Case Number: XXXXXX NYC Case Number: «Case»

**FINDINGS OF FACT AND DECISION**

Case Number: «Case»

Student’s Name[[1]](#footnote-1): «Last\_Name», «First\_Name»

Date of Birth: «DOB»

School District: N.Y.C. Dept. of Ed., District #

Hearing Requested by: «Parents\_Name» (“Parent(s)”)

Request Date/Date Complaint Filed: «Request\_Date»

Date(s) of Hearing: «Hearing\_Date»

Actual Record Closed Date: «Record\_Close\_Date»

Date of Decision: XX/XX/202X

Date of Distribution: XX/XX/202X

Time Sensitive Choose an item.

Impartial Hearing Officer: Corey Forster, Esq.

### NAMES AND TITLES OF PERSONS WHO APPEARED ON «Hearing\_Date»

For the Student:

Enter information. Press “enter” to add more as needed.

For the Department of Education:

Enter information. Press “enter” to add more as needed.

**JURISDICTION**

This proceeding arises under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, et seq.; Article 89 of the New York State Education Law; and the New York State regulations at 8 NYCRR § Part 200, et seq.

The undersigned Impartial Hearing Officer (“IHO”) is a certified New York State Special Education Hearing Officer, employed by the New York City Office of Administrative Trials and Hearings (“OATH”) as a Special Education Impartial Hearing Officer, and meets all of the qualifications and requirements outlined in both federal and state statute which grant the IHO the authority to adjudicate this hearing. Furthermore, the IHO is not currently, nor has ever been, an employee of the NYC Department of Education, and does not have any personal or professional interest or bias that conflicts with his objectivity to hear this matter.

**BACKGROUND**

Parent, through counsel, filed a Due Process Complaint (“DPC”) on or about «Request\_Date». In the DPC, Parent alleges that the Department of Education (“DOE” or “the District”) failed to offer Student a free appropriate public education (“FAPE”) for the «School\_Years» school year. [EXHIBIT].[[2]](#footnote-2) By way of relief, Parent seeks an award of tuition reimbursement/direct tuition funding for Student’s attendance during the «School\_Years» school year at Private School, a private program not approved by the Commissioner of Education for the education of students with disabilities. *Id*. Furthermore, Parent alleges that the placement is appropriate considering Student’s specific needs and the equities support their claim for tuition reimbursement and direct tuition funding for the school year(s) at issue. *Id*. In light of the foregoing and as more fully discussed below, I find that a) the DOE failed to prove its burden that it offered Student a FAPE for the «School\_Years» school year(s), b) Private School offers Student specially designed instruction sufficient to meet Student’s needs, and c) the equities support Parent’s requested relief including door-to-door transportation services to and from Private School.

**PROCEDURAL HISTORY**

I was appointed on «Appointment\_Date». On [DATE], I issued an Order directing Parent’s Representative and a DOE Representative (“the Parties”) to appear on «PHC\_Date» for a Settlement Conference and a Pre-Hearing Conference (“PHC”).[[3]](#footnote-3) My Order also included rules regarding how the Due Process Hearing (“DPH”) would be conducted. *See* IHO Ex. I. At the PHC, the Parties indicated that [THINGS]. [At that time, the parties jointly moved for an extension of the compliance period, which I granted].

On «Hearing\_Date», the Parties appeared for a virtual hearing. [DOE did not seek to introduce witness testimony nor any other evidence. DOE conceded it had failed to offer the Student an appropriate education for the school year(s) at issue.] OR [DOE submitted NUMBER exhibits into the record but presented no witnesses for testimony.] Parent submitted NUMBER exhibits into the record [on consent of DOE], including [an] affidavit(s), from WITNESS, WITNESS, and WITNESS. I accepted all affidavits into the record and DOE elected not to cross-examine the affiants. Both Parties rested before each offering an oral closing statement. Tr. XX.[[4]](#footnote-4)

**FINDINGS OF FACT AND DECISION**

After a full review of the record generated at hearing, I make the following findings of fact and determinations. Unless otherwise noted, I found the witness(es) to be credible.

[Identify IEP if in record, otherwise merely describe the child – diagnosis, classification, abilities, and needs.]

Student is a [AGE] student who is in the [GRADE] grade for the «School\_Years» school year. Student has been diagnosed with [INSERT DIAGNOSES]. *See* Ex. [INSERT RELEVANT EXHIBITS]. DOE’s Committee on Special Education (“CSE”) classified Student as a student with a Learning Disability for the «School\_Years» school year. *See* Ex. [INSERT RELEVANT EXHIBITS].

