

FINDINGS OF FACT AND DECISION

Case Number: 156531

Student's Name:

Date of Birth:

District:

Hearing Requested By: Parent

Date of Hearing: August 27, 2015
October 6, 2015
November 4, 2015
July 5, 2016
September 27, 2016
December 8, 2016
December 19, 2016
February 14, 2017
March 20, 2017

Actual Record Closed Date: April 14, 2017

Hearing Officer: Gary D. Peters, Esq.

Case No. 156531

NAMES AND TITLES OF PERSONS WHO APPEARED ON AUGUST 27, 2015

<input type="text"/>	DOE Designee	Dept. of Education
<input type="text"/>	Mother	Parent

NAMES AND TITLES OF PERSONS WHO APPEARED ON OCTOBER 6, 2015

<input type="text"/>	DOE Designee	Dept. of Education
<input type="text"/>	Mother	Parent

NAMES AND TITLES OF PERSONS WHO APPEARED ON NOVEMBER 4, 2015

<input type="text"/>	DOE Designee	Dept. of Education
<input type="text"/>	Mother	Parent
<input type="text"/>	<input type="text"/>	Dept. of Education

NAMES AND TITLES OF PERSONS WHO APPEARED ON JULY 5, 2016

<input type="text"/>	DOE Designee	Dept. of Education
<input type="text"/>	Mother	Parent

NAMES AND TITLES OF PERSONS WHO APPEARED ON SEPTEMBER 27, 2016

<input type="text"/>	DOE Designee	Dept. of Education
<input type="text"/>	Attorney	Parent
<input type="text"/>	Mother	Parent

NAMES AND TITLES OF PERSONS WHO APPEARED ON DECEMBER 8, 2016

<input type="text"/>	DOE Designee	Dept. of Education
<input type="text"/>	Attorney	Parent
<input type="text"/>	Mother	Parent
<input type="text"/>	<input type="text"/>	Dep't of Education

NAMES AND TITLES OF PERSONS WHO APPEARED ON DECEMBER 19, 2016

<input type="text"/>	DOE Designee	Dept. of Education
<input type="text"/>	Attorney	Parent
<input type="text"/>	Mother	Parent

Case No. 156531

Dep't of Education

NAMES AND TITLES OF PERSONS WHO APPEARED ON FEBRUARY 14, 2017

DOE Designee

Dept. of Education

Attorney

Parent

Mother

Parent

Parent

Parent

Parent

NAMES AND TITLES OF PERSONS WHO APPEARED ON MARCH 20, 2017

DOE Designee

Dept. of Education

Attorney

Parent

Case No. 156531

INTRODUCTION

On the above dates, I conducted hearings, pursuant to the Individuals Disability Education Act (IDEA, 20 U.S.C. section 1415 (f)(3) regarding a special education program, Students with Disability, New York City Impartial Hearing Case # 156531. The hearings were conducted at the impartial hearing office, New York City Department of Education, at 131 Livingston Street, Brooklyn, New York. At the hearing, the Department of Education, hereinafter referred to as the "DOE" was represented by its designee [] and the parent was represented by her counsel []

BACKGROUND

The child, hereinafter referred to as [] is a []; as per the Parent he has []. Additionally, since the end of the 2014-2015 school year, the DOE and the Committee of Special Education (CSE) denied [] special education services. Parent alleges that in May 2015, the "CSE" declassified her son despite []. The CSE allegedly ignored the several attempts of his mother to discuss her son's needs and instead requested an impartial hearing.

Parent's counsel maintained that during the 2015-2016 school year, the CSE continued to ignore []. The CSE was provided with a [] in December 2015, a [] in March 2016, and a [] in July 2016 confirming []. No action was taken until the DOE held a meeting in August 2016 to discuss providing [] with special education services; however, they refused to provide same.

Parent maintains that as the DOE failed to provide appropriate services to her son and that she enrolled him in a private special education school. She is seeking tuition reimbursement from the "DOE", compensatory services for [] for the 2015-2016 school year and reimbursement for an [] from November 2015.

THE DOE'S POSITION

Case No. 156531

On September 27, 2016 the DOE was served with a notice alleging that the DOE failed to provide [] with a FAPE, wrongly declassified him and incorrectly found him ineligible for services. The DOE maintains that it followed the procedures of the Chancellor's regulations in accordance with the Educational Law and determined that [] is a student without an educational disability and ineligible for services.

[] is a student who's [].
[]. Concededly, while [],
[], his difficulties aren't affecting his progress academically and as such, is not a child with a disabilities.

THE PARENT'S POSITION

That she is entitled to reimbursement for []
[] as the DOE ignored her son's [] and
provided entirely inappropriate recommendations. Additionally, []'s [] []
continue due to the CSE's mishandling of her son's educational needs.

Parent also requests that the DOE should be required to provide direct payment to the [] for her son's tuition as it failed to provide [] with an appropriate public school placement for the 2016-2017 school year. Lastly, the Parent is seeking a Related Service Authorization (RSA) for a from a [] [] [] []
[] to compensate for the DOE's failure to provide him with
[] for the entire 2015-2016 school year.

THE DEPARTMENT'S CASE

Ms. [] testified that she is currently employed by the DOE in
[] as an impartial hearing representative and has been in her position since August of 2016.

