



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-147

### **Application of the BOARD OF EDUCATION OF THE FRONTIER CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Hodgson Russ LLP, attorneys for petitioner, by Ryan L. Everhart, Esq.

McNelis Law PLLC, attorneys for respondents, by Patrick M. McNelis, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeal from a decision of an impartial hearing officer (IHO) which found that it failed to offer a free appropriate public education (FAPE) to respondents' (the parents') son in the least restrictive environment (LRE) and ordered it to reimburse the parents' for their son's tuition costs at the Bishop Timon-St. Jude Highschool (Timon) 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). 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. The student initially received services through the Early Intervention Program and the Committee on Preschool Special Education (CPSE) (Dist. Ex. 23 at p. 2). In summer 2012, he was referred to the CSE and, based on test results, classroom observations, and parental input, a CSE found the student eligible for special education as a student with "[m]ultiple [d]isabilities" (id.). The student started kindergarten in an 8:1+1 special class at a district elementary school (id.). In third grade, a CSE changed the

student's eligibility classification to other health impairment, and the student continued at the district elementary school, attending a 12:1 +1 special class in fourth grade and an integrated co-teaching setting in fifth grade (id. at p. 23). In March 2017, during the student's fourth-grade year, the student received diagnoses of reactive attachment disorder (RAD) and alcohol related neurodevelopmental disorder (ARND) (Dist. Ex. 23 at p. 3; see also Dist. Ex. 22 at p.1).<sup>1</sup> In 2018, the student was placed on home instruction after his emotional and behavioral difficulties rose to such an extent that the district determined he was no longer able to participate in school for the remainder of his fifth-grade year (see Dist. Ex. 23 at p. 3; see also Tr. pp. 320-22). The student subsequently attended a private "nontraditional" school in September 2018 for his sixth-grade year; however, he was unable to complete the year and was placed on home instruction again in April 2019 pending enrollment in a day-school program (Tr. pp. 286-88, 323-26; Dist. Ex. 23 at p. 2). In 2019, a CSE recommended that the student attend a 6:1+1 special class at the Stanley G. Falk School ("Falk School"), a State-approved nonpublic school, specializing in providing instruction and support to students with emotional disabilities (Tr. pp. 103-04; Dist. Ex. 23 at p. 2). The student's April 2021 IEP indicated that the student was found eligible for special education as a student with an emotional disability (Dist. Ex. 4 at p. 1).<sup>2</sup> The student continued at Falk until September 2022 (see Tr. pp. 328, 336, 381; Dist. Exs. 2; 4 at p. 1).

A CSE convened on March 10, 2022 to conduct an annual review, found the student continued to be eligible for special education as a student with an emotional disability, and developed the student's IEP with a projected implementation date of March 11, 2022 (Dist. Ex. 7 at p. 1; see Tr. pp.16-17).<sup>3</sup> The CSE recommended that the student attend a 6:1+1 special class with counseling services and that the student continue at Falk for the 2022-23 school year (Dist. Ex. 7 at pp. 1, 8; see Tr. pp. 18, 362). Subsequent to the March 10, 2022 CSE meeting, the parents decided they did not wish to move forward with the district's recommended placement at Falk and began to explore alternatives (Tr. pp. 151-52, 159-61, 329-31). Falk's enrollment coordinator advised the district via letter dated August 25, 2022 that the student would no longer be attending the district's recommended placement and instead would be attending a private parochial school for the 2022-23 school year (Dist. Ex. 13). The CSE reconvened on August 29, 2022 to review the student's programming for fall 2022 in light of the parents' plan to enroll the student at Timon

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<sup>1</sup> The student's IEP also notes the had received a diagnosis of "complex trauma" (see Dist. Ex. 14 at p. 1; see also Dist. Ex. 15).

<sup>2</sup> Some of the IEPs included in the hearing record use the term "emotional disturbance"; however, as the State changed the term "emotional disturbance" to "emotional disability" as of July 27, 2022, the term "emotional disability" is used in this decision (see 8 NYCRR 200.1[zz][4]; see also "Permanent Adoption of the Amendments to Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance," Office of Special Educ. Mem. [July 2022], available at <https://www.nysed.gov/sites/default/files/special-education/memo/emotional-disability-replacement-term-for-emotional-disturbance.pdf>). For purposes of this decision, I will use the updated terminology.

<sup>3</sup> The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

(Dist. Ex. 15; see Tr. pp. 71-73).<sup>4, 5</sup> The August 2022 CSE continued the recommendations from the March 2022 IEP, but indicated that the district would "exit" the student's IEP and that the district of location would develop a plan for the student (Dist. Ex. 15; compare Dist. Ex. 14, with Dist. Ex. 7). In a letter to the parents, dated September 7, 2022, the district confirmed that the parent had chosen to place the student at Timon and that the district would not be responsible for the costs of the tuition as it was able to offer and provide the student with a FAPE (Dist. Ex. 16). Given the student's enrollment at Timon, on November 7, 2022, the district of location convened a CSE to develop an individualized education services program (IESP) for the student (Dist. Ex. 19; see Tr. p. 225).

In a due process complaint notice, dated February 22, 2023, the parents sought tuition reimbursement from the district for the student's tuition at Timon, alleging that the district failed to offer the student a FAPE in the least restrictive environment for the 2022-23 school year (see Dist. Ex. 1).

An impartial hearing convened on July 12, 2023 and concluded on August 31, 2023 after two days of proceedings (Tr. pp. 1-385). An IHO presided over the impartial hearing but recused himself before issuing a decision in the matter. A second IHO (the IHO) was assigned to the matter. In a decision dated March 11, 2024, the IHO found that the district did not meet its burden to prove that it offered the student a FAPE in the LRE for the 2022-23 school year (IHO Decision at p. 13). With respect to the district's argument that the CSE's recommendation for placement at Falk School was appropriate for the student, the IHO noted that the CSE recommended the same program as the prior year but failed to address the student's progress, particularly with his social/emotional, and behavioral goals, or to ensure the student's access to nondisabled peers (id. at pp. 8-12). The IHO held further that the parents' unilateral placement at Timon provided education instruction specially designed to meet the student's unique needs in a less restrictive environment than the Falk School and that the student made progress (id. at pp. 16-21). In addition, the IHO found no equitable considerations that would warrant a reduction or denial of tuition reimbursement (id. at p. 24). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Timon for the 2022-23 school year (id.).

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

The district appeals. The central issues presented on appeal are (1) whether the IHO erred in finding that the district did not offer the student a FAPE in the LRE and, (2) whether the unilateral placement at Timon was appropriate thus entitling the parents to reimbursement of tuition. The district argues that despite his progress the student still required structure and the parents' unilateral placement was not designed to provide special education instruction and supports to students with emotional disabilities. The district argues the equitable considerations do not favor reimbursement due to the parents' actions in placing the student at Timon without advising the district they would be seeking tuition reimbursement. The district requests the IHO

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<sup>4</sup> At that time the parents advised the CSE that they would be seeking tuition reimbursement for Timon (Tr. pp. 81-84, 380-81).

<sup>5</sup> Timon has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

decision be reversed and a decision finding the parents are not entitled to reimbursement for their unilateral placement.

In an answer, the parents generally respond to the district's material allegations with admissions and denials and argue that the IHO's decision should be upheld 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" (Andrew 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 Andrew 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 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).

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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" (Andrew F., 580 U.S. at 402).

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

## **VI. Discussion**

### **A. August 2022 IEP**

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

Although the student's needs are not in dispute, a summary thereof frames the issues to be resolved on appeal; namely, whether the CSE's recommendations constituted the LRE for the student.

Although not mentioned in the August 2022 IEP or the prior written notice, the hearing record includes IEP progress reports and Falk report cards pertinent to the 2020-21 and 2021-22 school years (Dist. Exs. 5-6; 11-12). The report card ending in June 2021 indicated the student achieved a final academic average of 95 (Dist. Ex. 6). Teacher comments included "credit recommended" for art, "pleasure to have in class" for English language arts (ELA), "well organized" for literacy, "class assignments/projects well done" for math, "puts forth effort" for physical education, "conscientious student" for social studies, and "shows enthusiasm for learning" for technology (id.).

The student's June 2022 report card indicated that he achieved a final academic average of 92 (Dist. Ex. 12). Teacher comments included "pleasure to have in class" for English, global history, and physical education, "participates in class discussions" for health, "capable of better work" for fundamentals of algebra, "credit recommended" for guitar and film music, "cooperative" for earth science, and "successful completion of course" for computer applications and digital literacy (id.). In addition, the student's IEP goal progress report indicated that he was progressing gradually toward his math goal by November 2021 and satisfactorily by January 2022 (Dist. Ex. 5 at p. 1). Also during the 2021-22 school year, the student was progressing satisfactorily toward a goal targeting his communication during an emotionally charged moment where, by November of 2021, he was able to communicate effectively and positively with others (id.). Although by January 2022 the student was making less progress than anticipated, the progress note indicated he might still achieve the goal expecting him to communicate his wants or needs using appropriate statements (e.g., "I need help," "I am feeling very frustrated") (id.). Similarly, with regard to another emotional goal targeting the student's peer interaction skills, the IEP progress report indicated he was progressing satisfactorily with respect to engaging in reciprocal conversation and positive peer and adult interaction and was expected to achieve the goal (id. at pp. 1-2).

The student's IEP goals were modified in March 2022 as a result of the student's annual review (compare Dist. Ex. 7 at p. 7, with Dist. Ex. 4 at p. 8). The IEP progress report for March through June 2022 indicated that during the 2021-22 school year the student progressed satisfactorily toward a goal that targeted his ability to write a five-paragraph essay using a graphic organizer and was expected to achieve the goal (Dist. Ex. 11). With regard to the student's social/emotional/behavioral development, the IEP progress report indicated that he was progressing gradually toward meeting his goal to use appropriate coping skills (e.g., ask for time

and space when needed, assertive communication, etc.) in order to overcome a negative situation (id.). By June 2022 the student was making less progress than anticipated toward this goal; however, the progress report also indicated that the student used positive coping skills to overcome a negative situation and was receptive to counseling feedback (id.).

The special education director testified the student made social/emotional progress between eighth and ninth grade (Tr. pp. 87-88). The special education director also acknowledged the positive teacher comments included in the student's Falk report cards and IEP progress reports (Tr. pp. 88-91).

The March and August 2022 CSEs continued the student's eligibility for special education programs and services as a student with an emotional disability (Dist. Exs. 7 at p. 1; 14 at p. 1). The March and August 2022 IEPs contain essentially the same information and recommendations (compare Dist. Ex. 7, with Dist. Ex. 14). The August 2022 IEP will be reviewed as the operative IEP in place as of the beginning of the 2022-23 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; R.E., 694 F.3d at 187-88).

The August 2022 IEP included a listing of evaluation results conducted in 2019 and transition assessments conducted in 2021 and 2022 (Dist. Ex. 14 at pp. 2-3). Overall, the August 2022 IEP reflected that the student enjoyed researching different topics on his Chromebook, enjoyed physical education class, had consistent attendance at school, and enjoyed spending time on his computer and watching videos (id. at p. 4). The August 2022 IEP reported that the student's reading and comprehension were on grade level, although he seemed to perform better when he read a story he liked and in which he was invested (id.). He tended to talk in class frequently and distracted his peers, which at times hindered his and his peers' comprehension (id.). Verbal prompting and proximity generally were sufficient to get the student back on track and refocused (id.).

In writing, the student was able to generate good ideas, but had difficulty with organization and adding supporting details (Dist. Ex. 14 at p. 4). He had a tendency to rush through assignments (id.). The student benefited from use of a graphic organizer, a proofreading checklist to identify mistakes, and sometimes needed prompting to correct misspellings and grammatical errors (id.). After receiving feedback, the student was able to correct writing errors, accept constructive criticism, and make improvements to his work (id.).

In mathematics, the student was able to participate fully in class by completing the warm-up, class notes, and assignments (Dist. Ex. 14 at p. 4). He was easily distracted in class and was provided with several on-task focusing prompts which sometimes assisted him in making fewer unnecessary comments (id.). The student was able to graph linear equations, write linear equations based on a graph and an equation in standard form, and determine slope when provided with a graph, two coordinates, and equation (id.). The student was able to add, subtract, and multiply polynomials (id.). At that time, the student had finished a unit that consisted of solving equations such as one, two, three, and multi-step equations (id.).

With regard to the student's academic, developmental, and functional needs, including the student's needs that were of concern to the parent, the August 2022 IEP noted the student needed



to refer back to his notes and assignments when he was completing assignments (Dist. Ex. 14 at p. 4). He also needed to use a graphic organizer when completing extended writing assignments (id.).

The August 2022 IEP indicated that during a March 2, 2022 transition interview the student stated he was interested in attending college to study physical therapy and also to play collegiate-level soccer (Dist. Ex. 14 at p. 4). The August 2022 IEP noted the student had good organizational skills that would support his success in college (id.).<sup>7</sup> The student reported that his top strengths were that he was outgoing, athletic, and he persevered (id.). He identified his top areas for improvement as anger management and emotional regulation when upset (id.). The IEP indicated that working on these goals would assist the student in being successful in the high school setting as well as working as a physical therapist (v). According to the IEP, the student's goal was to live independently as an adult (id.). His mother expressed that living on his own was a realistic goal for the student in the future (id.). The parent further expressed that she would like the student to attend college and felt that he would benefit from the support of Adult Career and Continuing Education Services - Vocational Rehabilitation (ACCES-VR) for support with his transition to college and the workforce (id.). The student would receive support to apply for ACCES-VR services during his junior year. (id.).

The August 2022 IEP indicated the student displayed a positive attitude towards school and took pride in his academic efforts (Dist. Ex. 14 at p. 5). The IEP noted that the student had earned honor roll status (id.). The IEP described the student's attendance for the 2021-2022 school year as "exemplary" and indicated that he did not have any absences (id.). The student was also described as polite and well-mannered (id.). He engaged in conversation with others and was an active participant in group and class discussion (id.). According to the IEP, the student was able to work independently but would ask for help when needed (id.). The IEP noted that, at times, the student could be critical of others, particularly regarding the teaching methods of staff (id.). During those times, the student might use inappropriate language towards a staff member when he did not feel the teaching was to his liking (id.).

The August 2022 IEP indicated the student generally displayed appropriate interactions with peers (Dist. Ex. 14 at p. 5). He presented as a friendly and polite student (id.). The IEP stated that the student was social and engaging in the group setting; however, he seemed to prefer to work on tasks independently (id.). The student had the ability to ignore the distracting behavior of others (id.). He was improving his ability to accept peers and their skills and was able to refrain from comparing others to himself (id.). According to the August 2022 IEP, the student was able to display positive interactions with staff (id.). He was an active participant in counseling and enjoyed one-on-one conversation (id.). The student particularly enjoyed discussions involving his interests, such as soccer (id.). The IEP noted that, at times, the student might use inappropriate language towards staff whom he did not like (id.). During those times, the student required time and space (id.). He was often able to reintegrate to the task at hand without further prompts (id.).

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<sup>7</sup> The August 29, 2022 IEP also indicated that on October 15, 2021, the student completed the career cluster interest survey and tied in the two clusters of human services and law, public safety, corrections, and security (Dist. Ex. 14 at p. 3). The same IEP indicated that those results did not directly correlate with the student's interest in being a physical therapist and noted that the student would continue to participate in career exploration activities in order to further investigate his skill and interests (id.).

The August 2022 IEP indicated the student's strengths were that he was capable of positive academic behaviors; he actively participated in classroom topic discussions; he enjoyed participating in sports, and he had perfect attendance (Dist. Ex. 14 at p. 5). As an area of deficit, the IEP noted the student needed to use appropriate coping skills (e.g., ask for time and space when needed, assertive communication, etc.) in order to overcome a negative situation (id.).<sup>8</sup>

The August 29, 2022 IEP indicated the student needed a small student-to-teacher ratio (Dist. Ex. 14 at p. 5). It stated in pertinent part, that the student needed to seek adult assistance when he felt frustrated or emotionally escalated (id.). The IEP also noted that the student needed a highly structured classroom with clear expectations and rules (id.).

The March and August 2022 IEPs adopted, verbatim, language from the student's April 2021 IEP that described the effect of the student's needs on involvement and progress in the general education environment (compare Dist. Ex. 14 at 6, and Dist. Ex. 7 at p. 6, with Dist. Ex. 4 at p. 6). More specifically, the August 2022 IEP noted that at times the student focused on the actions or business of others versus his own (Dist. Ex. 14 at 6). In addition, he had difficulty accepting responsibility for his own actions and choices (id.). According to the August 2022 IEP, the student could become very fixated on only his side of a situation or an outcome to a situation and struggled to move past that (id.). The IEP stated that these behavioral choices negatively impacted the student's ability to learn and grow in a larger classroom setting, as they might be a result of his executive function impairments (id.). The student needed adult assistance in handling and moving past these hurdles (id.). Also, the IEP indicated that the student had difficulty understanding and therefore managing his emotions (id.). The IEP explained that, due to his attachment challenges, the student believed he had to protect himself to literally survive, and felt he had to control a situation, even when inappropriate, in order to "hide" or escape it (id.). The IEP noted that, when these behaviors occurred, validating the student's feelings and praising him for expressing himself in an appropriate manner was greatly effective (id.). The August 2022 IEP suggested that over time, with continued support along with natural maturity, the student's emotional awareness and self-regulation progress would continue to improve (id.).

The August 2022 IEP indicated the student needed positive behavioral interventions and supports to address behaviors that impeded his learning or that of others, but he did not need a behavior intervention plan (BIP) (Dist. Ex. 14 at p. 6).

## **2. Least Restrictive Environment**

The primary dispute on appeal pertains to whether the CSE's recommendation for the student attend a 6:1+1 special class at Falk constituted the LRE for the student.

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. of Webster Cent. Sch. Dist., 583

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<sup>8</sup> Physically, the student's abilities and expectations were within age- appropriate levels (Dist. Ex. 14 at p. 5). He participated in his physical education classes and was able to fulfill all physical education requirements (id.). The parents agreed that there were no physical needs at that time (id.).

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. of Borough of Clementon Sch. Dist., 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 non-disabled 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>9</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 student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

The district director of special education and pupil services (special education director) testified that she had been familiar with the student for four years, first through communication with her former director, and then in her role as CSE chairperson for the student's past two annual reviews (Tr. pp. 14-15). The special education director indicated the Falk School was a therapeutic setting for students with self-regulation, behavioral, and emotional needs (Tr. p. 18). She testified that CSE recommended a 6:1+1 special class setting for the student because a 6:1+1 special class helped to support students with behavioral needs and was a smaller class setting that was more structured, had clear expectations, and was staffed by a special education teacher who provided specially designed instruction (Tr. p. 20). State regulation provides that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]).

The district director of special education testified generally to her approach to moving a student from a more restrictive to a less restrictive setting (see Tr. pp. 43-44, 64-65). She explained that the desired outcome for a student placed in a restrictive setting was for the student to become more independent and move to a "least restrictive setting," such as a move from an out-of-district placement to "a district placement" (Tr. p. 41). The special education director explained that, if a student was showing a lot of progress at the more restrictive setting, the district would have conversations with the parents, teachers and principal and "set up a CSE meeting, and discuss a potential change in placement" (Tr. p. 42). When asked, as a CSE chairperson, what she would want to see to conclude a student should be in a less restrictive environment, the district special education director noted she would look at the student's report card, progress towards annual goals, the present levels of performance, and the level of support needed (Tr. p. 43, 64-65). She further reported that she would have conversations with school staff and talk about reducing some of the student's accommodations and goals (Tr. p. 43). The special education director reported that the district generally did not move a student from a more restrictive setting without having a plan for "kind of an in between kind of program" (Tr. pp. 43-44).

The special education director acknowledged that the student's placement at Falk was restrictive in that it was it was an out-of-district 6:1+1 special class (Tr. pp. 40-41). According to

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<sup>9</sup> The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

the special education director, at the March 2022 CSE meeting, no one from Falk suggested the possibility of placing the student in a less restrictive environment (Tr. pp. 42-43, 66). She further testified that she did not recall anyone suggesting a possible basis to move the student to a less restrictive setting (Tr. p. 44, 67-68). Yet during cross examination, the special education director testified that the student was very smart and needed a program with high academic rigor (Tr. pp. 86-87). She acknowledged the student was working towards a State Regents diploma but could not verify whether Falk offered every Regents class (Tr. pp. 86-87). She further indicated at Falk the student had no access to typically developing peers (Tr. p. 91). She was unsure of any extracurricular activities the student participated in at Falk, but indicated the student did not participate in any extracurricular activities offered by the district (*id.*). The special education director testified that the August 2022 CSE did not review any behavior charting from Falk, nor did she ever see any behavior charts, despite the student's IEP indicating that behavior charting would be the method used to measure the student's social/emotional/behavioral progress (Tr. p. 92). When asked how the student's counselor distinguished whether the student was progressing satisfactorily or progressing gradually, the special education director replied that she did not know (Tr. p. 93).

With respect to the continuum of placement available, the special education director testified that the district had self-contained classrooms at the high school that were not discussed during the August 2022 CSE meeting (Tr. p. 95). She further testified that other smaller settings, such Board of Cooperative Educational Services (BOCES) classes, were not considered (Tr. p. 96). In addition, there was no discussion at the August 2022 CSE meeting concerning any sort of concrete measurements or benchmarks that the student would need to achieve for the CSE to consider transitioning him out of Falk (Tr. p. 96). The special education director testified that, at Falk, the student was not pushed into any general education classrooms, although earlier in his educational career within the district he was mainstreamed into a general education class for 30 minutes during the school day (Tr. pp. 96-97; *see* Dist. Ex. 22 at p. 1). The special education director reported that mainstreaming a student with an emotional disability into a general education class would offer the benefit of appropriate peer modeling (Tr. pp. 97-98).

Testimony by the psychologist, who provided counseling to the student at Falk through a contract with the district, indicated that she began working with the student when he was in fifth grade and on home instruction (Tr. pp. 286-87). She reported that the student was a "star student" at Falk and that he did well academically and on his behavior charts (Tr. p. 295). She based her opinion on the student's high grades and the fact that the student "pretty consistently" earned scores of 45 and above out of 50 on his behavior charts at Falk (Tr. p. 294). The psychologist testified that she supported the parents' decision and thoughts about moving the student to a different school (Tr. p. 297). She stated that the primary focus of Falk was behavior and opined that instruction in the Regents classes lacked rigor (*id.*). The psychologist further opined that the structure of Falk classes did not allow the student to reach his academic potential (*id.*). The psychologist testified that the student also needed exposure to typically developing peers that did not have behavior difficulties (Tr. p. 298). The psychologist indicated that the student required more academic rigor and greater access to nondisabled peers, but he would need a smaller setting than the general high school setting and cited an example of regular hallway transitions that could be problematic for the student, thus she stated that it would be a "very big jump" for the student to transition directly from Falk to a regular high school setting in the district (Tr. pp. 300-301). The district director of special education similarly explained that would be challenging to transition directly from Falk to

the district high school but, as noted above, conceded that no "in between" programs such as a special class setting in the district or BOCES setting in another public school were considered by the CSE (Tr. pp. 94-95).

The Falk principal indicated that, "the largest factor" for determining whether a student should move to a less restrictive setting was whether a student still "need[ed] the interventions that [we]re unique to [the] setting" at Falk, such as the crisis supports and TCI interventions (Tr. p. 130). The Falk principal testified that Falk did not recommend the student move to a less restrictive setting because the student still needed crisis supports (Tr. p. 131). The principal indicated that, as noted above, towards the end of the 2021-22 school year, the student was not making anticipated progress towards meeting his annual goal to use appropriate coping skills in order to overcome negative situations (Tr. p. 135; see Dist. Ex. 11). The principal described that the student had made progress "but there were still times where he wasn't able to . . . pull that coping strategy in the moment" (Tr. p. 135). The Falk principal testified that the student's crisis episodes had reduced from one to two times per week to two to three times per month by the end of the 2021-22 school year (Tr. pp. 120-23). When the student became escalated or frustrated, he benefited from a trusted adult, such as a support counselor, removing him to de-escalate (id.).

As noted above, while the IEP described that the student, at times, struggled managing his emotions, could be inappropriate with staff, and benefited from positive behavior interventions, it also reflected that the student had strong academic skills, was polite and engaged in appropriate peer interactions, made progress in the social/emotional realm, and he did not require a BIP (Dist. Ex. 14 at pp. 5-6). While the Falk principal described the student's continuing need for adult interventions when the student became escalated (Tr. pp. 120-23), the CSE failed to consider whether support from adults could have been provided in an environment where the student would also have access to nondisabled peers and the regular curriculum. The August 2022 IEP indicated the student's entire school day would take place outside the general education setting in an approved private day school, despite evidence in the hearing record that the student had progressed considerably and that the CSE should have considered placement of the student in a less restrictive setting (Dist. Ex. 14 at p. 11).

The evidence shows that over time the student improved considerably while attending Faulk, but that is not a basis for continuing to place the student outside the district and completely exclude him from nondisabled peers. The evidence also shows that the student needed access to nondisabled peers and greater academic rigor. Thus, applying the first prong of the Newington test, the evidence in the hearing record does not lead me to the conclusion that the student could not be satisfactorily educated in the general classroom, with the use of supplemental aids and services and even he required accommodations to transition from class to class differently due to a lack of structure at certain times in a high school setting. Furthermore, even assuming for the sake of argument that some removal from a general education environment was necessary due to inadequate structure during academic classes, I see virtually no evidence that the CSE thereafter considered whether the student could attend any other public school programs including more suitable classrooms in other public school districts in order to provide the student access to nondisabled students to the maximum extent appropriate. Accordingly, there is no reason to disturb the IHO's determination that the district failed to offer the student a FAPE in the LRE.

## B. Unilateral Placement

Having found that the district failed to offer the student a FAPE in the LRE, the next inquiry is whether the parents met their burden to prove the appropriateness of Timon. 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). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). 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 (id. 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).

To demonstrate the appropriateness of Timon, the parent presented testimony of the student support coordinator at Timon (Tr. pp. 178-281). The support coordinator was the "point person" for all special education students at the school and she testified that she was familiar with the student (Tr. p. 178). The support coordinator reported that, at the time of the impartial hearing, Timon had 250 students (Tr. pp 181-82). There were approximately 60 students in the student's tenth grade cohort (Tr. p. 182).

In her role at Timon, the support coordinator indicated she worked with teachers on ways to implement strategies to help students in their classrooms (Tr. p. 178). She reported that she worked with students and the students knew, if they had trouble, they could see her or a guidance counselor (*id.*). She noted her job was to make sure all teachers had access to the students' special education files if they wanted to see them (Tr. pp. 182, 200). All teachers had a brief snapshot ("bullet points") of what each student needed, including accommodations (Tr. pp. 182, 218-23). The support coordinator attended all CSE meetings with the district of location for each student when students' IESPs were developed (Tr. p. 182). Before these meetings, she made sure to get data from teachers about "how things [we]re going in their classrooms" (Tr. pp. 182-83).

In the instant matter, the district challenges the parents' placement on the basis that Timon does not offer specialized instruction, counseling, or supports to address the student's needs (Req. for Rev. ¶ 45). The district's August 2022 IEP for the student indicated that he required a 6:1+1 special class and individual and group psychological counseling services (Dist. Ex. 14). The district of location's November 2022 and March 2023 IESPs for the student indicated that he required resource room services on a six-day cycle (*see* Dist. Exs. 19, 20). Upon a review of the hearing record, the district's argument has merit given the lack of evidence that Timon could meet the unique needs of the student. Moreover, the support coordinator also expressed apprehension regarding the school's ability to address the student's needs prior to his acceptance in the program (Tr. p. 178-79).

