757-59). At Gersh, staff collected data in a "program book," which included a student's IEP goals, data collection sheets, and "SD's," which the educational coordinator described as an ABA methodology regarding "how [staff] [were] go[ing to] approach

[25] The clinical director described discrete trial training as a 1:1 ABA teaching method that broke information down into units and built skills in a sequential manner, while data was collected on how the student responded (see Tr. pp. 1018-19).

[26] According to the educational coordinator, the student's goals were a combination of goals developed at the May 2017 CSE meeting and goals created by Gersh staff after the May 2017 CSE meeting (see Tr. p. 812; see generally Dist. Ex. 5).

the different goals" (id.). She further testified that there was "always" data collection, and behavioral and academic data were collected separately, but "graphed" daily (Tr. pp. 706, 730). At Gersh, students' academic goals were reviewed by the head of the therapeutic department, who was a BCBA, to ensure that the goals were appropriate, that students were "actually learning," and that the students were "where they're supposed to be" (Tr. pp. 706-07). Gersh's goals were comprised of a long-term goal and short-term benchmark goals, and Gersh documented students' progress toward their goals four times during the year (see Tr. pp. 707-08; Parent Ex. T).

At the impartial hearing, the student's then-current speech pathologist at Gersh testified that the student "typically" received individual speech-language therapy in the speech room, and in addition to his other annual goals, she addressed improving the student's eye contact, functional communication skills, and expressing wants and needs using total communication skills (Tr. pp. 595-98). According to communications between the parents and the student's providers during fall 2017, the student was using a "first-then" board as a visual strategy to address the student's language and behavior needs when completing specific tasks in school and in the home, and was working with number cards and on identifying his name (Parent Ex. J at pp. 1, 5, 9, 12-14).

Upon review, a January 2018 Gersh progress report indicated that using discrete trials, the student was working toward annual goals and short-term objectives such as demonstrating appropriate eye gaze, following two-step directions, identifying his first name, matching capital letters, tracing vertical lines and eight numbers, coloring, matching identical shapes and eight numbers, and identifying five colors (see Parent Ex. T at pp. 1-27). In addition, the student was working toward annual goals and objectives in which he was demonstrating his understanding of the conventions of print, using total communication strategies to express wants and needs, establishing and maintaining eye contact, following one-step verbal directions, turn-taking, engaging in parallel play and non-preferred activities, engaging in functional play with toys, transitioning from supine to sit position, walking down stairs using a reciprocal pattern, throwing a small ball overhand, participating in a variety of sensory activities, improving his fine motor skills, demonstrating improved sensory attention and visual motor skills, zipping and unzipping clothing, brushing teeth and washing hands, and unpacking his backpack (see Parent Ex. T at pp. 1-27; see also Tr. pp. 1032-33).

At the impartial hearing, the education coordinator testified that during the 2017-18 school year, the student attended the "BASE" ("Behavioral, Academic, and Social Enrichment") program at Gersh (Tr. p. 798; see Parent Ex. F at p. 1). A Gersh brochure described the "BASE Institute" as offering a full-day educational program and 12-month "academic, social and behavioral interventions" primarily for students on the "spectrum" and "who require[d] a high degree of individualized attention and treatment that may not be provided in a mainstream setting" (Parent Ex. F p. 1). According to the brochure, the "BASE Institute" utilized an "ABA approach" and students received an FBA to analyze "maladaptive behaviors," which were addressed through a BIP that "outline[d] proactive strategies to increase positive behavior and reactive strategies to reduce the frequency of maladaptive behavior" (id.).

At the impartial hearing, Gersh staff testified that the BASE program at Gersh implemented ABA methodology throughout the day with a one-to-one teaching model and discrete trial teaching for up to four hours throughout the day (see Tr. pp. 748-49, 1019-20). The educational coordinator further explained that the BASE program was designed for students who functioned at a "lower" level with a focus on functional academics, life skills, and vocational skills; for younger,

elementary students, the BASE program was delivered in a 6:1+1 student-to-teacher ratio (Tr. pp. 695, 699-700; see Tr. p. 1019). She also testified that students at Gersh received related services such as OT, PT, speech-language therapy, counseling, and art therapy, and also received adapted physical education, music, movement, and yoga instruction (see Tr. p. 698). At the impartial hearing, Gersh staff testified that teachers communicated with parents on a daily basis and parent trainings were held approximately once per month at Gersh and also on a consultation basis (see Tr. pp. 697, 1074, 1099). According to the educational coordinator, 138 of the 140 total students at Gersh had received a diagnosis on the autism spectrum (see Tr. pp. 789-90).