Prior to that she was working as a [] for [] and is a []. She stated that her responsibilities as a [] at [], include []
[]
[].

The witness conducted an IEP meeting for a reevaluation for []; she was directed to Exhibit 4-3, and stated that [] was described by his teachers and by school personnel

Case No. 156531

as [redacted] and that he's [redacted]. The team reviewed a [redacted] that was conducted by a DOE [redacted], teacher reports and progress reports. The witness recalled that [redacted] was classified as "[redacted]". She reviewed a [redacted], District Exhibit 2, and stated that the recommendations were as follows, "[redacted]
[redacted]
[redacted]
[redacted]
[redacted]. Therefore, [redacted]
[redacted], were not recommended.

She recalled that the parents voiced objections and concerns regarding the District's recommendation at the time of the meeting. Additionally, she was objecting to the presence of school personnel involved at the meeting; the chairperson, Ms. [redacted] [redacted] explained to her that since it was an IEP meeting, that program recommendations require that the school have members of the team present. The witness was directed to District Exhibit 4, the attendance page from meeting, and stated the following attendees were present: [redacted] a [redacted], an [redacted], and a [redacted] or [redacted] at the meeting. All teachers and support staff agreed with the District's recommendation of declassification.

Upon cross examination, the witness stated that the Parent was not present at the IEP meeting; that she participated on the phone. She recalled a discussion regarding rescheduling of the meeting and stated that "[redacted] [redacted] [redacted] [redacted] [redacted] [redacted]". The Parent requested a rescheduling and stated that she didn't want the [redacted] present. She remembered that scheduling was an issue, but didn't recall specifics.

Ms. [redacted] didn't remember if there were CSE minutes taken at this meeting. She recalled that the team reviewed a [redacted] from January 2015, however didn't review an evaluation from [redacted]. The witness was directed to Exhibit A, she recalled that there was another evaluation conducted by an agency that the DOE contracted out for, however she didn't review that report as it was deemed not to be

Case No. 156531

a good report, and that's why we had another [redacted]". She was uncertain if Exhibit A was the report as she never reviewed same.

The witness believed that the Parent may've brought to our attention that the report was poor and contained several grammatical errors. Consequently, "[redacted]
[redacted]
[redacted]". The witness stated that "[redacted]
[redacted]". The witness was directed to Exhibit 6 and conceded that it was reviewed at the meeting and confirmed that the provider was working on [redacted] with the child; he wasn't working on [redacted] as the Parent "requested that she shouldn't". Upon further questioning, the witness stated that she believed that it was "[redacted]
[redacted]". She confirmed that the report stated that "[redacted]
[redacted]
[redacted]".

The witness was directed to Exhibit F, an IEP from April 23, 2014; the mandate on page 6 provided for [redacted]
[redacted]. She was uncertain if this was the last IEP and in effect at the time of time of the meeting. She was unaware that the DOE had provided an RSA for [redacted]. As per Exhibit 2, the witness acknowledged that it indicated that [redacted] through an RSA at [redacted] was receiving [redacted]. She conceded that the team reviewed this report in the meeting. Ms. [redacted] testified that as the parent never shared any documents to indicate that progress was not reviewed; she conceded that the DOE was paying for the [redacted] and that it was mandated on his IEP.

The witness was directed to DOE Exhibit 5 and it stated that there are times that "[redacted]
[redacted]". During the IEP meeting, the witness stated that she didn't recall if she reviewed the goals from the prior IEP.

THE PARENT'S CASE

During the 2014-2015 school year, [redacted] attended [redacted] at [redacted].

Case No. 156531

(Tr. 148: 12-16.) He was classified with [] [] [] and received [] [] pursuant to an IEP created in April 2014. (Parent's Ex. F, Tr. 149: 4-9.) In December 2014, the CSE initiated a [] of [] (Tr. 149: 21-23.) [] ("[]"), an independent agency with no relationship to [] or the DOE, conducted the evaluation. (Parent's Ex. A, Tr. 150: 7-9.) The evaluation examined [] and found [] [] which indicated that [] []. (Parent's Ex. A at 5.) The evaluation also found that [] [] and recommended that he receive [] []. (*Id.*) After the evaluation was completed, the CSE deemed it unacceptable. According to the Parent, it was disqualified for []. (Tr. 151: 5-17.)

A [] evaluator from the DOE conducted a second evaluation. (DOE Ex. 2, Tr. 153: 4-12.), which indicated [] [] and determined that []. This confirmed a [] [] [] (DOE Ex. 2 at 4.) The DOE's evaluator determined that [] than the independent evaluation from []; however, the DOE's report did not recommend []. (*Id.* at 2.) The report directed [] to []. (*Id.*)

After the completion of this report, in May 2015, the CSE scheduled an IEP meeting to review []'s special education services. The Parent stated that she requested that the CSE adjourn the meeting to a later date because she could not be physically present at the meeting as she was traveling. (Tr. 154: 7-18.) The CSE denied her request, held the meeting and the Parent stated that she had no choice other than to attend by phone. Additionally, that it was difficult to meaningfully participate by sharing her thoughts and asking questions to the other individuals involved. (Tr. 200: 18 – 201: 3, 18 – 202: 13.) At the meeting the CSE only considered the DOE's January 2015 [] [], and entirely ignored the independent December 2014 evaluation. (Tr. 40: 3-6, 155: 16-21, 156: 8-11.) The DOE's January 2015 evaluation did not recommend [] [] for [] and the CSE declassified him as a special education student.