Student was evaluated by [EXPERT] in [MONTH] of [YEAR]. [EXPERT] found that Student [INSERT FINDINGS]. *See* Ex. [INSERT RELEVANT EXHIBITS]. Ultimately, [EXPERT] recommended [INSERT RECOMMENDATIONS]. *Id.*

Upon receipt of the [EXPERT]’s [MONTH/YEAR] report, Parent provided DOE a copy. *See* Ex. [INSERT RELEVANT EXHIBITS]. [INSERT ADDITIONAL COOPERATION ON PARENT’S PART AND THINGS THEY DID TO GET DOE TO PROPERLY PLACE STUDENT]. *See* Ex. [INSERT RELEVANT EXHIBITS]. Parent subsequently unilaterally placed Student at Private School for the «School\_Years» school year. *See* Ex. [INSERT RELEVANT EXHIBITS].

By way of a Ten-Day Notice (“TDN”) dated [DATE], Parent informed DOE of Student’s learning deficits and struggles with the development of her academic skills throughout her school career. *See generally*, Ex. [INSERT TDN EXHIBIT]. DOE failed to respond to Parent’s TDN.

*Burden*

School districts have the burden of proof, including the burden of persuasion and burden of production, in IDEA due process hearings, except that a parent or person in a parental relationship seeking tuition reimbursement for a unilateral parental placement has the burden of persuasion and burden of production on the appropriateness of such placement. *See* NYS Educ. Law § 4404(1)(c).

*Prong I*

The IDEA provides that children with disabilities are entitled to a Free Appropriate Public Education (“FAPE”). *See* 20 U.S.C. § 1400 (d)(1)(A). A FAPE consists of specialized education and related services designed to meet a student’s unique needs, provided in conformity with a comprehensive written Individualized Education Program (“IEP”). *See* 34 C.F.R. § 300.13. A school district has offered a student a FAPE when (a) the board of education complies with the procedural requirements set forth in the IDEA; and (b) the IEP is developed through the IDEA’s procedures and is reasonably calculated to enable the student to receive educational benefits. *See* *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982). In order to meet its substantive FAPE obligations, a district must offer a student an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017).

As to Prong I of the *Burlington/Carter* standard, the DOE failed to meet its burden at hearing. [The DOE Representative indicated on the record that it conceded Prong I, presenting no witnesses or other evidence. (*See* «Hearing\_Date» transcript, p. INSERT PAGE NUMBER HERE)]. Therefore, I am constrained to find that the DOE failed to offer the Student a FAPE for the «School\_Years» school year. Moreover, a review of the record herein establishes that the weight of the evidence supports the conclusion that the DOE failed to offer the Student an educational program reasonably calculated to offer a FAPE for the «School\_Years» school year.

[OR – WHEN THE IEP IS OFFERED BUT NO WITNESSES

As to Prong I of the *Burlington/Carter* standard, DOE failed to meet its burden. While DOE submitted Student’s [DATE] IEP into the record, a review of same offers no explanation as to how the CSE made its recommendation, how the IEP appropriately describes the Student, or whether the IEP is meaningfully calculated to confer educational benefit. In short, DOE declined to “offer a cogent and responsive explanation for their decisions” in creating that IEP, and it is “through the IEP that “[t]he ‘free appropriate public education’ required by the Act is tailored to the unique needs of” a particular child”. *Endrew F.*, 137 S.Ct. at 1002. Further, the only testimony in evidence regarding the provision of FAPE suggests that the recommendations contained in the IEP were not appropriate for Student. Parent testified that she raised specific objections to the DOE’s recommendations during various IEP meetings. *See, e.g.,* Ex. XX. Given the objections to the recommended program raised by Parent, it would be an error to determine that any of the IEPs in evidence were sufficient based solely on their contents, without testimony or documentary evidence to explain why the IEPs’ recommended program would offer Student “an opportunity greater than mere trivial advancement”, why it would meet Student’s unique needs, and why it was reasonably calculated to enable Student to receive educational benefit. *J.L. ex rel. J.R. v. New York City Dept. of Educ*., 2016 WL 6902137, at \*5-6 (E.D.N.Y. 2016).Therefore, I find that DOE failed to offer the Student FAPE for the «School\_Years» school year. ]

