The University of the State of New York

The State Education Department
State Review Officer
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No. 24-474

**Application of a STUDENT WITH A DISABILITY, by her parents, 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:**
The Law Office of Deborah A. Ezbitski, attorneys for petitioners, by Deborah A. Ezbitski, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that equitable considerations did not favor their request to be reimbursed for their daughter's tuition and transportation costs at the Solstice East Timbersong Academy Magnolia Mill School (Magnolia Mill) for the 2023-24 school year or for an independent educational evaluation (IEE). Respondent (the district) cross-appeals from that portion of the IHO's decision that found the student's unilateral placement at Magnolia Mill was appropriate for the 2023-24 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

### II. Overview—Administrative Procedures

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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.

Briefly, the student has had struggles with mental health since sixth grade, which increased during the 2022-23 school year (10th grade) (see e.g., Parent Exs. B at p. 1; C; D at pp. 1-3). The CSE initially convened on May 3, 2023, determined the student was eligible for special education

as a student with an emotional disability, and developed an IEP (Dist. Ex. 1 at pp. 1, 17, 18, 21, 22, 23).[1] For the remainder of the 2022-23 school year, the May 2023 CSE recommended that the student receive five periods per week of integrated co-teaching (ICT) services for math from May 12, 2023 to June 29, 2023 (id. at pp. 1, 16). As related services, the May 2023 CSE recommended the student receive one 40-minute session per week of individual counseling and one 40-minute session per week of group counseling, with a projected implementation date of May 12, 2023 and no projected end date (id. at p. 16). The May 2023 CSE also recommended a 12:1+1 special class placement for math, English language arts (ELA), social studies, and sciences in a State-approved nonpublic residential school with a projected implementation date of June 29, 2023 and no projected end date (id. at pp. 16, 21).

On May 15, 2023, the district sent the parents a prior written notice which indicated the May 2023 CSE identified the student as having an educational disability and recommended ICT services, and a 10-month special class placement at a State-approved nonpublic residential school with group and individual counseling services (Dist. Ex. 2).

The district's Central Based Support Team (CBST) referred the student to a number of residential placements (see Dist. Ex. 3). On May 22, 2023, the district received a response from Vanderheyden, a State-approved nonpublic residential school, which indicated that a "preplacement interview" of the student was required to determine if such program was appropriate (id. at p. 8).

On June 13, 2023, the parents entered into a contract to enroll the student in a 28-day summer program with Blue Ridge Therapeutic Wilderness (Blue Ridge), an out of state wilderness program (Parent Ex. I). The student went to Blue Ridge on June 17, 2023 (Parent Ex. H at p. 1; Parent Ex. Q at p. 49; R at p. 1).[2]

On July 3, 2023, the district received letters from Henrietta G. Lewis Campus School at Wyndham Lawn Residential and New Directions Youth & Family Services at Randolph Residential, which are both State-approved nonpublic residential school programs, that indicated the programs would consider the student for placement at another time because the parents did not respond to their requests for a student interview and offer to provide a school tour (Dist. Ex. 3 at pp. 5-6).

[1] 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]).

[2] The hearing record contains contradictory information regarding the student's start date at Blue Ridge. The parents' September 12, 2023 letter to the district and the student's transcript each indicated the student began at Blue Ridge on June 17, 2023 (Parent Exs. B at pp. 1, 2; F). In contrast, the hearing record contained a letter dated February 2, 2024 from the Blue Ridge "HR and Billing Specialist" that indicated the student was "enrolled" in the program "on 6/27/23" (Parent Ex. H at p. 1). The Blue Ridge contract listed the student's start date, or anticipated start date as June, 13, 2023, which was not reliable since the Interstate Compact paperwork attached to the exhibit was incomplete (Parent Ex. I at pp. 1, 15-16). The parents employed a professional intervention and transportation service to fly the student to Blue Ridge, which indicated a "service date" of June 17, 2023, and the receipt for the services was dated June 26, 2023 (Parent Ex. Q at p. 49). Overall, the evidence favors the June 17, 2023 start date at Blue Ridge over the June 27, 2023 date.

On September 12, 2023, the parents sent the district a 10-day letter, which indicated they did not agree with the student's May 2023 IEP because they believed the student required an immediate placement in a 12-month State-approved nonpublic residential school due to her extreme mood swings and dangerous behaviors (Parent Ex. B at pp. 2, 4). Further, the parents indicated that they intended to unilaterally enroll the student at Magnolia Mill for the 2023-24 school year and seek tuition reimbursement and reimbursement at public expense for a private neuropsychological evaluation that was completed in August 2023 (id. at p. 3).[3]

The student completed programming at Blue Ridge on September 23, 2023 (Parent Ex. H at p. 1). On September 25, 2023, the parent and Magnolia Mill entered into a contract for the student's attendance commencing that day and "continuing through the discharge date," which was May 14, 2024 (Parent Exs. L; M at p. 1).[4]

**A. Due Process Complaint Notice**

In a due process complaint notice dated April 30, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23, and 2023-24 school years and raised, among other things, the following allegations: the CSE deprived the parent of meaningful participation; the CSE failed to consider an independent evaluation of the student; the CSE relied on insufficient evaluative information to make its recommendations; the CSE was not duly constituted; the May 2023 IEP lacked appropriate goals and failed to sufficiently identify the student's needs; the CSE failed to recommend a 12-month program; the CSE failed to provide the student with an appropriate transition plan; the recommended program in the May 2023 IEP did not offer adequate or appropriate instruction, support, supervision or services to meet the student's unique needs in order to make educational progress; the 12:1+1 special class student to teacher ratio was too large for the student to benefit educationally and did not provide enough 1:1 instruction; the district failed to locate an appropriate school placement for the student; and the district failed to fulfill its child find duties (Parent Ex. A ¶¶ 23-27, 31-33). The parents also alleged that programs selected by the parent were appropriate, that they cooperated with the CSE, and that they made timely notifications to the CSE of their intent to seek tuition reimbursement (id. ¶¶ 28-30). As relief, the parents requested the following: tuition reimbursement for the student's placement at Blue Ridge from June 7, 2023 through September 22, 2023 and at Magnolia Mill from September 23, 2023 through June 30, 2024; reimbursement of the costs of transportation and related expenses for the student and the parents to and from Blue Ridge and Magnolia Mill during the 2022-2023 and 2023-2024 school years; and funding for the cost of a neuropsychological

