



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-080

**Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq.

Cuddy Law Firm, PLLC, attorneys for respondent, by Mark Gutman, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund the costs of her son's tuition at the Aaron School (Aaron) for the 2019-20 school year. 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 school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The student was the subject of a prior impartial hearing (2017 Proceeding), after which an IHO determined that the student had been denied a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18 school years (Parent Ex. B at pp. 5, 9).<sup>1</sup> During the 2017

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<sup>1</sup> The IHO's decision in that matter indicated that the hearing "pertains to the last three school years; i.e., 2014-15 through 2017-18"; however, that range represents four school years (Parent Ex. B at p. 5). Nevertheless, the entirety of the IHO's decision evinced that three school years were at issue with the 2017-18 school year being

Proceeding, the IHO in that matter issued an interim decision directing the completion of a private neuropsychological evaluation at public expense (*id.* at p. 11; *see* Parent Ex. E at p. 1).

The hearing record reflects that a CSE convened on December 12, 2017, and utilized the results of the private November 11, 2017 neuropsychological evaluation ordered by the IHO in the 2017 Proceeding to develop an IEP with an implementation date of January 11, 2018 (Dist. Ex. 1 at pp. 1, 2, 3, 21, 23).<sup>2</sup> Continuing to find the student eligible for special education and related services as a student with a speech or language impairment, the December 2017 CSE recommended placement in a State-approved nonpublic day school and the provision of 10-month services in an 8:1+1 special class with ten periods per week each of math and English language arts (ELA), five periods per week of social studies and four periods per week of sciences (*id.* at pp. 16, 17, 20, 21). The December 2017 CSE further recommended related services of one 30-minute session of individual occupational therapy (OT), three 30-minute sessions of individual speech-language therapy, one 30-minute session of group speech-language therapy, and an assistive technology device with individual applications, software, and training (*id.* at pp. 16-17, 21). For testing accommodations, the December 2017 CSE further recommended extended time, separate location, revised test directions, preferential seating and use of a scribe (*id.* at p. 18). The student was also recommended to receive special transportation (*id.* at pp. 20, 22).

The student began attending Aaron in May 2018 (Parent Ex. M at p. 1).<sup>3</sup> In a final decision dated June 25, 2018, the IHO in the 2017 Proceeding found that Aaron was an appropriate unilateral placement and that equitable considerations weighed in favor of the parent's requested relief (Parent Ex. B at pp. 9-10, 12). The IHO awarded direct funding of the student's tuition at Aaron for the 2017-18 school year, compensatory educational services of 792 hours of tutoring, 180 hours of speech-language therapy, 90 hours of OT, and an assistive technology device with 25 hours of training (*id.* at 10-11, 12-13). Neither party appealed the IHO's June 25, 2018 final decision. The hearing record further reflects that the parties entered into a settlement agreement to resolve allegations that the parent raised regarding the district's failure to offer the student a FAPE for the 2018-19 school year (Parent Ex. C at p. 2).

On May 29, 2019, the parent signed an Aaron re-enrollment contract for the 2019-20 school year, which was countersigned on June 6, 2019 (Parent Ex. H at pp. 1, 3). In a 10-day notice letter dated August 7, 2019, the parent advised the CSE that she had not received notification of a CSE meeting for the 2019-20 school year, nor had she received a placement recommendation, and, as a result, she rejected the district's "lack of program/placement" and intended to enroll the student

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the most recently challenged by the parent at that time (Parent Ex. B at pp. 5, 9).

<sup>2</sup> The CSE convened on December 12, 2017, approximately six months prior to the issuance of the IHO's final decision in the 2017 Proceeding, and it appears that an October 16, 2017 speech-language evaluation report and an October 21, 2017 OT evaluation report were available to and considered by the December 2017 CSE (Dist. Ex. 1 at pp. 2, 4, 5). After the conclusion of the 2017 Proceeding, the IHO ordered the CSE to reconvene again after his final decision and consider results from an independent speech-language evaluation and an independent occupational therapy (OT) evaluation (Parent Ex. B at p. 11).

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

at Aaron for the 2019-20 school year and seek direct funding for the cost of the student's attendance (Parent Ex. F at p. 1).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated October 7, 2019, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. A at pp. 3-4). According to the parent, the district failed to recommend a placement and provide a program uniquely tailored to meet the student's educational needs for the 2019-20 school year (*id.* at p. 3). Specifically, the parent alleged that the district failed to convene a CSE, failed to develop an IEP, and failed to recommend an appropriate placement for the 2019-20 school year (*id.* at p. 4). The parent also contended that Aaron was an appropriate unilateral placement for the student offering an academically rigorous curriculum and an individualized approach to ensuring student success (*id.*). The parent further argued that she consistently attended all CSE meetings and informed the district that she did not receive an offer of placement for the 2019-20 school year (*id.*). The parent asserted that she provided the district with timely notice of her intent to enroll the student in Aaron and seek public funding (*id.*). The parent also argued that she fully cooperated with the district throughout the student's education and that equitable considerations weighed in favor of her requested relief (*id.*). Accordingly, as relief, the parent sought the costs of the student's attendance at Aaron for the 2019-20 school year, including transportation and "any additional services the Student requires" (*id.* at p. 5).<sup>4</sup>

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

In an interim decision dated October 15, 2019, the IHO found that the parties were in agreement that the student's pendency placement was the student's program at Aaron based on the unappealed IHO decision dated June 25, 2018 (Parent Ex. D at p. 12). The IHO directed that the district provide the student's "pendency services from the date of filing until" the matter resolved (*id.*). In addition to determining the student's pendency program and placement, the IHO found that the district's refusal to implement pendency in the absence of an IHO order was in and of itself a denial of a FAPE to the student (*id.* at pp. 9-10).

A hearing that addressed pendency was held on December 6, 2019 to provide the district an opportunity to note its objection to the IHO's characterization of its failure to implement pendency without an IHO order as tantamount to a denial of a FAPE (Tr. pp. 1-9). Thereafter, the IHO provided assurances on the record that the district was not precluded from presenting a case on the merits (Tr. pp. 5-6). The parties proceeded to a one-day hearing on March 27, 2020 (Tr. pp. 10-69).

In a final decision dated March 31, 2020, the IHO found that the district denied the student a FAPE for the 2019-20 school year (IHO Decision at p. 2). The IHO then described the district's decision to rest on Prong I without conceding a denial of a FAPE to the student as a functional concession that was "at best, problematic" (*id.*). According to the IHO, the district's position led to a "tripartite misreading" of Burlington/Carter and its progeny, by establishing a non-existent

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<sup>4</sup> The parent also requested a finding that Aaron was the student's stay-put placement for the pendency of the proceedings based upon the June 2018 unappealed IHO decision (Parent Ex. A at pp. 2, 5).

"separate inquiry into the equities" (*id.* at pp. 2-4). Asserting that "the case itself as a whole [wa]s an inquiry into the equities" to be considered in the light of an IHO's inherent "equitable jurisdiction," the IHO found that the district may not be equitably permitted to simultaneously fail to offer the student a FAPE and refuse to reimburse the parent for exercising self-help and securing an appropriate placement for the student (*id.* at pp. 4, 5).

Next, the IHO determined that, since the district had failed to offer the student a FAPE for the 2019-20 school year, and failed to "effectuate a change of placement pursuant to State and federal law," the student's enrollment at Aaron ceased to be a unilateral placement as of the time when tuition reimbursement was awarded in the unappealed June 25, 2018 IHO decision (IHO Decision at pp. 5-6). The IHO further found that the student continued placement at Aaron by an agreement between the parties and that, under State law, it was the district's burden to demonstrate both that it offered a FAPE to the student and that Aaron was an inappropriate placement for the student (*id.* at p. 6). Having found that the district failed on both counts, the IHO ordered "by way of injunction" that the student's placement continued at Aaron and directed the district to fund the costs of the student's attendance for the 2019-20 school year and to reimburse the parent for any out-of-pocket expenses incurred (*id.* at p. 7).