When asked about the types of specialized service Timon offered, the support coordinator indicated the school offered academic intervention services (AIS), which she described as a general education service in math and reading during the school day (Tr. pp. 183, 229). She explained that for AIS "we have specific teachers in the room, usually an ELA and a math teacher . . . that kind of fill in the gaps in [students'] knowledge" (Tr. p. 228). She noted that if Timon had students with deficits in reading or math they would get extra skill support through AIS (Tr. p. 228). Some students had AIS built into their schedule and there were also three Title One tutors after school every day who provided tutoring in ELA, math, and science (Tr. p. 183).<sup>10</sup> Timon also employed a certified special education teacher who ran a student support class "a couple of

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<sup>10</sup> The support coordinator testified that this was not a special education service and it was not a service the student needed (Tr. pp. 246-47).



times a day" (Tr. pp. 183-84). That special education teacher worked with students with "the strongest needs" in her class (Tr. p. 184). The support coordinator testified that the special education teacher never worked with the student and the student never participated in the student support class (Tr. p. 247).

Furthermore, according to the support coordinator, the student did not receive counseling at Timon, and the related service was not listed on his IESP, despite the IESPs including social/emotional goals (Tr. pp. 247, 253-54; see Dist. Exs. 19 at p. 7; 20 at p. 7). The support coordinator noted that the student's parents requested at the CSE meeting that counseling be provided privately (Tr. pp. 249-50). The parent reported that in order for the student to receive counseling from the district of location he would have to be transported from Timon to a district school, which the parent was not in favor of (Tr. pp. 365-66). Additionally the parent reported that the district of location would not reimburse the parents for the cost of their private counselor (Tr. p. 364). Ultimately, the parents decided not to pursue counseling as they did not believe the student needed it (Tr. p. 365-66). The support coordinator testified that Timon did not track the student's progress toward his IESP goals, but rather "benchmark[ed]" three times a year (Tr. pp. 240-42). When asked, the support coordinator conceded that the student's goals were being managed "in the same manner. . . as every other student" (Tr. p. 265-66).

At the very least, to be reimbursable, the private placement must offer educational instruction specially designed to meet the unique needs of the student for it to be appropriate under the Act. Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65. Here, the hearing record does not show that Timon provided the student with specially designed instruction, nor does it show that the school monitored the student's progress as it related to his specific needs. In consideration of the record before me, the private school provided no special education to the student and is therefore not an appropriate special education placement for the student. While I sympathize with the parent's disagreement with the district's approach to the student's special education programming, evidence of progress at the private school alone is not sufficient because when seeking tuition reimbursement from a public school in a special education dispute, parents are not free to select a private school in which the "chief benefits of the chosen school are the kind of ... advantages ... that might be preferred by parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115; Fraguito v. Bd. of Educ. of the Suffern Cent. Sch. Dist., 2020 WL 4194804, at \*12 [S.D.N.Y. July 21, 2020] [finding that services were offered to all of the students whether disabled or not and a lack of services by special education professionals was insufficient to support reimbursement for a private school]). Accordingly, I am constrained to disagree with the impartial hearing officer's determination concerning the unilateral placement and I find that the parents have not met their burden of persuasion specially designed instruction that was reasonably calculated to enable the student to receive educational benefits.

## **VII. Conclusion**

Having determined that the parents failed to establish the appropriateness of the student's unilateral placement at Timon for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). I have considered the parties' remaining contentions and find they are without merit.

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

**IT IS ORDERED** that, the IHO's decision, dated March 11, 2024, is modified by reversing that portion which found that the parents met their burden to prove that Timon was an appropriate unilateral placement and ordered the district to reimburse the parents or directly pay Timon for the costs of the student's tuition for the 2022-23 school year.

**Dated:**           **Albany, New York**  
                          **May 22, 2024**

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