With respect to staff qualifications, the Gersh brochure reported that staff included "Certified Special Education Teachers," a "Certified School Psychologist," a "Licensed Clinical Psychologist," a "Licensed Speech/Language Therapist," a "Licensed Occupational Therapist," a "Board-Certified Music Therapist," "Teacher assistants/1:1 Aides," a "Consulting Psychiatrist," and a "Social Worker" (Parent Ex. F at p. 2).

At the impartial hearing, the educational coordinator acknowledged that at times Gersh employed teachers who were not certified in special education if the teacher otherwise held a degree and their certification was pending (see Tr. pp. 769-70). The hearing record shows that the student's special education teacher for the 2017-18 school year had a master's degree in special education and that she was "finishing" her teacher's certification (Tr. pp. 776, 1073). A doctoral level clinical psychologist testified that she had completed her certification as a BCBA, oversaw the Gersh ABA program, and was currently the Gersh clinical director (see Tr. pp. 1003, 1010, 1013).[27] The clinical director further testified that she worked in conjunction with the academic director and teachers to develop programming, ensured goals were addressed, trained staff providing the 1:1 instruction, and provided behavioral consultations, including FBA and BIP development (see Tr. pp. 1013-14, 1020-21). The Gersh speech-language pathologist and occupational therapist who worked with the student during the 2017-18 school year testified that they were both licensed and certified in their respective disciplines (see Tr. pp. 592, 595, 638, 882, 892-93).[28] The clinical director also testified that the student had a 1:1 aide with him throughout his school day at Gersh and that the aide had a high school degree and planned to become a registered behavior technician (RBT) (see Tr. pp. 1072-73, 1100).[29] According to the clinical director, the student's teacher and the classroom teaching assistant had "been part of the RB training" program (Tr. p. 1023). In addition, the clinical director testified that an RBT worked with the student during morning discrete trial training sessions (id.).

In addition to the foregoing, the evidence in the hearing record reveals that Gersh staff members were required to participate in weekly training sessions and monthly professional

[27] The clinical director testified that she moved to New York State in September 2017, and at the time of her testimony, she was awaiting approval as a licensed psychologist and a licensed behavior analyst within New York State (see Tr. pp. 1012-13, 1064-65).

[28] The student's Gersh physical therapist during the 2017-18 school year testified that she "[g]raduated . . . with [her] doctorate of physical therapy" and "[p]assed [her] licensing exam" in 2015; however, she did not discuss her certification (Tr. pp. 1107, 1112).

[29] The clinical director testified that an RBT was a certification received after candidates completed 40 hours of coursework, a practical supervision, and a compliance proficiency (certification) exam (see Tr. p. 1011).

development, received "intensive training on autism spectrum disorders and ABA," as well as data collection, and were trained by the crisis intervention team (Tr. pp. 735, 787-88; Parent Ex. F at p. 2). Also, the clinical director indicated that she conducted trainings with the classroom staff and related service providers regarding the student's behavior plan and his self-injurious behavior (see Tr. p. 1042; see Tr. pp. 609, 905, 1117, 1140-41). The speech-language pathologist noted that the clinical director supervised all related services and observed sessions and provided recommendations (see Tr. pp. 609-10, 638).

C. Progress

A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K., 932 F. Supp. 2d at 486-87; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[30] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Upon review of a January 2018 Gersh progress report, the student was progressing gradually or satisfactorily toward all of his annual goals and, as of the second marking period, the student had achieved many of the short-term objectives (see generally Parent Ex. T). The educational coordinator reviewed the January 2018 Gersh progress report and concluded that the student had been progressing toward "all" of his goals during the 2017-18 school year (Tr. pp. 707-25).