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

The district appeals arguing that the IHO deprived the district of its due process rights by denying it a meaningful opportunity to confront the parent's witnesses. The district asserts that the IHO prevented the district from cross-examining the parent's witnesses about their affidavits submitted in lieu of in-person testimony or the Aaron exhibits and further compounded this error by then improperly determining that it was the district's burden to demonstrate the inappropriateness of the parent's unilateral placement. The district also alleges that the IHO erred by relying on the June 25, 2018 unappealed IHO decision which found Aaron an appropriate unilateral placement for the 2017-18 school year to find that Aaron was an appropriate unilateral placement for the 2019-20 school year. The district asserts that the IHO failed to grapple with any evidence, failed to make any findings of facts, and deprived the district of the opportunity to confirm or discredit the evidence of the appropriateness of Aaron for the 2019-20 school year. The district contends that the IHO misapplied guidance from the United States Department of Education addressing pendency to justify shifting the burden from the parent to the district on the issue of the appropriateness of the parent's unilateral placement. The district further alleges that the IHO failed to properly analyze the appropriateness of the parent's choice of program from the time it was selected. As relief, the district requests that the IHO's decision be reversed and remanded to the IHO to take additional evidence and apply the correct Burlington/Carter analysis.

In an answer, the parent responds to the district's allegations with admissions and denials and argues that the IHO's decision should be upheld in its entirety. The parent asserts that the district was permitted to put on a case in chief and chose to rest on documentary evidence. The parent further contends that the testimony of the parent's witnesses was deemed irrelevant and not considered by the IHO. The parent argues that the IHO did not make an appropriateness determination regarding Aaron and as such, any cross-examination of the parent's witnesses had no bearing on the IHO's ruling. The parent also asserts that the IHO correctly concluded that the student was not unilaterally enrolled in Aaron because the district failed to offer any placement in the alternative, and correctly determined that it was the district's burden to demonstrate that Aaron

was not an appropriate placement. The parent further argues that the IHO did not conflate pendency with an appropriateness determination. The parent next contends that if the IHO erred in his analysis, the hearing record supports a finding that Aaron was an appropriate unilateral placement and that the district's request for remand should be denied. Lastly, the parent requests that the IHO's determination that the student should remain at Aaron at public expense for the 2019-20 school year be affirmed.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the 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" (Andrew 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 Andrew 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>5</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

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<sup>5</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" (Andrew F., 137 S. Ct. at 1000).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Legal Standard**

Turning to the IHO's analysis of the applicable legal standard, I agree with the district that the guidance from the United States Department of Education set forth in Letter to Hampden is specific to identifying a student's pendency placement (49 IDELR 197 [OSEP 2007]). The IHO erred by extending its application beyond that context. The appropriate legal standard in this matter is the three-prong Burlington/Carter analysis along with its corresponding allocations of the burdens of proof set forth under State law.

Review of the hearing record reveals that the parties proceeded to the hearing with the understanding that the underlying matter concerned a request for funding of the student's unilateral placement at Aaron for the 2019-20 school year, with the parent prepared to demonstrate the appropriateness of Aaron and that equitable considerations weighed in favor of her requested relief (Tr. pp. 24-27, 30-33; Parent Exs. A at pp. 3-5; F at p. 1; G; H at pp. 2, 5; J-O). Neither party argued that the student's enrollment in Aaron was anything other than a unilateral placement during the impartial hearing. To contrary it was the IHO who advanced a new theory, as described above, that the student's enrollment at Aaron had not been a unilateral placement since the June 2018 unappealed IHO's decision and that the unappealed IHO decision represented an agreement between the parties under State law that Aaron was the student's placement (IHO Decision at pp. 5-6).

First, for purposes of contrast, the standards applicable to identifying a student's pendency placement shall be reviewed. During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v.



Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Once a pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at \*1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at \*23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197). If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197). If a private school placement funded by the school district is the pendency placement, then the school district must continue to pay for that placement for the duration of the proceedings regardless of the final outcome of the dispute (see Zvi D., 694 F.2d at 906, 908; Vander Malle v. Ambach, 673 F.2d 49, 52 [2d Cir. 1982]; S.S., 2010 WL 983719, at \*1, \*6, \*8-\*9; Ambach, 612 F. Supp. at 233-34). The Second Circuit has repeatedly emphasized that the stay-put placement becomes effective "once a party has

filed an administrative due process complaint" (Doe v. E. Lyme Bd. of Educ., 2020 WL 3273347, at \*6 [2d Cir. June 18, 2020]).

At the outset, there is no dispute amongst the parties that the district has been required to fund the student's placement at Aaron since the filing of the parent's due process complaint notice as a result of its obligation to provide the student with his pendency (stay-put) placement. However, contrary to the IHO's theory that the unappealed IHO decision amounted to an agreement between the parties that Aaron constituted the student's placement for purposes other than pendency, a student's pendency placement and the appropriateness of a student's placement are separate concepts (O'Shea, 353 F. Supp. 2d at 459 [finding that "pendency placement and appropriate placement are separate and distinct concepts"]; Student X, 2008 WL 4890440, at \*20; see Mackey, 386 F.3d at 162 [a claim for tuition reimbursement under pendency is evaluated separately from a claim for tuition reimbursement pursuant to the inadequacy of an IEP]). Further, each school year is analyzed separately, and the parent must place FAPE at issue (Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 414-15 [S.D.N.Y. 2005] [holding that parents must "put FAPE at issue" in each school year for which they seek tuition reimbursement by giving notice to the district], aff'd, 192 Fed. App'x 62 [2d Cir. Aug. 9, 2006]; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at \*7 [N.D.N.Y. Sept. 29, 2010] [noting that reenrollment at a private school does not extinguish analysis of the elements applicable in a tuition reimbursement case]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 366 [S.D.N.Y. 2009]).

In describing his view that the student's placement at Aaron continued independent of the pendency of any due process proceeding, the IHO pointed to the district's obligation to offer every student an education, as well as the procedures outlined in the IDEA if a district wishes to effectuate a change in a student's placement (IHO Decision at pp. 6-7). With respect to the former, the IHO pointed to the district's obligation to provide all students an education pursuant to the New York State Constitution (see N.Y. Const. art. XI, § 1 ["The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated"]; Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 48 [1982] [interpreting the State Constitution to require provision of "a sound basic education"]; see also N.Y. Educ. L. § 3202[1] [providing that "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition"]).

While the IHO rightly admonished the district for failing to offer the student an IEP describing the special education program and services to which he was entitled for the 2019-20 school year, neither the constitutional provision nor the procedural protections he cited support the reading he applied. Rather, the June 2018 IHO decision resulting from the 2017 Proceedings outlined a remedy that was specific to the 2017-18 school year (see Parent Ex. B), and, as the district did not consent to or refer the student to Aaron for the 2019-20 school year, the void in the student's placement created by the district's violations could not be filled by automatically defaulting to the "last agreed upon" placement absent a pending proceeding to trigger the student's stay-put entitlement. Instead, the parent's ultimate remedy is set forth in the IDEA and consists of reimbursement for private school tuition upon a showing that the unilateral placement was appropriate for the student for the school year for which the student was denied a FAPE (see Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370-71; see also 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). The statutory scheme requires the CSE to conduct a review of the student's special

education programming at least annually, develop an IEP, and then offer special education services in every year in the least restrictive environment, and there is no case law or statute that allows an administrative hearing officer to completely abandon that statutory scheme simply because the student was granted tuition reimbursement previously due to a denial of a FAPE.