[TRANSPORTATION] Additionally, the provision of transportation in this case was a necessary component of a FAPE. *See* *Mr*. *P. v. West Hartford Bd. of Educ*., 885 F.3d 735, 741 (2d Cir 2018); 20 U.S.C. §1401(26)(A); 34 C.F.R. §300.34; NYS Educ. Law §§ 4401(1); §4402(4)(a); 8 N.Y.C.R.R. §200.1(ww); NYC Chancellor’s Regulation A-801(2)(I)(A). The IDEA requires school districts to provide transportation “if that service is necessary for a disabled child ‘to benefit from special education,’ even if that child has no ambulatory impairment that directly causes a ‘unique need’ for some form of specialized transport.” *Donald B. by Christine B. v. Board of Sch. Commissioners of Mobile County, Ala*., 117 F.3d 1371, 1374 (11th Cir 1997) (citations omitted); accord *Mr*. *P.,* 885 F.3d at 741 (related services include necessary transportation) citing 20 U.S.C. §1401(26)(A) and *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 (1982); *see also* 34 C.F.R. §300.34. Additionally, State law defines special education as “specially designed instruction . . . *and transportation*, provided at no cost to the parents to meet the unique needs of a child with a disability,” and requires school districts to provide disabled students with “suitable transportation to and from special classes or programs.” NYS Educ. Law §4401(1) (emphasis added); §4402(4)(a); 8 N.Y.C.R.R. §200.1(ww); NYC Chancellor’s Regulation A-801(2)(I)(A) (“State Education Law mandates that the City School District provide transportation for special education children residing in New York City to and from the school they legally attend”).  The “language and spirit of the IDEA” supports providing transportation to students with a disability classification as a related service, and transportation is an integral part of the District’s obligation to provide a student with a FAPE.  *See Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1528 (9th Cir. 1994); *Ne. Cent. Sch. Dist. v. Sobol*, 79 N.Y.2d 598, 608 (1992). [It is undisputed that Parent requested the provision of transportation and there is no indication that the district even attempted to provide it. Ex. A.] Accordingly, the denial of a FAPE here includes the denial of appropriate transportation.

*Prong II*

A private school placement must be “proper under the Act.” *Florence County Sch. Dist.*

*Four v. Carter*, 510 U.S. 7, 12, 15 (1993); *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985). This means that the private school must offer an educational program which meets the student’s special education needs. *See* *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112, 115 (2d Cir. 2007); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998). 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. Subject to certain limited exceptions, ‘the same considerations and criteria that apply in determining whether the [s]chool [d]istrict’s placement is appropriate should be considered in determining the appropriateness of the parents’ placement.’” *Gagliardo*, 489 F.3d at 112 (quoting *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2d Cir. 2006)).

Parents need not show that the placement provides every special service necessary to maximize the student’s potential. *Frank G.*, 459 F.3d at 364-65. When determining whether a unilateral placement is appropriate, “[u]ltimately, the issue turns on” whether the placement is “reasonably calculated to enable the child to receive educational benefits.” *Frank G.*, 459 F.3d at 364; *see* *Gagliardo*, 489 F.3d at 115. 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). 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. *See* *Gagliardo*, 489 F.3d at 112 (quoting *Frank G.*, 459 F.3d at 364-65).

[Private School Description – what do they do, how do they do it for the Student?]

I find that Parent has met their burden to prove that the private program offered/offers an educational program which met Student’s need under Prong II of the *Burlington/Carter* standard. [Evidence of Progress if offered and cite to record]

In reviewing [summarize remaining evidence, if any], I find that the weight of the evidence establishes that Student’s individual special education needs were addressed by Private School and that the instruction offered was “reasonably calculated to enable the child to receive educational benefits.” *Frank G.*, 459 F.3d at 364. I note that the DOE offered no arguments concerning the appropriateness of Parent’s unilateral placement, nor challenging the equities in this action. I further note that the DOE did not cross-examine any of Parent’s witnesses, nor objected to any document accepted into the record.

*Equities*

Even if a parent establishes a right to reimbursement under the IDEA, “courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246-47, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009). “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.” *Carter*, 510 U.S. at 16. In making that equitable determination, a hearing officer may consider many factors, including, *inter alia*, whether a parent’s unilateral withdrawal of her child from the public school was justified, whether the parent provided the Department with adequate notice of the withdrawal, whether the amount of private-school tuition was reasonable, whether the parent should have availed herself of need-based scholarships or other financial aid from the private school, and whether there was any fraud or collusion in generating (or inflating) the tuition to be charged to the Department, or whether the arrangement with the school was fraudulent or collusive in any other respect. *E.M. v. New York City Dep’t of Educ.*, 758 F.3d 442, 461 (2d Cir. 2014).