Based upon the student's 2017-18 report card for the second marking period, he exhibited progress toward improving his work habits and classroom behaviors, such as following class routines and schedules, completing assignments, and cooperating in group activities; he demonstrated emerging skills in behaviors, such as working independently, organizing space and materials effectively, following oral and written directions, communicating needs appropriately, demonstrating the ability to ask for help when needed, and independently solving problems (see Parent Ex. U). Regarding community-based activities, the report card noted that the student made progress toward goals in the areas of safety skills, interacting appropriately with people and in the

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

community, transitioning, and following directions; and he exhibited emerging skills in his ability to wait appropriately (id.). Also, the 2017-18 report card indicated that the student was working on, and progressing in, skills in decoding, health and wellness, understanding rules and social etiquette, numbers, technology general concepts, participating appropriately in structured groups, hygiene, and mealtime independence (id.).

In addition, Gersh staff indicated that the student was exhibiting progress in social skills related to showing more interest in people in his environment, waving hello, engaging in turn-taking, being able to sit and attend longer, maintaining eye contact, and responding to his name (see Tr. pp. 602, 606-07, 614, 702-03, 708, 1032, 1037, 1047, 1133-34; Parent Ex. J at p. 10). The occupational therapist, physical therapist, and clinical director testified that the student had shown progress in the areas of attending during sessions, transitioning to sessions, and improving fine motor skills (see Tr. pp. 899-900, 906-07, 1032, 1117-18, 1128-29, 1133). Furthermore, staff indicated that they had seen an overall decrease in the student's self-injurious behavior (see Tr. pp. 702, 904-05, 1037, 1047, 1057). The clinical director testified that the student's off-task behavior had decreased from approximately 36 minutes in September 2017, to approximately 10 minutes at the time of her testimony (see Tr. p. 1037).

D. LRE

The district contends that Gersh was not appropriate because the student had no opportunities to interact with nondisabled peers, and thus, was overly restrictive. The parents assert that they are not held to the same "stringent" State standards with regard to LRE and unilateral placements. Upon review, the evidence in the hearing record does not support the district's contentions.

Initially, and as argued by the parents, although the restrictiveness of a parental placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L., 744 F.3d at 830, 836-37 [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364).

Moreover, given the student's significant needs, the district has failed to produce any rebuttal evidence in this case indicating that the student would obtain greater educational benefit from a less restrictive setting. Thus, even though Gersh did not provide the student with access to nondisabled peers, it appears from the May 2017 IEP that the student's only opportunities to have access to his nondisabled peers in the district's recommended placement and program would have occurred during "building assemblies and special programs" (Dist. Ex. 5 at p. 19); therefore, in consideration of the totality of the circumstances, including that Gersh provided the student with specially designed instruction to address his identified needs, and the relevant factor of the student's reported progress at Gersh, LRE considerations do not weigh so heavily as to preclude

the determination that the parents' unilateral placement of the student at Gersh for the 2017-18 school year was appropriate (C.L., 744 F.3d at 837; Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

VIII. Equitable Considerations

Having concluded that Gersh was an appropriate unilateral placement for the student for the 2017-18 school year, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. The district argues that the IHO failed to engage in any meaningful legal analysis upon which to conclude that equitable considerations weighed in favor of the parents' requested relief. As noted above, the district also asserts that if I find that it is responsible for a denial of a FAPE due to the lack of summer services, tuition reimbursement should nevertheless be denied because the parents did not place the student at Gersh during summer 2017 and the proposed 6:1+3 special class placement was available in the district by September 2017. While I agree that the district accomplished great strides in establishing an in-district programming for the student, as explained herein, overall the evidence in the hearing record does not support a reduction or denial of tuition reimbursement in this case on the basis of 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 [indicating that "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"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; 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]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice 10 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]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial

of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the district points to the fact that the IHO appeared to issue a finding regarding equitable considerations prior to finding that the district failed to offer the student a FAPE as a basis to preclude or reduce an award of tuition reimbursement to the parents (see Req. for Rev. ¶¶ 49-50). Some of the district's allegations of error on the part of the IHO are entirely correct.[31] The IHO's decision discussed factual matters that were relevant to equitable considerations, but it is difficult to discern what the IHO was balancing when considering the conduct of the two parties. For example, on the one hand, the parents are understandably disturbed when the district failed to have the intensive special education programming at all for the summer 2017 called for by the student's IEP, but while exercising their right to reject the public programing, the intensity of their concerns (i.e. student's alleged difficulty with transitions between programs and the likelihood of regression, the alleged lack of the updated FBA and BIP that were needed to continue address interfering behaviors, concerns the use of staffing with the student who lacked advanced credentials and ABA experience, the student's continuing need for well-established ABA programing) is far more muted when questioned about their decision to place the student in at 8-week summer camp with an aide, at which point the student's father testified that "we were concerned not so much in terms of ABA, but we were concerned maybe that he might, you know, lose a little of what he learned academically, but we also knew that he would gain some more positive skills too that he also needs from the camp" (Tr. p. 1547). The point is that while the IHO was quick to adopt the parent's perceptions of the district's process and proposed programing into her decision, some of the accusations made by the parents against the district are not immune from scrutiny, and the parents may have exaggerated when making their claims in some instances. Nonetheless, a review of the evidence in the hearing record fails to uncover any evidence—nor does the district point to any conduct on the part of the parents—that warrant either a reduction in, or a complete bar to, the parents' request to be reimbursed for the full costs of the student's tuition at Gersh for the 2017-18 school year (see generally Tr. pp. 1-1730; Parent Exs. A-Z; Dist. Exs. 1-32; 34-38; 40). The parents vigorously participated in CSE planning process, identified their concerns to district staff, toured the public school and gave appropriate notice of their intention to unilaterally place the student at Girsh. The district's argument must be dismissed.

[31] IHO's analysis of the district's program focuses on the fact that the district's 6:1+3 class was insufficiently "well-established" but it does not describe what elements of the IEP the district was incapable of providing after the programming was up and running in September 2017 (IHO Decision at pp. 31-32). The IHO's analysis is not based upon the Endrew F. standard for whether the student's IEP was properly designed, nor does it specifically identify an element of the IEP that the school lacked the capacity to provide, other than a vague reference to a structured ABA program. On that point, the record is replete with evidence that the district had the capacity to provide ABA to the student in the 6:1+3 special class, even if the parent had pedagogical concerns over the manner of delivery. The district personnel were candid with the parents that the delivery of services over summer 2017 would be problematic due to the lack of a functioning program, but they were equally clear that the matter would be corrected in September 2017. While not certainly not a case-winning argument on the district's part, the IHO's standard that the student could only receive services in a "well-established" program is not rooted in any established legal standard for a FAPE. It reeks of a contest over which program is superior, with the winning program being the definition of a FAPE for the student.

While I find no reason to limit the parent's request for tuition reimbursement relief from September 2017 to June 2018, the district's argument that such relief occurs after the district corrected its failure to have services in place for the student warrants brief discussion. As noted above, the district struggled in 2016 and ultimately failed to find a location to implement the student's May 2016 IEP. Despite developing a new in-district strategy for the 2017-18 school year, the district nevertheless failed to provide the student's mandated services called for by the May 2017 IEP. Although the parents were made aware at the time of the CSE meeting that the district intended to carry through on its promise to have services in place by September 2017, in the face of these failures, and in the midst of the district's failure to provide the student's IEP services after the beginning of the school year, the parents opted to sign an agreement with Gersh in mid-August 2018 to unilaterally place the student and began incurring the costs for his private services in early September (Parent Exs. I; Y). Where, as here, the objective evidence shows that the district's track record of actually implementing multiple IEPs was poor, the parents were justified in continue with their plans to effectuate a unilateral placement that they felt they could place greater reliance upon. Tuition reimbursement for an entire school year based upon a school district's denial of a FAPE during the early portion of the school year is within the broad remedial authority of a due process administrative officer and courts (see, e.g. Novak v. Ennis Indep. Sch. Dist., 2012 WL 13026966, at *8 [N.D. Tex. Sept. 11, 2012]; see also Application of a Student Suspected of Having a Disability, Appeal No. 18-085). While the parents could have permissibly changed course and placed their son in the 6:1+3 special class setting in September 2017, equity does not require that they must suffer the loss of reimbursement for Gersh for the remainder 2017-18 school year simply because they were unwilling to try the program after the district failed to deliver services under two successive IEPs.

IX. Conclusion

In summary, having determined that the evidence in the hearing record establishes that the district failed to offer the student a FAPE in the LRE for the 2017-18 school year, that the evidence in the hearing record establishes that the parents sustained their burden to demonstrate the appropriateness of the student's unilateral placement at Gersh, and that equitable considerations weigh in favor of the parents' requested relief, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 17, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER