



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 19-047

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

### **Appearances:**

Law Office of Lisa Isaacs, PC, attorneys for petitioner, by Lisa Isaacs, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, 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 parent) appeals from the decision of an impartial hearing officer (IHO 2) which denied her request to be reimbursed for the student's tuition costs at Camp Ramapo (Camp Ramapo) for the extended school year portion of the 2018-19 school year.<sup>1</sup> The appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

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

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<sup>1</sup> Two IHOs rendered determinations in this matter, IHO 1 determined the student's placement under the pendency provisions of the IDEA (Tr. pp. 1-3; *see* October 4, 2018 IHO Pendency Order). IHO 2 took over the matter after IHO 1 recused himself, and IHO 2 subsequently rendered the final decision (Tr. p. 16; *see* IHO Decision at p. 10).

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The hearing record is sparse with regard to the student's early educational history. The student attended a charter school for first grade and a specialized school for twice-exceptional students with social learning differences for second grade (Parent Ex. G at p. 1). For third grade (2016-17), the student transferred to one of the district's elementary schools where the student

received integrated co-teaching services along with related services of speech-language therapy, occupational therapy (OT), and counseling (Parent Ex. G at p. 1).<sup>2, 3</sup>

During the student's third grade school year the parent referred the student to the CSE for additional evaluation due to the parent's concern that the student required additional behavioral support in the classroom (see Parent Ex. G at pp. 1, 5). In response, a school psychologist conducted a psychoeducational evaluation of the student in January 2017 (Parent Ex. G). Based on her assessment, the psychologist concluded that the student's overall cognitive ability was in the average range with the student demonstrating stronger verbal than nonverbal skills (id. at p. 5). Achievement testing yielded scores in the average range in reading and writing and below average range in math, where the student had difficulty with problem solving, numerical operations, and some tasks of fluency (id.). The psychologist described the student as very outgoing, sweet in nature, and curious; however, noted that at times the student's use of language was provocative and that the student appeared to have significant difficulty self-regulating (id. at p. 6). The psychologist indicated that the student appeared to possess age appropriate skills with regard to the student's aptitude for learning but noted that classroom observations and teacher reports indicated that the student was not performing near the student's actual level of ability (id.). The psychologist further indicated that the student's performance appeared to be directly related to the student's symptoms of ADHD, as well as the student's level of motivation, mood and impulsivity (Parent Ex. G at p. 6).

In February 2017 the parent commenced a due process hearing by filing a due process complaint notice that was subsequently amended, in which she asserted that the district failed to offer the student a FAPE for the 2016-17 school year, which assertions the district conceded (Parent Ex. B at pp. 2, 3-4). In a decision dated September 5, 2017, an IHO ordered the CSE to prepare a new IEP that added 25 hours per week of 1:1 school-based behavior therapy and 10 hours per week of 1:1 home-based behavior therapy to the student's IEP for the 10-month school year (Parent Ex. B at p. 9). In addition, the IHO ordered the CSE to add 10 hours per week of 1:1 home-based behavior therapy for July and August and 1:1 behavior therapy during all 12-month special education teacher support services (SETSS) and related services sessions to the student's IEP (Parent Ex. B at p. 9). The IHO also ordered that the district provide ABA supervision and school-based counseling as compensatory services (Parent Ex. B at p. 9). Lastly, the IHO ordered that the additional IEP and compensatory services be provided from the first day of school in September 2017 through summer 2018 (Parent Ex. B at p. 9).

On October 10, 2017 a CSE convened to amend the student's IEP to include the behavior therapy as directed by the IHO (compare Parent Ex. B at p. 9 with Parent Ex. C at pp. 17-18).

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<sup>2</sup> The hearing record reflects that the student was found eligible for special education services as a student with other health impairment (OHI), due to diagnoses of attention deficit/hyperactivity disorder, predominately hyperactive/impulsive type (severe) and oppositional defiant disorder (ODD) (Parent Ex. G at pp. 1, 6; see Parent Ex. I at p. 1).

<sup>3</sup> The exhibit refers to integrated co-teaching services as an "Instructional Co-Teaching Class (ICT Class)" (Parent Ex. G at p. 1).

According to dated notes, written on the IEP, the parent inquired about a structured program for the student for summer 2018 (Parent Ex. C at p. 3).

On March 7, 2018 the district completed an educational evaluation of the student at the request of the parent (Parent Ex. F at p. 1). Administration of formal academic achievement testing yielded average scores for reading comprehension and sentence completion, and a below average score for spelling (Parent Ex. F). In addition, the testing yielded a math composite score in the low range (Parent Ex. F). The evaluator reported that the student's overall math fluency score was below average, with an average score for addition fluency, below average score for multiplication fluency, and low score for subtraction fluency (*id.* at p. 2). The student also attained a below average score on a measure of basic math skills and operations (*id.* at pp. 1, 2).

A CSE convened on March 9, 2018 and recommended that the student receive the following special education services for the 10-month school year, commencing on March 16, 2018: integrated co-teaching services in core academic classes, individual counseling services one time per week for 30 minutes in the counselor's office, group counseling (3:1) services one time per week for 30 minutes in the counselor's office, individual occupational therapy (OT) three times per week for 30 minutes in the classroom, individual speech-language therapy one time per week for 30 minutes in the speech room, individual speech-language therapy one time per week for 30 minutes in the classroom, and individual behavior therapy 25 times per week for 60 minutes in the classroom and individual behavior therapy ten times per week for 60 minutes at home (Parent Ex. D at pp. 15-17). The March 2018 IEP also included multiple testing accommodations and management strategies for the student, as well as specialized transportation (*id.* at pp. 6, 18, 21).

With regard to 12-month services, the March 2018 CSE recommended that between July 5, 2018 and August 31, 2018, the student receive special education teacher support services (SETSS) for English Language Arts (ELA) and math two times per week each for one period ; individual counseling services one time per week for 30 minutes; individual OT services two times per week for 30 minutes; individual speech-language therapy two times per week for 30 minutes; individual behavior therapy ten times per week during SETSS and related services sessions; and individual behavior therapy ten times per week for 60 minutes in the home (Parent Ex. D at pp. 17, 21-22). According to the IEP, the SETSS, counseling services, and OT was to be located in "Separate Location Separate Location, Provider Location or Home", the behavior therapy was to be provided in "Home, Separate Location" and the speech language therapy was to be provided in "Separate Location Home, Separate Location" (Parent Ex. D at p. 17). The IEP noted that the student required specialized transportation and would be placed in any one of the district's 32 instructional regions (Parent Ex. D at pp. 20, 22). The contents of the March 2018 IEP will be discussed in greater detail below.

The district issued a prior written notice dated March 14, 2018 to the parent that reflected recommendations consistent with the March 2018 IEP and noting the student's placement in a non-specialized district school in one of the district's public school regions for the extended school year (compare Parent Ex. H and Parent Ex. D at pp. 6, 15-18, 21-22).<sup>4</sup>

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<sup>4</sup> Although defined as a related service in federal regulation (34 CFR 300.34[c][16]), the district did not list special transportation among the related services on the prior written notice with regard to the student (Parent Ex. H).

In a June 1, 2018 letter directed "To Whom It May Concern", the student's psychiatrist, opined that given the student's diagnoses of ADHD and ODD, the student required a structured, fulltime, summer environment that had educational content that matched the student's high level of functioning (Parent Ex. I). The psychiatrist further opined that the program must have support for social, emotional, and behavioral components that would allow the student to maintain gains from the past school year in an ICT classroom and prepare for the next school year (Parent Ex. I).

By letter dated June 11, 2018, the parent advised the school principal and school psychologist of her concerns regarding the student's summer (12-month) placement (Parent Ex. J). The parent indicated that she understood that the district did not provide summer placements for high functioning students with special needs like those of the student (*id.* at p. 1). However, the parent advised the district that despite the support the student had received the previous summer (SETSS and related services) "last year was unsuccessful" (*id.*). The parent noted that the district was aware that the lack of a summer placement in 2017 proved to be inadequate for the student, despite the summer SETSS providers (who quit) and OT and speech-language providers (who were unable to deliver services adequately due to the student's challenges) (*id.*). The parent opined that although home behavioral support was recommended for 2018, it was not adequate to cover the day of a structured educational and developmental environment or summer camp (*id.*). The parent advised the district that she had identified a special education program that would provide structure and instruction to address the student's ADHD, maintain the student's social and academic skills, and prepare the student for the upcoming school year: Camp Ramapo (Parent Ex. J at p 1). She opined that the program would prevent the student from regressing academically or behaviorally over the summer (*id.*). The parent further advised the district that unless it could provide an educational program with academic, emotional, and social components consistent with the student's abilities, in a group of functional peers, the parent would plan for the student to attend Camp Ramapo and "use the due process rights of parents for funding for the program" (*id.*). The parent requested reimbursement in the amount of \$7,315 for the cost of the educational portion of the program that would run from July 8 to August 17, 2018 (*id.*).

The parent's letter further indicated that she would use the behaviorists before and after, but not during, the period that the student was at Camp Ramapo (Parent Ex. J at p. 1). She also requested related service authorizations for August 18-31, 2018 for OT two times per week for 30 minutes and speech-language therapy two times per week for 30 minutes, with speech-language related service providers that would continue with the student into the (forthcoming) school year (*id.*). The parent stated that she did not think counseling would be beneficial for the few weeks at the end of the summer but indicated that the student would resume the full-compliment of services in the fall (*id.* at pp. 1-2). She asked to be advised whether (the district) could provide a fully integrated fulltime educational program for the student for the summer and a speech-language pathologist that would continue with the student in the fall (*id.* at p. 2).

A letter to the parent from the camp director emeritus (director) of Camp Ramapo, dated June 7, 2018, indicated the student was enrolled to attend the camp for six weeks between July 7,

2018-August 17, 2018 (Parent Ex. L). The letter listed the cost of the program portion of the six-week residential encampment as \$7,315, which had been paid in full (Parent Ex. L).<sup>5</sup>

In an email dated June 30, 2018, the parent requested a Related Service Authorization (RSA) for SETSS, which was subsequently emailed to her by the district (Dist. Ex. 6 at pp. 1-3). In a second email dated July 5, 2018, the parent advised the district that she was unable to find a behaviorist to work with the student due to their lack of availability and/or lack of behavioral training (*id.* at p. 1). The parent also indicated that the OT and speech-language services provided in a school setting the prior summer were unsuccessful due to the student's dysregulation and lack of behavioral support (*id.*). The parent stated that she would not be using the district's RSAs for SETTS, speech-language therapy or OT because the sessions were inadequate to [meet] the student's needs due to the lack of a structured day environment with sufficient behavioral support (*id.*).

### **A. Due Process Complaint Notice and Subsequent Events**

By due process complaint notice dated July 5, 2018, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 12-month services portion (July and August 2018) of the 2018-19 school year (*see* July 5, 2018 impartial hearing request at pp. 1-2).<sup>6</sup> The parent contended that the district refused to offer a "summer school program" and that the "team determined that [the district] did not have an appropriate educational setting for [the student] for the ESY" (*id.* at p. 2). According to the parent "SETSS for ELA and Math, Counseling Services, Occupational Therapy, Speech/Language Therapy and Behavior Therapy outside of a school setting, would fail to address [the student's] needs" (*id.* at p. 2). The parent also contended that the student required 12-month services, and that the 12-month services set forth in the March 2018 IEP did not provide for any access to peers and was therefore not the least restrictive environment (LRE) (*id.*).<sup>7</sup> The parent contended that she located a therapeutic educational summer camp that was an appropriate alternative to the 12-month services offered by the district and requested reimbursement for the program portion of the cost of the student's attendance at Camp Ramapo during July and August of 2018 (*id.* at pp. 3-4).

The parent amended her due process complaint notice on August 27, 2018 to add additional arguments with respect to FAPE for the 2018-19 school year, and included a request for an order defining the student's pendency placement (Parent Ex. A). Similar to her first due process

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<sup>5</sup> The billing statement from Camp Ramapo indicates that the cost of the camp had been paid in full on June 5, 2018 (Parent Ex. M).

<sup>6</sup> The July 5, 2018 impartial hearing request was submitted to the Office of State Review as part of the hearing record and identified on the record certification as document number 13, but it was not identified by IHO 2 specifically as a parent, district or IHO exhibit (*see* IHO decision at p. 11).

<sup>7</sup> In this case, the hearing record and the pleadings refer to extended school year (ESY), 12-month services and summer program interchangeably; however, unless directly quoting material, I use the term 12-month services in this decision. As a matter of State law, a school year runs from July 1 through June 30 (*see* Educ. Law § 2[15]), and the "12-month" or "extended" portion of a school year occurs in July and August before the 10-month September to June portion that the vast majority of public school students are accustomed to.

complaint notice, with respect to 12-month services the parent stated in the amended due process complaint notice that

[the student's] experience in ESY during the Summer 2017 proved to be unsuccessful, and [the student's mother] believed that [the student] required intensive programming for ADHD and ODD symptoms, which affect [the student's] self-regulation, attentional and inter-personal abilities. Based upon their experience in 2017, [the student's mother] was not willing to repeat an ineffective and inappropriate ESY for [the student] enrolled [the student] in a therapeutic educational summer camp

(id. at p. 2).

A prehearing conference and a hearing on the issue of pendency was conducted, after which the IHO appointed to preside over the proceeding (IHO 1) issued an interim decision on the issue of pendency on October 4, 2018 (Tr. pp. 1-14).<sup>8</sup>

The parent submitted a second amended due process complaint notice dated November 2, 2018 that included more arguments with respect to FAPE for the 2018-19 school year and included a request for relief in the form of compensatory education (Parent Ex. E).<sup>9</sup>

## **B. Impartial Hearing Officer Decision**

A second IHO (IHO 2) was appointed after IHO 1 recused himself from the matter (Tr. p. 16). While the impartial hearing was pending, the parent withdrew her claims related to the 10-month portion of the school year from September 2018 to June 2019 and limited the matter to claims involving the student's summer 2018 special education programming (Tr. pp. 32-34, 51-52).<sup>10</sup> The impartial hearing was reconvened by IHO 2 on December 27, 2018 and was concluded on March 5, 2019, after three additional days of hearing (Tr. pp. 15-171). In a decision dated April 22, 2019, IHO 2 determined that the district offered the student a FAPE for the 12-month services during the summer portion of the 2018-19 school year, reasoning that "based on the evidence presented [I find that] the program was appropriate for this student if [the student] had a mind to continue in school after June 2018. [The student] did not." (IHO Decision at p. 9).

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<sup>8</sup> The October 4, 2018 "pendency order" executed by IHO 1 was submitted to the Office of State Review as part of the hearing record and identified on the record certification as document number 8, but it was not identified by IHO 2 as being designated a parent, district or IHO exhibit (see IHO Decision at p. 11).

<sup>9</sup> The parent's claims related to the district's failure to provide appropriate extended-year services for the student during summer 2018 were contained in both the initial due process complaint notice and the two subsequent amended due process complaint notices.

<sup>10</sup> According to the parent, a partial resolution agreement was reached in September 2018 and the parent alleged that the district breached the agreement (Parent Ex. E at p.6). The resolution agreement was not included in the hearing record.

IHO 2 also addressed the parent's unilateral placement of the student at Camp Ramapo for the 12-month services portion of the 2018-19 school year and found that the district was not required to reimburse the parent for the cost of attending the camp (IHO Decision at pp. 8-10). Among IHO 2's stated reasons were his finding that Camp Ramapo was not a therapeutic summer program, it was a normal summer camp, that there was no credible evidence that the student worked on academics at Camp Ramapo, that there was no written individual program for the student, and that there were no trained therapists, and no evidence of goals or progress (id.).

#### **IV. Appeal for State-Level Review**

The parent appeals.<sup>11</sup> Initially, the parent contends that IHO 2 erred in failing to find that the district's recommendation that 12-month services denied the student a FAPE with respect to the programming offered during the months of July and August in 2018. The parent contends that although the March 2018 IEP placed the student in a district non-specialized public school setting for the 12-month services portion of the 2018-19 school year, the district never identified and offered a public school site to the student, and did not offer the parent any assistance in locating one. The parent also asserts that IHO 2 erred in failing to determine that the recommended 12-month services were too restrictive for the student and not in the least restrictive environment (LRE) because the student required access to peers in order to make progress in light of her social and emotional needs. The parent alleged that the "ESY consisting solely of SETSS for ELA and Math Counseling, Occupational, Speech/Language and Behavior Therapy was insufficient to serve student, thereby violating the Least Restrictive Environment (LRE) mandate of the IDEA." The parent also states in the request for review that the "[s]tudent's primary area of need is social and behavioral. [The student] could not be well served in the highly restrictive program of related services and SETSS in a one-to-one setting without access to and experience with student peers."<sup>12</sup>

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<sup>11</sup> The parent's request for review does not conform with the pleading requirements set forth in State regulation. Although I will, in the exercise of my discretion, not impose dismissal of the parent's request for review in this matter, counsel for the parent is cautioned that future pleadings must comply with the pleading requirements expressly prescribed by State regulation, especially the requirement with each issue numbered and set forth separately or risk dismissal (8 NYCRR 279.8[a], [c][2]). Paragraph numbering in a pleading remains permissible, as counsel for the parent did in this case, but it is no longer required, and it is not a substitute for the current requirement separate enumeration of issues presented to an SRO in the appeal. An example of a request for review with properly enumerated issues is located at <https://www.sro.nysed.gov/common/sro/files/book/sample-narrative-request-for-review-osr.pdf>. The defect in the parent's request for review causes the district to state that it denies virtually every allegation and to "respectfully refers the SRO to the Decision, and hearing record and exhibits, for their true content and meaning" and then restate its entire case, including many facts that are, frankly, not relevant to the issues in dispute. The result is an overgeneralized response rather than a critical analysis of the strengths and weaknesses of those aspects of the IHO's decision that remain in dispute and the evidence relevant thereto. Paragraphs 40-47 of the request for review begin to approach what is needed in terms of identifying specific issues, but then with respect to each issue, counsel should identify with citation the relevant portions of the hearing record that address the particular issue in question. The citation in paragraph 47 is appropriately done, but it is up to counsel's discretion if she wishes to go further and quote the hearing record to that extent, as the block quotations from the hearing record are not required under the State regulation as revised effective January 1, 2017.

<sup>12</sup> Beyond the LRE aspect of type of services offered, it does not appear that the parent has a disagreement with the type of educational and related services offered such that SETSS and the related services discussed above should have been abandoned by the district and some other type of educational placement should have been substituted in their place (i.e. offering a special class or residential setting instead of SETSS or ICT services).



The parent also asserts that IHO 2 misunderstood the decision and order that led to the March 2018 changes to the student's IEP, which did not mandate the very restrictive setting without the benefit of any peer interaction. Lastly, on the issue of FAPE, the parent contends that the district presented no witnesses in support of its claim that a FAPE was offered, and that the evidence and testimony entered by the parent proves that the district's recommended 12-month services were not appropriate.

The parent next contends that IHO 2 erred in failing to find that Camp Ramapo was an appropriate placement for the student during July and August of 2018, because the camp provided the student with an appropriate peer grouping, offered didactic instruction, addressed daily living skills, and remediated social deficiencies. The parent also contends that IHO 2 erred by importing pre-conceived notions of what a typical summer camp provides, and that the hearing record established that Camp Ramapo was a specialized therapeutic setting, that the student accessed academics while at Camp Ramapo, and made progress with respect to social emotional needs.

The parent also contends that IHO 2's conduct of the impartial hearing showed that he was not impartial in that he engaged in intimidation tactics and was impatient and hostile to the parent and witnesses, resulting in effects that stymied the testimony of the parent and her witnesses.

Lastly, the parent contends that IHO 2 erred in failing to address equitable considerations, and that equitable considerations support reimbursement for the unilateral placement at Camp Ramapo that the parent seeks.

In an answer, the district, in relevant part, asserts that IHO 2 correctly found that the 12-month services set out in the March 2018 IEP offered the student a FAPE and correctly determined that the unilateral summer placement at Camp Ramapo was not appropriate. The district also asserts that IHO 2 was impartial, the parent had opportunity to be heard, and that IHO 2's credibility determinations were valid and, consequently, requests that IHO 2's decision be upheld.

## **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

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Instead, the parent appears to argue that those services should have been provided with a different level of restrictiveness, that is in different location and/or environment.

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 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]).<sup>13</sup>

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

## **VI. Discussion**

### **A. Conduct of Impartial Hearing – IHO Bias**

Turning initially to the parent's contention that IHO 2 was not impartial, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write

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<sup>13</sup> 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).

decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

The parent asserts that IHO 2 exhibited bias by overt hostility, an injudicious attitude and inclusion in the decision of several "note:" references that revealed bias (Tr. pp. 84, 146-47, 154, 156; IHO Decision at pp. 3, 6). The hearing transcript also contains several instances of IHO 2 making his own objections to questions proffered by the parties and then sustaining them. (see Tr. pp. 113, 118, 131, 144). Although the instances cited by the parent arguably support an impression that IHO 2 at times exhibited impatience with the parties, witnesses and conduct of the proceeding,<sup>14</sup> a thorough review of the hearing record reveals that the parent was able to enter the evidence and elicit the testimony to support her case in this matter, and that she had a reasonable opportunity to be heard. Overall, an independent review of the hearing record demonstrates that the parent had the opportunity to present a case at the impartial hearing and that the impartial hearing was conducted in a manner consistent with the requirements of due process by IHO 2 (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Moreover, in reviewing this matter as it stands before me, I have conducted an independent review of the parent's claims,

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<sup>14</sup> I have previously discussed the practice of IHOs raising and sustaining their own objections, stating that

it is the IHO's responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]). Additionally, an IHO has the obligation in some instances to ensure that there is an adequate record to support his or her decision (Application of a Student with a Disability, Appeal No. 11-065). Although the practice of an IHO of formally raising and sustaining his or her own objections has not been especially common, it has some basis in adjudication (see State v. Santos, 413 A.2d 58, 69 [R.I. 1980]). From time to time, it may leave open the possibility that the IHO will later be accused of bias or partiality, but neither the practice itself nor an adverse ruling inexorably leads to the conclusion that the IHO has acted with bias or renders the impartial hearing fundamentally unfair (see Menchaca v. Uribe, Jr., 2010 WL 3294249, \*7 [C.D.Cal. Jun. 30, 2010]; U.S. v. Battles, 2003 WL 22227190, at \*10-\*11 [N.D.Ill. Sept. 26, 2003]).

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I note however that the practice is not universally admired and has in some instances been disfavored—overuse of the technique can, in some instances, cross the line and result in prejudicial error to a party (see, e.g., State v. Steele, 23 N.C.App. 524, 527 [N.C.App. 1974]; De Bock v. De Bock, 184 P. 890, 897 (Cal. App. 3 Dist. 1919) ["Such procedure is not to be commended except in unusual cases"]). This is not the first time a party has unsuccessfully challenged limited use of the practice by an IHO (see Application of a Child with a Disability, Appeal No. 07-130) and, as in that case, impermissible overuse of the technique is not present in the circumstances in this case and is not a basis for disturbing the IHO's determination.

(Application of a Student with a Disability, Appeal No. 12-032). Similar to the circumstances in Application of a Student with a Disability, Appeal No. 12-032, IHO 2 often, but not always, explained the basis of his own objections. As this is not the first time parties have appealed for State-level review alleging bias on the part of IHO 2 due to this uncommon practice (see Application of a Child with a Disability, Appeal No. 07-130), I suggest to IHO 2 that he make it a routine practice to explain to the parties at the outset of an impartial hearing, or in this case, upon being appointed, before further testimony is taken, that he has this practice and its purpose.

as well as the evidence and testimony in the hearing record and, as set forth below, have sustained a portion of the parent's claims on appeal.

### **B. 12-Month School year Services – Summer 2018**

Turning to the merits of IHO 2's determination that the district offered the student a FAPE for the summer 2018 portion of the 2018-19 school year, the parent advances two different reasons that IHO 2's conclusion was incorrect. One argument is fairly straightforward. Specifically, the parent alleges that although the March 2018 IEP placed the student in a district non-specialized public school setting for the 12-month services portion of the 2018-19 school year, the district never identified and offered a site to the student, and did not offer the parent any assistance in locating one.<sup>15</sup> The parent's other claim, which is an IEP design claim that is rooted mostly in an argument based on the IDEA's LRE mandate and the lack of a clear indication of the environment in which the student would receive 12 month services, to wit: the district offered the student a program comprised solely of individual summer services that did not include any group learning or experience in a classroom setting. For the reasons set forth below I agree that the district denied the student a FAPE with respect to the special education services for summer 2018, but not for all of the reasons stated by the parent.

At the outset, I note that the IDEA does not automatically require the provision of school services during the summer months for all students with disabilities; 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).<sup>16</sup>

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<sup>15</sup> The district asserts that this claim should be rejected because it was not raised in the "amended DPC" (Answer ¶12). However, this specific claim was raised by the parent, not only once, but in all three due process complaint notices (see July 5, 2018 impartial hearing request at p. 2; Parent Exs. A at p. 2; E at p. 2). To the contrary, it is the district that, for whatever reason, completely failed to address the most critical issue presented by the parent's complaints with regard to the provision of a FAPE to the student, that being her IEP implementation claim.

<sup>16</sup> 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]).

## 1. Failure to Implement the Student's IEP during Summer 2018

With respect to the parent's claim that the district failed to implement the student's IEP, the IDEA requires that 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]).

In this case, the March 2018 IEP listed the site where the 12-month services were to be implemented as follows: "Placement Recommendation for July and August: NYC DOE School Non-Specialized (District 1-32)" (Parent Ex. D at p. 18). The March 14, 2018 prior written notice set forth the placement and services recommended at the March 9, 2018 CSE meeting, and similarly identified the "Extended School Year" placement recommendation as "NYC DOE School Non-Specialized (District 1-32)" (Parent Ex. H at p. 1).

The available evidence in the hearing record supports the parent's contention that the district failed to implement the 12-month services in a district public school as set forth on the March 2018 IEP, and instead only offered a program of individual services to be provided pursuant to related services authorizations (RSA's) for the SETSS and related services recommended for July and August 2018. The parent's testimony concerning discussions at the March 2018 CSE

meeting establishes that she expressed her opinion that the recommended 12-month services were the same as those offered in the previous school year and "it had not worked then," and the district members of the CSE "responded that they could not offer [the student] a DOE placement, because [the student's] cognitive skills were too advanced for the population" (Tr. p. 112). The parent's testimony is unrefuted due to the lack of testimony from any of the other CSE members. The parent further testified that district members of the CSE, specifically the principal and the school psychologist attending the meeting, told her that the district could not provide a setting where there would be an appropriate peer grouping and, as a result, the services on the IEP could be made available, but a placement could not (Tr. pp. 112-13, 114-16). The parent further testified that the district did not otherwise offer to assist the parent with finding a summer placement on her own, which is what prompted the parent to begin consulting with other parents and professionals to investigate where students with special needs could obtain behavioral and social emotional support to minimize regression over the summer months (Tr. pp. 116-17). Lastly, the parent also testified about a letter she sent to the district in part to inform the district of her intention to unilaterally place the student at Camp Ramapo during July and August 2018, wherein she related that it had been made clear to her by unnamed persons at the student's public school that the district "does not provide summer placements for high functioning children with special needs" (Tr. p. 126-27; see Parent Ex. J).

Based on the foregoing, I find that the district denied the student a FAPE when it substantially deviated from the student's March 2018 IEP recommendation that the placement for student's 12-month services would be at a NYC DOE School Non-Specialized (District 1-32) as there is no evidence that the district took any action at all to implement the student's IEP as written by providing the parent with the information regarding a public school site at which the services would be provided. IHO 2 found that "the program was appropriate for this student if [the student] had a mind to continue in school after June of 2018. [The student] did not" (IHO Decision at p. 9), but that conclusion is not supported by evidence in the record. Moreover, even if there had been such evidence of school refusal, it would not excuse the district from the need to show that it took the requisite actions to put the student's written IEP into effect. Indeed, the gravamen of the parent's claim concerning the district's placement of the student for 12-month services is that the district was required, pursuant to the March 2018 IEP, to place the student in a "school," to use IHO 2's nomenclature, and failed to do so. Instead, the district provided the parent with RSAs for individual related services without placing the student at the NYC DOE School Non-Specialized (District 1-32) identified in the March 2018 or otherwise providing evidence that shows that the district afforded the student with access to a classroom structure. Although IHO 2 attributes the parent's rejection of the district's 12-month services to the student's alleged disinclination to attend any educational program or related services over the summer, the hearing record amply reflects that the district and parent agreed that the student needed 12-month services, and the only dispute between the parent and district was whether the district could or would implement the placement as written in the March 2018 IEP.

Given 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]).

## 2. Description of the Student's Needs and Prior Summer

Although the student's needs are not in dispute and the parent does not argue that the SETSS and related services listed in the student's IEP for summer 2018 were inappropriate aside from being violative of the IDEA's LRE mandate,<sup>17</sup> a review of the student's needs as set forth in the March 2018 IEP is helpful to (1) determine whether the alleged failure of the CSE to design an appropriate IEP contributed to a denial of a FAPE and (2) whether the parent has successfully met her burden to show that Camp Ramapo offered appropriate special education and related services to address the student's unique needs. Accordingly, I will set forth what the evidence shows regarding the student's needs before returning to the parent's argument that the IHO erred in finding the district's IEP appropriate and her argument that the IHO erred in finding Camp Ramapo inappropriate.

With respect to the student's academic achievement, functional performance, and learning characteristics, the March 2018 IEP indicated that the student's reading level was "on grade level for this point in the school year for fourth graders" (Parent Ex. D at p. 1). The IEP indicated that the student was focusing on reading out loud to improve fluency and working on reading comprehension by answering questions in school and at home about the book the student was reading (Parent Ex. D at p. 1). According to the IEP, the student's teachers were working with the student on reading parts of a book and stopping to summarize and pulling out important information (who, what, where, when, why, and how) and using visual supports to identify the main idea (Parent Ex. D at p. 2). In terms of writing, the IEP indicated that the student needed a lot of support to plan out an assigned story and used an organizer to plan out the introduction, body paragraphs and conclusion (Parent Ex. D at p. 2). When conferencing with a teacher, the student was able to verbalize the student's story ideas; however, the student usually required support to stick to writing guidelines and used a checklist to self-assess the student's writing throughout the unit (Dist. Ex. At p. 2). With respect to math, the IEP indicated that the student was working on addition/subtraction up to 1000 and fluency of math facts including multiplying two-digit by one-digit numbers (Parent Ex. D at p. 2). The IEP noted that when the student was given a math quiz that the student had a negative outlook on she would sometimes shut down during the quiz (Parent Ex. D at p. 2). The student responded well to praise and positive reinforcement and used a checklist with reminders to reread math problems and check the student's answer using multiple strategies (Parent Ex. D at p. 2).

The IEP indicated that at the time of the CSE meeting, the student had received speech-language therapy two times per week individually and during classroom and therapy activities the student was "extremely" self-directed (Parent Ex. D at p. 2). As detailed in the IEP, speech-language therapy targeted the student's auditory processing; ability to identify the main idea, draw inferences, and formulate predictions; and using organizers to support the student's writing (Parent Ex. D at p. 2). The IEP stated that the student was most successful during pull out sessions but indicated that the student required convincing and a reward to go to the therapy room (Parent Ex. D at p. 2). During push in sessions, the student often refused to engage with the clinician and

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<sup>17</sup> Instead, as described above, it appears that the inappropriateness of the services in the IEP, insofar as the parent is concerned stems, from LRE concerns and the contention that the student's needs are primarily behavioral and social, and that the programming proposed by the district lacked sufficient access to peers.



walked around the classroom, eloped to the hallway, and yelled at the clinician (Parent Ex. D at p. 2). According to the IEP, the student's performance during therapy could be inconsistent and was dependent on the student's level of motivation and ability to attend to the task at hand (Parent Ex. D at p. 2). With respect to receptive language, the student was able to comprehend "wh" questions and understand linguistic concepts (Parent Ex. D at p. 2). The student continued to benefit from verbal prompts to answer inferential questions, express the main idea, and identify supporting details (Parent Ex. D at p. 2). The IEP indicated that the student was easily overwhelmed, distracted and had difficulty staying on task and therefore struggled to recall, process, and understand information presented both verbally and visually (Parent Ex. D at p. 2). With respect to expressive language, the IEP indicated that the student spoke in sentences with age appropriate grammar and syntax but noted that sometimes the student benefitted from verbal prompts to help the student express ideas in a clear and concise manner and answer questions (Parent Ex. D at p. 2).

The IEP noted that the student performed better when participating in activities that the student enjoyed (Parent Ex. D at p. 3). The IEP indicated that the parent expressed significant concern with regard to the then-current ABA program being used as it did not address the student's academic needs (Parent Ex. D at p. 3). According to the IEP the parent requested an ABA provider with an educational background (Parent Ex. D at p. 3). The parent also expressed concern regarding the number of providers and the size of the team needed to address the student's academic and behavioral needs and stated that it was very challenging for everyone to be on the same page and consistent in the use of strategies and routines to address the student's needs (Parent Ex. D at p. 3). In addition, the parent inquired and expressed concern regarding the student's 12-month program and the student's need for more support academically throughout the summer (Parent Ex. D at p. 3).

In terms of the student's social development, the IEP described the student as a friendly student who enjoyed social interactions with peers but who struggled to interact appropriately with classmates due to her impulsivity (Parent Ex. D at p. 4). The IEP indicated that the student had shown improvement in her ability to compromise and to be more flexible when things did not go the student's way (Parent Ex. D at p. 4). According to the IEP, the student craved attention from both peers and adults which often resulted in the student calling out at inappropriate times or speaking at a volume that was too loud for the occasion (Parent Ex. D at p. 4). In addition, the student would walk out of the classroom in order to gain adult attention (Parent Ex. D at p. 4). The IEP indicated that although these behaviors had subsided they beginning to start up again (Parent Ex. D at p. 4). As noted in the IEP, the student had a tendency to dominate conversations and needed clear limits in order to be successful (Parent Ex. D at p. 4). The student had recently begun to make self-deprecating remarks about the student's academic abilities and progress (Parent Ex. D at p. 4).

The IEP indicated that the student demonstrated a high level of anxiety during testing and benefitted from positive reinforcement and encouragement (Parent Ex. D at p. 4). The IEP indicated that in ABA sessions the student's team had worked to decrease the student's disruptive behaviors and elopement from the classroom and while overall the student had made tremendous progress there had been a recent regression in the student's behavior (Parent Ex. D at p. 4). The student had demonstrated a significant reduction in disruptive and unsafe behaviors which had allowed more time for learning (Parent Ex. D at p. 4). The IEP indicated that it was important to

note that when the student became emotionally dysregulated the student struggled to apply previously taught skills for self-regulation, as well as functional communication skills (Parent Ex. D at p. 4).

The IEP stated that the student's strengths included the student's aim to please teachers as well as others whom the student cared about (Parent Ex. D at pp. 4, 21). The IEP noted that making good decisions within the classroom was motivating for the student, as the student became very proud of herself when doing the right thing, both academically and socially (Parent Ex. D at p. 4). The IEP indicated that the student had difficulty following directions when the student became upset by changes in the daily routine (Parent Ex. D at p. 4). The student challenged adults by verbally refusing their direction and by simply walking away (Parent Ex. D at p. 4). According to the IEP, during these moments it could take some time to get the student refocused, as the student required a lot of 1:1 support (Parent Ex. D at p. 4). The student struggled with transitions especially when they involved leaving the classroom (Parent Ex. D at p. 4). The IEP stated that the student benefitted from school-based counseling to help improve the student's ability to follow directions, social interactions, and address issues of poor self-esteem (Parent Ex. D at p. 4). The student also benefitted from implementation of the student's behavior intervention plan, as well as ABA (Parent Ex. D at p. 4).

With respect to the student's physical development, the March 2018 IEP described the student as healthy and able-bodied and noted that the student enjoyed physical activity and play (Parent Ex. D at p. 5). The IEP indicated that when the student was in the classroom, the student tended to move aimlessly or would sit next to one of the student's teachers, mostly trying to be helpful, but sometimes becoming overwhelmed with excitement and acting silly and inappropriate (Parent Ex. D at p. 5). According to the IEP, the student had three behavioral specialists that came every day to develop behavior plans for the student at school and the therapists had shared their list of strategies based on consistency, redirection and a reward plan (Parent Ex. D at p. 5).

As detailed in the IEP, the student became overwhelmed during transitions and during this time tended to wander around the classroom avoiding work, fidgeting, grabbing materials and distracting the student's peers (Parent Ex. D at p. 5). As a result, the student missed instruction and needed adult support to catch up with the class (Parent Ex. D at p. 5). The student benefitted from an adult to help engage the student through the use of rewards (Parent Ex. D at p. 5). The IEP indicated that in the classroom the student was distracted by visual and auditory stimuli and at times was unable to follow directions or academic instructions (Parent Ex. D at p. 5). The student had sensory processing difficulties which hindered the student's ability to self-regulate (Parent Ex. D at p. 5). The student required encouragement and constant direction from adults to initiate, plan, and execute academic tasks (Parent Ex. D at p. 5). The classroom routine was helpful in providing the student a frame of reference that facilitated transitions and the student responded well to deep pressure and upper body stretches that enabled the student to sit and attend (Parent Ex. D at p. 5). The student had difficulty with handwriting as the student applied too much pressure to the pencil against the paper due to weak "inner" hand muscles (Parent Ex. D at p. 5). In addition, the student tended to perseverate on making the student's handwriting perfect (Parent Ex. D at p. 5). According to the IEP, the student was friendly with peers but had not established close friendships (Parent Ex. D at p. 5). If the student became anxious or upset, the student was unable to problem solve even when looking for examples on the wall near the sitting area that could help the student (Parent Ex. D at p. 5).

The IEP identified the following supports to address the student's management needs: checklists, organizers, use of a visual timer for breaks and assignments, positive reinforcement, questions read and paraphrased, use of a tracker for writing, movement breaks, frequent check-ins, self-monitoring tools and techniques, visual aids, preferential seating, frequent teacher check-ins, frequent prompts and refocusing cues, previewing material, head phones for noise reduction, implementation and progress monitoring of a BIP, positive reinforcement, use of rewards and motivational tactic as it relates to BIP, and structured class routines (Parent Ex. D at p. 6).

The March 2018 IEP included goals that targeted the student's ability to verbally express frustration in appropriate ways; use acceptable ways to gain attention; improve self-concept by reducing self-deprecating statements; summarize events of a story in sequential order independently assess one page of own writing using a checklist, answer inferential questions about grade level texts; increase math fluency; solve grade-level, multi-step, math subtraction word problems; practice self-regulation strategies to improve attention, behavior, and school performance; decrease pressure of pencil against paper to increase handwriting speed; improve auditory working memory by verbally retelling information from lists, phrases sentences and paragraphs; identify main idea, salient details and draw inferences from grade level texts; use visual organizers outlines, and rubrics to generate, organize compose, and edit written work; and stay on task for five minutes (Parent Ex. D at pp. 8-15).

During the impartial hearing, the parent testified that in summer 2017 she attempted to implement the student's 12-month services recommendations, but, "[i]t did not go well" (Tr. p. 108). The parent indicated that as an initial matter she needed to discuss the location of recommended IEP services with the CSE (Tr. p. 108). She described the difficulty she had accessing the services due to their scheduled location and the student's difficulty with anxiety on subways, buses, and around crowds (Tr. pp. 108-09). The parent testified that once at the public school, the related service providers asked her to sit in on the therapy sessions because the student was highly dysregulated (Tr. p. 109; see Dist. Ex. 6 at p. 1). No other children were present (*id.*). According to the parent, within a week (of services starting) the student was oppositional and defiant, and the providers complained (Tr. p. 110). At some unspecified point, the parent discontinued the speech-language and OT services (*id.*). With respect to the recommended SETSS, the parent reported that the services were provided at home in summer 2017 on a 1:1 basis (*id.* at pp.110-12). The parent testified that providing SETSS was very problematic; providers quit, and some just stopped showing up (Tr. p. 110). The parent testified that she contacted the CSE about providers quitting because they could not work with the student (*id.*). She explained that in order to provide the student with a program during summer 2017, she reached out to people in her church (for camp suggestions) and tried to keep the student busy and engaged with other children (Tr. p. 111). However, according to the parent, the student got kicked out of summer activity programs due to behavioral issues (*id.*).

Moving to the March 2018 IEP, the parent testified that she communicated to the district the problems with the student's 2017 12-month program prior to the March 2018 CSE meeting both verbally and via email (Tr. p. .114). The parent testified that the school psychologist "stated explicitly" they could not recommend a district placement because the student's "skill level exceeded the levels—it would not be a compatible grouping" (Tr. p. 115). According to the parent's testimony, the principal expressed regret that the school itself did not have its own summer courses or summer placement (*id.*). Therefore, the district could not recommend anything other

than what was recommended previously (*id.*). The parent further testified that after the March 2018 CSE meeting, she had several conversations with the district about her concerns regarding the student's ability to make it through the summer without regression because of inadequate support (Tr. pp. 116-17).

With this background description of the student's needs in mind, the parent's concerns at the time of the CSE meeting and the parent's description of her experiences in the previous summer and leading up to the March 2018 CSE meeting, I will turn next to several points with respect to the adequacy of the district's proposed IEP for summer 2018 and the parent's case regarding the unilateral placement at Camp Ramapo.

### **3. Adequacy of the IEP for Summer 2018 and LRE**

In this case, neither party disputes that the student required a 12-month school year program to prevent substantial regression and, consistent with this need, the CSE recommended that between July 5, 2018 and August 31, 2018, the student would receive both direct and group service SETSS for English Language Arts (ELA) and math two times per week each for one period (Parent Ex. D at pp. 17, 21-22). Confusingly, the IEP indicated that the location of the SETSS, would be "Separate Location Separate Location, Provider Location or Home" (*id.* at p. 17). Although the parent does not make this point specifically, it is also unclear to me how the 12-month SETSS services in a "group" setting, as recommended in the March 2018 IEP, could realistically be implemented in a student's home (*see* Parent Ex. D at p. 17).<sup>18</sup> The IEP also recommended 12-month services in the form of counseling services one time per week for 30 minutes in a "Separate Location Separate Location, Provider Location or Home," individual OT services two times per week for 30 minutes, once again confusingly located "Separate Location Separate Location, Provider Location or Home" (*id.*). The IEP called for individual speech-language therapy during summer 2018 two times per week for 30 minutes in an unclear location of "Separate Location Home, Separate Location" (*id.*). According to the IEP individual behavior therapy was mandated ten times per week during SETSS and related services sessions in a "Home, Separate Location" and, in addition, it also called for individual behavior therapy 10 times per week for 60 minutes in the home (*id.*). The portion of the March 2018 IEP detailing the "parent concerns" also supports the parent's claim that the IEP was insufficient. The section relates that the parent expressed

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<sup>18</sup> Additionally, as I have warned the district in the past, it is not clear at all that the parties are working with the same definition of "SETSS," a term that, unlike all of the elements of the student's programming, is not described in New York State's continuum of special education services. Whether the SETSS service is "a flexible hybrid service combining Consultant Teacher and Resource Room Service " that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" as once represented to me by the district in another case (after my insistence that evidence of the service be produced by the district in right of record inadequacies) (Application of a Student with a Disability, Appeal No. 16-056), or whether SETSS in this proceeding means some other a la carte service that is completely disconnected from supporting the student in a general education classroom setting as evidenced by the district's designation of the student's home as a location on the IEP and parent's receipt of an RSA for the service suggests, the record simply does not indicate in any meaningful way. I have warned the district previously that I will not take judicial notice of the meaning of the term or favor one party over another as to its meaning (Application of a Student with a Disability, Appeal No. 17-103). It is the district's burden to produce evidence that describes the SETSS as proposed for each student that becomes the subject of a due process proceeding, and the district has failed to address that burden in this case.

"concerns in meeting for a full summer program which would also address academic skills" and that the "team" disagreed, because "related services as well as ABA and SETSS which are in place for [the student] this summer . . . are sufficient and at this time feel a small class would be too restrictive" suggesting that some kind of school-based placement with non-disabled peers should have been in the mix (Parent Ex. D at pp. 22-23). Together with the unrefuted statement of the parent's concerns expressed during the March 2018 CSE meeting and notation of "NYC DOE School Non-Specialized (District 1-32)" in the IEP and prior written notice as described previously, these confusing statements in the IEP contribute to my finding that the district denied the student a FAPE, especially in the absence of any testimony from district witnesses that further information was shared with the parent about the meaning of these location descriptions at a point in time roughly contemporaneous with the creation of the IEP.<sup>19</sup>

Finally, I note that not all of the parent's LRE claims or claims that student had to be placed with peers are valid as some of the contents of the student's IEP for summer 2018 were mandated under the prior IHO's order issued in September 2017 (Parent Ex. B at p. 9).<sup>20</sup> Specifically the district was mandated to revise the student's IEP to provide "ten hours per week of 1: 1 home-based services by a provider trained in behavioral therapy during July and August and 1: 1 services by a provider trained in behavioral therapy during all summer (extended school year) special education teacher support services ('SETSS') and related services sessions" and that the district "shall provide and fund the following services as compensatory services: ten hours per month of ABA supervision by a BCBA from September 2017 through August 2018" (*id.*). To the extent that the district was complying with an order of the IHO, it cannot be faulted for providing services in a setting other that directed by the IHO, that is, one teacher/provider and one student.<sup>21</sup>

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<sup>19</sup> Although not fatal to the parent's argument that the district denied the student a FAPE, there is evidence that the parent was more attuned to how the summer services described in the March 2018 IEP would work as a practical matter. During the school year preceding the one at issue here, IEP covering summer 2017 also included identically confusing language about the location of services and placement in one of the district's public school (Parent Ex. C at p.18). However, with respect to summer 2017, despite the confusing way in which the content of the IEP was laid out, the parent testified as to her understanding that one or more school sites had been proposed at one point in Chinatown and that the parties had thereafter "negotiated" that OT and speech language services would be provided in East Harlem even though she did not agree with the services (Tr. p.108-09). At the time the parent had expressed concerns about subways, buses and crowds and the parent's decision to take cabs or direct buses instead to alleviate the student's anxiety (*id.*), but that just calls into question why she was transporting the student at all as the IEP covering summer 2017, similar to the IEP for the subsequent summer, also required the district to provide specialized transportation as a related service (Parent Ex C at p. 20). None of these questions are answerable with the record in its current state.

<sup>20</sup> It is unclear the extent to which the parent believes the services in the IHO's September 2017 order could have been offered in a different manner, but a collateral attack, if any, cannot be made on that order at this point as the route for review would be direct appeal from the order in that proceeding.

<sup>21</sup> 1:1 instruction and, in some circumstances 1:1 aides, are viewed as restrictive in the sense that by its very description 1:1 services either limit or preclude access to other students. State regulations were amended, effective June 29, 2016, requiring CSEs to consider certain factors prior to determining that a student needs a one-to-one aide its effect on the restrictiveness of the student's setting (*see* 8 NYCRR 200.4[d][vii][3][g]). State guidance published in 2012 outlined similar considerations ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Mem. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). 1:1 instruction is perceived by parties

In light of the above, I find that IHO 2 erred in concluding that the district offered the student a FAPE during the 12-month services period of the 2018-19 school year, and I will reverse that determination.

### **C. Unilateral Placement**

My finding with respect to the district's failure to offer a FAPE during the 12-month services portion of the 2018-19 school year does not end the inquiry with respect to the parent's request for reimbursement for the unilateral placement at Camp Ramapo. 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, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether 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; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["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]; 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]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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and administrative hearing officers as very clearly restrictive as it does not occur with a group of students (see, e.g., Application of a Student with a Disability, Appeal No. 18-117; Application of a Student with a Disability, Appeal No. 18-101; Application of a Student with a Disability, Appeal No. 17-075; Application of a Student with a Disability, Appeal No. 17-015). 1:1 services is not the same as, for example, a group of six students all having an individual teacher responsible for their instruction (i.e. 6:6 student-to-teacher ratio) which is a different type of claim that I have addressed in other unilateral placement cases. That said, some of the services, such as SETSS, were clearly designated as a group service that should have allowed access to peers, but as noted above, no group service could be offered if located in a setting such as the student's home (Parent Ex D at p. 17).

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).

At the outset, I recognize that the hearing record lacks specific detail concerning the strategies and techniques Camp Ramapo used to address the student's unique educational and social/emotional needs. However, the district did not call any witnesses in support of its position that Camp Ramapo was an inappropriate unilateral placement. Moreover, although IHO 2's decision engaged with some of the testimonial evidence presented in support of the parent's claim for tuition reimbursement, it also included a fair amount of opinion and conjecture untethered to citations to the record or specific evidence. Accordingly, a discussion and weighing of evidence in favor of, as well as against, the award of tuition reimbursement for the student's program portion of Camp Ramapo is helpful in determining whether the parent has met her burden on this issue.

In support of her claim for tuition reimbursement, the parent testified concerning the difficulties the student encountered the previous summer when the district had recommended 12-month services that were in many respects very similar to those recommended in the March 2018 IEP for summer 2018 and that testimony was summarized above.<sup>22</sup> The parent reported that in order to develop a summer program for the student that would be supportive, she spoke with different professionals who knew and worked with the student, including a private therapist that had been seeing the student once or twice a week, behaviorists who were delivering a sizable portion of the ordered ABA, parents of special needs children about where their children went for the summer for support in order to make sure there was minimal regression, and hopefully, development, and with the student's psychiatrist (Tr. p. 117). According to the parent, the psychiatrist recommended that the student participate in a highly supportive summer program that would allow the student to be socially engaged (Tr. p. 117) The psychiatrist noted that the student was very creative and smart as well as very active and dysregulated, and recommended an environment that would permit the student to develop motor skills, engage in artistic expression, and socialize with children to understand social boundaries and reciprocity (Tr. p. 118).

The parent also testified that the supervisor of the behaviorists working with the student reviewed Camp Ramapo material for the parent, provided the camp with documentation on the student, and after thinking about other placements indicated that Camp Ramapo would be "good

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<sup>22</sup> The IEP covering summer 2017 indicated that the student should receive SETSS in ELA and math, OT, speech-language therapy, counseling, and behavior therapy (Parent Ex. C at p.17).

fit" for the student (Tr. p. 119). The parent indicated that another private therapist who worked with the family for over a year also thought that attending Camp Ramapo would be a positive experience for the student, particularly in the absence of any other structured environment for the summer (Tr. p. 119-20).

With respect to evidence that Camp Ramapo was appropriate to meet the student's needs in the areas of dysregulation, oppositional behavior, peer interaction and attention, as referenced above, in a letter dated June 7, 2018, the Camp Ramapo director indicated that the camp provided a "residential therapeutic and educational experience designed to teach skills enabling participants to improve their social success" (Parent Ex. L). He further indicated that the program provided by the camp included the necessary structure and instruction to address the student's ADHD, minimize regression, and prepare for the school year (id.)

In a second letter dated August 9, 2018 and addressed "To Whom it May Concern," the director provided additional information about Camp Ramapo (Parent Ex. K). Specifically, he stated that Camp Ramapo was a residential, inclusive environment purposely designed for children having difficulty maintaining healthy relationships with peers and adults (id.). The director explained that the camp activities were structured to meet the needs of children who could benefit from a higher than average level of supervision, engaging environment, and a character-building curriculum (id.). He noted that in addition to a full range of traditional activities, Camp Ramapo's curriculum included: activities that involved exploring and learning about the natural environment, a reading and technology center where participants had access to educational software and a library, bike repair, theater arts, cooking, ropes courses, wilderness exploration, physical education, and chess (id.). According to the director, participants in the camp interacted with peers continually and received a significant amount of social skills instruction daily; the camp program helped children increase their capacity for social success, enabling them to navigate academic environments with more proficiency (id.).

During the impartial hearing, the camp director provided testimony that expanded on the information found in his letters. The director testified that Camp Ramapo was a residential summer camp for children with special needs (Tr. p. 64). He reported that the camp offered a full range of traditional camp activities at a "much higher than average staff to camper ratio," as well as a lot of structure and individual attention (Tr. pp. 64-65). According to the director, a typical bunk group at Camp Ramapo consisted of six campers with four or five full-time assigned staff (Tr. p. 65). Campers "travel[ed]" throughout the camp as bunks (Tr. p. 100). Staff was typically comprised of college students that received up to two weeks of training from the camp prior to the start of the first session (Tr. pp. 65-66). On-going supervision occurred throughout the summer and was provided by staff that were primarily professional educators and some social workers (Tr. pp. 65, 74-75). Many of the college students worked at the camp as part of an internship where they earned college credit (Tr. p. 66). They met with a college instructor and had in-service training throughout the summer, as well as professional development meetings on weekly basis (Tr. p. 66). In addition, staff participated in formal evaluation conferences (Tr. p. 66). Campers also had daily contact with professional staff; however, it was not as frequent or extensive as their contact with the counselors (Tr. p. 66).

The parent testified that eventually she and the student visited Camp Ramapo, toured the grounds and met with the camp director (Tr. p. 121). According to the parent, the student appeared



happy, which was not the norm and was curious about the ability to build bikes and do art (*id.*). The parent inquired of the director about the availability of the IXL Learning program, a math program the student used at home 30 to 40 minutes a day and the camp's reading protocol (*id.*). The parent testified that she asked extensive questions about how the student could be supported in terms of the student's IEP, understanding that the student's biggest challenges were going to be in math (Tr. pp. 121-22). The parent indicated that she thoroughly toured the camp, investigated, and asked every question she could (Tr. p. 122). The parent reported that certain camp activities required the development of trust, something that was relevant to the student's needs (*id.*). The camp also had a gate with a guard at the entrance of the road (Tr. p. 122). I note that this was significant because the student had a history of elopement when dysregulated (Tr. p. 125; Parent Ex. D at p. 4). The parent explained that she asked the student what the student wanted to do, noting that the student was oppositional and unless the student agreed to something it was difficult to make it happen (Tr. p. 123). According to the parent, the student indicated a desire to go to Camp Ramapo for specified sessions (*id.*). The parent discussed Camp Ramapo again with the student's therapist about the camp being a good fit (*id.*).

With regard to the student's March 2018 IEP, the parent testified that she discussed the IEP with the camp director and with a person with an advanced degree who supervised the counselors (supervisor) (Tr. pp. 123-24, 144). The parent interacted with the supervisor throughout the summer while the student was at the camp and when the student was experiencing "challenging moments" (Tr. p. 124). The parent reported that she spoke with the supervisor about ways of keeping the student stimulated, connected, and learning (*id.*).

With respect to the components of the camp's programming that were relevant to the student's needs, the camp director indicated that he met the student prior to the camp season (Tr. p. 68) and that the camp received extensive application information in writing on each camper who attended the camp (Tr. p. 68). He further explained that there were three documents—a camper application completed by the parent, a professional report written by someone with professional knowledge of the student, and a health history—that are needed to make a determination to accept a camper (Tr. pp. 89-90). He reported that this information was put together with information from other campers and the camp administration selected a group of kids that they felt would be an appropriate peer group for the student, to provide a good fit for socialization (Tr. pp. 68-70, 91). The camp director testified that during the six weeks that the student was at camp he had the opportunity to observe the student at all camp events including meals, in group activities and sometimes walking around (Tr. p. 80).

According to the director, in the process of selecting the student's bunk, he wanted kids who would be at the student's level in terms of their ability to interact socially (Tr. p. 70). He noted that the student's functional level in terms of conversation was higher than some of the other students at camp and he wanted a good fit in terms of capacity of kids to socialize with each other (Tr. p. 70). The director testified that he determined the student's social level "[p]rincipally by having met her" (Tr. p. 90). The camp director indicated that each bunk group received a daily schedule for the following day in the evening (Tr. p. 71). There was a mixture of program activities that consisted of recreational activities (i.e., swimming, hiking) and didactic instruction (i.e., bike repair, photography, theater arts, cooking, library, chess) (Tr. pp. 70-72). According to the director, didactic activities were led by a "specialist" in those activities (Tr. p. 72). Instructors were in the room teaching a lesson on an activity, with the campers' general bunk counselors

present to support the activity (*id.*). The director compared that the didactic activities to an academic setting in that campers sat, raised their hands, and took turns while watching someone in front of them teach a lesson (Tr. pp. 72-73). I note that this was consistent with the student's October 2017 IEP that indicated two behaviors identified as areas of significant difficulty for the student included following directions and sitting in an assigned seat when directed to do so (*see* Parent Ex. C at p. 4). The October 2017 IEP contained a goal addressing the student's ability to participate in a task for 15 minutes without getting out of the student's seat (*id.* at p. 9). The March 2018 IEP included a goal related to the student's ability to stay on a given task without any distractions or avoidance for five minutes (Parent Ex. D at p. 15). Although the camp director indicated that the camp did not write any objectives for the student, instead focusing more broadly on the goals of the program, he also noted the camp mostly focused a lot of time and attention on social skills development and building relationships with other campers, as well as with staff (Tr. pp. 76, 78). The director testified that Camp Ramapo was a place where a number of the student's challenges involving peers and social relationships were demonstrated by the student, and then addressed, so that the student was capable of learning how to navigate social settings more successfully (Tr. p. 87).

Concerning the specific skills that Camp Ramapo worked on with the student, the director testified that "the principal sort of overarching thing that sort of pervades all activities, including eating a meal, is the social skills aspect. But then there are other ...skillsets, be they motor skills, communication skills, things like that...in the program as well" (Tr. p. 95). When pressed to identify the specific skills worked on with the student, the director stated "I would just go back to saying there isn't... the equivalent of an IEP in a program such as this that kind of is the agreed to roadmap for that type of thing" (Tr. p. 95).