Case No. 156531

(DOE Ex 4.)

The Parent did not agree with the CSE's decision to declassify her son; although she could've have requested an impartial hearing, she stated that she preferred to work with the CSE. Following the meeting, the Parent wrote to [redacted], the [redacted] of the CSE, asking for a second IEP meeting. (Parent's Ex. G, Tr. 151: 19-20, 156: 18 – 157: 8.); she did not receive a response. She sent a second letter on May 22, 2015 again requesting a second IEP meeting and for an [redacted]. (Parent's Ex. H.) The CSE failed to respond to the Parent's request and she sent a third letter on June 5, 2015 (Parent's Ex. I, Tr. 160: 4-14.) On June 11, 2015, the DOE initiated the impartial hearing proceeding. (DOE Ex. A, Tr. 160: 21-23

During the 2015-2016 school year, [redacted] attended [redacted] ("[redacted]"). (Parent's Ex. E, Tr. 162: 10-12.) The Parent decided to remove her son from the [redacted] due to [redacted] and believed that [redacted] (Tr. 205.)

At [redacted], [redacted] did not receive any special education services due to his declassification, and experienced problems. (Tr. 163: 4-9.) He had difficulty in [redacted] [redacted]. (Tr. 163: 12-20.) He also had problems with [redacted] [redacted] and [redacted] [redacted] [redacted] [redacted]. (*Id.*) The DOE conducted a [redacted] in March of 2016; it confirmed [redacted]'s difficulties with [redacted] [redacted]. (Parent's Ex. E.) During a 55 minute observation, it was noted that [redacted] [redacted]. (*Id.*) The observation also noted that [redacted] had difficulty [redacted] [redacted]. (*Id.*)

During this school year, the Parent obtained two evaluations for her son. The first evaluation was a [redacted] [redacted] administered by [redacted], a licensed and certified [redacted] [redacted]. (Parent's Ex. D, Tr. 235: 5-7.) [redacted] has been in private practitioner for well over [redacted] years. He is now a [redacted] [redacted] and [redacted]. Her area of

Case No. 156531

specialty is [redacted]; she is also a [redacted] and administers [redacted] assessments.

This witness stated that [redacted] presented as [redacted] who had [redacted], and that he tested [redacted], and found that he had [redacted] [redacted] and he also had [redacted] [redacted].

[redacted] [redacted] diagnosed the child with [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]. (Parent's Ex. D, Tr. 248: 24 – 249: 2.) She noted that [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]. (Parent's Ex. D, Tr. 238: 16-18.) She documented that [redacted] continued when she administered the [redacted], which was the same evaluation provided to him in January 2015, wherein [redacted] [redacted]. (Parent's Ex. D, Tr. 245: 24 – 246: 3.)

[redacted] described [redacted] [redacted]. (Tr. 246: 6-25.) To address his [redacted], [redacted] recommended that [redacted] [redacted]. (Parent's Ex. D, Tr. 250: 11 – 251: 3.) [redacted] noted that [redacted] [redacted]. (Tr. 260: 16-23.), [redacted] also recommended:

[redacted]
[redacted]
[redacted]
[redacted] (Tr. 252: 6-17; 253: 22-25.)

The second assessment conducted in the 2015-2016 school year was a [redacted] from [redacted] administered by [redacted] [redacted]. (Tr. 275: 9-11.) Dr. [redacted] described [redacted] as "[redacted] [redacted]" since [redacted]

Case No. 156531

[redacted]
[redacted]. (Tr. 293: 14-16, 24 – 294: 8.); consequently, [redacted]. (*Id.*) Based on conversations with the parent and teacher, surveys and historical reports in addition to their observations and testing of [redacted], the doctors diagnosed him with “[redacted],” which [redacted] [redacted] [redacted]. (Tr. 294: 19-25, 296: 1-3.) They determined that he demonstrated [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]. (Tr. 292: 9-12.) Dr. [redacted] noted that [redacted], and that [redacted]. (Tr. 290: 1-15.); when [redacted] [redacted], [redacted] demonstrated [redacted] [redacted]. (Tr. 291: 9-15.)

Dr. [redacted] testified that a [redacted] was recommended for the child in order to assist in [redacted]
[redacted]. (Parent’s Ex. C, Tr. 305: 2-13.) He recommended that [redacted] be placed with [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]. (Parent’s Ex. C, Tr. 314: 2-6.) and that he be provided with [redacted] as part of the curriculum with related services for [redacted] in order to [redacted]. (Tr. 316: 5-17, 317: 2-9.)

The Parent stated that she provided both evaluations to the CSE. In December 2015, shortly after she received a copy of [redacted]’s report she provided it to [redacted] [redacted], who works for the CSE. (Parent’s Ex. K, Tr. 167: 18-23, 215: 16-21, 228: 2-7.) The CSE did not convene a meeting after receiving [redacted]’s evaluation. (Tr. 169: 11-14.) The Parent also provided a [redacted] to Mr. [redacted], on July 11, 2016, shortly after receiving same. (Parent’s Ex. J, Tr. 228: 11-12.)