[3] Magnolia Mill is an out-of-state residential program (see generally Parent Ex. K). In various affidavits, the program is sometimes referred to as Magnolia Mill or Magnolia Mills (see Parent Exs. S; U; Y). In the description of the school included in the hearing record, it is referred to as Magnolia Mill (see Parent Ex. K). For purposes of this decision, the program will be referred to as Magnolia Mill.

[4] The Commissioner of Education has not approved Magnolia Mill as a school or program with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7).

evaluation completed on December 5, 2022, and for the cost of a psychological evaluation completed on August 16, 2023 (id. ¶¶ 35-37).[5]

**B. Impartial Hearing Officer Decision**

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on June 10, 2024 and concluded on July 2, 2024 after three days of proceedings including a prehearing conference (Tr. pp. 1-187).

In a decision dated September 13, 2024, the IHO found that the district did not meet its burden that it offered the student a FAPE for the 2022-23 and 2023-24 school years; that Blue Ridge was not appropriate to meet the student's needs; that Magnolia Mill was appropriate to meet the student's needs; that the equities did not favor the parents' request for tuition reimbursement or transportation reimbursement; and that the district was not required to fund the cost of the August 16, 2023 psychological evaluation (IHO Decision at pp. 3-4, 14, 16-18, 21-22).

For the 2022-23 school year, the IHO determined that the district knew or should have known that the student was suspected of having a disability in January 2022 and because it did not evaluate and develop an IEP until May 2023, the IHO determined the district failed in its child find duties and denied the student a FAPE for the 2022-23 school year (IHO Decision at pp. 13-14). The IHO noted that the parents did not seek any relief in their due process complaint notice regarding the 2022-23 school year (id. at p. 14; see Parent Ex. A).

For the 2023-24 school year, the IHO determined that the May 2023 IEP was not meaningfully calculated to confer an educational benefit upon the student because the district failed to offer an explanation as to how the May 2023 CSE made its recommendation, or how the May 2023 IEP appropriately described the student's needs (IHO Decision at p. 14). Accordingly, the IHO determined that the district did not offer the student a FAPE for the 2023-24 school year (id.).

As for the student's unilateral placements for the 2023-24 school year, the IHO determined the parents did not meet their burden that Blue Ridge was appropriate because there was no evidence that the program offered an educational program that met the student's needs (IHO Decision at pp. 15-16). The IHO also noted that there was a dispute over whether the student required a 12-month therapeutic program but determined that there was no evidence that the parents disagreed with the lack of a 12-month program, requested summer services for the student, or that the student's mental health had deteriorated to the point where she needed an immediate placement in a 12-month program (id. at p. 15). The IHO further found that Blue Ridge was not appropriate because there were no special education components to the program, and it was primarily therapeutic (id. at p. 16).

The IHO also determined that the parents met their burden that Magnolia Mill was an appropriate unilateral placement for the student because it provided an educational program that meet the student's individual needs (IHO Decision at p. 17). The IHO noted Magnolia Mill

[5] The total cost of the student's Blue Ridge program was $62,530 (Parent Ex. J). The total cost of the student's Magnolia Mill program was $165,179.16 (Parent Ex. M).

provided a unique program which combined therapeutics and academics to support the student by focusing on the student's mental health needs first while maintaining the student's academic progress (id. at p. 16).

However, the IHO determined that the equities did not favor the parents' request for tuition reimbursement because the parents were not fully cooperative with the district and impeded its attempts to place the student in a program for the 2023-24 school yar (IHO Decision at pp. 18-19). The IHO determined that the record showed that after the May 3, 2023 IEP meeting, the district provided prospective State-approved nonpublic residential school programs for the student on or around June 2023 prior to the start of the 2023-2024 school year and that there was no evidence that the parents found the prospective placements inappropriate for the student, but rather the parents decided not to make the student available for a tour of these placements in order to determine whether the placements were appropriate for her (id. at p. 19). Accordingly, the IHO determined the parents failed to cooperate with the CBST, thus the equities supported a finding that the parents were not entitled to reimbursement for the cost of tuition at Magnolia Mill (id.).

Regarding transportation, the IHO determined that though the district did not raise any arguments regarding the parents' requests for transportation reimbursement, and the parents presented invoices to support an award of reimbursement for transportation expenses, since she found the parents were not entitled to reimbursement for the tuition costs at both the unilateral programs for the 2023-24 school year, the parents were also not entitled to reimbursement for transportation to these programs (IHO Decision at p. 18).

Regarding the parents' request for reimbursement for the independent educational evaluation (IEE), the IHO denied the parents request for reimbursement of the August 30, 2023 psychological evaluation conducted at Magnolia Mill in the amount of $4,000 because the parents did not unequivocally express their disagreement with the district's March 2023 psychoeducational evaluation in their April 2024 due process complaint notice and the district was unaware of the evaluation it was defending during the impartial hearing (IHO Decision at p. 19).

Based on the above findings, the IHO dismissed the parents' due process complaint notice with prejudice.

## IV. Appeal for State-Level Review

The parties' familiarity with the particular issues presented for review on appeal in the parents' request for review, the district's answer with cross-appeal, and the parents' answer thereto is presumed and therefore, the allegations and arguments will not be recited in detail here. The issues to be determined on appeal are whether the IHO erred in determining that Magnolia Mill was appropriate to address the student's needs; whether the IHO erred in determining that equitable considerations did not favor the parents' claim for tuition reimbursement at Magnolia Mill or transportation reimbursement for the 2023-24 school year; and whether the IHO erred in determining the parents were not entitled to reimbursement for the August 2023 IEE.

## 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]).[6]

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**

Initially, neither party has appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years or that Blue Ridge was not an appropriate unilateral placement for the 12-month portion of the 2023-24 school year. Accordingly, these findings have become final and binding on the parties and will not be further

[6] 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).

discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

**A. Unilateral Placement**

In its answer with cross-appeal, the district argues that the IHO erred by finding Magnolia Mill was appropriate because there was no evidence of the student's therapeutic progress.

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; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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., 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). 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).

**1. Student Needs**

While not in dispute on appeal, a discussion of the student's needs provides context for the parties' dispute over whether Magnolia Mill was appropriate to address the student's needs.

According to the May 2023 IEP, the student's "mental health began to rapidly decline in the [ninth] grade" such that she was hospitalized on multiple occasions (Dist. Ex. 1 at p. 2). The May 2023 IEP reported that the student's "functioning at school and at home ha[d] only declined" after her hospitalization, with actions that included bringing a knife and a toy gun to school and running away from home (id. at p. 3). The May 2023 IEP also indicated that the parents "ha[d] grown fearful of what [she] might do to [her]self or others" if "in a very negative mood" (id.). The May 2023 IEP indicated that the student had received a diagnosis of attention deficit hyperactivity disorder (ADHD) and that the student's care team from one hospitalization believed the student met criteria for a diagnosis of autism spectrum disorder (id. at pp. 2, 5).

The May 2023 IEP included student report that "[h]omework [wa]s generally a significant struggle" and that she "procrastinat[ed] frequently" (Dist. Ex. 1 at p. 3). According to the May 2023 IEP, the student "described feeling like the time 'disappears'" after school and that it was more difficult to get things done in the evening (id.). The May 2023 IEP indicated that the student demonstrated cognitive skills within the high average to superior range for fluid reasoning, verbal comprehension, working memory, and visual spatial skills according to the December 2022 neuropsychological evaluation (id. at pp. 1, 3). The student demonstrated processing speed skills within the average range (id.).

Academically, the May 2023 IEP indicated the student primarily obtained achievement assessment scores within the average range, with superior skills demonstrated on sentence reading fluency and applied problems subtests (Dist. Ex. 1 at pp. 2, 4).[7] The May 2023 IEP indicated that the student demonstrated some difficulty with "geometry[-]related problems" although her "overall performance showed very strong mathematical skills" (id. at p. 4). According to the May 2023 IEP, the student reported that she had difficulty in English class because she was "often confused during the discussion" and did not "catch on to the inferences or implied meanings that the teachers t[ook] from the texts" (id. at p. 3). The May 2023 IEP indicated that the student's teachers reported the student appeared to understand the material but had difficulty completing work (id. at pp. 4-5). The May 2023 IEP also indicated that the student demonstrated more success in a class if she

[7] The May 2023 IEP included results from a March 2023 psychoeducational evaluation that referenced results from a neuropsychological evaluation conducted in December 2022, although it appears that the May 2023 IEP mislabeled the date of the March 2023 evaluation as March 2022 (compare Dist. Ex. 1 at pp. 1, 2 with Dist. Ex. 4 at pp. 1, 2).

was interested in the material or was provided with a concrete reason for a task's completion (id.). Further, some of the student's teachers indicated the student "engag[ed] in small pranks" during a less-preferred class, or "only participate[d] in class to make jokes or make off-task comments" (id.).

The May 2023 IEP indicated that the student "ha[d] the capabilities" to complete assignments but "largely refus[ed] to complete most school work and thus [wa]s failing most of [her] classes" (Dist. Ex. 1 at p. 5). The parents reported to the May 2023 CSE that they were "concerned about [the student's] safety and well-being" and that she "need[ed] a more supportive, structured, and therapeutic school setting" (id.). According to the May 2023 IEP, the CSE "agreed that a residential setting [was] appropriate at th[at] time due to [the student's] significant mental health and behavioral issues at home, which pose[d] potential safety risks to [her]self and others" (id.). The May 2023 IEP indicated that the CSE "also decided to add ICT [services] for math as an interim service for the remainer of [the student's] time at [the district's high school], as well as a reduced work load, extended time, and preferential seating" (id.).

Regarding the student's social development, the May 2023 IEP summarized the student's hospitalizations for "suicidal ideation" and reported that she had recently participated in counseling outside of school, although that counselor "terminated services because they believed [the student] needed more intensive therapeutic interventions" (Dist. Ex. 1 at pp. 5-7). The May 2023 IEP indicated that a neuropsychological report from December 2022 indicated that the student "fit the criteria for a trauma or stress[-]related disorder" and that the student's "anxiety and traumatic memories [were] easily reactivated by minor stressors" (id. at p. 6). The May 2023 IEP indicated that the student "experienc[ed] significant difficult[y] sustaining [her] attention" based on parent and student report, and that "[t]his seem[ed] to be impairing [her] ability to focus in class, meet deadlines, pay attention to what [she was] doing, and contribute[d] to difficulties concentrating" (id.). The May 2023 IEP did not describe any concerns about the student's physical development, other than indicating the student took medication for ADHD (id. at p. 7).

The May 2023 IEP indicated that "[f]or the remaining time at [the district's high school]" the student's management needs required the following supports and accommodations: extended time on large assignments, no assignments/classwork for excused absences due to mental health issues, a reduced work load, preferential seating, mental health and therapeutic supports throughout the day, clearly explained and concrete directions, clear and direct communication of expectations, behavioral supports, positive reinforcement, opportunities for socialization and peer collaboration, and opportunities to incorporate areas of interest into assignments (Dist. Ex. 1 at pp. 7-8). According to the May 2023 IEP, the student "require[d] special education supports to access the general education curriculum" and was "recommended to attend a residential non-public school so that [she] c[ould] receive the mental-health support [she] need[ed] with individualized attention, close supervision, and a safe environment" (id. at p. 8).

### 2. Magnolia Mill and Specially Designed Instruction and Progress

The district argues in its answer with cross-appeal that the student required a therapeutic setting in order to address her significant emotional difficulties and that there was insufficient information to support that the student made therapeutic progress at Magnolia Mill.

Here, the evidence in the hearing record supports the IHO's conclusion that the student's placement at Magnolia Mill was appropriate to meet her needs.

The clinical director of Magnolia Mill testified in her affidavit that "Magnolia Mill [wa]s a learning community that empower[ed] students to thrive academically, emotionally, and socially" (Parent Ex. Y ¶ 1, 8). Regarding academic instruction, the academic director of Timbersong Academy testified that Timbersong Academy was "the academic arm of Magnolia Mill[] School" (Tr. p. 120; Parent Ex. U ¶ 2). She further testified that "Timbersong Academy [wa]s a traditional, non-public school, licensed by" North Carolina that strove to "provide a traditional education program that encourage[d] academic, personal, and emotional growth . . . within a residential setting" (Parent Ex. U ¶ 8). According to the academic director, Timbersong Academy was a "year-round" program that "offer[ed] [five] terms that [were] 10 weeks long" (Tr. p. 129; Parent Ex. U ¶ 8).

The academic director testified that students attended classes Monday through Thursday, then went "off campus for experiential activities" on Fridays (Parent Ex. U ¶ 9). The academic director included in her affidavit that their "course offerings [we]re supplemented through the use of accredited online programs" and that the program also offered "a credit recovery program" (id.). Additionally, the program's "five full[-]time teachers and four part[-]time elective teachers" were "licensed in the state of North Carolina" and that "teaching assistants" were not used at the program (id. ¶ 11).

The Timbersong Academy program description indicated that student assessments of progress were administered twice a year, and those students who had an IEP or a plan pursuant to section 504 of the Rehabilitation Act of 1973 (504 plan) were "provided a study skills class to assist them with their education" (Parent Ex. P at p. 1). The program description indicated the program employed "a full-time special education teacher that monitor[ed] the study skills caseload and provide[d] executive functional support" along with "an individualized academic plan" (id.). The program description also indicated that "all teachers provide[d] scaffolding [and] differentiated instruction" and "follow[ed] student accommodations" such as "extra time, filled-in notes, [and] modifications" (id.). Additionally, the academic director testified that there were "five full[-]time teachers" at Timbersong Academy and each class had "between four and eight students" with "[o]ne teacher" (Tr. p. 123).

The academic director testified during the hearing that the student began at Timbersong Academy in September 2023 (Tr. p. 121). Upon entry into the program, the academic director testified that staff reviewed the student's May 2023 IEP and conducted math and English assessments (Tr. pp. 121-22). The academic director further testified that the student's classes at the school were chosen "[b]ased upon her transcript and the credits she needed" for "graduation" (Tr. p. 123).[8]

Regarding the student's needs, the academic director testified in her affidavit that the student "struggle[d] with access to school due to her mental health struggles"; indicating that the student exhibited "difficulties in . . . executive function[ing] and behavior" and "struggled to

[8] The student's academic schedule was included in the hearing record, as was a description of the available courses (see Parent Exs. O; P at pp. 2-6).

identify how her behavior affect[ed] others" (Parent Ex. U ¶¶ 28, 29). Further, the academic director testified that the student demonstrated difficulty with her organizational skills, her "ability to resist impulses," "function[] in social settings," adapt to "changes in" her environment, demonstrate appropriate reactions to events, and demonstrate problem-solving skills (id.).

To address the student's needs, the academic director testified that the "director of learning services created [a] 504 plan for [the student]" and "used the testing and [their] information from observations of [the student]" to complete the support plan (Tr. p. 124). The academic director testified regarding the adjustments made for the student included "limiting the number of assignments," ensuring "she had one-on-one attention from teachers during some study hall periods," and "participating in a weekly study hall session" (Tr. p. 128).

The academic director testified in her affidavit that the student demonstrated difficulty within the program's "regular study hall . . . because of her executive function weaknesses," and to address those needs, they placed her in an executive functioning skills class called Study Skills (Parent Ex. U ¶ 30). The academic director testified that the class "focuse[d] on . . . organization, attention, mood, [and] working memory," and the student attended the class "two times per week" (id.). The academic director further testified that in the study skills class, the student "worked" on "everything from organization to just tips and checks to be able to work or function better in academic life in addition to having a support plan" (Tr. pp. 123-24).

Additionally, the academic director testified that the student "work[ed] well with a small teacher[-]to[-]student ratio" with "breaks" that offered an opportunity to use "a calming strategy" that facilitated "engage[ment] in class" (Parent Ex. U ¶ 28). According to the academic director's affidavit, the student "also need[ed] prompts and reminders to stay on task and in school throughout the school day" for which she "received support in Study Skills" (id.).

Turning to the therapeutic services delivered by Magnolia Mill, the clinical director testified in an affidavit that they "work[ed] with students" who had previous "attachment wounds, trauma and/or chronic stressors" that "negatively impacted their school performance and relationships" (Parent Ex. Y ¶ 8). According to the description of Magnolia Mill, staff used "a connective and therapeutic framework" that was "designed to address" student challenges such as depression, social anxiety, post-traumatic stress disorder (PTSD), and obsessive compulsive disorder (OCD) and "integrat[ed] advanced therapeutic modalities [that] provide[d] tailored support" (Parent Ex. K at p. 5). The clinical director offered in her affidavit that the team of adults at the program, including "[s]upervisors, teachers, and therapists, communicate[d] and collaborate[d] in order to meet the needs of the students" (Parent Ex. Y ¶ 10). According to the clinical director, the therapists associated with the program were "either fully licensed by the state" or "had an associate license" (id. ¶ 9).

The description of Magnolia Mill indicated that its "educational approach" and "academic curriculum . . . emphasiz[ed] critical thinking and creativity" (Parent Ex. K at p. 10). The Magnolia Mill description further indicated that it "integrate[d] a connective therapeutic framework into [its] educational approach" and "implement[ed] individualized education plans [] cater[ed] to each student's strengths, challenges, and aspirations" (id. at pp. 11-12). The clinical director testified in her affidavit that students were "expected to 'master' the [eight] core competencies (education, community, emotional regulation, growth mindset, independence, relationships, responsibility,

and self[-]care) in order to graduate" (Parent Ex. Y ¶ 12). The Magnolia Mill description reviewed their "[e]ight [c]ore [c]ompetencies" along with their family and "experiential programming," noting that their "clinical services" were "an integral part of a comprehensive approach to education and personal development" (Parent Ex. K at pp. 6-8).

The clinical director identified that the student's social/emotional needs relating to her diagnoses, depression, and trauma "precluded her from not only being able to engage in critical thinking and academic efforts, but also attending and participating in school on a regular basis" (Parent Ex. Y ¶¶ 15, 16, 21). In her affidavit, the clinical director testified that to address those needs, staff used a variety of therapies including "milieu therapy," "individual therapy," "adventure therapy," "equine and milieu therapy," "trauma processing," "motivational interviewing," and "[e]motion[-][f]ocused [f]amily [t]herapy" (id. ¶ 17). The student's discharge summary indicated the student received group therapy three times per week, individual therapy one time per week, family therapy one time per week, psychiatric consultation monthly, ongoing educational programming, ongoing experiential therapy, and ongoing life skills development (Parent Ex. V at pp. 5-6). The parent confirmed during cross-examination that at Magnolia Mill, the student received individual, group, and family counseling (Tr. pp. 89, 107-08).

The district asserts on appeal that "[t]here was insufficient information to support the therapeutic progress of the [s]tudent at [Magnolia Mill]." However, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The evidence in the hearing record shows that although the student experienced academic and therapeutic struggles while attending Magnolia Mill, she demonstrated some progress overall. For example, the academic director testified in her affidavit that the student's performance within the program was variable; she initially "ma[de] academic progress" but "struggled more with her behavioral triggers and school motivation" for about a month, during which time she "refus[ed] school and her grades [were] significantly impacted" (Parent Ex. U ¶ 32). The academic director further testified that the student had difficulty "during the second quarter," which was borne out in the student's school transcript (Tr. p. 130; see Parent Ex. W). According to the academic director, after use of a "relationship-based model," adjustments in the school day and classes, along with "inherent motivation . . . from seeing some lower grades," the student "c[a]me back to class before the term ended and [] bounce[d] back in terms of her grades" (Tr. pp. 127-28; see Parent Ex. W).

Testimony indicated that the student's "social, emotional, and mental health needs all impacted her ability to access her own education and positively participate in academics" and were inseparable from her educational needs (Parent Exs. U ¶ 31; Y ¶ 21). However, Timbersong Academy's "restrictive setting . . . allowed [the student] to receive the intensive therapeutic support she needed while maintaining her academic progress" (Parent Ex. U ¶ 31). According to the academic director's affidavit, Timbersong Academy met the student's needs because their program "combine[d] therapeutics and academics to support" her "and focus[ed] on the mental health needs first while maintaining [the student's] academic standing and progress" (id. ¶ 26).

Additionally, the academic director offered in her affidavit that the program used "trauma[-]informed teaching" that "allowed [the student] to positively access her education and make progress in her goals" (Parent Ex. U ¶ 31).[9] The clinical director confirmed that the eight core competencies were part of the student's goals (Tr. pp. 160-61; see Parent Ex. Y ¶ 12). The clinical director also indicated that the student "did not master the [eight] core competencies before" her "discharg[e] in May" but that the "family expressed satisfaction with the amount of healing and repair they experienced in family therapy that they felt comfortable with an early discharge" (Parent Ex. Y ¶ 23). When asked during redirect why the student did not master the core competencies, the clinical director testified that the student "met enough of her clinical goals . . . to the comfort level of her family that they were ready for discharge" (Tr. p. 162). According to the clinical director, the student did not master "[c]ommunity and relationships" as part of the core competencies (Tr. pp. 165-66).

The clinical director indicated in her affidavit that "it [wa]s normal for residents to fall back into old maladaptive patterns and unhealthy coping skills," and when the student in this case experienced this, "the treatment team was able to respond to her needs" (Parent Ex. Y ¶ 18). According to the clinical director, when the student struggled, she "bec[a]me increasingly vulnerable to negative peer influence" (id. ¶ 19). The clinical director also indicated that at such times, the student "was typically receptive to staff or her therapist" working with her "to get to the root cause of her frustration" (id.). The discharge summary dated May 20, 2024 summarized the student's medications, diagnoses, and treatment plan, and the student's therapist indicated that the student "greatly improved her ability to communicate with [her] parents" (Parent Ex. V at pp. 1-7). The therapist also indicated the student required "continued support" to "practic[e] assertive communication rather than falling back into old patterns of avoidance" and recommended continued therapy (id. at p. 7).

Further, the parent testified that after the student's attendance at Blue Ridge, she was "much more stable" and "[w]hat she had learned in wilderness was then reinforced at Magnolia Mill" (Tr. pp. 90-91). After the student's attendance at Blue Ridge and Magnolia Mill, the parent testified

[9] The academic director testified that the student did not complete the 11th grade while attending Magnolia Mill, rather, the student "got through three quarters" of 11th grade and "she was pulled before she finished her coursework to complete" the grade (Tr. pp. 121, 128-29). May 23, 2024 was the date the student left Magnolia Mill, and also the date of the end of the fourth term (compare Tr. p. 166, with Parent Ex. V at p. 1).

that the student's grades improved, her "mental health" improved, and they "[do not] see any risky behaviors or reason for alarm" (Tr. pp. 91-92).

The parent offered in her affidavit that the student's progress at Magnolia Mill was "significant" and that the "program [was] structured with ample support for [the student] who needed to learn in a smaller, supervised setting" (Parent Ex. S ¶ 19). According to the parent's affidavit, the student "participated in group, individual[,] and family therapy," and "worked on specific goals, some of which include[d] responsibility, emotional regulation[,] and growth mindset" (id.). The parent also indicated that the student "learn[ed] how to cope with her trauma and understand her emotions while also utilizing coping mechanisms when" she "bec[a]m[e] dysregulated" id.). The parent testified that between September 2023 and May 2024 the student demonstrated progress in her ability to regulate her emotions and communicate with her family (Tr. p. 108).

Based a review of the hearing record, the evidence supports the IHO's finding that Magnolia Mill provided the student with instruction specially designed to meet the student's unique needs and, contrary to the district's assertions, that she made some progress while attending that program.

**B. Equitable Considerations**

The parents argue on appeal that the IHO erred by misapplying the standard in weighing equitable considerations in tuition reimbursement cases. The parents argue that they cooperated with the district and that their concern over not interrupting the student's therapeutic placement at Blue Ridge in order to return to New York for an in-person interview at a State-approved nonpublic residential placement was reasonable and understandable. The district's arguments with respect to equitable considerations are aimed at the parents' asserted lack of cooperation with the district's efforts to locate a State-approved nonpublic residential school program that would accept the student for the 2023-24 school year.

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).

While specific to the process of placing students in approved out-of-State residential schools, State guidance sets forth the expected roles of parents and districts in the referral and placement process:

> Parents are integral partners in the referral process and are expected to cooperate fully in the intake interview and screening process for the residential school. While the CSE must consider the concerns of the parents in the placement process, the district must take responsibility to secure an appropriate placement for the student in the least restrictive environment even in the instance where a parent does not fully engage with the referral and placement process.

("Placement of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ. Mem. [April 2022], at p. 8, available at https://www.nysed.gov/sites/default/files/programs/special-education/2022-23-out-of-state-residential-placement-memorandum-and-attachments.pdf). In a question and answer attachment to the guidance, in response to the query of what recourse a district has if a parent impedes the district in its effort to secure an approved residential school, the guidance directs that, even if a parent impedes the referral process, "[u]ltimately, the district must take affirmative actions to make arrangements for the student to complete the process" ("Placement of Students with Disabilities in Approved Out-of-State Residential Schools," Attachment 1, at p. 2).

Accordingly, while a district might find itself in an unenviable position of having to locate and secure a placement for a student without the parents' full engagement, "participating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents" (Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 [9th Cir. 2012]). Instead, the district's contention is that the relief sought by the parents is unwarranted because there are equitable considerations concerning the parents' cooperation with the CSE process that should bar

tuition reimbursement for the 2023-24 school year. Here, while I can sympathize with the parents' choice to keep the student at Blue Ridge for treatment, as described further, the hearing record lacks evidence that would warrant disturbing the IHO's findings that the parents were insufficiently cooperative with the district and impeded its ability to locate a State-approved nonpublic residential school program for the student for the 2023-24 school year, and therefore, equitable considerations do not support their request for tuition reimbursement.

The May 2023 IEP recommended that the student to attend a 10-month program consisting of a 12:1+1 special class for math, ELA, social studies, and sciences together with counseling, at a State-approved nonpublic residential school program (Dist. Ex. 1 at pp. 16, 21). The parent included in her affidavit that they "wait[ed] [six] weeks . . . for the [district] to offer [the student] a residential program," but since no such placement was made "by mid-June" and with "advice" from the "professionals" who worked with the student, the parents "unilaterally placed [the student] at Blue Ridge" on "June 17, 2023" (Parent Exs. J at p. 1; S ¶¶ 9, 15).

The evidence does not specify exactly when or how many referral packets were sent by the CBST to various State-approved nonpublic residential school programs; however, the evidence includes correspondence as early as May 22, 2023 showing responses had been received from some of the proposed nonpublic schools (see Dist. Ex. 3). According to the various correspondence, the district received responses from nine State-approved nonpublic residential school programs (see Dist. Ex. 3).

According to the evidence, six of the nonpublic schools declined to accept the student, but three of the nonpublic schools sought to continue the intake process for the student (Dist. Ex. 3). According to two of the nonpublic schools, the parents did not respond to a request to set up that interview (id. at pp. 5, 6, 8). The Vanderheyden program sent a letter to the parents dated May 22, 2023 offering a "preplacement interview" (id. at p. 8). The Randolph Residential and Randolph Academy Union Free School District and the Wyndham Lawn Residential & H. G. Lewis Campus School each sent a letter dated July 3, 2023 in which they indicated that the schools "would consider this [student] for placement at another time" but they "have had no response from [the] parent/guardian after offering an interview and tour" (id. at pp. 5, 6). Although the hearing record was silent as to when these two schools initially reached out to the parents to schedule an interview, the record shows that at least one school, Vanderheyden, had reached out to the parent on or before May 22, 2023 (id. at p. 8).

The parent indicated in her affidavit that the CBST sent the student's "referral packet" to "nine schools, five of which" responded "that they could not meet [the student's] needs" (Parent Ex. S ¶ 18). The parent further offered in her affidavit that they "spoke with Vanderheyden and Randolph Academy" but "[b]oth facilities required" the student's attendance for a "tour, which could not happen when [the student] was at Blue Ridge" (id.). The parent testified that she "spoke with Randolph Academy, Vanderheyden, and also [] Summit" in June 2023 (Tr. pp. 84, 85). The parent further testified that "after some time," Summit "declined to offer [them] a spot" (Tr. p. 84). The parent testified that when she spoke with the schools, they shared with her that the student was required to be present at an interview and tour to be considered for the program, and the schools did not relent on that requirement despite the parent informing them the student was unavailable (Tr. pp. 85, 112-13).

In response to a question from the IHO, the parent testified that there were "a few reasons" why the parents did not bring the student for a tour of the residential programs, but that "[i]f it had to happen, [she] th[ought] it could have" (Tr. p. 111). The parent testified that she "[did not] know what to do" because she "wanted to follow their rules" regarding the presence of the student at the residential programs, "[b]ut [she] [did not] want to upset [the student]" (id.). Further, the parent indicated the student "was still fragile emotionally" and they knew the student "ha[d] to continue on somewhere for 8 to 12 months after" the completion of Blue Ridge programming (id.). The parent testified that she "was [] worried that if [the student] was taken out of the woods, it could have been a problem mental-health wise" (id.).

The hearing record is unclear as to when, specifically, the parent spoke with the three schools in June 2023. While the parent's testimony suggests that the student was already at Blue Ridge when the interviews/tours would have occurred, she also indicated in her testimony that she "mentioned" to Blue Ridge that the student was needed for a tour of the New York State programs (Tr. pp. 85-86). The parent further testified that she was worried because she did not want the student "to become dysregulated and have a problem" (Tr. pp. 85-86). The parent testified that she ultimately chose not to have the student leave Blue Ridge for a tour (Tr. p. 86). There is no direct evidence from Blue Ridge regarding whether the student would be able to attend an intake visit at one of the nonpublic residential schools, only an opinion at the time of discharge that the student should not return to the home environment (Parent Ex. R at p. 2).

According to the parent, while the student was at Blue Ridge, on August 18, 2023 the student's father called Vanderheyden and left a message for to talk to them about setting up an interview and a tour (Tr. pp. 87, 105, 110). The parent testified that they "never heard back" from Vanderheyden (id.). When asked whether in August 2023 it was still the parent's understanding that the student could not be present for a tour, the parent testified that "we would have . . . had to force it . . . [i]t was not something that seemed like a great idea" (Tr. p. 88). She continued that "[b]ut if it had to happen, we could have made it happen" (id.). The parent testified that at that time, the student's therapist recommended that the student "not return home at all, but to leave Blue Ridge and go somewhere directly" and the parent did not want the student "to not have anywhere to go" (id.).

The student's mother testified that between August 18 and September 12, 2023, the parents had not heard anything from the district about any programs the student may be eligible for (Tr. pp. 106-07). On September 12, 2023, the parents sent the district a 10-day letter, which indicated that they intended to unilaterally enroll the student at Magnolia Mill for the 2023-24 school year and seek tuition reimbursement (Parent Ex. B at p. 3). The parent also testified that after September 12, 2023, she did not believe she received "any other communications from the CSE" or the district about other programs for the student or regarding another CSE meeting (id.).

The student completed programming at Blue Ridge on September 23, 2023 (Parent Ex. H at p. 1). On September 25, 2023, the parent and Magnolia Mill entered into a contract for the student's attendance commencing that day (Parent Exs. L; M at p. 1). The IHO questioned the parent as to why the student did not go on a residential tour after Blue Ridge, to which the parent testified the student went directly from Blue Ridge to Magnolia Mill, which did not have a requirement that the student "attend any interview" (Tr. p. 113).

Out-of-district placements, such as residential or therapeutic day placements, often require substantial effort and cooperation from all parties involved to successfully secure a suitable bed or seat for a student in need. The resources of the family, school district, and nonpublic schools can be significantly taxed as the process unfolds. In this instance, the weighing of the parties' respective conduct and cooperativeness is mixed.

The evidence shows that one nonpublic school, Vanderheyden, was prepared by May 22, 2023, to set up an intake interview for the student while the student was still in New York, before leaving for Blue Ridge on June 17, 2023 (Dist. Ex 3 at p. 8). The parent testified about speaking to other schools in June 2023, but other evidence indicates that by July 3, 2023, the Randolph and Wyndam Lawn residential placements reported that the parents had been unresponsive to their intake requests (Dist. Ex. 3 at pp. 5-6).

The parent testified that the student's father attempted to re-engage Vanderheyden one time by voicemail several months later in August 2023 but did not follow up further due to a vacation (Tr. p. 110). While a vacation may have been much needed after a long period in a difficult family situation, it is not a convincing reason and it does not explain why the parents did not respond to the other nonpublic schools either before or at that time. The evidence suggests that the parent understood the importance of the intake process to the nonpublic schools and that their own concerns about missing time at Blue Ridge were a significant factor in their decision. However, this decision regarding intake interviews for a subsequent residential setting appears to have been made by the parents without discernible input from Blue Ridge clinicians indicating that it was imperative that the student not attend intake interviews.

On the other hand, the district has not produced evidence that the CSE or the CBST emphasized the importance of completing the intake process to facilitate a nonpublic school placement. Instead, it appeared to leave it to the nonpublic schools to stress the importance of the interview process. Thus, this case has some similarities and differences to another case, M.R. v. S. Orangetown Cent. Sch. Dist. (2011 WL 6307563, at *3, *12 [S.D.N.Y. Dec. 16, 2011]), where the district made clear the need to follow through with the intake process, which the parent in that case did not do in a cooperative manner due to personal misgivings or disagreements.