Thus, the IHO erred in finding that a change in the student's then-current placement for purposes of pendency constituted unconditioned assent by the district to fund that placement on a going forward basis (see Application of the Dep't of Educ., Appeal No. 13-230 [holding that an IHO erred by failing to apply the elements of the Burlington/Carter analysis by substituting a pendency standard]). To hold otherwise would obviate the parents' notice requirements (20 U.S.C. § 1412[a][10][C][iii][III][bb]), eliminate the financial risk of a unilateral placement (see Burlington, 471 U.S. at 374) and undermine the regulatory provisions allowing districts to correct IDEA violations before the commencement of an impartial hearing (e.g., 34 CFR 300.510[a] [setting forth the requirements for the resolution meeting]; 8 NYCRR 200.5[j][2][i] [same]; 8 NYCRR 200.5[h] [outlining provisions relating to mediation]). These regulations providing districts the opportunity to course-correct serve to promote the conciliation envisioned by the IHO. The impartial hearing is not "the mediation of obstacles along the path of a collaborative process" (IHO Decision at p. 3), it is by design a last resort.<sup>6</sup>

Based on the foregoing, the IHO erred by failing to apply a Burlington/Carter analysis to the parent's unilateral placement of the student at Aaron for 2019-20 school year. While the IHO erred in applying the wrong legal standard, for the reasons set forth below, the district's request for a remand of this matter is denied because the evidence in the hearing record demonstrates that the parent's unilateral placement of the student at Aaron was appropriate under the Burlington/Carter framework.

## **2. Conduct of Hearing**

Before turning to an application of the Burlington/Carter standard discussed above, a review of the adequacy of the impartial hearing process and the evidence in the hearing record is necessary. The district alleges it was denied its due process rights when the IHO determined that the parent did not have a burden to demonstrate the appropriateness of Aaron for the student for the 2019-20 school year. The district argues that, once the IHO made this determination, he deemed the parent's evidence in support of a unilateral placement at Aaron irrelevant, thereby depriving the district of the opportunity to cross-examine the parent's witnesses.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the

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<sup>6</sup> The IHO's comment that viewing the district's failure to offer the student a FAPE as the first prong of an analysis "encourages the mistaken view that these hearings are about who should get what money" rather than "defining the points of contact between a child's needs and a district's responsibility" is belied by the plain text of the IDEA (IHO Decision at p. 3). This intersection of the student's needs with the district's responsibility articulated by the IHO is the very definition of the Prong I FAPE analysis and once it is determined that the district has failed to offer the student a FAPE—by virtue of the district's concession or failure to meet its burden—according to the IDEA, the purpose of the hearing becomes determining "[p]ayment for [the] education of children enrolled in private schools without consent of or referral by the public agency" (20 U.S.C. § 1412[a][10][C]).

attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

The hearing record reflects that, due to the COVID-19 pandemic, the parties, attorneys, court reporter, translator and witnesses appeared via teleconference after the IHO had provided guidelines to the parties for conducting the hearing under these unique circumstances (Tr. pp. 13-17, 44, 60-61). The district offered two exhibits into evidence (a December 2017 IEP and a March 2020 IEP that post-dated the parent's due process complaint notice by approximately five months) and purported to "rest on Prong I" (Tr. pp. 12, 21, 24; see Dist. Exs. 1-2). When pressed by the IHO to state whether or not the district was conceding that it failed to offer the student a FAPE for the 2019-20 school year, the district's attorney reiterated that the district was "resting on Prong I" and confining its case to disputing the appropriateness of the parent's unilateral placement and equitable considerations (Tr. pp. 24-27). The IHO stated on the record that he was issuing a finding that the district failed to offer the student a FAPE for the 2019-20 school year (Tr. pp. 27, 29).

The hearing proceeded with the parent's case. The parent offered 15 exhibits into evidence including three affidavits in lieu of in-person testimony (Tr. pp. 11-12, 23; see Parent Exs. A-O).<sup>7</sup> The district's attorney objected to the November 2017 neuropsychological evaluation report as hearsay (Tr. p. 18; Parent Ex. E). The IHO stated that hearsay does not apply "at these hearings" and would not apply to exclude a neuropsychological evaluation report in general (Tr. p. 19). The IHO also stated that the district routinely offers exhibits into evidence without an authenticating witness (id.). Despite the IHO's explanation, the district's attorney next objected to the student's February 2020 progress report as hearsay (id.; Parent Ex. L). The IHO stated "I would advise you against interposing objections such as that unless you want me to apply them in the future . . . . The rules of evidence do not apply strictly in these hearings. And useful information about the student . . . will be admitted by me" (Tr. p. 19). Following the IHO's admonition, the district's attorney once again objected to the exhibits offered by the parent—this time, to specific paragraphs in the affidavits—on the basis that they contained hearsay, which the IHO overruled (Tr. pp. 20-21; Parent Exs. N, O).

The district presented an opening statement, indicating that the district "reserve[d] its right to challenge the appropriateness of the Aaron School, subject to cross-examination as it's not staffed appropriately, the teachers are not properly certified, and it does not address the student's needs" (Tr. p. 24). The district was then provided the opportunity to cross-examine the parent's witnesses who had testified by affidavit (Tr. pp. 34-35). The principal of Aaron appeared via teleconference for cross-examination (Tr. pp. 38-58; see Parent Ex. O). During cross-examination, the IHO intervened on several occasions to ascertain the district's attorney's objectives and

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<sup>7</sup> The copies of the affidavits of the principal and the head teacher of Aaron included in the electronic hearing record submitted to the Office of State Review are not signed by the affiants or notarized (see Parent Exs. N at p. 8; O at p. 5). The hearing record indicates that the affidavit of the Aaron principal admitted at the hearing was notarized (Tr. p. 37).

prevailed upon him to limit his inquiry to "essential questions only" (Tr. p. 44; see Tr. pp. 39, 53-54, 60-61).

During a break in the cross-examination of the Aaron principal, a discussion of the unappealed June 25, 2018 IHO decision ensued, whereupon the IHO in this matter determined that the student's enrollment at Aaron was not a unilateral placement but rather was a continuation of the student's placement at Aaron (Tr. p. 62). At that point, the IHO further stated that the parent did not "have a Prong II burden. The Aaron School is the child's placement. Why are we doing this?" (id.). The district's attorney argued that the appropriateness of Aaron must be evaluated each year and that he was asserting that it was inappropriate for the 2019-20 school year (Tr. p. 63). The IHO then asked the district's attorney, "Where would you anticipate the student going to school this year if not at Aaron" (id.). The district's attorney indicated that he could not answer that question (Tr. pp. 63-64). The IHO stated on the record and elaborated in his decision his view that Letter to Hampden provided that an unappealed IHO's decision on the merits that is favorable to the parent is final, must be implemented, and once implemented becomes the student's current educational placement (IHO Decision at p. 6; Letter to Hampden 49 IDELR 197).

As noted above, State regulation provides that all parties shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing (8 NYCRR 200.5 [j][3][xii]). Here, the IHO's decision to curtail the district's opportunity to cross-examine the parent's witnesses based on an incorrect legal conclusion that the testimony was irrelevant was error; however, under the circumstances of this case, the error does not warrant remand for further proceedings.

While the district argues it should have been allowed to cross examine the witnesses, the district does not proffer any specifics on appeal as to any strategic advantage that could be gained by its cross-examination of the parent's witnesses. Turning to the district's opening statement during the impartial hearing for insight as to the district's intentions does not help the district's case. First, as discussed in more detail below, it is well settled that the unilateral placement need not employ certified special education teachers (Carter, 510 U.S. at 13-14) and, therefore, the district's position regarding the qualifications of the teachers at Aaron was unlikely yield any relevant, let alone dispositive information in its favor in light of the totality of the circumstances.<sup>8</sup> Moreover, the district's argument that Aaron did not meet the student's needs was flawed from its inception given the district's own failure to meet its burden of production under State law to introduce any evidence of the student's needs for the school year at issue (Educ. Law § 4404[1][c]). One court in this jurisdiction has addressed whether a unilateral placement was appropriate under circumstances in which the student's needs remained unclear (A.D. v. Bd. of Educ. of City Sch. Dist. of New York, 690 F. Supp. 2d 193, 206 [S.D.N.Y. 2010]). In A.D., the Court discussed how New York has placed the burden of production and persuasion on parents to establish that the unilateral placement was appropriate (690 F. Supp. 2d at 206). However, if there is a lack of required evaluative information and the IEP is deficient as a result, the Court held that, when analyzing whether the unilateral placement addresses the student's needs, the district, rather than

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<sup>8</sup> Further, the Aaron principal testified that the teachers at Aaron were licensed special education teachers, the student's class was "run by a teacher certified in Orton-Gillingham instruction," and that the student's related service providers "held New York State licenses in their respective field" (Tr. pp. 44-45; Parent Ex. O at pp. 3-4).

the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance (*id.* at p. 207; see Application of the Bd. of Educ., Appeal No. 08-056). Under the circumstances of this proceeding—where the district essentially waived any defense that failed to offer the student a FAPE for the 2019-20 school year and, in addition, appeared at an impartial hearing and failed to meet its statutory burden of production related to its ongoing duty to evaluate the student or describe the district's view of the student's special education needs—responsibility for that deficiency lies with the district and the district would be hard-pressed to argue that the student's needs as set forth in the parent's documentary evidence were not accurate or complete. The district's subtle attempt to shift that responsibility back to the parent in contravention of A.D. rings hollow.

Further, there is no explanation in the hearing record for why, if as the district argues in its appeal that cross-examination of the parent's witnesses was "crucial" to its case, the district did not call the witnesses during its case in chief or make any attempt to call the same or other witnesses for rebuttal purposes (see Req. for Rev. at ¶ 6). Even less persuasive is the district's argument that it was denied the opportunity to "confirm or discredit . . . the Parent's exhibits pertaining to Aaron's appropriateness" through cross-examination of the parent's witnesses (*id.*). Other than the affidavits in lieu of testimony, the parent's exhibits that carry the most weight in a review of the appropriateness of Aaron include a November 2017 neuropsychological evaluation report and a February 2020 mid-year report regarding the student's progress at Aaron (see Parent Exs. E; L), which happen to be the documents to which the district interposed objections on the grounds of hearsay during the impartial hearing (see Tr. pp. 18-19). If the district's main objective in cross-examining the witnesses regarding the documents was to establish that the content of the documents constituted hearsay, as the IHO ruled, it is well-settled that hearsay is permissible in impartial due process hearings brought under the IDEA (see Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 202 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 268 [D.D.C. 2007] [noting, in addition to case law allowing hearsay evidence in administrative hearings, that "the IDEA supports this precedent by not explicitly banning hearsay evidence from administrative proceedings held pursuant to the statute"]; Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1101 [C.D. Cal. 2000]; see also Application of the Dep't of Educ., Appeal No. 12-075; Application of a Student with a Disability, Appeal No. 12-007; Application of a Child with a Disability, Appeal No. 03-053; Application of a Child Suspected of Having a Disability, Appeal No. 93-018). At the administrative level, an IHO may accept and rely on documents as evidence in rendering a determination and need only exclude evidence if it is irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]). Thus, there is no categorical hearsay exception for the district to rely on. If the district's attorney was of the opinion that the documents were unreliable, he should have been prepared with specific information about each document's problems rather than wasting valuable hearing time and resources continuing to raise inapplicable, baseless general objections found in any law school textbook on the rules of evidence. If the district wanted to delve into these exhibits to otherwise "confirm or discredit" their content, it was incumbent upon the district to call a witness on direct or rebuttal to accomplish this, rather than rely on the parent's witnesses. Further, given that the CSE that developed the student's December 2017 IEP apparently relied heavily upon the November 2017 neuropsychological evaluation report to describe the student's needs (compare Dist. Ex. 1 at pp. 1-4, with Parent Ex. E at pp. 1, 5-20) and the March 2020 CSE set forth an abbreviated description of the student's needs that was generally consistent with the February 2020 progress report if not

based upon it (compare Dist. Ex. 2 at pp. 1-2, with Parent Ex. L at pp. 2-4, 8, 11-12), the district would be hard-pressed to argue with any credibility that the exhibits were deficient in some way. In sum, the district has failed to show that, had it been provided further opportunity to cross-examine the parent's witnesses, the results of such testimony would have affected the outcome in this matter, since, as described below, the documentary evidence in the hearing record is sufficient to show that Aaron was an appropriate unilateral placement for the student for the 2019-20 school year.

Although the IHO erred in deviating from the appropriate legal standard, his ire with the district's litigation strategy against the parent was not misplaced. The hearing record shows that the district failed to develop an IEP for the student for the 2018-19 and 2019-20 school years and although offering evasive statements regarding whether the district would concede that it denied the student a FAPE, the district's attorney could not articulate at the impartial hearing what program the district intended the student to attend for the 2019-20 school year (Tr. pp. 34, 63-64; see Parent Ex. A at p. 4).<sup>9</sup> Next, adding insult to injury, the district, thereafter refused to provide the student with an undisputed pendency program in the absence of an IHO order (see Interim IHO Decision at p. 9). The IHO was correct to find that impeding the student's right to pendency services could form an independent basis for finding a denial of a FAPE. Impeding a parent's right to the procedural protections afforded by the IDEA is among the more serious violations of the IDEA that a school district can commit. It is well settled that the refusal to immediately provide uncontested pendency services is inconsistent with the plain text of the IDEA (see Letter to Goldstein, 60 IDELR 200 [OSEP 2012] [indicating that a district may not wait for a formal order from a hearing officer before implementing a student's stay-put placement where the stay put placement is uncontested]; Application of a Student with a Disability, Appeal No. 18-058). Next, district then posited its intention to "rest on Prong I" without meeting its burden of production, let alone its burden of proof, while simultaneously refusing to concede that the student had been denied a FAPE for the 2019-20 school year (see Tr. pp. 24-27). As a final part of its litigation strategy, the district's attorney, as described above, objected to several of the parent's exhibits on the dubious ground of hearsay and further engaged in vague, unfocused cross-examination of the parent's witness until curtailed by the IHO (Tr. pp. 18-21, 38-61). The district's conduct in this case is reprehensible as its objectives appeared to be geared primarily toward evading the procedural protections afforded to the parent and thwarting the impartial hearing process rather than attempting to mount legitimate defenses against the parent's claims.

The Supreme Court has recognized that disability discrimination is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect" (Alexander v. Choate, 469 U.S. 287, 295 [1985]). In this matter, the IHO rightly expressed his frustration with the district. Although his discussion of the district's stance on Prong I led to an incorrect legal analysis, as addressed above, the IHO correctly asserted that the district's strategy served to blunt its utter failure to meet its basic obligations to this student. A review of the district's conduct during this proceeding exhibits at best incompetence or ignorance of the relevant legal standards or at worst flagrant bad faith. An SRO's jurisdiction is limited to "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

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<sup>9</sup> According to the district's attorney, "[t]here was a settlement" regarding the 2018-19 school year, "which also directed direct funding to the Aaron School" (Tr. pp. 33-34).

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]), and the IDEA does not provide a method of redress for such troublesome conduct by the district. Nevertheless, the district should remain mindful that other statutes exist and that a denial of a FAPE may establish a prima facie violation of section 504 of the Rehabilitation Act of 1973 (section 504), 29 USC § 794(a), or the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (see I.M. v. City of New York, 178 A.D.3d 126, 133-35 [1st Dep't 2019]). The failure to provide IEP services has been found to establish a sufficient claim of bad faith or gross misjudgment when administering disability services under section 504 and the ADA (J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 467 [S.D.N.Y. 2018] [holding allegation of gross misjudgment in failing to provide IEP nursing and special transportation services was sufficient to plead violation of section 504 and the ADA]; Rutherford v. Florida Union Free Sch. Dist., 2019 WL 1437823 \*36 [S.D.N.Y. Mar. 29, 2019] [holding allegation of bad faith or gross misjudgment by failing to implement an IEP was sufficient to plead violation of section 504 and the ADA]; R.B. v. Bd of Educ. of the City of New York, 99 F.Supp.2d 411, 419 [S.D.N.Y. 2000] [holding allegation of bad faith or gross misjudgment by denying the student a FAPE was sufficient to plead violation of section 504 and the ADA]). Courts have also equated gross misjudgment with deliberate or reckless indifference (J.L., 324 F.Supp.3d at 468). A denial of a FAPE resulting from bureaucratic negligence or incompetence coupled with a district's inaction in the face of reports and complaints can rise to the level of bad faith, gross misjudgment or deliberate indifference to the rights of a disabled student (I.M., 178 A.D.3d at 137).

To be clear, no findings other than IDEA findings may be made in this case because it appears that the IHO was not appointed to hear matters pursuant to any other statute, and I lack the jurisdiction to act under any other remedial statutory scheme. However, that does not mean that administrative hearing officers must sit by in idle silence without any comment on what passes before them. In this case, the IHO erred in departing from a Burlington/Carter analysis and in partially preventing the district from cross-examining the direct testimony by affidavit offered by the parent. However, the appropriate remedy for that error in this particular case is to reject and discount all of the testimonial evidence offered by the parent rather than remand the matter to continue these proceedings, especially in light of the district's failure to meet its own obligations in the process. Upon viewing the case in that light, the nontestimonial evidence offered by the parent in support of her case weighs heavily in favor of her claim for funding at Aaron for the 2019-20 school year. It would be an unjust outcome to allow the district, which was supposed to address its burden of production by offering its own case in the first place, to continue its litigation tactic and try to make its case in chief through cross examination. Accordingly, I will turn next to the remainder of the documentary evidence and describe why the parent has met her burden to show that Aaron is appropriate, even in the absence of any of the witness testimony that the district argues must be cross-examined.

## **B. Unilateral Placement**

In its appeal, the district concedes that it did not defend its offer of FAPE and asserts that during the hearing it intended to challenge the appropriateness of the student's unilateral placement at Aaron. The district argues that cross-examination of the parent's witnesses was essential to



demonstrating that Aaron did not address the student's needs.<sup>10</sup> As indicated above, it was the district's obligation to call witnesses it deemed crucial to its case. Further, on appeal the district provides no specific allegations as to why Aaron was an inappropriate placement for the student. Ultimately, the district's request that this matter be remanded is denied for the reasons set forth above and given that the hearing record overwhelmingly supports the appropriateness of the student's program and placement at Aaron for the 2019-20 school year without consideration of the testimony of the parent's witnesses provided by affidavit and cross-examination.

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.

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

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<sup>10</sup> On appeal the district also asserts that the IHO failed to analyze whether Aaron was an appropriate placement for the student for the 2019-20 school year, rather, he erroneously determined that Aaron was appropriate based on a prior IHO decision regarding the 2017-18 school year.

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).

### **1. The Student's Needs**

Although not in dispute on appeal, a discussion of the student's special education needs frames the discussion of the appropriateness of the parent's unilateral placement of the student at Aaron. According to the private November 11, 2017 bilingual neuropsychological evaluation report, the student was ten years and seven months old and in fifth grade at the time of the evaluation (Parent Ex. E at p. 1). The evaluation was conducted in both English and Spanish and consisted of informal and formal assessments as well as a document review (id. at p. 2).<sup>11, 12</sup> The November 2017 bilingual neuropsychological evaluation report indicated that during testing the student was alert and oriented, engaged easily with the evaluator using appropriate eye contact, separated easily from the parent, and was cooperative and pleasant (id. at p. 4). The student communicated in Spanish with the parent and responded to the evaluator in English even when the evaluator addressed him in Spanish (id.). The report indicated that the student frequently made tangential comments, possibly to avoid the more academically difficult activities presented to him (id.). The student had some difficulty understanding task-specific directions and with maintaining his attention (id.). According to the evaluation report, the student often appeared "spacey," required repetition and/or prompting, and became restless when engaged in a challenging task (id.). The student often processed information very slowly or lost track of what he was doing after getting distracted by something else in the environment (id.).

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<sup>11</sup> "Measures Administered" included clinical interview and developmental history; Woodcock Johnson Test of Achievement, Fourth Edition (WJ-IV ACH); Woodcock Muñoz Pruebas de Habilidades Cognitivas Batería III; Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V); Woodcock Muñoz Pruebas de Aprovechamiento Batería III; Woodcock Johnson Test of Cognitive Abilities, Fourth Edition (WJ-IV COG), selected; NEPSY-II Developmental Neuropsychological Assessment, selected; Gray Oral Reading Tests, Fifth Edition (GORT-5), and Evaluación Neuropsicológica Infantil (ENI-2) (Parent Ex. E at p. 2).

<sup>12</sup> "Records Reviewed" included a social history report, a classroom observation report, an OT teacher report, a teacher report, and a psychoeducational evaluation report, all dated sometime during June 2016 (Parent Ex. E at p. 2). Other records reviewed, all dated sometime during July 2016, included a speech-language evaluation report and a physical therapy school function evaluation report (id.). The student's August 2016 IEP and an October 2016 IEP were also reviewed (id.). The evaluator reviewed a couple of documents pertaining to the student's due process proceedings in 2017 (id.). Although no date was provided, the evaluator also reviewed a "Student Screening for Academic/Cognitive/Neurobehavioral Problems" completed by the student's classroom teacher from the district school he attended at the time of the evaluation (id. at pp. 2, 4).

The November 2017 bilingual neuropsychological evaluation report included detailed analysis of results obtained through the administration of the diagnostic tools used with the student (see Parent Ex. E at pp. 3-13, 18-20). Specifically, administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to the student in English yielded a full scale IQ (FSIQ) of 76, which the evaluator indicated was "in the well below average range of overall intelligence" compared to the student's same-aged peers (id. at pp. 5, 18). She further reported that there was no discrepancy among the student's various index scores but there was significant inter-subtest scatter (id.). Administration of the Woodcock Muñoz Pruebas de Habilidades Cognitivas Bateria III to the student in Spanish revealed that he functioned in the very low range of general intelligence, with a general intellectual ability scale of 68, placing him at the second percentile compared to his chronological peers (id. at p. 6).

In addition to the student's cognitive scores in English and in Spanish, the neuropsychological evaluation report indicated the student's understanding of visuospatial relationships, visual abstract reasoning, visual motor integration, and auditory and visual attention was intact (Parent Ex. E at p. 13). The report noted there was evidence of visual closure/mental rotation difficulties and right/left confusion, as well as graphomotor speed issues with a heavier motor demand (id.).

The bilingual neuropsychological evaluation report indicated that in the memory domain, the student was able to learn isolated pieces of verbal information at an age appropriate rate in English, but he required opportunities for repetition/rehearsal (Parent Ex. E at p. 13). The student exhibited a much easier time with working memory when dealing with visually presented material, but his auditory working memory, short-term and long-term memory for orally and visually presented information, and associative learning were poor in both English and Spanish (id. at pp. 13-14).

The same report noted the student had a history of language concerns that interfered with his functioning in English and Spanish as he transitioned to English dominance (Parent Ex. E at p. 14). The student's semantic and phonemic fluency in English were intact, but his verbal fluency in Spanish was poor (id.). Despite his ability to blend sounds into words in Spanish, the student demonstrated severe phonological processing deficits in English with respect to segmentation, blending, rhyming, identifying sight words, reading fluency, and rapid naming (id.). The student had difficulty following multistep instructions in both languages (id.). His expressive vocabulary and verbal reasoning abilities were not age-appropriate in either English or Spanish (id.). The evaluation report noted that results of the evaluation indicated that the student showed English language dominance (id.).

Academically, the student's overall abilities were below expectation and quite poor in both Spanish and English (Parent Ex. E at pp. 11, 14). At the time of the evaluation, the student's math and writing abilities were at or below the third grade level (id. at pp. 11-12, 14). According to the report, the student was not acquiring developmentally appropriate reading skills, increasing his automaticity, or learning sight words at an expected rate and therefore his comprehension was inconsistent and primarily poor (id. at p. 14). The student was able to do better when material was in front of him; however, because of his difficulty retaining what he read in working memory, the student could not access details without rereading the material (id.). Also, the student's listening comprehension suffered due to his working memory deficits (id.).

The bilingual neuropsychological evaluation report indicated the student was a well-behaved and pleasant youngster (Parent Ex. E at p. 14). He had no difficulty transitioning from one task to another and "aim[ed] to please" (id.). Although the student's visual and auditory attention was age-appropriate, his higher order cognitive/executive functioning skills were "quite impaired" (id.). Functional difficulties in the classroom included speaking, sustaining attention, staying on task, filtering distractions and regulating verbal output (id.). The report indicate that the student lacked good problem-solving strategies and "step-wisdom," worked very slowly (particularly when a motor demand was present), and processed information inefficiently (id.). The student had difficulty with concept formation, fluid reasoning, and inhibition (id.).

The evaluation report also included information provided by the student's then-current teacher about the student's performance in the classroom and his difficulties with language, which had a significant impact on his academic functioning in all areas (e.g., comprehending abstract classroom discussions, paraphrasing stories presented orally, summarizing and making inferences, following directions, and increasing vocabulary) and, specific to math, understanding math vocabulary, identifying relevant information, using cues in word problems, and integrating multiple aspects of word problems (Parent Ex. E at p. 9). According to the teacher, the student demonstrated significant delays in most aspects of reading and writing (id.). The student's teacher also reported that the student exhibited attentional and executive function deficits, inconsistent performance, ineffective learning strategies, and difficulty completing classwork and homework (id. at p. 10). According to the teacher's report, the student had difficulty staying focused, maintaining mental effort, and following through on tasks, in that he stopped performing tasks when they became too complex or had too many details (id.).

Although it was difficult for the evaluator to state with certainty to what extent the student's transition from basic Spanish to English dominance and the effects of his language, cognitive and learning deficits contributed to his clinical picture, she concluded that the student met the criteria for diagnosis of a language disorder (Parent Ex. E at p. 14). She further determined that due to variation in the student's scores, in that his FSIQ was too high and he had no adaptive skill deficits, the student's performance did not meet the clinical criteria for diagnosis of an intellectual disability (id.). According to the evaluator, middle school would require more developed academic skills, a solid grasp of the underlying relationships between concepts, and a deeper and more nuanced understanding of language-based ideas (id. at pp. 14-15). The evaluator noted in the report that the student would be asked to process and understand large amounts of material presented orally and in writing, as well as to convey his ideas in the classroom (id. at p. 15). Further, the evaluator reported that the student would have significant difficulty without the skills needed to think conceptually, assimilate and access information efficiently, and fluidly decode written language and therefore required an "intensive amount of 1:1 intervention" (id.).

The evaluator determined that the student required a small, specialized classroom that could provide evidence-based multimodal/multisensory instruction to accommodate his language, cognitive, and learning needs, and that he would benefit from a 1:1 paraprofessional to assist with academic tasks and "focal maintenance" (Parent Ex. E at p. 15). The evaluation report included almost three pages of additional recommendations specific to classroom modifications, testing accommodations, speech-language therapy, assistive technology, and 1:1 academic instruction in math, phonics, and writing (id. at pp. 15-17).

Specifically, the evaluator recommended the following classroom modifications: provide opportunities for repetition, review and rehearsal, as well as corrected practice to improve storage and recall; use preferential seating; reduce distractions; provide visual aids/cues; break down information into smaller chunks; simplify oral directions; check for understanding and ask the student to paraphrase; relate new information to background knowledge; use organizational strategies such as graphic organizers and semantic schemas to help the student learn new information; provide extended time to complete classroom assignments and homework; provide practice sheets that the student could work on at home and at school to increase automaticity; and reduce the amount of homework to a more manageable amount (Parent Ex. E at p. 15). Additionally, the evaluator recommended the nurturance and encouragement of effective metacognitive strategies (evaluate task while doing it, avoid careless errors, clearly define the instructional targets) (id.).

Recommended testing accommodations were as follows: extended time (double); separate location; directions read and reread; questions read aloud; preferential seating; answers recorded in any manner; and use of a calculator (Parent Ex. E at p. 15). With regard to related services recommendations, the evaluator indicated that speech-language therapy should continue at a rate and degree prescribed by the student's most recent speech-language evaluation (id.). Also, the evaluator recommended that the related service be delivered by a therapist with an understanding of bilingual populations and the development of bilingualism (id.). Further, the evaluator recommended that the student's classroom teacher and speech-language therapist consult each other to periodically evaluate the student's progress, identify instructional variables, and target appropriate interventions (id.). Additional recommendations included the following: an assistive technology assessment to evaluate the student's need for systems to facilitate/enhance learning; use of directed vocabulary activities and word games to help the student learn how to use context to infer the meanings of words; and instruction in memory strategies such as mnemonics, visual representation, and oral elaboration (id. at p. 16).

The evaluator further indicated in her report that the student required intensive 1:1 compensatory math instruction and recommended providing the following strategies: diagrams and other visual aids to map out important concepts; hands-on experience applying concepts in practical ways outside of school; practice looking at word problems and identifying what processes will be needed; instruction in basic number concepts; correctly solved problems to analyze; drill games; proofreading exercises; concrete explanations; demonstration, modeling and feedback; reinforcement for fluency building; concrete to abstract teaching sequence; and alternative delivery systems (peers, software, etc.) (Parent Ex. E at p. 16).

According to the evaluator, the student required systematic, sequential, and explicit compensatory 1:1 phonics instruction and provision of the following: targeted word level problems; explicitly taught letter-sound associations; behavior analysis principles infused to systematically and sequentially progress from one phonics skill to the next; cueing, feedback, and opportunities to make many responses; multisensory methods to help the student understand phonological and orthographic features of words; facilitation of rhyming, segmentation, blending, phonemic awareness, word pattern detection, word identification, and nonsense word naming; modeling followed by independent practice; selection of developmentally appropriate literature to highlight the phonics skills focused on at particular points in the sequence of instruction; and application of instruction of sound-symbol relationships to spelling (Parent Ex. E at p. 17).

Finally, the evaluator also opined that the student required 1:1 compensatory writing instruction to include the following: breaking down writing tasks into smaller units; teaching brainstorming, self-monitoring and editing skills; providing outline templates and other planning tools; allowing alternatives to written assignments; working on sentence formulation and organization (id.).

## **2. Aaron**

According to a description included in the hearing record, Aaron was a private special education school for students in grades kindergarten (K) through 12 who exhibited language, learning, attention, and social challenges, and "whose mission [wa]s to educate children in a meaningful learning environment so they c[ould] maximize their potential and become confident, successful citizens of their school and community" (Parent Ex. K at pp. 1, 8). Aaron instructional staff included masters level head teachers, bachelors and masters level assistant teachers, and clinical staff including speech-language pathologists, occupational therapists, social workers, school psychologists, and a college placement counselor (id. at p. 4). Clinical services were delivered in individual and dyad sessions for grades K-5 and within the structure of the classroom in the middle school and high school grades, with additional individual and small group sessions scheduled as needed (id. at p. 5). Available clinical services offered include speech-language therapy, OT, counseling, "[a]lert," life skills, social skills, writing lab, study skills-tools for executive functioning, and peer group (id.). The student-to-teacher ratio for grades K-2 was 10:1, for grades 3-5 the ratio was 12:1+1, and for grades 6-12 the ratio was up to 15:1+1 (id. at p. 4). Aaron's K-12 curriculum was developed based on Common Core Standards (id. at p. 6). The curriculum scope and sequence were content-focused and adapted to meet the needs of each student at every grade level (id.). The classroom team worked together to develop and adapt instructional plans on a regular basis to meet the diverse learning styles of the students (id.). The Aaron curriculum incorporated a language-based, structured, multisensory and inter-disciplinary approach to present academic information in a way that promoted learning and retention of material (id.). Unique experiential programming was threaded throughout the program to foster skill development, greater independence, self-advocacy, and attunement to one's learning style (id.). The Aaron program description indicated that the school's hallmarks include a collaborative team approach, strong academic curriculum, integrated social skills program, self-understanding and advocacy emphasis, executive function skills building, technology and art integration, and transition to post-secondary life (id. at p. 7).

According to the student's 2019-20 Aaron mid-year report, dated February 2020 (mid-year report), the student was in a homeroom class with a student-to-staff ratio of 13:1+2 that was equipped with a Phonic Ear FM System to enhance auditory processing and attention (Parent Ex. L at p. 1). Within this classroom group, the student received instruction in science, social studies, writing, health and human development (HHD), visual arts, technology, music, and physical education (id. at pp. 1, 9). ELA and mathematics were taught in a small, skill-based group contingent on the student's ability level as well as learning needs (id. at p. 1). The mid-year report reflected that to further address the student's individual needs he participated in whole group therapeutic services including study skills (30 minutes), writing lab (45 minutes), and peer group (45 minutes) each week (id.). In addition, all students were assigned to a "Connection Time"

session (30 minutes) and an "Alliance Club" (30 minutes) (id.).<sup>13</sup> The mid-year report noted that the student was a valued member of the class, and due to his difficulty with expressive, receptive, and pragmatic language, social cognition, and attention, he required a variety of individualized supports and strategies to ensure his continued academic, and social/emotional progress (id.).

The mid-year report indicated that the student received five 45-minute sessions per week of ELA instruction in a small group (Parent Ex. L at p. 2). Instruction for the group was based on the Orton-Gillingham (O-G) approach, where lessons included new and old review of previously learned concepts, visual and auditory drills focused on letter and phoneme sounds, blending drills focused on tapping out phonemes to create words, and introduction of new material through learning rules and patterns, and reading and spelling (id.). The mid-year report revealed that in reading, the student learned a variety of specific concepts related to phonemes and phonemic rules, as well as rules related to syllable division, consonant/vowel/vowel consonant (CV/VC) rules, plural rules, and adding suffixes, and how changing the suffix to a root word changes the word meaning (id.). Students applied understanding of various syllable rules and rules pertaining to suffixes to comprehend the meaning of passages (id.).

According to the mid-year report, the student required teacher support to assist with decoding extended passages that included multisyllabic words and, to address the student's difficulty understanding task directions, he was provided with extra time in responding to a prompt (Parent Ex. L at p. 2). He benefitted from teacher facilitated discussions, verbal cues, breaking down tasks into steps, and simplified and modified language (id.). When spelling words and applying learned syllable division rules, the student benefitted from teacher modeling, one-on-one support, and clear verbal cues in order to help him distinguish the sounds within a given word (id.). Use of interactive lessons, a variety of activities, and chunking information helped the student learn new information (id.). Use of his student workbook helped the student to go back and review phonological rules as well as practice new information in a clear and consistent format (id.). At times the student was unable to recall multiple spellings of a given phoneme to encode accurately, and benefitted from teacher prompting, repetition, and review of phonemes to assist his mastery of spelling learned sounds (id.). During times in ELA when the student had difficulty distinguishing appropriate times to socialize with his peers due to struggles with social cognition (e.g., initiated conversation with peers during unexpected times, made jokes, made off-topic comments when responding to teacher prompts), the student received reminders that his behavior was unexpected (id. at p. 3). The student also benefitted from using strategies such as taking short breaks outside the classroom, using a sensory tool (e.g., putty), and providing consistent expectations (id.). The student was motivated by acting as a teacher helper (e.g., passing out materials, helping a peer, modeling a concept to the class) (id.). The mid-year report included three goals and corresponding "[m]ethod[s]" to improve the student's ability to read and write "Red Words" from the O-G list, read and spell multisyllabic words by applying specific rules, and read

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<sup>13</sup> The student's seventh grade class schedule reflected the school day at Aaron was between 8:00 a.m. and 2:45 p.m. (see Parent Ex. J). Homeroom, ELA, and math occurred daily while science and social studies occurred three days per week (see id.). Writing class occurred on two days per week and writing lab on one day per week (see id.). The schedule included other areas of instruction that occurred throughout the week including HHD, Alliance, peer group, public speaking, drop everything and read (DEAR), study skills, specials, strategy games, student advisory, extra gym, mindfulness/yoga, farmer's market, park, "WIP," lunch, snack, free time/cash in, and dismissal (see id.).

and spell a variety of words using his knowledge of vowel teams, suffix patterns, and plural rules (id.).

The mid-year report indicated that the student's small math group utilized the EnVision Mathematics 4 curriculum and teacher-created materials such as worksheets, templates, and related math activities on the SmartBoard (Parent Ex. L at p. 3). Each lesson began with a "Do Now" activity and review of homework from the previous night to ensure that previously taught concepts were understood and could be completed independently (id.). Instruction focused on strengthening basic skills and achieving grade level mastery of mathematical concepts (id.). Problem-solving instruction was embedded in nearly every lesson to provide opportunities to practice and reinforce problem-solving skills (id. at p. 4). The student benefitted from using manipulatives, pictures, written equations to solve problems, and patterns (id.). Formative and summative assessments such as unit tests, quizzes, and independent work were conducted to measure the student's progress (id.). Before attending math class, the student often took a "body break" in order to re-energize himself for the class (id.). To address the student's difficulties with higher order thinking problems in math, which required analysis of the question, the student benefitted from 1:1 teacher support, direct questions, and visuals (id.). He benefitted from the use of sensory tools and body breaks when he had difficulty staying focused (id.). As the student frequently rushed to answer a question, with teacher prompting, he was quick to self-correct answers and benefited from repetition and review of material and directions, chunking information, and visual cues (id.). The mid-year report included three math goals and the methods used to improve the student's ability to build on and extend his knowledge of addition and subtraction multi-step word problems, multiplication of multi-digit numbers, and use of rounding and estimating to solve multiplication and division equations (id.).

Regarding the student's writing skills, the mid-year report indicated that the Aaron middle school utilized a writing curriculum that was sequential, structured, and systematic (Parent Ex. L at p. 7). Throughout the school year, the class worked on idea generation and expressions of feelings, thoughts and experiences (id.). To enhance foundational writing skills the class worked on expository, narrative, persuasive, and informative writing projects (id.). The curriculum was supported through programs such as "Thinking Maps" and "Framing Your Thoughts," in addition to teacher-created independent and group projects, journal writing, oral and written responses, and visualization activities (id.). The class was introduced to the steps involved in the writing process (e.g., brainstorming, organizing, drafting, revising, editing, publishing), which was used across all areas of the curriculum (id.). The student benefitted from clear and consistent expectations for his written work, teacher check-ins to ensure he understood directions, and breaking down the writing process into steps (id. at p. 8). Teachers often met 1:1 with the student in order to encourage him to apply his writing strategies, including Thinking Maps, as well as to help him check over his own work for clarity (id.). The use of visuals, graphic organizers, chunking of information and directions, and repetition and review best supported the student in completing writing tasks (id.). The student's mid-year writing goals included to improve the structure of his writing through understanding the drafting/editing process, generate ideas to create an extended writing piece, and use learned writing strategies and organize his thoughts when responding in writing to prompts (id.).

In science, the mid-year report indicated that pictures, videos, and hands-on activities were used to help the student better understand and master the concepts the class was learning (Parent



Ex. L at p. 5). The student required frequent repetition and review of concepts in order for him to get a full understanding of the information presented (id.). The student struggled with decoding and receptive language, which affected his ability to read, comprehend, and retain the scientific language in terms taught in class (id.). To address this need, content was chunked into smaller parts, written in modified language that was clear and concise, and delivered through instruction that was continuously repeated and reinforced (id.). Although during class the student was an active participant, and eager to share his ideas, questions and conclusions during whole-group instruction, his difficulties with social cognition resulted in him making off-topic comments and asking questions with the intention of making his peers laugh (id.). After class, teachers had conversations with the student to problem solve, and he had a difficult time perspective-taking (id.). Teachers explained how the student's actions affected the group, and that potentially, he caused his peers to become distracted (id.). When this occurred, the student benefitted from teacher prompts such as "[I]s that on topic?" or "[A]re you answering my question?" to redirect him to the subject being discussed (id.). The mid-year report further noted that in science, the student would continue to receive modified instruction, a variety of visual supports, and opportunity to engage in hands-on activities to support his learning needs and help him further develop his scientific inquiry (id.). The mid-year report also indicated that to achieve the science goals, the student would use technology and critical thinking skills to demonstrate and interpret diagrams and charts, as well as Thinking Maps and on-line resources in preparation for creating an invention and presenting/explaining his invention to peers, teachers, and parents at an "Invention Convention" (id. at p. 6).