The CSE scheduled an IEP meeting in August 2016. (Tr. 170: 15-17); although sections of the [redacted] [redacted] were discussed, the diagnosis and recommendations in the report were not discussed. (Tr. 171: 13-15, 174: 3-8.) The [redacted]

Case No. 156531

_____ reports by _____ were not discussed as the members of the IEP team claimed they did not have the report (Tr. 174: 20-24.) The Parent maintained that she sent the _____ to Mr. _____, just as she had the _____ and provided the team with another copy of _____'s report during the meeting. The team informed the Parent that they were not comfortable with considering the report as they claimed that they had just received it. (Tr. 175: 14-20.) After the meeting concluded, the Parent sent the IEP team another copy of _____'s report via email. (Parent's Ex. K, Tr. 177: 7-10. She was never contacted again by the CSE and an IEP was not created for the 2016-2017 school year. (Tr. Tr. 179 and 180: 3-5.)

The Parent enrolled her son in the _____ for the 2016-2017 school year and believed it would provide an appropriate setting to address his needs. (Tr. 180: 18-21.) The _____ is a _____
_____. (Tr. 355: 12-13, 22-25.) The curriculum is _____, while at the same time _____ (Tr. 391: 24 – 392: 3.) _____ is implemented at the school while students are provided with _____ including _____ Teachers engage in _____ (Tr. 358: 19 – 359: 4.) To support student's _____ needs, _____ (Tr. 360: 1-13.) Additionally, students engage in a _____ (Tr. 361: 1-5.)

At the _____, _____ is in a _____ where he is one of _____ students. (Tr. 371: 24-25, 372: 14-15.). He receives accommodations in his class to meet his needs, including _____

_____. (Tr. 376: 12-20, 378: 19-25,

Case No. 156531

379: 11-25, 380: 11-25.) [] receives []
[]. (Parent's Ex. P, Q, R, Tr. 385: 7-16.)

On August 10, 2016, the Parent informed the DOE of her intention for her son to attend the [] in September. (Parent's Ex. L.) She stated that despite the fact that she had interest in working with the DOE in classifying her son as a student with a disability and identifying an appropriate public school for him (*Id.*), She never heard from the DOE in response to her letter. (Tr. 182: 20-25.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The purpose behind the Individuals with Disabilities Education Act (IDEA) is to (20 U.S.C. section 1400-1482) ensure that students with disabilities have available to them a FAPE; see *Schaffer v. Weast*, 126 S. Ct. 528, 531 [2005]; *Bd. Of Education v. Rowley* 458 S.Ct. 176, 179-81 [1982]; *Frang G. v. Bd. Od Edu.* 459 F. 3d 356 371 92d Cir. 2006). A FAPE includes special education and related services designed to meet the student's unique need provided in conformity with a comprehensive written IEP (20 U.S.C. section 1401 [9] [D] 34 C.F.R. section 300.13 see 210 U.S.C. section 1414 'd' ; 34 CFR Section 200-347_. The student's recommended program must also be provided in the east restrictive environment (LRE) (20 U.S.C. section 1412 [a][5]aA); CFR section 300.13 [a][2][i], 200. 1.116 [a][2]; 8 NYCRR 200.6 [a][1]; see *Walczak v. Fla. Union Free School Dist.* 142 F. 3d 119, 132 [2d cir. 1998]

The legal standard applicable to request for payment for educational services such as in this case is well established. A Department of Education may be required to pay for educational services obtained for a child by the child's parents if: 1. the services offered by the Department of Education were inadequate or inappropriate, 2, the services selected by the parents were appropriate and 3. equitable considerations support the parent's claims (*Sch. Comm. Of Burlington v. Dept. of Educ.* 471 U.S. 359 [1985]; *Florence County Sch. Dist. Foru v. Carter*, 510 U.S. 7 [1993]; *Cerra v. Pawling Center. School Dist.* 427 F. 3d 186, 192 [2d Cir. 2005] "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 developed a proper IEP".

Under the second criteria of the legal standard, the child's parent bears the burden

of proof with regard to appropriateness of the services which the parents obtained for the child for the current school year (Application of a Child with a Disability, Appeal No. 94-29; Application of the Bd. Of Education of the Monroe-Woodbury CSE, Appeal No. 93-34; Application of a Child with a Disability, Appeal No. 95-57, in order to meet that burden, the parent must show that the services were “proper under the act”, (IDEA) (Burlington 471 U.S. at 370) i.e. that the private school offered an educational program which met the child’s special educational needs (Application of a Child with a Disability, Appeal NO. 94-29). The test for the parent’s private placement is that it is appropriate not that it is perfect (M.S. v Bd. Of Educ. 231 F. 3d 96, 105 [2d Cir. 2000] cert. denied 532 U.S. 942 2001. The private school need not employ certified special education teachers, nor have its own IEP for the student. While parents are not held as strictly to the standard of placement in the LR as school districts are restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. School Comm. 315 F. 3d, 21, 26-17 [1st Cir. 2002]).

The final criterion of ran award of tuition reimbursement is that the petitioners’ claim is supported by equitable considerations (Carmel Centre Sch. Dist. V.V. P. 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005] aff’d 2006 WL 2334140 (2d cir. 2006);’ Frank G. 459 F. 3d at 363-64). Equitable considerations are relevant to fashion relief under the IDEA (Burlington 471 U.S. at 374; Mrs. C. v. Voluntown Bd. Of Edu. 226 F. 3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that [c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required) such considerations include the parties, compliance or non compliance with state and federal regulations pending review the reasonableness of the parties’ positions and like matters (Wolfe v. Taconic Hills Cent. Sch. Dist. 167 F. Supp 2d 530, 533 [N.D.N.Y. 2001] citing Town of Burlington v. Dept. of Educ. 736 F. 2ds at 773, 801-02 [1st Cir. 1984] aff’d 471 U.S. 359 [1985]; with respect to equitable considerations, tuition 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 fining of

Case No. 156531

unreasonableness with respect other action taken by the parents 20 U.S.C. section 1412 (a)(10)(C)(iii) Warren G. v. Cumberland Co. Sc. Dist. 190 F. 3d 80, 86 (32d Cir. 1999); see Application of the Bd. Of Edu. Appeal No. 04-102; Application of the Bd. Of Educ. Appeal No. 04-026) However, reimbursement may not be denied or reduced for failure to provide such notice where compliance with the notice required would likely result in physical or emotional harm 20 U.S.C. 14122 (a)(C) (iv)(I)(cc)(II)(bb).

The DOE designee stated that to be eligible for FAPE a child must have a disability that adversely affects their educational performance. The evidence established that the Parent's claims are meritless in accordance with the IDEA. Therefore, []'s parents are not entitled to perspective funding and/or tuition reimbursement for the unilateral placement at the [] for the 2016/2017 school year, nor are they eligible for compensatory [] and/or reimbursement for their private [].

Ms. [], the [] who chaired the CSE review during the 2014/2015 school year, opined that [] is a student with specific challenges that do not warrant the exclusion of receiving instruction with typically-developing students. It is the DOE's position that the testimony and evidence established that [] is a student who []; due to his [], he []. In light of these facts, and [], it led the IEP team to believe that he was no in need of special education services. He was ultimately declassified as an academically-disabled student.

Furthermore as per testimony from [], the [] who facilitated the IEP meeting in August 2016 to determine whether or not [] required special education support to address his [], that he did not meet the criteria for special education support and/or services as outlined in the IDEA Section 300.8.. Ms. [] stated that during this conference, the evidence highlighted that [] had [], which led the IEP team once again to believe that he did not warrant special education services.

The DOE asserts that they are not disputing []'s struggles, however the question

Case No. 156531

is whether or not he requires special education services and/or related services to have equal access to the general education curriculum and make meaningful progress as outlined within the IDEA. Mr. [] stated that the Parent answered these questions best when she stated "[]". Additionally, the testimony and evidence corroborates Ms. the Parent's testimony.

I will not repeat the all details of evidence where but the support and basis for my findings of fact and decision are grounded in that testimony as it appears above. I have considered the testimony of all of the witnesses who testified at the hearing. With respect to the issues presented at the hearing, I make the following findings of fact.

1. I find that the parents have met their burden in proving that the services that they have unilaterally chosen for [] are appropriate.
2. Equitable considerations support the Parent and reimbursement and related relief is appropriate.

As the State Review Officer has expressly recognized in the absence of evidence demonstrating that the parents failed to cooperate in the development of the IEP or otherwise engaged in conduct that precluded the development of an appropriate IEP, equitable considerations generally support a claim of tuition reimbursement." See *supra*, Appeal No. 05-087 (referencing Application of the Board of Edu. Appeal No. 05-030; Application of the Board of Educ. Appeal No. 04-091; Application of a Child with a Disability, Appeal No. 04-049).

When a parent believes a school district failed to provide their child with a FAPE, the parent may enroll the student in a private school at their own expense and request reimbursement. An IHO will award reimbursement if he or she finds that: (1) the educational program offered to the student by the school district was inappropriate; (2) the program selected by the parent was appropriate; and (3) the equitable considerations favor reimbursement. *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 246-47 (2009); *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 363 (2d Cir. 2006); *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).

Case No. 156531

In New York, the Legislature has seen fit to place the initial burden on the school system to prove the appropriateness of both its educational program and placement for a student. Educ. Law § 4404(1)(c). Thereafter, the burden shifts to the parent to prove the appropriateness of his/her chosen school for the student and that the equities favor the parent. *M.O. v. New York City Dept. of Educ.*, 793 F.3d 236, 243 (2nd Cir. 2015). To meet its initial burden, the DOE must show that “a preponderance of the evidence” presented during the hearing establishes that the program offered to the student was appropriate. *A.M. v. New York City Dept. of Educ.*, No. 15-4076, 2017 WL 83384, at *14 (2d Cir Jan. 10, 2017). If the DOE is unable to present sufficient evidence to establish the appropriateness of its proposed program, it cannot meet its burden. *Id.* (reversing an IHO ruling because the DOE presented no evidence supporting the appropriateness of its IEP).

As stated above, I find that the DOE failed to provide [] with an appropriate educational program or placement for the 2016-2017 School Year. I agree with Parent’s counsel that the DOE failed to create a program or provide a placement for [] for this current school year. The DOE maintained that an IEP was not provided to [] in August 2016 because his [] was sufficiently high to not warrant services. (Tr. 85: 11-16.); the DOE failed to prove same and or provide evidence to establish the level of []’s [] during the 2015-2016 school year. Additionally, I agree that the DOE produced no evidence of his ability to [] []. The only evidence regarding []’s abilities during the 2015-2016 school year were provide by the Parent and established that her son had difficulties with []. (Parent’s Exs. C, D, E.)

I concur with Parent’s counsel in that [], however this fact does not excuse the DOE from its obligation to provide special education services. The U.S. Department of Education recognized in Letter to Anonymous, that students who have high cognition and have disabilities are protected under the IDEA and implementing regulations. Letter to Anonymous, 55 IDELR 172 (2010) (stating that a student with ADHD could require special education services to address a lack of organizational skills.)

(*Id.*)

The CSE failed to conduct a follow up IEP to discuss that report despite its promise to do so.

Ms. [] testified that she reviewed the [] during the August IEP meeting. (Tr. 113: 15-17.); however that the team determined that it was unnecessary to provide him with special education services. Dr. [] testified that
[]
[]
[]
[]. (Tr. 310:16-25.) More particularly, [] is exposed to [] and needs to [], it is going to be very difficult for him to do this with his [][][][] issues without an appropriate educational environment. (Tr. 311: 7-16.)

Parent maintained that if the DOE properly reviewed the assessments and [redacted], it would have recognized that [redacted] was a student who was struggling.

Case No. 156531

However, the DOE failed to do this and to provide him with a necessary and appropriate educational program. Additionally, the DOE provided no educational placement for the 2016-2017 school year for [] and failed to provide him with a FAPE for the 2016-2017 school year. _

[] is attending the [] for the 2016-2017 school year. I agree with the Parent that her son's placement at [] is appropriate and the DOE has presented no evidence to the contrary. The classroom teacher, [], testified and described how she and other professionals at the school are able to accommodate []'s special education needs. (Tr. 376-385.) Ms. [] explained that in addition to [] receiving

[], she collaborates with the school's [] to help [] []. (Tr. 376: 1-6, 12-15.) Ms. [] stated that she [] and is aware of []

[], (Tr. 376: 12 – 377: 7.) Regarding []'s [] [] and [], Ms. [] tries to []. (Tr. 377: 13-20.) She often provides [] with [] and [] []. (Tr. 377: 21-24.) She also provide him with [] [] [] [], including [] [] [] [] []. (Tr. 377: 21 – 378: 4, 380: 13-25.) Furthermore, [], is provided with []

[] [] [] [] [] [] [] [] [] [] [] []. (Tr. 384: 1-11.) These techniques help [] with respect to [] [] and []. [] is provided with [] [] [] [] [] [] [] [] [] [] []. (Tr. 379: 11-25, 381: 13-17.)

Dr. [] testified that [] needs a school that [] [] and the [] provides same (Tr. 318: 3-18.) The school

Case No. 156531

supports []'s [] [] [] development; [] [] [], he receives [] [] and []. (Tr. 382: 25 – 383: 4.) The student uses [] to [] and to [] [] [] [] []. (Parent's Ex. N.) In his [] class, he is learning about []. (*Id.*) Additionally, within the classroom, []. As stated, Ms. [] often []. (Tr. 382: 4-9, 16-22.)

Dr. [] is familiar with the [] [] having worked with many students who attend it, and testified that it can provide an appropriate educational setting for [] (Tr. 326: 5-8, 327: 9-10.). He explained that the school can meet his needs and provide []. (Tr. 327: 9-16.)

I agree that the [] is an appropriate placement for [] and that he is making progress. Ms. [] testified that she has observed him [], especially with regard to []. (Tr. 386: 7-13.) She explained that [] and []. (Tr. 374: 11-13, 386: 19-23.) Although [], the efforts he is making in this area are helping. (Tr. 387: 4-7.)

Regarding equitable considerations, I find that the Parent cooperated with the DOE to identify the appropriate special education services for her son. On the very day that her son was declassified from special education, May 8, 2015, the Parent contacted the CSE to request another meeting. (Parent's Ex. G, DOE's Ex. 4.) After this May 8th communication, she contacted the CSE two more times to request a second opportunity to discuss her son's special education needs as she was concerned about the DOE's decision to declassify him. The Parent believed that she didn't have the opportunity to meaningfully participate in the May 8th IEP meeting. (Parent's Ex H, I, Tr. 201: 18 – 202:

Case No. 156531

4.) Instead of scheduling a second meeting to discuss her concerns, the DOE filed an impartial hearing request. (DOE Ex. 1.)

I find that the Parent again made efforts to cooperate with the DOE in to the 2015-2016 school year. She received [redacted]'s [redacted] [redacted] and provided it to Mr. [redacted]. She also provided Mr. [redacted] with her son's [redacted] in July 2016. (Parent's Ex. J.) I find that she reasonably assumed that Mr. [redacted] would share reports with his colleagues at the CSE. The DOE never contacted the Parent to meet to discuss [redacted]'s report. (Tr. 168: 7-8.) An IEP meeting was not scheduled until August 2016 after Mr. [redacted] received the [redacted]. (Tr. 170: 11-17; 228: 6-7.)

Incredibly, when the CSE held the IEP meeting in August 2016, the DOE representatives claimed they did not have [redacted]'s report. (Tr. 175:1.) After the Parent again provided the DOE with a copy of [redacted]'s report during and after the IEP meeting, the CSE representatives never contact her to discuss the report. (Tr. 179: 23-25.) I agree that the DOE's lack of communication with the Parent in scheduling an IEP meeting and in timely reviewing the evaluations, demonstrate the DOE's failure to equitably work with the Parent.

Additionally, the Parent made additional efforts to cooperate with the DOE and secure special education services for her son were documented in the letter she submitted to the CSE, through her attorney, informing them of her intent to place her son at the [redacted] for the 2016-2017 school year. (Parent's Ex. L.) As required, she sent this letter more than ten business days before her son began at the [redacted] on September 8, 2016. (*Id.*) 20 USC § 1412(a)(10)(C)(iii)(bb).

The Parent expressed an interest in working with the DOE to appropriately classify her son and identify a special education placement for him in a public school. (*Id.*); however, she received no response from this letter and never received any program or placement for son. (Tr. 182: 20-25.)

It is uncontroverted that the Parent signed an enrollment contract with the [redacted] [redacted] before she met with the DOE in August 2016. However, she stated that it was to ensure that she had a back-up plan for her son in case the DOE did not appropriately plan

Case No. 156531

for hi. She was aware that pursuant to her enrollment agreement she would be able to withdraw her son from the [] [] any time before October 1st with limited financial consequences if the DOE provided her son with an appropriate educational placement. (Parent's Ex. P at 3-4, Tr. 386: 20-25.) Finally, the Parent stated that she was aware of her obligation to pay the []'s tuition. (Tr. 184: 21-23.) While she is asking for an award of prospective funding paid directly to the [] due to her limited financial means, she understands she is bound by the []'s enrollment contract to pay for her son's tuition. (Tr. 184: 24 – 185: 13.)

New York courts have recognized that parents who cannot afford up-front payments should not be prevented from petitioning for publicly-funded tuition on the identical principles facing parents who have paid all, or part, of the tuition prior to seeking tuition reimbursement from a school district. Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F.Supp.2d 138, 147 (W.D.N.Y. 1999) (granting preliminary injunction requiring a school district to pay for private placement and instructing the district to "make whatever financial arrangements are necessary" to allow student to attend private school); Connors v. Mills, 34 F. Supp. 2d 795, 804 (N.D.N.Y. 1998) ("It simply cannot be the case that an act designed to grant 'all' disabled children access to needed services would undermine that very goal by making such access dependent upon a family's financial situation.").

I conclude that that the Parent cooperated in working with the DOE in an effort to identify an appropriate public school placement for her son and that the equities favor her position.

Regarding compensatory services, as the DOE acted inappropriately when it decided to declassify [] from receiving special education services and that he is entitled to receive same. The DOE failed to establish a credible reason to discredit the [] [] performed by []. The DOE's impartial hearing request stated that it was disapproved due to grammatical, spelling and contextual errors. (DOE Ex. 1.) I agree with the Parent that the DOE produced no evidence of these errors or how they affected the substantive conclusions of the report. Ms. [] testified that she was aware of the evaluation, however, never personally reviewed the report and could not explain why it

Case No. 156531

was deemed inappropriate. The DOE presented no evidence to explain why the report was discredited. Additionally, the [] report, prepared by an independent agent of the DOE also determined that [] needed [] [] [] because of his []. When this evaluation assessed [] with the [], he scored in the [], however the report was conducted by a DOE professional which was the only report considered. Despite the fact that [], the DOE's in-house report determined that [] was not in need of []; the report recognized that child had [], but only recommended that []. I find that []'s testimony was credible wherein he stated that this recommendation is "absolutely no[t] accurate" because [] and []. (Tr. 258: 19 – 259.)

The team that conducted []'s May 2015 IEP meeting where he was declassified from special education, exhibited bad faith when it determined that the [] [] produced by its own colleague should be afforded more weight than the report of an independent evaluator. Additionally, the team disregarded a recommendation within a [] from [], the school [] was attending at the time of the meeting that was also reviewed during the meeting. (DOE Ex. 6, Tr. 44: 15-19.) Although the provider who wrote this report acknowledged that she was not addressing [], she stated that he continued to show a need in [] goals. (DOE Ex. 6.) The only recommendation for a decrease in services that this report made, was that [] no longer needed [] to address [] goals. I agree with Parent's counsel that it is uncertain if the IEP team reviewed any of the goals on []'s previous IEP, goals that addressed [], to ensure they had been met before deciding to declassify him. Ms. [] could not identify his previous IEP. (Tr. 50: 4-6.)

I agree that at the time of the IEP meeting in May 2015, the DOE had more than sufficient evidence to find that [] continued to need [] to address []. The DOE disregarded this evidence and denied [] any

Case No. 156531

special education services.

The IDEA provides that courts "shall grant the relief that the court determines to be appropriate." (20 U.S.C. § 1415(i)(2)(c)(iii); 34 C.F.R. § 300.516(c)(3).) Compensatory education is "prospective equitable relief" that requires a school district to fund education "as a remedy for any earlier deprivations in the child's education." *Somoza v. New York City Dept. of Educ.*, 538 F.3d 106, 109 n.2 (2d Cir. 2008). [redacted]'s April 2014 IEP mandated that he receive [redacted] [redacted]. (Parent's Ex. F.) As such, to compensate [redacted] for the DOE's inappropriate decision to withhold these sessions during the 2015-2016 school year when it declassified him, the DOE should be ordered to provide him with [redacted] for the entire school year, i.e., [redacted], of make-up service.

The Parent is entitled to reimbursement for [redacted]'s [redacted] [redacted]. 8 NYCRR § 200.5(g). (Parent's Ex. D, Q.) The DOE's [redacted] from January 2015, which was the only such report the CSE ever considered, was wholly inappropriate and stands as an aberration among his [redacted]. The DOE's report ignored the gravity of [redacted] and provided entirely inappropriate recommendations with regards to addressing such issues. (Tr. 258: 19 – 259.) The DOE's reports and recommendations directly contradicted the recommendation of the [redacted]'s report, which was commissioned by the DOE and took place just one month earlier. (Parent's Ex. A.) Additionally, as per Parent's counsel, the inappropriateness of the DOE's evaluation is further evidenced by the fact that a second independent evaluator, [redacted], identified [redacted]'s need for [redacted] [redacted] ten months after the DOE's evaluation. Furthermore, [redacted] have continued through to the present day, evidencing that the DOE's January 2015 report was inappropriate. I again agree with Parent's counsel in that if the CSE had not disregarded the [redacted]'s report, and/or if the DOE had conducted a proper evaluation in January 2015, the Parent would not have needed to commission [redacted]'s report. Therefore, the Parent should be reimbursed by the DOE for the cost of [redacted]'s evaluation and report.

I agree with the parents that [redacted]'s require a [redacted] school

Case No. 156531

setting with [redacted]
[redacted], and all services which can address her needs. I find that the [redacted]
where he has been in attendance since September 2016 is an appropriate placement for
[redacted] and that he has made "meaningful educational progress as evidenced by the testimony
herein and by the academic interim report card.

ORDER

For the foregoing reasons, I Order the following:

- (1) That the DOE provide direct payment to the [redacted] tuition for the
2016-2017 school year in an amount not to exceed the sum of [redacted]
within 30 days of receipt of final bill.
- (2) That the DOE issue a RSA for a [redacted] [redacted]
[redacted] to compensate for the DOE's
failure to provide [redacted] with [redacted] for the entire
2015-2016 school year.
- (3) That the DOE reimburse the Parent in the sum of [redacted] for the cost of the
[redacted] performed by [redacted]
[redacted] within 30 days from the date of this order.

Dated: April 21, 2017

[redacted]

Gary D. Peters, Esq.
Impartial Hearing Officer

GDP: [redacted]

PLEASE TAKE NOTICE

The parent and/or the New York City Department of Education has a right to obtain a review of this decision by a State Review Officer of the New York State Education Department under Part 200.5(k) of the Regulations of the Commissioner of Education, Section 4404 of the Education Law, and the Individuals with Disabilities Education Act.

Case No. 156531

Directions and forms can be found on the Office of State Review website:
<http://www.sro.nysed.gov/RevisedRegulationsOverview.html>

Case No. 156531

DOCUMENTATION ENTERED INTO THE RECORD**PARENT'S EVIDENCE**

A.	<input type="text"/>	12/17/14	14
B.	Related Service Progress Report/ <input type="text"/>	6/30/14	2
C.	<input type="text"/>	December 2015	17
D.	<input type="text"/>	11/21/15	8
E.	<input type="text"/>	3/23/16	2
F.	IEP	4/23/14	9
G.	Request for IEP meeting	5/8/15	1
H.	Request for IEP meeting	5/22/15	1
I.	Request for IEP meeting	6/8/15	1
J.	E Mail from Parent to <input type="text"/>	7/11/16	1
K.	E Mail from Parent to CSE	8/16/16	1
L.	Notice of Placement/Email Delivery	8/10/16	3
M.	<input type="text"/>	undated	1
N.	<input type="text"/>	Fall 2016	1
O.	<input type="text"/>	November 2016	1
P.	Enrollment Contract <input type="text"/>	2016-2017	8
Q.	Invoice <input type="text"/>	11/21/15	1
R.	Counter IHO Request	9/27/16	6
S.	Closing Statement Parent's Attorney	3/20/17	26

DOE's EVIDENCE

1.	Due Process Complaint	6/11/15	3
2.	<input type="text"/>	1/22/15	8
3.	Prior Written Notice Recommendation	6/4/15	2
4.	Recommendation of Classification	5/8/15	3
5.	Teacher Report	undated	2
6.	<input type="text"/> Progress Report	undated	1
7.	Receipt of Impartial Hearing Delivery	6/25/15	1

Case No. 156531

Case No. 156531

Case No. 156531

Case No. 156531

--

Case No. 156531

--

Case No. 156531

PLEASE TAKE NOTICE

Within 35 days of the date of this decision, the parent and/or the New York City Department of Education has a right to appeal the decision to the State Review Officer of the New York State Education Department under Section 4404 of the Education Law and the Individuals with Disabilities Education Act.

"The notice of intention to seek review shall be served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed. The petition for review shall be served upon the school district within 35 days from the date of the decision sought to be reviewed. If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period." (8NYCRR279.2[b]) Failure to file the notice of intention to seek review is a waiver of the right to appeal this decision.

Directions and sample forms for filing an appeal are included with this decision. Directions and forms can also be found in the Office of State Review website: www.sro.nysed.gov/appeals.htm.