



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-027

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

### **Appearances:**

Law Office of Anton G. Cohen, PC, attorneys for petitioner, by Sandra Robinson, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at the Adelphi Academy (Adelphi) for the 2022-23 school year. The appeal must be sustained.

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

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

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

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

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

The student in this case attended a nonpublic, "mainstream, parochial school" for kindergarten through eighth grade (Tr. p. 93). At the impartial hearing, the parent testified that the student's classrooms at the nonpublic parochial school consisted of approximately 10 to 12 students, and "he was the only [student] with an IEP" in his classrooms (Tr. pp. 93-94). She further testified that, while attending the nonpublic parochial school, the student received special education consisting of special education teacher support services (SETSS) instruction, as well as related services consisting of occupational therapy (OT), physical therapy (PT), and speech-language therapy (see Tr. p. 94). In addition, the student attended "mainstream summer program camps" during the same time period (Tr. pp. 95-96).

During the 2021-22 school year, the student—whose chronological age would have reportedly placed him in the eighth grade—was attending a fourth grade classroom at the nonpublic parochial school (see Dist. Exs. 6 at pp. 1-2; 11 at p. 1; but see Dist. Ex. 4 at p. 1 [describing the student as a ninth grade student during the 2021-22 school year]). At that time, he had been receiving 17 hours per week of SETSS for "reading and math" for the "last two years," and prior to that, he had received seven hours per week of SETSS to address mathematics skills—all on a 12-month school year basis (Dist. Ex. 11 at p. 1).<sup>1</sup> In addition, the student received five 30-minute sessions per week of individual speech-language therapy (one session in the school setting), PT services, and two 30-minute sessions per week of individual OT (both outside the school setting) (see Dist. Exs. 8 at p. 1; 9 at p. 1; 10 at p. 1).

At the impartial hearing, the parent testified that, in January 2022, she contacted the district to inquire about the process for the student to enter high school (see Tr. p. 96). At that time, the district sought the parent's consent to reevaluate the student, which the parent provided (id.). The evidence in the hearing record reflects that the district conducted a psychoeducational evaluation of the student in March 2022 (March 2022 psychoeducational evaluation) (see Dist. Ex. 4 at p. 1). The district also completed a level I vocational interview of the student on March 10, 2022 (see generally Dist. Ex. 12). Shortly thereafter, in April 2022, the district obtained the student's progress reports prepared in the areas of speech-language therapy, PT, OT, and SETSS (see Tr. pp. 96-97; Dist. Exs. 8-11). According to the parent's testimony, a CSE initially convened on or about April 28, 2022, and then reconvened on June 10, 2022 (see Tr. p. 97). The parent testified that the CSE reconvened in June because she had "expressed [her] confusion at [the April 2022] meeting"—which she thought would include discussions about the student's "high school options"—when she was told that in order to discuss the student's high school options, it would be necessary to convert the student's individualized education services plan (IESP) to an IEP (Tr. p. 97).<sup>2</sup> According to the parent's testimony, if she wanted to convert the student's IESP to an IEP on that day, the student's "services would cease" for the remainder of the school year (Tr. pp. 97-98). The parent asked to reconvene the CSE meeting on June 10th or 11th, the day after the student graduated from the nonpublic parochial school, and the CSE agreed (Tr. p. 98).

On June 10, 2022, a CSE reconvened for the student's annual review and to develop an IEP for the student for the 2022-23 school year (see Dist. Ex. 1 at pp. 1, 34). Finding that the student remained eligible for special education as a student with an intellectual disability, the June 2022 CSE recommended a 12-month school year program in a specialized school, consisting of the following: a 12:1+1 special class placement for instruction in mathematics, English language arts (ELA), social studies, and sciences; two 30-minute sessions per week of individual OT; two 30-

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<sup>1</sup> As reflected in the hearing record, the student had the same SETSS provider for the "past [eight] years" (Dist. Ex. 11 at p. 1). According to a SETSS progress report completed during the 2021-22 school year, the SETSS provider estimated that the student performed on a second to third grade level in reading and mathematics and at a kindergarten to first grade level in written expression (id.). According to the SETSS provider, the student was "usually very responsive when working with the provider that he [wa]s very familiar with," but he would, "at times shut down or guess at answers when he [wa]s with someone outside of his circle" (id.).

<sup>2</sup> Although the hearing record does not include any copies of the student's previous IESPs, the evidence reflects that the student had an IESP, dated June 21, 2021—which was part of the referral package sent to Adelphi—that was most likely in place prior to the development of the June 2022 IEP (see Parent Ex. J ¶ 25).

minute sessions per week of individual PT; four 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group; and the services of a full-time, individual health paraprofessional (noting, "Down Syndrome & Severe Food Allergy" in the IEP) (*id.* at pp. 27-29, 34). The June 2022 CSE created annual goals with corresponding short-term objectives targeting the student's needs in the areas of communication skills (i.e., speech-language); academic skills (i.e., mathematics, reading, and writing); gross motor skills (i.e., PT); and attention, organization, and fine motor skills (i.e., OT) (*id.* at pp. 12-27).<sup>3</sup> In addition, the June 2022 CSE recommended testing accommodations and special transportation (*id.* at pp. 30, 34). With respect to the student's participation with nondisabled students, the June 2022 IEP reflected that the student "c[ould] participate in extra-curricular and nonacademic activities, events, and classes with the general education population and non-disabled peers with intensive supervision when deemed appropriate by the IEP team" (*id.* at p. 33).

In the portion of the June 2022 IEP listing "Other Options Considered," the June 2022 CSE noted that it considered and rejected a 15:1 special class placement in a community school, a 6:1+1 special class in a specialized school, and a 12:1+1 special class in a community school (Dist. Ex. 1 at p. 37). More specifically, the June 2022 CSE explained that the CSE considered but rejected the 12:1+1 special class placement in a community school because the student "require[d] a more

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<sup>3</sup> With regard to the student's participation in State and district-wide assessments, the June 2022 determined that the student would participate in an "alternate assessment on a particular State or district-wide assessment of student achievement" (Dist. Ex. 1 at p. 32). In the June 2022 IEP, the CSE denoted that the student had a "severe cognitive disability, significant deficits in communication/language, and significant deficits in adaptive behavior"; he required a "highly specialized educational program that facilitate[d] the acquisition, application and transfer of skills across natural environments (home, school, community, and/or workplace)"; and the student required "educational support systems such as but not limited to, assistive technology, personal care services, health/medical services, or behavioral intervention" (*id.*). The June 2022 CSE identified the following as the specific alternate assessments: the Student Annual Needs Determination Inventory (SANDI), the Formative Assessment of Standards Tasks (FAST), the New York Alternate Assessment (NYSAA), and a Student Portfolio (*id.*). In addition, the June 2022 CSE identified ELA, mathematics, sciences, and social studies as the alternate assessment subjects (*id.*). As a rationale for why the student was identified for alternate assessments rather than participating in regular assessments, the June 2022 CSE indicated that the student's "delays in cognition, reading, math, and adaptive functioning, in comparison to his/her chronological age, preclude[d] him from participating in Standardized State testing" (*id.*). In addition, the June 2022 CSE noted that, "per chancellor's regulations, the student [wa]s exempt from the promotion policy based upon lack of participation in state and citywide assessments" (*id.*). Due to the student's participation in alternate assessments, the June 2022 CSE was required to create short-term instructional objectives or benchmarks for the student, which are described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal" (*see* 8 NYCRR 200.4[d][2][iv]; *see* 20 U.S.C. § 1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (*see id.*). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal;" benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (*id.*). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (*id.*).

modified, structured learning environment due to significant cognitive, achievement, social and adaptive deficits" (*id.*). In addition, the CSE explained that it considered and rejected the 6:1+1 special class placement in a specialized school because the student could "function in a less restrictive environment with [a] higher student to teacher ratio" (*id.*).

In a prior written notice from the district, dated July 16, 2022, the district summarized the special education and related services recommended for the 2022-23 school year (*see* Dist. Ex. 2 at pp. 1-2). The July 2022 prior written notice reflected the same information as noted in the June 2022 IEP regarding what other placement options the June 2022 CSE considered and rejected (*compare* Dist. Ex. 2 at p. 2, *with* Dist. Ex. 1 at p. 37). In a school location letter, dated July 16, 2022, the district identified the particular district public school assigned to implement the student's IEP (i.e., assigned public school site) (*see* Dist. Ex. 3 at p. 1).<sup>4</sup>

In a letter dated August 23, 2022, the parent, through her attorney, notified the district of her intentions to unilaterally place the student at Adelphi for the 2022-23 school year and to seek funding for the costs of the student's tuition from the district (*see* Parent Ex. B at p. 1).

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

By due process complaint notice dated September 8, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (*see* Parent Ex. A at p. 1). More specifically, the parent asserted that the June 2022 CSE was not properly composed of the required attendees, and the CSE impermissibly engaged in predetermination of the student's program recommendations by only considering "programs and placements" in specialized schools, which "further compromised the parent's opportunity to participate in the IEP process" (*id.* at p. 2). In addition, the parent indicated that the CSE failed to evaluate the student in all areas of suspected disability, noting that, upon information and belief, the district failed to conduct a classroom observation and failed to evaluate the student's communication, daily living, and socialization skills (*id.*). The parent also indicated that the June 2022 CSE failed to rely on "sufficient, reliable, and current evaluative data to develop an appropriate program that accurately identified the student's academic and social/emotional needs, established annual goals and provided the appropriate special education services to address those needs in the [least restrictive environment (LRE)]" (*id.*). Next, the parent alleged that the June 2022 CSE failed to conduct an appropriate vocational assessment to identify the student's "career interests, work-related aptitudes and skills and need for training" (*id.*).

In addition to the alleged procedural violations, the parent asserted that the June 2022 IEP was "substantively flawed because the recommended placement in a 12:1+1 [special class] with related services of [speech-language therapy], OT, PT and [a] 1:1 [full-time] [health] [paraprofessional]" failed to offer the student a FAPE in the LRE (Parent Ex. A at pp. 2-3). The parent indicated that the June 2022 CSE was "well aware that the student ha[d] never attended a self-contained special education class in a specialized school as he had been enrolled in a private mainstream school for the past eight years" (*id.* at p. 3). The parent further indicated that, although the June 2022 CSE knew that the student had "always been mainstreamed to the full extent

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<sup>4</sup> The school location letter, while identifying the assigned public school site, did not specify whether it was a district specialized school or a district community school (*see generally* Dist. Ex. 3).

possible," the June 2022 CSE failed to "discuss specific mainstreaming opportunities with the parent and recommend it in the student's IEP" and only "ambiguously" recommended that the student participate with his nondisabled peers in "extracurricular and nonacademic activities, events, and classes with the general education population and non-disabled peers with intensive supervision when deemed appropriate by the IEP team" (*id.* [emphasis in original]).

Next, the parent asserted that the June 2022 IEP failed to include "adequate supports to address the student's social/emotional needs or [to] achieve the recommended annual goals" (Parent Ex. A at p. 3). According to the parent, the present levels of performance in the June 2022 IEP did not "adequately describe the student's strengths and weaknesses because the CSE failed to properly reevaluate" the student (*id.*). The parent indicated that the management needs section of the June 2022 IEP did not "address all of the student's needs" and would not "adequately support him in the recommended program" (*id.*). Additionally, the parent indicated that the annual goals and short-term objectives were "impermissibly vague, overbroad, fail[ed] to address every area of the student's deficits," and failed to include baselines, targets to be achieved, and a means to measure the achievement of the annual goals (*id.*). The parent also noted that the June 2022 IEP failed to include recommendations for social skills training and annual goals for the student's "behavioral and/or social skills" (*id.*). In addition, the parent asserted that the June 2022 IEP did not include "individualized academic instructions [sic] given that the student had received 1:1 SETSS for many years," and it failed to include a recommendation for counseling supports or social skills support (*id.*).

With respect to the assigned public school site, the parent indicated that, based on a visit, the student would not be appropriately grouped for instruction and it could not provide the student with a "safe nut-free environment" (Parent Ex. A at p. 3).

As relief for the alleged violations, the parent sought, among other things, an order directing the district to reimburse or to directly fund the costs of the student's tuition at Adelphi for the 2022-23 school year (see Parent Ex. A at pp. 3-4).

## **B. Facts Post-Dating the Due Process Complaint Notice**

On September 12, 2022, the parent executed an enrollment contract with Adelphi for the student's attendance during the 2022-23 school year (eighth grade) (see Parent Ex. D at pp. 1, 4). The student attended Adelphi from September 12, 2022 through June 16, 2023 (see Parent Exs. E-G; see generally Parent Ex. H).

## **C. Impartial Hearing Officer Decision**

On November 7, 2022, the parties proceeded to an impartial hearing, which concluded on December 19, 2022, after three total days of proceedings (see Tr. pp. 1-246). In a decision dated January 22, 2023, the IHO found that the district offered the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 7-8). As a result, the IHO did not address whether Adelphi was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's requested relief, and the IHO dismissed the parent's due process complaint notice (*id.* at p. 8).

In reaching the conclusion that the district offered the student a FAPE, the IHO first determined that the hearing record failed to contain any evidence of any procedural violations in the development of the student's IEP that resulted in a failure to offer the student a FAPE (see IHO Decision at p. 7). Next, the IHO noted that, as "stated by [c]ounsel, mainstreaming opportunities [were] at the heart of this case" (*id.*, citing Tr. p. 49). In this regard, the IHO found that, contrary to the parent's assertions, the student's June 2022 IEP specifically indicated that the student "c[ould], under supervision, participate in activities with nondisabled peers" (IHO Decision at p. 7, citing Dist. Ex. 1 at p. 33). In addition, the IHO pointed to testimony by the "IEP [c]oordinator" from the assigned public school site, who indicated that the "recommended [district] program allow[ed] for opportunities to participate in general education classes (depending on progress) and extracurricular activities" (IHO Decision at p. 7, citing Tr. pp. 46, 48-49). The IHO also pointed to testimony by the district school psychologist who conducted the student's March 2022 psychoeducational evaluation, who testified that the district program was "specifically designed for students such as the one at issue with significant cognitive and academic delays" (IHO Decision at p. 7, citing Tr. pp. 151-53).<sup>5</sup> In light of the foregoing, the IHO concluded that the district sustained its burden to demonstrate that the student's recommended program was "tailored to the [s]tudent's significant needs with appropriately measured opportunities for mainstreaming" (IHO Decision at p. 7).

Next, the IHO found that the 12:1+1 special class placement for mathematics, ELA, social studies, and sciences, together with related services and the paraprofessional services, was "appropriate for the [s]tudent's academic and social-emotional needs" (IHO Decision at p. 7). In addition, the IHO noted that although the June 2022 CSE did not recommend counseling services, "it seem[ed] likely that the multifaceted supports outlined in the [district's] program would have addressed social[/]emotional needs" (*id.*). Moreover, the IHO pointed to evidence in the hearing record describing the student as "'well-rounded,' and 'very well received by his teachers and classmates'"—and as a result, concluded that counseling services were "not necessary" for the student (*id.* at pp. 7-8).

Finally, the IHO found that the June 2022 CSE was not properly composed, as it did not include a regular education teacher (see IHO Decision at p. 8). The IHO noted that the student's regular education teacher from the nonpublic parochial school had been invited to attend the CSE meeting, but did not attend (*id.*). Nevertheless, the IHO concluded that, although the absence of a regular education teacher at the June 2022 CSE meeting was "procedurally improper," "this lapse d[id] not amount of a deprivation of [a] FAPE not only because the recommended program was thorough and well considered, but also because it was predominantly a specialized non-general education program" (*id.*).

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<sup>5</sup> The district school psychologist who completed the student's March 2022 psychoeducational evaluation also attended the June 2022 CSE meeting and participated as both the school psychologist and the district representative (or chairperson) (see Dist. Ex. 1 at p. 37). State regulation provides, in part, that a district representative must be an individual who is "qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" (8 NYCRR 200.3[a][1][v]).

In summary, the IHO found that the district offered the student a FAPE for the 2022-23 school year and dismissed the parent's due process complaint notice (see IHO Decision at p. 8).

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

The parent appeals, arguing that the IHO erred by finding that the district offered the student a FAPE in the LRE by recommending the implementation of the student's IEP in a district specialized school and by failing to provide mainstreaming opportunities within the IEP itself. In addition, the parent argues that the IHO erred by finding that there was no evidence of any procedural violations in the development of the student's IEP that rose to the level of a denial of a FAPE. More specifically, the parent asserts that the June 2022 CSE impermissibly engaged in predetermination with regard to the recommendation of a specialized school, which deprived the parent of an opportunity to meaningfully participate; the June 2022 CSE was not properly composed because it lacked a regular education teacher and the student's SETSS provider; the CSE failed to meaningfully consider the parent's request for a general education setting; and the district failed to comply with its own policy requiring the CSE to submit an "LRE Check List for supervisor review" prior to recommending a specialized school. In addition, the parent contends that the IHO erred by finding that the district offered the student a FAPE because the district failed to assess the student in all areas of suspected disability, including the student's adaptive behavior deficits, daily living skills, and vocational skills. Due to the district's failure to adequately assess the student in these areas of need, the parent asserts that the present levels of performance in the June 2022 IEP did not include "material information" about those needs, the annual goals failed to address those needs, and the specialized school recommendation was not tailored to the student's needs.

With respect to the unilateral placement, the parent argues that Adelphi was appropriate to meet the student's needs, and equitable considerations weighed in favor of the parent's requested relief. The parent seeks an order directing the district to pay the costs of the student's tuition at Adelphi for the 2022-23 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

#### **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. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [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>6</sup>

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

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

## **VI. Discussion: June 2022 IEP—Educational Placement and the LRE**

Here, the parent contends that the IHO erred by finding that the district provided the student with appropriate mainstreaming opportunities by improperly relying on one statement in the June 2022 IEP and improperly relying on retrospective testimony from the IEP coordinator. More specifically, the parent argues that the IEP statement relied upon by the IHO failed to identify mainstreaming opportunities and instead, postponed any mainstreaming opportunities until a CSE deemed it appropriate for the student. In addition, the parent asserts that the IEP coordinator's testimony, while retrospective, also failed to identify specific mainstreaming opportunities the student would have received at the assigned public school site. As a final point, the parent asserts that neither the June 2022 CSE nor the IHO engaged in any meaningful analysis of whether the June 2022 IEP included a recommendation for the student's educational placement in the LRE by applying the two-prong LRE test set forth by the Second Circuit in Newington, and therefore, the IHO's decision must be reversed.

In response, the district asserts that the June 2022 CSE contemplated such mainstreaming opportunities for the student, but determined it was not yet appropriate for the student. In addition,

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<sup>6</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

the district contends that the IEP coordinator's testimony was not retrospective, but rather, permissibly explained how the IEP would have been implemented and further explained that the student would have mainstreaming opportunities during the school day.

Upon review, the evidence in the hearing record supports the parent's contentions, and as explained below, the IHO's finding that the district offered the student a FAPE in the LRE for the 2022-23 school year must be reversed.

Consistent with the parent's arguments, a review of the IHO's decision reveals that in reaching the conclusion that the district offered the student a FAPE in the LRE for the 2022-23 school year, the IHO relied on one sentence from the student's June 2022 IEP—which, according to the IHO, indicated that the student "c[ould], under supervision, participate in activities with nondisabled peers"—as well as retrospective testimony from the IEP coordinator at the assigned public school site indicating that the district's program "allow[ed] for opportunities to participate in general education classes (depending on progress) and extracurricular activities" and testimony by the district school psychologist indicating that the recommended program was "specifically designed for students such as the one at issue with significant cognitive and academic delays" (IHO Decision at p. 7, citing Tr. pp. 46, 48-49, 151-53 and Dist. Ex. 1 at p. 33 [noting that the student could "participate in extra-curricular and nonacademic activities, events, and classes with the general education population and non-disabled peers with intensive supervision when deemed appropriate by the IEP team"]). Notably however, the IHO reached this conclusion without undertaking an analysis of the two-prong test set forth in Newington to determine whether the June 2022 IEP placed the student in the LRE (*id.*). Similarly, the evidence in the hearing record reveals that not only did the June 2022 CSE suffer from the same fatal flaw, but also that the June 2022 CSE, in making its placement recommendation for the 2022-23 school year, only considered self-contained programming options and options the district already had available rather than making its recommendations based upon the student's needs, a consideration of the full continuum of alternative placements, and then offering the student the least restrictive placement from that continuum that was appropriate for his needs in contravention of T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 165-67 (2d Cir. 2014). Consequently, the IHO's conclusion must be reversed.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent

appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to

(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).<sup>7</sup>

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the

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<sup>7</sup> The Second Circuit left open the question of whether costs should be considered as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

It is the second prong that I find particularly problematic in this case. In other words, assuming that some removal of the student from a general education was appropriate for portions of the day due to his low academic functioning, the next question that the CSE otherwise failed to grapple with was the extent to which the student should otherwise be placed with nondisabled students to the maximum extent appropriate (see 20 U.S.C. § 1412[a][5][A]). As further described below, it appears that once the CSE considered the student's deficits in the core areas of his academics, the LRE determination was made in a one-size-fits-all manner that the student should be completely removed from nondisabled peers at all times. Overall, the hearing record contains little, if any, evidence to establish that the district engaged in any meaningful LRE considerations that were individualized to this student after making its recommendation to remove the student from his nondisabled peers for the 2022-23 school year. For example, the hearing record does not include any contemporaneous information, such as notes or CSE meeting minutes, and the July 2022 prior written notice for the June 2022 CSE meeting merely recites the same information about special class placement options that the CSE considered and rejected but does not otherwise reflect what, if any, discussions took place about the recommended placement or the student's placement in the LRE (compare Dist. Ex. 1 at p. 37, with Dist. Ex. 2 at p. 2; see generally Tr. pp. 1-246; Parent Exs. A-J; Dist. Exs. 1-12). At a minimum, the evidence in the hearing record indicates that—consistent with the district school psychologist's frank testimony concerning the innocuous impact of the regular education teacher's absence from the June 2022 CSE meeting—the CSE was not "making a general education program recommendation" (Tr. pp. 139, 143; see Dist. Ex. 1 at p. 37; see also Tr. pp. 167-70 [indicating that the district school psychologist sent the CSE meeting notice invitation to the "school contact person" and the "team's link" at the student's nonpublic

parochial school, but did not send the meeting notice directly to the student's regular education teacher]).<sup>8,9</sup>

At the impartial hearing, the district school psychologist testified that June 2022 CSE reviewed the following documents: the March 2022 psychoeducational evaluation, the student's most recent report card, a "teacher report," and "progress reports from the providers," as well as a "review of the records" (Tr. pp. 146, 149-50; see generally Dist. Exs. 4-11; 15). She further testified that, based on the results of the March 2022 psychoeducational evaluation, she found that the student obtained a full-scale intelligence quotient (IQ) of 40, which placed the student in the "extremely low range," and that, overall, the student's "reading, math, and writing skills were significantly delayed, falling in the very low range" (Tr. p. 148). According to the district school psychologist, the June 2022 CSE used the student's report card "in conjunction" with the testing results obtained from the March 2022 psychoeducational evaluation, "which supported the fact that [the student wa]s, . . . , severely delayed, and [wa]s functioning on a very below grade level curriculum, and the program recommendation we gave support[ed] students [who we]re that low functioning" (Tr. pp. 150-51; see generally Dist. Exs. 4; 6). When asked her opinion of how the student would "do in a mainstream school," given his cognitive skills, the district school psychologist testified that "[i]t would be extremely, extremely difficult for him to be in a

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<sup>8</sup> More specifically, the district school psychologist testified that although the student's regular education teacher had been invited to the June 2022 CSE meeting, the teacher called the parent the night prior to the CSE meeting to advise her that she could not participate at the student's CSE meeting the next day (Tr. p. 143). The district school psychologist further testified that, at the June 2022 CSE meeting, the CSE had the parent "sign [a] member excusal form, so [the CSE] could proceed [with the meeting] without the general ed[ucation] teacher" (id.). Without further questioning, the district school psychologist testified that, "it should be noted that it wasn't required, since we . . . weren't making a general education program recommendation" (id.). The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). However, as indicated above, 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]). The hearing record does not include a copy of the member excusal form allegedly signed by the parent (see generally Tr. pp. 1-246; Parent Exs. A-J; Dist. Exs. 1-12). However, even assuming for the sake of argument that the parent agreed to proceed without a regular education teacher at the CSE meeting, this in no way absolved the June 2022 CSE of its obligation to meaningfully engage in the two-prong Newington analysis to determine the student's educational placement in the LRE. Nevertheless, it does beg the question of how meaningfully the June 2022 CSE could have discussed the student's placement in the LRE without a regular education teacher present at the meeting, especially in light of the regular education teacher's role at a CSE meeting under the IDEA and State and federal regulations and the fact that the student had been educated in a fully integrated setting for kindergarten through eighth grade (see Tr. pp. 93-94).

<sup>9</sup> With regard to the absence of the student's SETSS provider from the June 2022 CSE meeting, the district school psychologist testified that, although the provider had not been invited to attend the meeting, the CSE obtained a SETSS progress report and noted that, within the CSE meeting invitation, "it's written in black and white that the parent c[ould] invite whoever she want[ed]," but the "special education teacher participant role" had been fulfilled with the "CSE special ed[ucation] teacher being present" (Tr. p. 144).

mainstream" (Tr. p. 151). After describing the June 2022 CSE's program recommendations for the student in the June 2022 IEP, the district school psychologist further noted that, "because of the [d]istrict [specialized school] placement and his cognitive functioning and academic functioning w[ere] so significantly low, [the CSE] also initiated 12-month services" (Tr. pp. 151-52). She further testified that the June 2022 CSE recommended a specialized school for the student "based on his IQ and the achievement testing" and explained that a district specialized school was a "program specifically for students that [we]re so cognitively and academically delayed" as they worked on a "very modified curriculum that [wa]s close to, or at, their significant, . . . , low level" (Tr. pp. 152-53). Moreover, the curriculum at district specialized schools also worked on students' activities of daily living (ADL) skills and "work readiness skills" (Tr. p. 153).

The district school psychologist was then asked about the "ACES" program, which she described as an "academic career and essential skills program, [that] . . . support[ed] students that ha[d] a classification of intellectually disabled, as well as other classifications like multiple disabilities" (Tr. pp. 153-54). Students within this program participated in alternate assessments, and the program focused on ADL skills, work readiness skills, and preparing students to "transition or graduate from high school" and to enter the workforce (*id.*). According to the district school psychologist, the June 2022 CSE discussed this program option, but the parent "refused"; in addition, she testified that the CSE considered other program options, including an 8:1+1 special class in a specialized school, which the CSE rejected because the student could "function in a less restrictive set[ting] . . . with [a] higher student-to-teacher ratio" (Tr. pp. 153, 159-60).<sup>10</sup>

Turning to the June 2022 CSE meeting, the district school psychologist confirmed that the CSE discussed the student's academic strengths and that the student's providers had developed the annual goals in the IEP (Tr. pp. 156-57). She also testified that the CSE discussed the student's social/emotional needs and that she did not recall the parent raising any concerns at the meeting (*see* Tr. pp. 160-61). In addition, the district school psychologist testified that the parent had expressed an interest in a district specialized school since the parent was unsure whether "she wanted to place [the student] privately or publicly," but further noted that she wanted to "see that placement before making a final decision"—which, according to the district school psychologist, was "another reason why the team offered a public school setting" (Tr. p. 161; *see* Tr. pp. 187-88 [indicating that the parent did not "mention mainstream" opportunities for the student at the CSE meeting, but instead, asked about district specialized schools before the CSE made its recommendations]).

On cross-examination, the district school psychologist confirmed that the June 2022 CSE "did not recommend any mainstreaming opportunities" for the student, "program wise" (Tr. pp. 178-79). She also confirmed that neither she nor the district special education teacher who participated at the June 2022 CSE meeting asked any of the student's "providers and teachers" from the nonpublic parochial school "whether or not [the student] c[ould] participate in any academic classes in the general education environment" (Tr. p. 179). However, the district school psychologist explained that the CSE did not "have the opportunity to ask the general ed[ucation] teacher that was invited" (*id.*). Turning to the recommendation for a 12:1+1 special class

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<sup>10</sup> Neither the June 2022 IEP nor the July 2022 prior written notice reflect any discussion of the ACES program at the CSE meeting (*see generally* Dist. Exs. 1-2).

placement in a district specialized school, the district school psychologist confirmed that she did not "formally" complete an "LRE checklist" from the district's standard operating procedures manual (SOPM) with respect to the development of the student's IEP and she did not "submit an LRE checklist to [her] supervisor before making the program recommendation for the [d]istrict [specialized school]" (Tr. pp. 181-82).<sup>11</sup> Next, the district school psychologist testified that the June 2022 CSE recommended that the student participate in "nonadaptive gym" or "regular gym," but could not explain whether that meant that the student would be in a "regular gym class in a general education class" because "some students in a [d]istrict [specialized school] setting" were in a "mainstream gym class"—however, she did not know whether "all [district specialized schools] ma[de] arrangements for that in their building" (Tr. pp. 182-83).<sup>12</sup>

Next, the district school psychologist was asked about her understanding of an "inclusion program" at district specialized schools (Tr. p. 183). According to the school psychologist, inclusion programs were for "more higher functioning students, but that still need[ed] that very structured and small setting" (*id.*). She further explained that "some of the students w[ould] be included into a mainstream class, [and] some students w[ould] have the IEP, and some won't" (*id.*). Notwithstanding that the district school psychologist had recommended inclusion programs at district specialized schools previously, the school psychologist testified that the June 2022 CSE did not discuss inclusion programs at the meeting (*see* Tr. pp. 184, 197-98; *see generally* Dist. Ex. 2). The district school psychologist confirmed that although the hypothetical model posed to her—namely, an inclusion program where some students received SETSS—sounded "similar" to the student's program at the nonpublic parochial school, she could not fully confirm its similarity because she would need to look at the "qualifications of these instructors" as a point where the hypothetical program may differ (Tr. pp. 185-86). With respect to the annual goals adopted by the June 2022 CSE from the student's providers into the IEP, the district school psychologist confirmed that those providers had worked with the student in a "mainstream environment" (Tr. p. 186). She could not confirm, however, whether those providers understood that those annual goals "would be implemented in the mainstream environment," which was similar to the environment the student attended when his providers had "developed [the] progress reports" (*id.*).

When asked why the June 2022 CSE did not recommend an inclusion program in a district specialized school for the student, the district school psychologist testified that his "skills [we]re too low functioning for right now" but maybe later, with appropriate services, the "team that . . . work[ed] with him in the future could decide, that maybe he c[ould] transition from this 12:1:1

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<sup>11</sup> To be clear, neither party submitted into evidence any document identified as the district's SOPM LRE checklist during the impartial hearing (*see generally* Tr. pp. 1-246; Parent Exs. A-J; Dist. Exs. 1-12). The district school psychologist later testified that, even if the June 2022 CSE had filled out the SOPM LRE checklist, it would not have changed the CSE's recommendation (*see* Tr. p. 196). However, the school psychologist clarified that when the CSE makes a recommendation from the "least restrictive to more restrictive, [they we]re required to have a consultation with [their] supervisors" for "input"—and the supervisors do not make a "final decision" on the placement recommendation (Tr. pp. 195-96). In addition, the district school psychologist testified that the CSE did not consult with a supervisor concerning this student (*see* Tr. pp. 198-99).

<sup>12</sup> In contrast to the district school psychologist's testimony, the June 2022 IEP indicated the following with regard to whether the student would participate in a "regular physical education program": the student "will participate in physical education in a specialized class in [a district specialized school]" (Dist. Ex. 1 at p. 33).



into an inclusion" program "(Tr. pp. 196-97). However, given the "data [the CSE] had in front of [them] at the time, it wasn't an appropriate recommendation" (*id.*).

Given the testimonial evidence discussed above and absent any documentary evidence to the contrary, the evidence in the hearing record establishes that the June 2022 CSE did not engage in an appropriate, individualized LRE analysis regarding the extent to which the student should be removed from his nondisabled peers when determining his educational placement. Nor did the IHO engage in the two-prong analysis required by the Second Circuit's Newington test, namely (1) whether education in the general classroom, with the use of supplemental aids and services, could be achieved satisfactorily for this student, and, if not, (2) whether the June 2022 CSE mainstreamed the student to the maximum extent appropriate (see generally Tr. pp. 1-246; Parent Exs. A-J; Dist. Exs. 1-12). To the extent that the district school psychologist's testimony suggests that the June 2022 CSE recognized that the student's needs required more supports and services than could be offered in an inclusion program or in another regular education setting given the student's very low cognitive skills, this same testimony does not answer the question of why, when providing additional supports to the student in either an inclusion setting or another less restrictive setting, did the CSE believe that the student had to be removed from his nondisabled peers entirely in order to receive sufficient additional support. This is essentially the question that is always posed by the Newington test with respect to whether any education in the general classroom, with the use of supplemental aids and services, could be achieved satisfactorily for this student. Had the CSE engaged in the statutorily required analysis and IHO applied the Newington test more systematically throughout the administrative process, they would have discovered that the facts in this case closely parallel those considered by the Second Circuit in T.M. (752 F.3d at 154-55, 161-63). One set of factual circumstances that the CSE should have been more prepared to address was that this student—similar to the student at issue in T.M.—attended "'mainstream' general education classrooms with non-disabled students" (i.e., an integrated setting) for kindergarten through eighth grade as a parentally placed student in a nonpublic parochial school (T.M., 752 F.3d at 153-54; see Tr. pp. 93-94; Dist. Ex. 11 at p. 1). Also similar to the facts weighed and considered by the Court in T.M., the evidence in the hearing record reflects that the student made progress and "was able to achieve a satisfactory education" while attending the integrated classrooms (T.M., 752 F.3d at 162-63; see generally Dist. Exs. 6; 11). Therefore, as the Court concluded in T.M., the facts in this case "clearly demonstrate[] that [the student] could succeed" in an integrated setting (T.M., 752 F.3d at 162). In addition, and also consistent with T.M., the hearing record does not contain evidence—nor does the district point to any evidence—indicating that the student would "obtain greater educational benefits from a more restrictive setting" (T.M., 752 F.3d at 162).<sup>13</sup> In light of these facts, it is reasonable to conclude from the first prong of the Newington test that an integrated setting should have been considered first as the least restrictive

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<sup>13</sup> I have presided over many cases in which a party or an IHO equates the term "additional support" with "more restrictive" as if the two phrases are synonymous and, for some disabled students, the type of additional supports available in non-integrated settings are very clearly necessary to provide the student with educational benefits or to avoid unduly impinging upon the educational experience of other students in the general education setting. However, it does not follow that "additional support" always means "more restrictive." The same misplaced understanding of "additional support" with "more restrictive" also appeared to occur in this case as evidenced by the June 2022 CSE's rejection of a 6:1+1 special class placement in a district specialized school, as the CSE noted that this placement option had been rejected because the student could function in a "less restrictive environment with [a] higher student to teacher ratio" (Dist. Ex. 1 at p. 37).

placement that could address the student's needs (see T.M., 752 F.3d at 162), rather than immediately deciding to remove the student from the general education setting and his nondisabled peers for the entire school day.

Instead, while the CSE recognized that the student required more support, the hearing record thereafter lacks any evidence that the district considered placement of the student in an integrated setting at all for the 2022-23 school year. It appears that the reason for the complete exclusion of the student from integrated programming was that, essentially, such programming was for higher functioning students than the student in this case, rather than the argument that such a program did not exist in the district. As a result, the facts of this case differ somewhat from the argument advanced by the Cornwall district—namely, the nonexistence of an in-district integrated summer program—before the Second Circuit, which the Court resoundingly rejected that reasoning (T.M., 752 F.3d at 166). The Court instructed that if the Cornwall school district did not wish to create an integrated program, it was not required to, but that it was required to place the student in an integrated public program elsewhere (id.).<sup>14,15,16</sup>

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<sup>14</sup> According to the Court in T.M., the pervasiveness of the LRE requirement required the application of the two-prong Newington test to the "entire proposed educational program" (see T.M., 752 F.3d at 162-65 [finding specifically that the LRE requirement applies to the summer component of the student's recommended 12-month school year program]; see also 34 CFR 300.107; 300.114; 300.117; 8 NYCRR 200.4[d][2][v][a][1]-[3]). In T.M., the Court rejected the district's assertion that the "LRE requirement [was] necessarily limited, in the ESY context, by what programs the school district already offer[ed]" (T.M., 752 F.3d at 163). Significantly, the Court explained that a "disabled child should not be forced into a special classroom if he or she can be appropriately educated in a mainstream classroom" (T.M., 752 F.3d at 163).

<sup>15</sup> The Court held that "[w]e therefore agree with both parties that the IDEA does not require a school district to create a new mainstream summer program from scratch just to serve the needs of one disabled child. \* \* \* Instead, the school district may choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity" (T.M. 752 F.3d, at 166). Assuming that the parents are correct and that the district should have offered the student a full-day integrated setting with appropriate supports (a contention that the district has not refuted in this case under a Newington analysis), it does not follow that the district must be the entity that creates such a program or that it be created exactly as the parents wish. But the district may be called on to find such an all-day integrated program. The Second Circuit went on to reject several of Cornwall's additional arguments: "Cornwall responds that it had no way to offer T.M. a placement in a mainstream ESY program operated by another entity, because (1) no public mainstream ESY programs existed in the area and (2) New York law prohibited it from offering T.M. a placement in a private mainstream ESY program. But even assuming those facts are true, they do not change Cornwall's obligation under the IDEA to consider a full continuum of alternative placements and then offer T.M. the least restrictive placement from that continuum that is appropriate for his needs" (T.M. 752 F.3d, at 166).

<sup>16</sup> In determining a student's educational placement, State and federal regulations provide that a district must "ensure" that a student attend a placement "as close as possible to the [student's] home" and "[u]nless the IEP of a [student] with a disability requires some other arrangement, the [student] is educated in the school that he or she would attend if nondisabled" (34 CFR 300.116[b][3], [c] [emphasis added]; see 8 NYCRR 200.1[cc], 200.4[d][4][ii]). Numerous courts have held that, while a district remains obligated to consider distance from home as one factor in determining the school in which a student's IEP will be implemented, this provision does not confer an absolute right or impose a presumption that a student's IEP will be implemented in the school closest to his or her home or in his or her neighborhood school (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380-82 [5th Cir. 2003]; Lebron v. N. Penn. Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; Letter to Trigg, 50 IDELR 48

Moreover, the documentary evidence relied upon, in part, by the IHO in reaching the conclusion that the district offered the student a FAPE in the LRE—namely, the statement in the June 2022 IEP that the student could participate with his nondisabled peers in "extracurricular and nonacademic activities, events, and classes with the general education population and non-disabled peers with intensive supervision when deemed appropriate by the IEP team"—is wholly insufficient as evidence of any meaningful LRE discussion or whether the June 2022 CSE engaged in the two-prong Newington test—and fails on its face to provide the student with any participation with his nondisabled peers or provide any evidence that it was even considered by the CSE (Dist. Ex. 1 at p. 33; see IHO Decision at p. 7). In addition, the hearing record does not include any evidence to explain how the June 2022 CSE arrived at the statement inserted into the student's IEP especially when the hearing record is devoid of any evidence that any LRE discussions occurred at all at the June 2022 CSE meeting (see generally Tr. pp. 1-246; Parent Exs. A-J; Dist. Exs. 1-12).

As for the IEP coordinator's testimony relied upon, in part, by the IHO to reach the conclusion that the district offered the student a FAPE in the LRE, the IEP clearly deferred the student's access and interactions with nondisabled peers to an unknown, later time "when deemed appropriate by the IEP team," that is, until after some future action by the CSE rather than under the June 2022 IEP (Dist. Ex. 1 at p. 33). However, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 [indicating that "[a]t the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). Generally, R.E. stands for the proposition that a district cannot rely on after the fact testimony to rehabilitate a deficient IEP (see R.E., 694 F.3d at 186-88). In grappling with the permissibility of retrospective evidence in R.E., the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]).

Although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the

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[OSEP 2007]; see also R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; A.W. v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 [6th Cir. 2003]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]; Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-95 [5th Cir. 1996]; Urban v. Jefferson Cnty. Sch. Dist. R-1, 89 F.3d 720, 727 [10th Cir. 1996]; Poolaw v. Bishop, 67 F.3d 830, 837 [9th Cir. 1995]; Murray v. Montrose Cnty. Sch. Dist. RE-IJ, 51 F.3d 921, 929 [10th Cir. 1995]; Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361-63 [8th Cir. 1991]; Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152-53 [4th Cir. 1991] [holding that a district must "take into account, as one factor, the geographical proximity of the placement in making these decisions"]; H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1177-79 [S.D.N.Y. 1992]).

IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'" [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). Here, given that the mainstreaming statement in the student's June 2022 IEP essentially precluded any opportunities to participate with his nondisabled peers until deemed appropriate by the CSE, the IEP coordinator's testimony concerning how students in a 12:1+1 special class placement may be mainstreamed into an integrated setting at the assigned public school site went far beyond explaining or justifying the mainstreaming statement in the student's June 2022 IEP (see Tr. pp. 40, 42, 46). More specifically, the IEP coordinator testified that, at the assigned public school site, once a student in the 12:1+1 special class was "making progress," the staff would "gradually try to incorporate them into the . . . inclusion program," which meant that "two to three students [went] with a paraprofessional from class to class and participate[d] in the gen[eral] ed[ucation] classes with support of a [d]istrict [specialized school] para[professional] (Tr. p. 46). In addition, those students would be assigned a "SETSS teacher . . . to help modify work, and assignments, and give extra support in between those gen[eral] ed[ucation] classes" (id.).

Therefore, in light of the evidence in the hearing record, which is devoid of any evidence to conclude that the June 2022 CSE engaged in a meaningful consideration of the student's LRE when establishing a complete exclusion from nondisabled peers or that the IHO engaged in the two-prong Newington analysis regarding the student's educational placement, the IHO's finding that the district offered the student a FAPE in the LRE for the 2022-23 school year must be reversed.

## **VII. Unilateral Placement**

Having determined that the district failed to offer the student a FAPE in the LRE for the 2022-23 school year, the next inquiry focuses on whether the parent's unilateral placement of the student at Adelphi was appropriate. In this instance, the IHO did not analyze the parent's unilateral placement; therefore, the inquiry here begins with an examination of the student's needs.

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 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).

#### **D. Student Needs**

Before reviewing the evidence of the adequacy of the special education and related services offered by Adelphi, it is necessary to review the evidence in the hearing record describing the student's special education needs. As previously noted, at the time of the June 2022 CSE meeting, the student had been attending a fourth grade classroom as an eighth grade student at a nonpublic parochial school (see Tr. pp. 93-94; Dist. Ex. 11 at p. 1). Prior to the CSE meeting, the district completed the March 2022 psychoeducational evaluation of the student (see generally Dist. Ex. 4). The evaluation included a brief overview of the student's educational history, behavioral observations made by the evaluator during testing, and the results of the cognitive and academic achievement testing administered to the student (id. at pp. 1-3). The evaluator characterized the student as an auditory learner based on his responses on the Learning Style Inventory (id. at p. 1). She noted the student self-reported that he "learn[ed] better when things [we]re explained to him and [that] he prefer[ed] to work by himself" (id.). The evaluator described the student as "socially engaging and personable," and reported that his level of cooperation and activity during testing were appropriate (id. at p. 2). However, she noted that the student was distracted and required

redirection "from time to time" (id.). According to the evaluator, the student was prompt, yet careful, in responding, and "generally persisted with challenging tasks" (id.). Still, the student "required questions repeated and simplified" (id.).

An administration of the Wechsler Intelligence Scale for Children–Fifth Edition (WISC-V) to the student yielded a full scale intelligence quotient (IQ) of 40, which fell in the "[e]xtremely [l]ow range" and which was consistent with a 2015 assessment of the student's cognitive functioning (Parent Ex. D at pp. 2-3). An assessment of the student's academic achievement using the Woodcock-Johnson IV Tests of Achievement Test (W-J IV ACH) yielded "an overall Reading Standard Score (SS) of 41 which [fell] in the [v]ery [l]ow [r]ange" and "an overall Math Standard Score (SS) of <40 which [fell] in the [v]ery [l]ow [r]ange"—both of which were also consistent with measures of the student's reading and math abilities in 2015 (Dist. Ex. 4 at p. 5). With respect to reading, the evaluator reported that the student was able to read a basic, single sentence with ease but was not able to apply phoneme-grapheme relationships to unfamiliar words (id.). The evaluator noted that the student had "difficulty identifying the correct missing word in a passage," which indicated difficulty with the application of syntactic and semantic cues (id.). With regard to spelling, the evaluator reported that the student spelled initial items easily, but on more moderate to advanced levels, "further development was needed" (id.). The evaluator reported that the student demonstrated errors in his writing such as incomplete sentences, awkward syntax, and limited content (id.). In addition, the evaluator noted that the student appeared to have limited understanding of grade or age-appropriate math skills and relied on strategies that appeared to be inefficient (id.). The evaluator administered a level 1 vocational interview to the student, which indicated that he wanted to pursue a career as a music disc jockey (id.).

In an April 2022 report card completed by the student's regular education teacher at his nonpublic parochial school, it was reported that, in ELA, the student could receive instruction at a second grade level and perform well, but he struggled during an assessment to complete independent comprehension tasks beyond the early first grade level (see Dist. Ex. 6 at p. 1). The teacher remarked that the student "should continue to develop independent reading skills in conjunction with guided instruction to optimize language development" (id.). A progress report from the student's SETSS provider indicated that the student was reading on a second grade level and was reading "more fluently" (Dist. Ex. 11 at p. 2). According to the SETSS provider, he was able to read short chapter books to completion with minimal prompting and showed "comprehension mastery" (id.). The SETSS provider reported that the student exhibited "major delays in written language and perform[ed] on a kindergarten/first grade level" in writing, and he required "constant prompting" to form grammatically correct sentences and formulate ideas (id. at p. 3). She also reported that the student had "minimal knowledge on [the] use of punctuation within a sentence, but exhibit[ed] some knowledge of ending punctuation" (id.).

Turning to mathematics, the student's April 2022 report card reflected that the student required a modified curriculum, functioned at a second grade level, had made some "nice progress," and had shown increased independence in completion of skills when given strategies (Dist. Ex. 6 at p. 1). The student's regular education teacher also noted that the student's mathematics skills would regress after a week or more without review of a topic and that the student would benefit from "consistent, short revolving reviews and/or tasks requiring [him] to use multiple learned skills" (id.). The student's SETSS provider noted that the student had made "great progress" in mathematics and knew the multiplication tables "0 thru 11," but he needed prompts

to complete simple division (Dist. Ex. 11 at p. 1). The SETSS provider also reported that the student would sometimes multiply rather than add when solving addition problems, and he required a prompt to remind him that he was adding (id.). At that time, the student was able to solve one-step word problems using key words (id.). According to the SETSS provider, the student required "constant review" in order to prevent regression, and he received a daily spiral review of past and present work, "including time and money, addition and subtraction of multi-digit numbers, collecting data and plotting data on picture graphs [and] line graphs" (id.). The student's SETSS provider indicated that all of the student's academics were modified and that daily review and constant prompting and redirection were necessary to avoid regression (id. at p. 4). She further noted that the use of manipulatives in mathematics was necessary to promote the student's comprehension and that the use of extra time and a separate location during tests were of "utmost importance" (id.).

With regard to the student's speech-language development, the student's speech-language pathologist indicated that, for the 2021-22 school year, the student received four individual 30-minute sessions of speech-language therapy at a separate location (agency based) and one individual 30-minute session at his school (see Dist. Ex. 8 at p. 1). In an April 2022 progress report, the speech-language pathologist noted that the student benefitted from individual sessions with limited distractions, as he was "easily distracted by competing auditory and visual stimuli as well as tangential thoughts" (id.). In addition, she noted that the student "perseverate[ed] on daily schedules, times, and routines and requir[ed] redirection to attend for fleeting intervals throughout sessions" (id. at pp. 1-2). According to the speech-language pathologist, the student presented with delays in expressive and receptive language, intelligibility, and fluency (id. at p. 2). Although the student's speech intelligibility had improved significantly, "as rate, spontaneity, and complexity of speech increase[d]," the student's "intelligibility, fluency, and syntactic skills decrease[d]" (id.). More specifically, the speech-language pathologist noted that the student exhibited "speech sound substitutions, distortions, and omissions, as well as disfluencies of prolongations and sound and word repetitions" (id.). She further noted that the student lacked the "lingual coordination to appropriately plan and sequence motor speech movements necessary for consistent accurate speech production" (id.).

With regard to reading, the speech-language pathologist indicated that, with minimal to moderate decoding prompts, the student was able to read fourth grade level text (see Dist. Ex. 8 at p. 2). She reported that in order to accurately answer reading comprehension questions, the student "require[d] maximum prompts, cues, and models to recall read information" (id.). The speech-language pathologist indicated that to retain information, the student benefitted from story repetitions, previewing questions, and having reading comprehension questions presented with the corresponding part of a story (id.). In addition, he benefitted from choice questions, word boxes, and the use of graphic organizers to improve "synthesis of materials" (id.). According to the speech-language pathologist, the student was "able to make inferences and predictions based on provided images, picture scenes, and known facts," but he had "difficulty making inferences or predictions based on textual evidence, characters within a story plot, or hypothetical situations" (id.). The speech-language pathologist reported that the student demonstrated progress in his ability to identify synonyms and antonyms for a specific target (id.). In addition, although he had difficulty providing definitions of "target lexicon" independently, the student could demonstrate the definition by using the target lexicon appropriately in a sentence (id.). The speech-language pathologist also reported that the student "made progress identifying negation based on concrete

items or visuals, but [was] not yet [able to] show understanding of negation when incorporated into reading comprehension questions" (id.). Finally, the speech language pathologist reported that the student required maximum prompting to demonstrate understanding of contrasts and was able to "decode words containing vowel pairs, digraphs, blends, r- controlled vowels, and silent 'e', but benefit[ed] from prompts and cues to accurately encode words" (id.).

In the area of writing, the speech-language pathologist indicated that, although the student had made progress in his ability to produce grammatically correct sentences containing target lexicon, he did not consistently encode spoken thoughts to written sentences with accuracy (see Dist. Ex. 8 at p. 2). Rather, when transcribing a sentence, the student tended to omit words, grammatical markers, or make word-order errors (id.). The speech-language pathologist recommended that the student continue to receive speech-language therapy in order to improve his receptive and expressive language skills, speech intelligibility, and fluency (id.).

Turning to the student's social development, the student's SETSS provider indicated that although he was very well received by his teachers and classmates, he was sometimes shy, and seemed to socialize more with the fourth grade students than peers his own age (see Dist. Ex. 11 at p. 4). According to the SETSS provider, the student exhibited anxiety, at times, followed by frustration, and he could become fixated on upcoming events that he was excited about (id. at p. 3). During such times, the use of redirection, breaks, or tangible rewards assisted the student with focusing on the task at hand (id.).

In terms of the student's physical development, the March 2022 psychoeducational evaluation report noted that the student had received a diagnosis of Down syndrome (see Dist. Ex. 4 at p. 1). The student also had nut allergies and used an EpiPen if exposed; the evaluation report also noted that the student required eyeglasses for reading (id.). An April 2022 PT summary indicated that the student presented with "lower than normal muscle tone around [his] trunk, pelvis and extremities," but he was able to ambulate safely throughout his environment (see Dist. Ex. 9 at p. 1). The physical therapist noted that the student had a stable base of support, an "adequate step and stride length with increased cadence and sometimes heavy steps," and his motor planning ability was good (id.). The physical therapist noted that the student enjoyed gross motor activities, transitioned well from one activity to the next, and could follow simple directions and complete assigned tasks with verbal prompting and modeling (id. at pp. 1-2). The physical therapist recommended that the student continue to receive PT services to address gross motor deficits, and to improve balance and coordination, grading of movements, and postural control (id. at p. 2).<sup>17</sup>

In an April 2022 progress report, the student's occupational therapist indicated that the student had been receiving two individual 30-minute sessions OT at a separate location (agency based) for the 2021-22 school year (see Dist. Ex. 10 at p. 1). The occupational therapist noted that the student was motivated, but often distracted by, "environmental stimuli and other children" and would sometimes perseverate on topics, which required varying levels of redirection during sessions (id.). The therapist indicated that the student performed writing activities of copying familiar words and letters and that the student demonstrated progress with "accuracy of neatness,

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<sup>17</sup> The physical therapist did not, however, indicate the frequency or duration of PT sessions provided to the student (see generally Dist. Ex. 8).



sizing, and alignment of writing" (*id.*). The student was able to copy two familiar words at a time from near/mid-point; one from far point; and with unfamiliar words, he was only able to copy two to three letters before returning to the source material (*id.*). The OT progress report reflected that the student had difficulty with self-formulated topics or sentences, and he required moderate verbal cues for recall (*id.*). According to the occupational therapist, the student's "speed of writing when copying or self-formulating sentences [was] slow," and he required additional time to perform and complete accurate writing tasks (*id.*).

### **E. Adelphi and Specially Designed Instruction**

In assessing the appropriateness of a unilateral placement for tuition reimbursement purposes, parents must demonstrate that the private school provides specialized instruction tailored to the student's unique individual needs; this evidence may, at times, consist of descriptions of the school's programmatic elements without more specific evidence related to the student's experience with the individualized program during the school year at issue. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], *cert denied*, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]).<sup>18</sup>

One of the factors to consider in determining if a private school is appropriate is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient" (Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]). Parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at \*9 [S.D.N.Y. Mar. 18, 2010]), as a lack of evidence as to how a student's significant area of need is addressed by the unilateral placement can result in a finding that the unilateral placement is not appropriate (see R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [finding a unilateral placement was not appropriate where it was undisputed that speech-language therapy was "critical" to remediate the student's language needs, the private placement chosen by the parents did not provide speech-

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<sup>18</sup> To be clear, the district makes no assertions in its answer regarding the appropriateness of the student's unilateral placement at Adelphi for the 2022-23 school year (see generally Answer).

language therapy and, although the parents claimed the student received private speech-language therapy, they "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"), aff'd, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [finding that the parent failed to prove that the unilateral placement addressed the student's considerable social/emotional needs absent testimony from the student's counselor, evidence concerning the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]).

As noted above, the student's cognitive functioning was in the extremely low range and his reading and mathematics skills were significantly delayed compared to his same age or grade peers (see Dist. Exs. 4 at pp. 5-6; 6 at p. 1; 11 at p. 1). In addition, the student demonstrated receptive and expressive language delays, as well as difficulty with speech intelligibility and fluency (see Dist. Ex. 8 at p. 2). The student was ambulatory, but had low muscle tone (see Dist. Ex. 9 at p. 1). The student was working on improving his handwriting skills (see Dist. Exs. 10 at p. 1). The student was also easily distracted and could fixate on topics he was excited about, and therefore, he required redirection (see Dist. Exs. 10 at p. 1; 11 at p. 3). In addition, the student was social, but enjoyed having time to himself (see Parent Ex. H at pp. 2, 6).

At the impartial hearing, the head of Adelphi—who was also the director of "Project Succeed" at Adelphi (director)—provided an overview of both the school and the school's Project Succeed program (Parent Ex. J ¶¶ 1, 4, 10-23). Initially, the director described Adelphi as a "160-year-old private, independent, college preparatory day school" structured into three divisions: a lower school serving prekindergarten through 4th grade students, a middle school serving 5th through 8th grade students, and an upper school serving 9th through 12th grade students (id. ¶ 10).

According to the director, Adelphi currently enrolled approximately 175 students, with only one class per grade (with the exception of prekindergarten) and with an average student-to-teacher ratio per class of eight students to one teacher (see Parent Ex. J ¶ 11). As reflected in her testimony, "each classroom [wa]s led by a head teacher who work[ed] collaboratively with a Project Succeed special education teacher, certified school counselor, licensed speech[-]language pathologist, and other professionals lowering the actual staffing ratio to approximately 2:1 and even 1:1 if needed" (id.). Given the low student-to-teacher ratio per class, the director indicated that this "allow[ed] for daily small group skill instruction and individualized attention" (id.). Generally, students were grouped in a class based on "chronological age and corresponding grade level," however, the director clarified that a "class may contain students who [we]re identified according to level of functioning in one or more areas of instruction within the age range of approximately 12 [to] 18 months" (id.). The director also testified that "Adelphi's rigorous academic curriculum consist[ed] of daily [ELA] & Literacy, Math, Social Studies, Science, and Physical Education," all of which followed the "Common Core State Standards"; according to the director, some students received a modified version of the Common Core State Standards "based on their academic potential" (id. ¶ 12).

Turning to the "Project Succeed" program at Adelphi, the director initially indicated that approximately "20 [percent]" of the students enrolled "present[ed] with learning disabilities, speech[-]language impairments, developmental delays and neurological disorders such as A[ttention] D[eficit] D[isorder] (ADD) or A[ttention] D[eficit] H[yperactivity] D[isorder]

(ADHD)" (Parent Ex. J ¶ 15).<sup>19</sup> The director explained that "[o]ne of the primary means" to address these students' needs was through the Project Succeed program, which provided students with a "fully integrated program . . . [and] with necessary special education and related services within Adelphi's mainstream environment" (id.).

According to the director, Project Succeed offered "daily individual (1:1) or small group remediation where a student [wa]s paired with a learning specialist based upon their personal learning profile," and the instruction was provided "through a multi-sensory approach, within a structured learning environment in regular classes" (Parent Ex. J ¶ 16). In addition to the "daily academic remediation sessions," students in Project Succeed "received daily small group tutorials, . . . to assist with homework assignments and preparing for the next day classes" (id.). As noted by the director, Project Success provided students with related services, such as speech-language therapy, school-based counseling, and social skills training (both individual and small group) (id.). In addition, students could receive testing accommodations available through Project Succeed (id.). The director further explained that the "principal goal of Project Succeed [wa]s to equip disadvantaged students with the skills necessary to access [the] general education curriculum along with their typically developing peers" (id.).

The Project Succeed program also offered students a "specialized reading program . . . to develop various comprehension strategies" and to support "individual fluency while fostering small group and whole class instruction to strengthen comprehension and written response skills" (Parent Ex. J ¶ 17). In addition, the director testified that the "Project Succeed teachers utilize[d] a multi-sensory teaching approach in address the needs of the students with significant academic delays" (id.). As reflected in her testimony, the Project Succeed teachers delivered instruction in a "push-in and pull-out [manner] throughout the school day in order to provide students with individualized supports and multi-sensory instructional strategies," which included the following: "clarification of written instructions, explicit modeling, use of graphic organizers, verbal prompting and redirection, sentence frames, step by step modeling, defining new vocabulary words and visuals, oral rehearsal and identification of significant text details by highlighting key information and providing differentiated worksheets" (id.). The director also explained that Project Succeed students received "specialized instructions and related services individually or in a small group as needed throughout a school day" (id. ¶ 21). For example, the director noted that Project Succeed "ensure[d] that two or more students [we]re able to work together (e.g., taking turns, sharing materials, waiting for his/her turn to speak, etc.) and provide[d] opportunities to work on a student's ability to participate in small group instruction (e.g., sitting nicely, paying attention to the teacher, following instructions presented to a group of students, answering questions, etc.)" (id.). However, the director further explained that this was balanced with each

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<sup>19</sup> As described in a brochure, the Project Succeed program at Adelphi offered services for "College Bound Students with Special Needs" (Parent Ex. C at p. 1). In addition, the brochure described Project Succeed students as exhibiting "average to superior intelligence, who ha[d] mild to moderate learning needs" (id. at p. 2). The brochure further describes the Project Succeed program, including "Adelphi's 'Succeed Center'" and specific program accommodations, and the curriculum (id. at pp. 3-4). The brochure, in a "Frequently Asked Questions" section, also indicates that Project Succeed assists students with identified learning needs by providing an "individualized instructional environment, differentiated teaching strategies, and/or supplemental learning materials" (id. at p. 6).

student's opportunity "to be a positive role model and [to] be challenged within the classroom" (id.).

Turning more specifically to the student in this case, the director testified that the Project Succeed program at Adelphi was a "fully integrated special education program" that was a "fundamentally different and lesser restrictive alternative to [the] self-contained special education class in a [d]istrict [specialized school]," as had been recommended in the student's June 2022 IEP (Parent Ex. J ¶ 32). At Adelphi, the student could "learn in a fully integrated special education program with modified curriculum and individualized learning supports" (id.). The director testified that the student required "specialized 1:1 reading and math intervention services to be incorporated into the school's curriculum during the entire school day" and "[m]ore important[ly], [the student] require[d] a program with mainstreaming opportunities" to the fullest extent possible (id.).

As reflected in the director's testimony, the student received "individualized special education instructions and the related services of counseling and speech[-]language therapy in addition to a placement in a structured and supportive classroom setting with low student-to-teacher ratio" since he began attending Adelphi's Project Succeed in September 2022 (Parent Ex. J ¶ 34). Given the fully integrated nature of Project Succeed, the director testified that the student "receive[d] these services while associating and interacting with nondisabled and typically developing peers within Adelphi's mainstream environment" (id.). The student's eighth grade classroom consisted of "eight (8) students" and "two of the students (including [this student] ha[d] IEPs and [we]re enrolled in the Project Succeed program" (id. ¶ 35; see Tr. pp. 84-85). The director also testified that the student's "classroom teachers work[ed] closely with the Project Succeed team and all strategies, modifications and accommodations [we]re incorporated at all times" (Parent Ex. J ¶ 35).

In addition to the above information concerning the student's enrollment in the Project Succeed program at Adelphi, the hearing record also included copy of the student's weekly schedule (see Parent Ex. E). According to his schedule, the student's school day began at 8:30 a.m. and ended at approximately 3:20 p.m., with the ability to schedule additional Project Succeed "Tutorials" from 3:20 p.m. to 4:05 p.m. (id.). Each of the student's school days began with a daily check in with a counselor (1:1) (id.). Thereafter, the student engaged in classroom instruction in the following courses, as well as receiving the following related services and Project Succeed sessions: Spanish, science, music, math, art, history, physical education, English, speech-language therapy, Project succeed individually and in a small group (3:1), individual counseling, and group social skills training (id.). The student's schedule also included a daily 30-minute midmorning break, a daily lunch period (with small group social skills training during lunch on Tuesday and Thursday), one period per week designated as "Houses" (i.e., described as team building activities or projects with other students from different grades in the student's same house), and one period per week designated for a weekly assembly (id.; see Parent Ex. H at p. 6).

Next, the hearing record demonstrates that, as part of his counseling and social skills training, the student was "working on asking for help and expressing his feelings in an appropriate manner" (Parent Ex. J ¶ 37). The student's counselor also worked with him on "self-regulation, attentional and organizational skills," as well as "maintaining appropriate eye contact and appropriate social exchanges" (id. ¶ 38). According to the director, the student had "difficulty with

basic life skills such as understanding values, creative thinking, problem solving, critical thinking and coping with emotions" (id.).

To address the student's academic and social challenges within a small mainstream classroom, the director testified that the student received "[c]onsistent modeling and management needs . . . , along with constant structure and routine" (Parent Ex. J ¶ 39). She also testified that the student "struggle[d] with test-taking and comprehension skills" and "consistently rushe[d] through his assignments just to complete them as quickly as possible" (id.). To address these needs, the student received "[n]umerous testing accommodations," including extended time, a separate location, and having directions read and reread, which "dramatically increase[d] his ability to answer questions correctly" (id.). In addition, the evidence indicated that, "[w]ith exams, [the student] need[ed] visuals, highlighted terms and templates" and test formats such as "matching columns, word banks and multiple choice" (Parent Ex. H at p. 4). Furthermore, the evidence reflected that, for exams, the student used "review sheets that provide[d] important vocabulary words, key notes, and practice questions"; index cards for vocabulary; and mnemonic devices (id.).

According to the director, the student required redirection to reread materials "in order to comprehend it" (Parent Ex. J ¶ 41). Additionally, the student "highlight[ed] directions on an assignment" to use as a reference while answering questions (id.). The director testified that the student benefitted "greatly from using the process of elimination and highlighting important words and sentences as he read[]" (id.). In addition, the director noted that the student received "constant reminders and cues to stay on task," he was provided with preferential seating in his core classes to assist his "ability to focus and be less distracted," and he received "positive reinforcement and encouragement . . . to remain on task and put more effort into his work" (id.).