Thus, based on the above, the equitable considerations in accordance with 20 U.S.C. §§ 1412(a)(10)(C)(iii) and 1415(i)(2)(C)(iii) lead me to conclude that the award of tuition reimbursement should be reduced, given the parents' actions that reflect a failure to fully cooperate with the district in completing the process, but tempered by a partial completion of the process by the district through the efforts of the nonpublic schools with lackluster follow-up efforts by the CBST or CSE when the nonpublic schools reported to the district that the parents were unresponsive. While the parents may have felt that making the student available for certain required intake procedures would have placed additional burdens on the student in the context of her needs and current receipt of therapeutic interventions, the record does not support a finding that the parents informed the district of their concerns or attempted to work with the district to find a way for the student to participate in certain necessary steps to secure an appropriate approved nonpublic placement for her. However well-intentioned the parents' choices may have been in deciding not to make the student available for interview and tours, such actions cannot be said to demonstrate the requisite cooperation with the district that would support a finding that equitable considerations weighed in the parents' favor and supported reimbursement. Accordingly, the

IHO's determination regarding equitable considerations and the parents' cooperativeness is supported in part by the evidence in the hearing record, I will award reimbursement, but reduced by 50 percent. Since the equitable considerations do not favor the parents' entire request for tuition reimbursement at Magnolia Mill, such will also apply the reduction to the parents' request for transportation cost reimbursement; accordingly, the IHO's determination denying transportation reimbursement for the student and the parents travel to and from Magnolia Mill is also modified accordingly (see IHO Decision at pp. 17-18).

**C. Relief – Independent Educational Evaluations (IEE)**

The parents argue that the IHO erred in denying the reimbursement of the cost of the psychological evaluation on the grounds that the parent had not made a formal request for an IEE prior to having the private evaluation conducted. The district seeks to uphold the IHO's determination.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[10]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]. If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will

[10] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

In the April 30, 2024 due process complaint notice, the parent requested district funding for IEEs that was completed December 5, 2022 and August 16, 2023 (Parent Ex. A ¶¶ 23, 37). Contrary to the IHO's determination, the parents indicated in their due process complaint notice that they disagreed with the district psychoeducational evaluation and generally disagreed with the district evaluations because they did not provide sufficient information to make appropriate recommendations (id. at ¶ 23). The district psychoeducational evaluation was dated April 20, 2023 (Dist. Ex. 4).

Recently, the District Court of the Southern District of New York found that a parent may commence an impartial hearing and request a district-funded IEE in a due process complaint notice in the first instance and need not communicate with the school district or the CSE prior to seeking an impartial hearing regarding their request for such an IEE (Moonsammy v. Banks, 2024 WL 4277521, at *15-*17 [S.D.N.Y. Sept. 23, 2024]).[11] Accordingly, the parents' request for an IEE at public expense may not be denied on this basis. [12] While the IHO did not have the benefit of the district court's view in Moonsammy, ultimately I am constrained to reverse her determination to deny the parent's request for a public funded IEE on this ground.

Taking into account the parents' request for an IEE in the due process complaint notice and given the recent district court authority permitting this practice, the district was required to defend its evaluation of the student. The district did not defend its April 20, 2023 psychoeducational evaluation during the impartial hearing; the April 20, 2023 psychoeducational evaluation was admitted into evidence as a district exhibit but there was no witness testimony to explain the evaluator's findings (see Tr. pp. 1-187); and further, the district is not appealing the IHO's determination that it denied the student a FAPE for the 2023-24 school year. Having failed to defend its evaluation, I find that the district shall be required to reimburse the parents for the cost of the August 16, 2023 private psychological assessment of $4,000 (see Parent Ex. X).

[11] Under 34 CFR 300.502(b)(2), it would appear that the district has only one option to forestall litigation on the issue, and that is to grant the IEE at public expense before the presentation of evidence begins in the due process hearing that was commenced by the parent. This is of little consequence so long as the district is in agreement with the parent to grant the IEE. However, with the burden of production and persuasion placed on school districts under State law, there is little incentive for a parent to use the resolution meeting with a school district. Strategically, it would almost always be more effective from a parent's perspective to force a district into defending itself in an impartial hearing as soon as possible on this issue. The district's second option under the regulation to commence a due process hearing of its own accord "without unnecessary delay" is illusory in cases where the parent has already initiated the proceeding by making the initial request for an IEE in their own due process complaint notice.

[12] Although the District Court in Moonsammy found that a parent may request an IEE in the due process complaint notice in the first instance (2024 WL 4277521, at *15-*17), the Court indicated that parents should endeavor whenever possible to "[s]eparat[e] the IEE process from the formal dispute resolution process" as the Second Circuit Court of Appeals has explained that this "serves to reinforce the focus on collaboration and communication among an IEP Team" and "provides an additional opportunity for discussion and cooperation between parent and school before the parties feel that they need to resort to formal procedures" (Trumbull, 975 F.3d at 170).

Regarding the December 2022 neuropsychological evaluation, pursuant to the regulations, the parents are only entitled to one IEE at a public expense (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]). Accordingly, it would be inappropriate to award additional funding for the December 2022 neuropsychological evaluation especially when there is no evidence that the parents even paid for such evaluation. During the impartial hearing, the IHO requested the parents provide evidence of the cost of the December 2022 neuropsychological evaluation which was never received by the IHO (Tr. p. 67; see Parent Exs. A-F, H-S, U-Z). Further, the parents did not indicate in their due process complaint notice or their request for review the cost of the December 2022 neuropsychological evaluation.

**VII. Conclusion**

The evidence in the hearing record supports the IHO's determinations that Magnolia Mill was an appropriate unilateral placement for the student and the evidence leads to the conclusion that equitable considerations do not fully weigh in favor of the parents' request for tuition reimbursement for the student's attendance at Magnolia Mill during the 2023-24 school year or the related transportation costs. Finally, the parents are entitled to reimbursement for the cost of the August 16, 2023 private psychological assessment.

I have considered the parties' remaining contentions and find them unnecessary to address given the ultimate decision above.

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated September 13, 2024, is modified insofar as equitable considerations weigh partially in the parents' favor;

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for 50 percent of the parents' costs for Magnolia Mill and transportation for the 2023-24 school year;

**IT IS FURTHER ORDERED** that the IHO's decision, dated September 13, 2024, is modified by reversing those portions which denied the parent's request for an IEE at district expense; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents $4,000 for the cost of the August 16, 2023 private psychological assessment.

**Dated:** **Albany, New York**
**January 31, 2025**

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