Similarly, in social studies, curriculum was emphasized and supplemented through text, research, multimedia presentations, field trips and multisensory, visual activities (Parent Ex. L at p. 6). Students used higher order cognitive skills, small group and individual projects, role-playing and perspective taking, whole group discussions, and written/oral reflections to demonstrate comprehension of major ideas (id.). Hands-on activities were incorporated whenever possible and scaffolded questions were asked during lessons (id.). With regard to the student's difficulties with impulsivity and self-regulation, the student sometimes struggled with focusing and staying on topic (id. at p. 7). He sometimes forgot to raise his hand when he had something to contribute to the class discussion and conversed with peers about an off-topic subject (id.). Similar to his other classes, teachers used redirection and prompting to "raise a quiet hand," or "focus on today's lesson" to provide the student with the opportunity to regroup and refocus (id.). Other strategies used in social studies class included partner work, kinesthetic activities, visual aids and chunking (id.). The mid-year report goals for social studies class included for the student to participate in group discussions, read alouds, interactive videos, and independent projects (id. at p. 6). To address the student's ability to answer critical thinking questions, the report indicated he would use Thinking Maps to compare and contrast and demonstrate cause and effect (id. at p. 7).

Further, the mid-year report indicated that the student received social/emotional and behavioral support through his participation in HHD, Connection Time, and Alliance Club (see Parent Ex. L at pp. 9-11). In HHD, the student participated in developing his social cognition, attention skills, and knowledge of health-related material through classroom discussions and interactive individual activities such as self-care routines (id. at p. 9). To address the student's difficulties with social cognition, his tendency to engage in side conversations with peers, and his lack of recognition with regard to the effect his actions had on himself and on his peers' learning environment, teachers broke down the material, encouraged body breaks when needed, chunked

information, used repetition, and included visuals throughout their presentation (id.). HHD goals included that the student would expand his knowledge of health-related material, improve his social cognition and attention skills, increase self-awareness, and demonstrate a greater level of independence in relation to responsible decision-making (id.).

The mid-year report indicated that Connection Time, an "intensely individualized" supportive conference, occurred one time per week for 30 minutes (Parent Ex. L at p. 9). Each middle school student at Aaron individually met with their "connection therapist," who was paired with that student based on the student's individual learning needs (id.). The purpose of Connection Time was to help students identify their areas of strength and develop deeper awareness and appreciation of their learning style, reinforce areas of need, manage assignments, identify and use individualized strategies to help them move towards independence, and acquire the skills to become effective and confident self-advocates, learners, and individuals (id.). The student's connection time therapist was a speech-language pathologist, and connection time sessions focused on improving the student's receptive and expressive language skills, particularly as they related to reading and writing tasks (id.). To address the student's challenges related to receptive and expressive language, phonological awareness, encoding and decoding skills, and to improve the student's understanding of written material and his written expression capabilities, elements of the Google Read and Write assistive technology suite were used during sessions (id.). The student practiced using word prediction and spell-check tools to aid with encoding errors and improve the speed and accuracy of his writing (id. at pp. 9-10). The student also used a text-to-speech tool during writing tasks to read back his work, allowing him to hear and correct grammatical errors or omitted words (id. at p. 10). He also used highlighting tools during reading comprehension tasks (id.). In addition, through facilitated discussion and visual aids, the student worked on his ability to discriminate between appropriate and inappropriate times to be silly, as well as reflect on the effect his actions had on others in the classroom (e.g., it is harder to learn, teachers might be disappointed) (id.). Goals included that the student would increase his independent self-reflection, self-awareness of personal challenges, self-advocacy, and independence in social and academic contexts, and improve receptive and expressive language as well as also social cognition and communication skills (id.).

The mid-year progress report indicated that through Alliance Club groups, students participated in activities designed to develop their understanding of what it means to be part of a community and how they could become community helpers (Parent Ex. L at p. 10). The Alliance Club group members participated in community service projects that benefitted the Aaron community and the greater city and global communities (id.). The overall theme for community service projects was "Healthy Living" (id.). Topics included fitness, nutrition, and how to be a role model (id. at pp. 10-11). The student worked on working productively and cooperatively with a shared purpose (see id. at p. 11).

A student summary included at the end of the February 2020 mid-year report provided an overall description and summary of the student (see Parent Ex. L at pp. 11-12). Among other things already noted herein, the report indicated the student would continue to work on self-advocating when he did not understand something, improving his ability to stay attentive during academic lessons and learning and applying new information and strategies during academic lessons (id. at p. 12).

The mid-year report reflected that at the time it was prepared, the student was having a successful year and the report specifically included the student's grades as follows: ELA (91/A-), Math (94/A), science (93/A), social studies (96.5/A), and writing (89/B+) (see Parent Ex. L at p. 13). According to the report he also received the following grades in non-academic subjects as follows: art (96/A), tech media (91/A-), music (84/B), and physical education (91/A-) (*id.*).<sup>14</sup>

In conclusion, in its request for review the district put forth no specific arguments as to why Aaron was not an appropriate unilateral placement for the student. Absent such assertions, and in consideration of all of the above with regard to the appropriateness of the instruction and services the student received, review of the evidence in the hearing record supports a finding that the student's program at Aaron was specially designed to address his unique educational needs during the 2019-20 school year.

### **C. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE]

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<sup>14</sup> The mid-year report also indicated that study skills, writing lab, peer group, HHD, connection, and alliance club were designated as "N/A," which was equivalent to "not a graded component" (*id.*).

can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO opined that "[o]ne of the fundamental tenets of equity jurisdiction is that a party may not plead equity having come to the decision-maker with unclean hands" and that, therefore, where the district "acknowledges that it has failed to meet its definitional obligation to provide an appropriate placement may not then argue that, although the family has exercised self-help and found such a program, it should not be held accountable for the cost of that program because of 'the equities'" (IHO Decision at p. 5). While the IHO's view may be broader than the IDEA contemplates, there is some authority that indicates that, where the district's "abdication of its responsibility" is so clear, equitable considerations weigh in the parents' favor (N.R. v. Dep't of Educ. of City Sch. Dist. of City of New York, 2009 WL 874061, at \*7 [S.D.N.Y. Mar. 31, 2009]; see also Application of the Dep't of Educ., Appeal No. 13-072). Accordingly, while the district's concession on its own might not usher in this sort of a bar to a reduction or denial of relief to the parent on equitable grounds, the district's complete failure to convene a CSE to develop an IEP for the student comes closer.

In any event, the district does not assert any factors that would limit or bar an award of direct funding to the parent on the basis of equitable considerations. The hearing record reflects that the parent provided timely notice that the district had not, as of August 2019, convened a CSE to develop an IEP for the student for the 2019-20 school year (Parent Ex. F at p. 1). There is no indication in the hearing record that the district responded to this letter or otherwise communicated with the parent regarding the offer of a FAPE to the student. The parent also timely notified the district of her intention to unilaterally enroll the student at Aaron for the 2019-20 school year and seek direct funding on August 7, 2019 (id.). Accordingly, the hearing record does not include any evidence that would warrant a finding that the parent is not entitled to a full award of funding for the costs the student's tuition at Aaron for the 2019-20 school year.

As a final matter, there appears to be no dispute that the parent was legally obligated to make tuition payments to Aaron for the student's attendance during the 2019-20 school year but that she lacked the financial resources to do so (see Parent Exs. G-I; see also E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a 'direct-payment' remedy" and holding that "where the equities call for it, direct payment fits comfortably within the Burlington-Carter framework"]; Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406, 428 [S.D.N.Y. 2011] [finding it appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). Accordingly, the district shall be required to reimburse the parent for the amounts paid to Aaron for the student's tuition for the 2019-10 school year and directly fund the balance.

## **VII. Conclusion**

In summary, while the IHO erred in applying the wrong legal standard in this matter, I ultimately reach the same outcome on different grounds. That is, the documentary evidence in the hearing record without consideration of the parent's witness affidavits establishes that Aaron was an appropriate unilateral placement for the student for the 2019-20 school year and that equitable considerations do not present a bar to an award of direct funding.

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

**Dated: Albany, New York  
June 18, 2020**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**