In reading, the director indicated that the student—who was then-currently "between the end of [four]th and the beginning of [fif]th grade level for both reading and writing"—benefitted from "reading aloud, whether it [wa]s him being read to or he [was] participating to read" (Parent Ex. J ¶ 42). The director also indicated that the student benefitted from "'stop and talks' and guided questions" (id.). However, the evidence reflected that the student "struggle[d] with pronunciation of certain words" when reading aloud, and he also "struggle[d] to identify figurative language such as imagery, metaphor, simile, and personification" (Parent Ex. H at p. 5). The director testified that the student had a desire to work more efficiently when he was given positive reinforcement, encouragement, and immediate feedback and grading of his assignment while he was present (see Parent Ex. J ¶ 41).

Next, an Adelphi "Initial Progress Report," dated December 2022, indicated that, to assist with organization, the student used folders and notebooks that were labeled and color coded, weekly outlines, notes, a pacing schedule, checklists, frequent breaks, and materials broken down into more manageable tasks (Parent Ex. H at pp. 4-5). The progress report also noted that the student required a multisensory approach to learning; and "visuals, auditory presentation, repetition, redirection and reminders" to support his engagement and comprehension of lessons (id. at p. 4). To help the student with organization, he received weekly outlines every Monday to prepare for upcoming assignments and lessons (id. at p. 7). Finally, the December 2022 progress report indicated that the student struggled with attention and that in addition to frequent breaks,

the student had access to sensory materials, such as squeeze balls, Velcro, and small bags filled with marbles (id. at p. 4).

Based upon a review of the evidence in the hearing record, the evidence supports a finding that the student's placement at Adelphi, with the related services of speech-language therapy, social skills training, and counseling, coupled with the educational accommodations provided by Adelphi and the Project Succeed program demonstrate that the parent's unilateral placement provided the student with specially designed instruction specifically designed to meet his unique educational needs.

#### **F. LRE**

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

As previously noted, however, "a unilateral private placement cannot be regarded as proper under the IDEA when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient" G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 584 [S.D.N.Y. 2010], aff'd, 486 F. App'x 954 [2d Cir. 2012] citing Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]). Here, the LRE constituted the deficiency in the district's public school placement. Consequently, in order for the parent to prevail, the hearing record must contain sufficient evidence to demonstrate that the student's unilateral placement at Adelphi remedied this deficiency. As discussed below, the evidence in the hearing record supports a finding that the parent sustained her burden to establish that Adelphi and the Project Succeed program provided the student with an educational program in the LRE.

Initially, the evidence reflects that Project Succeed was not a separate class at Adelphi, but rather, it was a "mainstream integrated program, [] with an extensive amount of support services and modifications" and that Project Succeed students received appropriate modifications for their needs (Tr. p. 85). As previously indicated, the student attended a class at Adelphi during the 2022-23 school year that consisted of a total of eight students, and he was one of two students in the class with an IEP (see Tr. pp. 88-89).

According to the Adelphi brochure, "Project Succeed students [we]re not isolated and singled out but [we]re included in classes and activities" (Parent Ex. C at p. 3). The brochure noted

that "Project Succeed students [we]re Adelphi students first, as are all others," and further indicated that "[t]heir special needs d[id] not identify or mark them but rather help[ed] us gain insight into how to help them reach their full potential" (id.).

At the impartial hearing, the parent testified that she was concerned about LRE for the student, that she had expressed to the June 2022 CSE that the student had been enrolled in a general education class, and that "this [was] all he [knew], out of school and inside school" (Tr. p 101). She indicated in her testimony that she wanted "that model to continue" for the student, and at the June 2022 CSE meeting, she was told that the student's participation with nondisabled peers "would be based on the school, and they would deem when it would be appropriate, and that, . . . , that would come at a later date" (Tr. p. 1023). However, the parent also testified that the June 2022 CSE did not discuss any specific mainstreaming opportunities and told her that the "new team w[ould] make those decisions" (Tr. pp. 102-03).

The evidence also reflects that the principal at the student's nonpublic parochial school recommended Adelphi to her (see Tr. p. 108). She testified that, for high school, she was looking for the student to "continue in an environment he was familiar with" (id.). The parent confirmed that she wanted the student to have "full access to [a] nondisabled population," explaining further that this was the environment the student had come from and that that was what she wanted to continue for him (id.). The parent testified that she "believe[d] in inclusion" (id.). In addition, the parent confirmed that the June 2022 CSE did not discuss an "inclusion" program within a district specialized school (Tr. p. 108-09). According to her testimony, the parent looked at other schools with special education programs on site, similar to Adelphi, but chose Adelphi because the classes "were the right size" and "it looked like an extension of exactly where he had been" (Tr. pp. 109-10). She also testified that she "liked the ratio of the modeling" the student would get at Adelphi (Tr. p. 110). The parent opined that the student benefitted "100 percent" by being among nondisabled peers, and he was participating in extracurricular activities at Adelphi, such as choir and the school play (Tr. p. 113).

During cross-examination, when asked if she had any concerns about the student attending a school whose student population had "average or above average" IQs, the parent testified that she believed it was "appropriate" for the student because she did not "believe that these tests [we]re an adequate representative" of the student, especially given that the student's SETSS provider—who knew the student and who taught the student—was not at the June 2022 CSE meeting to provide more information about the student (Tr. pp. 122-23). The parent further testified that she "needed a high school for [the student] that would give him modeling, . . . [and] inclusion, and also . . . give him special education services" (Tr. p. 124).

With respect to LRE, the director described the Project Succeed program as "a fully integrated special education program" that was a "fundamentally different and [a] lesser restrictive alternative to a self-contained special education class" in a district specialized school (Parent Ex. J at ¶ 32). In addition, the evidence reflects that the student received individualized special education instruction and related services while "associating and interacting with nondisabled and typically developing peers with in Adelphi's mainstream environment" (id. ¶ 34). The evidence also reflects that the student benefitted from "appropriate peer modeling and thrive[d] on social interactions with [the] mainstream population" (id. ¶ 43).

Based on an independent review, the evidence in the hearing record supports a finding that the student's unilateral placement at Adelphi and in Project Succeed provided the student with mainstreaming opportunities, and thus, offered the student an educational placement in the LRE.

### **G. Progress**

As a final point, while a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

In this case, the director testified that, while at Adelphi in Project Succeed, the student's self-esteem had increased, and he had made a "good adjustment to his new school and [had] notably improved in his ability to attend academic classes and extracurricular activities, in his verbal expression with his peers and adults, and in his self-advocacy skills" (Parent Ex. J ¶¶ 43, 45).

In addition, according to the December 2022 progress report, the student was on a fifth grade reading level, and had shown progress "with some reading comprehension" and with his handwriting (Parent Ex. H at p. 5). He also demonstrated "improvement in his thought process" and "actively participate[d] during class discussions" (id.). In writing, the December 2022 progress report indicated that the student could "write a paragraph in a simple format when given a template, sentence starters, and receiving prompting" (id.). According to the December 2022 progress report, the student was "showing progress within his subject areas" (id. at p. 6).

The parent testified that since attending Adelphi and Project Succeed, the student had made "tremendous progress" and that he had grown "socially, emotionally, and educationally" (Tr. p. 112). She reported that he had friends at Adelphi, he talked about his friends there, and he had even "shown interest in girls" (id.). The parent indicated that the student requested to do homework daily in order to complete it on time, and when studying for tests at home, he often got the right answer (see Tr. pp. 112-13).

Based on the foregoing, the evidence in the hearing record supports a finding that the student was making progress at Adelphi during the 2022-23 school year.

### **VIII. 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] 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).

In this case, the IHO did not make a finding on equitable considerations (see generally IHO Decision). The parent contends that equitable considerations weigh in favor of their request to be reimbursed for, or for the district to directly fund, the costs of the student's tuition at Adelphi for the 2022-23 school year, as they cooperated in the development of the student's IEP, visited the assigned public school site, and timely delivered a 10-day notice of their intention to unilaterally place the student at Adelphi. In its answer, the district makes no assertions as to whether equitable factors weigh against an award of tuition reimbursement or direct funding of the student's tuition costs (see generally Answer). The hearing record shows that the parent notified the district of her intent to unilaterally enroll the student at Adelphi for the 2022-23 school year by letter dated August 23, 2022 (see Parent Ex. B at p. 1). The evidence in the hearing record also shows that the parent attended the June 2022 CSE meeting and there is no indication in the evidence in the hearing record that she impeded the district's ability to meet its obligations under the IDEA (see generally Tr. pp. 1-246; Parent Exs. A-J; Dist. Exs. 1-12). In addition, the hearing record includes sufficient evidence of the parent's inability to front the costs of the student's tuition (see Tr. pp. 111-12; Parent Ex. I), which supports a direct payment remedy (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). As such, there is no basis in the hearing record to reduce or deny the parent's requested relief related to equitable considerations.

**IX. Conclusion**

In view of my conclusions above that the district failed to establish that it offered the student a FAPE in the LRE, the parent's unilateral placement of the student at Adelphi was appropriate, and that equitable considerations favored the parent, the IHO's decision denying the parent's relief must be reversed.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated January 22, 2023, is modified by reversing that portion which found that the district offered the student a FAPE in the LRE for the 2022-23 school year;

**IT IS FURTHER ORDERED** that the parent's unilateral placement of the student at Adelphi in the Project Succeed program was appropriate to meet the student's unique needs; and,

**IT IS FURTHER ORDERED** that the district is ordered to directly pay the costs of the student's tuition at Adelphi for the 2022-23 school year.

**Dated:** Albany, New York  
April 24, 2023

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