With respect to academic instruction at Camp Ramapo, parent testified that based on her conversations with the student and camp supervisor, the student used the IXL math program while she was at camp (Tr. p. 147). The parent acknowledged that the IXL math program had a tracking component and that Camp Ramapo did not provide her with any information to show that the student had been using the program, other than verbal confirmation (Tr. p. 148). The parent testified that she saw the camp's technology center, requested, in writing, that the student be given the opportunity to practice math using the IXL program, and provided the camp with the student's password and code for the program (Tr. pp. 130-31). According to the parent, it was the same request about IXL that she had made of the teachers at CSE meetings (Tr. pp. 130-31).

The parent also testified concerning the student's progress at Camp Ramapo, particularly in contrast to the student's unsuccessful experience during summer 2017. Progress is relevant to a parent's claim that a unilateral placement is appropriate, but such a finding 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]; *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. v. Northeast Sch. Dist.*, 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; *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). Nor does progress itself demonstrate that a private placement was appropriate (*Gagliardo*, 489 F.3d at 115). Instead a

finding of progress is 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]). The parent testified that Camp Ramapo was the first place the student attended where the parent was not called to pick up the student (Tr. p. 128). She opined that one of the greatest benefits of the camp was that the student was not rejected there (Tr. p. 128). In addition, the camp provided the student with an opportunity to socialize and feel that the student belonged to a community and could be a social person in the community (Tr. p. 127). The parent testified that the student was a tactile learner and everything at the camp was tactile and experiential (Tr. pp. 127-28). The parent reported that when she visited the student at Camp Ramapo, the student was glowing and relaxed and did not argue with the parent (Tr. pp. 128-29). The student tolerated the parent giving the student instructions about following rules, which the camp supervisor stated was a positive sign (Tr. p. 129). The parent testified that she, "felt that [the student] had repaired her relationship with herself," and the relationship with the parent in terms of the parent being able to set boundaries (Tr. p. 129). Overall, the parent indicated that the student found a community at Camp Ramapo and was willing to participate in and grow in it (Tr. p. 130). The parent testified that her goal for enrolling the student in Camp Ramapo, was to not repeat the "chaotic" summer of 2017 where people kept quitting or kept complaining about the student, resulting in the student's relationships becoming adversarial (Tr. pp. 131-32). The parent's goal was for the student to trust adults, to be willing to take instruction from adults, to learn from adults, to work with children the student's age and peer level, and to be able to learn in an environment that the student did not perceive as threatening (id.). The parent testified that at Camp Ramapo the student was happy, cooperative, engaged, and made friends (Tr. p. 132). The student also was paired with a younger camper for the purpose of showing compassion and aiding in the younger student's development (id.). According to the parent, the pairing successfully reinforced the student's social skills, compassion, and learning in nontraditional ways (id.).

With respect to progress, the camp director testified that in the beginning the student "presented as someone who had some pretty significant struggles in terms of relating to other kids" (Tr. p. 80). He noted that the student "made some pretty good progress in that regard" but added that he did not have a sense "that the matter was completely resolved" (Tr. pp. 80-81). He clarified that while he thought the student had developed some skills that would help her with regard to social success, when the summer ended the student probably still had challenges she would face in that area (Tr. p. 81).

Turning to the factors that do not favor reimbursement for the unilateral placement, as noted in the district's answer and consistent with the hearing record, although the student may have generally benefited from the student's experience at Camp Ramapo due to the high camp counselor to camper ratio and a nurturing environment of the kind that would be of benefit to any student, disabled or not, the hearing record does not demonstrate if or how the parent's chosen program provided educational instruction specifically designed to meet the unique needs of the student. While the focus at Camp Ramapo on social skills development and building relationships among peer campers and between campers and staff in a summer camp environment that was designed for students with special needs was generally salutary to the student's social-emotional development and regulation, the hearing record does not demonstrate that Camp Ramapo actually delivered special education services to the student.

The hearing record reflects that Camp Ramapo did not provide educational planning for the student, counseling, or any other formal therapeutic or behavioral services or interventions in ways that were similar to what a student would receive under an IEP (see Answer at p. 9; IHO Decision at p. 10). Testimony by the parent indicated that at the end of the student's camp experience, counselors came up to her and said that working with the student was "extremely challenging, but [the student's] amazing" (Tr. pp. 129-30). However, the hearing record did not specify strategies employed by Camp Ramapo staff and whether they did or did not work for the student. The lack of information is particularly confounding because the student's March 2018 IEP contained a list of management strategies to address the student's management needs, including the use of a visual timer for breaks and assignments, positive reinforcement movement breaks, frequent check-ins, self-monitoring tools and techniques, visual aids, preferential seating, frequent prompts and refocusing cues, and headphones for noise reduction (see Dist. Exs. C at p. 4; D at p. 4), and the parent indicated that she showed the IEP to Camp Ramapo. While the unilateral placement need not formalize such recommendations into an IEP or replicate them exactly, some objective evidence conveying a similar level of detail of the particular strategies that Camp Ramapo used to address the student's unique needs is needed to support the parent's case.

Testimony by the Camp Ramapo director indicated that the camp did not write any objectives for the student, instead it focused more broadly on the goals of the program, that there was no equivalent to an IEP; and that the camp did not create a document summarizing the skills the student worked on during the summer (Tr. pp. 78, 95-96). In addition, program areas such as bike repair and chess were led by "specialists" in each area or counselors, rather than by instructors with some kind of demonstrated skill or expertise in educating students with disabilities having academic and behavioral challenges (Tr. pp.72-74). Although on-going staff supervision occurred throughout the summer by primarily professional educators and social workers, other activity areas such as reading, and cooking were taught primarily by camp counselors (Tr. pp. 65, 73-75). Furthermore, the camp director indicated the camp experience was designed to address and help remediate skills that students feel "behind in" (Tr. pp. 82-83). The director indicated that a "thumbnail" description of the camp experience was that "the road to self-esteem is through skill building and through teaching kids what they feel they may lack, how to be successful in those things that they feel they may lack in relation to their mainstream camp cohorts, and then to send them back to those environments ... with those increased skills" (Tr. pp. 82-83). He added that the "therapeutic piece is that when you learn the many different things that you're going to learn here, it addresses to some degree how you're feeling about yourself, your competence, your achievements, things like that" (Tr. p. 83). The director noted that "therapeutic" did not mean there were therapy sessions, and that there were no formalized sessions with therapists at the camp (Tr. p. 83). The parent specifically asserted in this case that Camp Ramapo that it was a therapeutic camp, which would be in alignment with the student's social, emotional, and behavioral needs, but the testimony of the director casts doubt as there are no therapists or psychologists that deliver therapeutic services to the student and the director was unable to describe, at least months later at the time of the hearing, any specific social skills that the student worked on (Tr. pp. 83-84, 95-96). The parent also clarified that that before and after the student attended Camp Ramapo that the student accessed behavior therapy and some counseling services (Tr. p. 135). The lack of specific evidence in this regard together with the lack of any specific evidence that specialized math or

ELA instruction was actually delivered to the student to address the identified needs in those areas weighs heavily against a finding in favor of the parent.<sup>23</sup>

In light of the above, I find that the hearing record offers no compelling reason to reverse IHO 2's determination that the parent did not prove that Camp Ramapo was not an appropriate unilateral placement for the 12-month services portion of the 2018-19 school year. While the student may have benefited from the experience at Camp Ramapo, as noted by the parent's testimony, the evidence is anecdotal and subjective at best, the lack of any documentation or testimony specific to the student's receipt of any individualized special education instruction, related services or management interventions Camp Ramapo used with the student to address the student's individual needs. Thus, the available evidence offers no reason to modify IHO 2's conclusion with respect to Camp Ramapo, and I decline to do so.

## **VII. Conclusion**

Having determined that IHO 2 erred in finding that the district offered the student a FAPE for the 12-month services portion of the 2018-19 school year, but correctly found that Ramapo was not an appropriate unilateral placement for the student, it is not necessary to determine whether equitable considerations support the parents' claim, and the necessary inquiry is at an end.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that IHO 2's decision dated April 22, 2019 is modified, by reversing that portion which found that the district offered the student a FAPE for the 12-month services portion of the 2018-19 school year.

**Dated:**            **Albany, New York**  
                         **July 3, 2019**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**

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<sup>23</sup> The parent could not say what math skills the student actually worked on at Camp Ramapo, and she only indicated that the camp had IXL at the student's grade level and the student "was to practice" (Tr. p. 131).