Here, Parent provided the necessary Ten-Day Notice of their concerns with the DOE’s offer of FAPE for the Student for the «School\_Years» school year. Ex. «Exhibit\_TDN». Parent furthermore gave the DOE notice of their intention to unilaterally place the Student at the Private School. *Id*. No evidence was submitted at hearing describing the DOE’s response to the TDN.

[{PROSPECTIVE TUITION FUNDING} By way of relief, Parent seeks reimbursement for their private school tuition costs and to have the balance of unpaid tuition sent directly to the Private School. Direct tuition funding is relief encompassed by the equitable remedial powers inherent in IDEA. *See*, *e.g.*, *Mr. and Mrs. A. v. New York City Dep’t of Educ.*, 769 F. Supp. 2d 403, 406 (S.D.N.Y. 2011)(parents may seek direct funding in the instance in which, “due to a lack of financial resources, [parents of a student with a disability] have not made tuition payments but are legally obligated to do so.”) Having reviewed [EVIDENCE], I find that the unilateral tuition costs far exceed the Parent’ income. Ex. «Exhibit\_taxreturn». Equity demands that the DOE fund Student’s Private School tuition in this instance.

I find no issue with the reasonableness of the costs, including tuition, associated with the Private School. Ex. «Exhibit\_Tuition». Student attended the Private School during the year(s) at issue. [EXHIBIT]. [Furthermore, I find that the Private School developed a described a comprehensive remote learning plan for periods of time in-person instruction would be suspended during the COVID-19 pandemic.] [EXHIBIT] Moreover, I find that the weight of the evidence establishes that Parent cooperated with the DOE and its CSE’s efforts to develop an IEP and recommend a program and placement for the «School\_Years» school year. [EXHIBIT] Overall and after considering the record at hearing, I find that the equities support Parent’s claim for tuition reimbursement [and direct funding].

**OTHER CONTENTIONS**

I have reviewed the parties’ remaining contentions and find them to be either unnecessary to this decision, without merit, beyond my jurisdiction, or without sufficient basis in the record for a finding.  Accordingly, any relief not specifically discussed in this decision is denied, and all remaining claims not discussed herein are dismissed with prejudice.

**ORDER**

NOW, THEREFORE, IN LIGHT OF THE ABOVE FINDINGS OF FACT, IT IS HEREBY **ORDERED THAT**:

(1) Parent’s claim for tuition reimbursement for Student’s unilateral placement [, as well as direct tuition funding,] at Private School is GRANTED for the «School\_Years» school year as follows:

1. The District shall reimburse Parent in the amount of [$$$$] [*merge with paragraph above if pure reimbursement*]
2. [The District shall directly fund the balance of Student’s tuition at Private School in an amount not to exceed [$$$$$];

(2) The District shall reimburse Parent for the cost of tuition at Private School as described above within [##] days of submission of proof of payment. [; and,]

[(3) The District shall pay to Private School the remainder of any tuition funds, totaling [$$$$$] dollars within [##] days of submission of a signed, notarized bill encompassing tuition costs owed by Parent to Private School for the Student’s attendance at Private School for the «School\_Years» school year; and]

[(4) The District shall provide to Student round-trip door-to-door special education transportation to and from Private School for the remainder of the «School\_Years» school year(s).]

Dated: \_\_\_\_\_\_

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Corey Forster

Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

Within 40 days of the date of this decision, the parent and/or the Public School District has a right to appeal the decision to a State Review Officer (SRO) of the New York State Education Department under section 4404 of the Education Law and the Individuals with Disabilities Education Act.

If either party plans to appeal the decision, a notice of intention to seek review shall be personally served upon the opposing party no later than 25 days after the date of the decision sought to be reviewed.

An appealing party’s request for review shall be personally served upon the opposing party within 40 days from the date of the decision sought to be reviewed. An appealing party shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete. The rules of procedure for appeals before an SRO are found in Part 279 of the Regulations of the Commissioner of Education. A copy of the rules in Part 279 and model forms are available at http://www.sro.nysed.gov.

**APPENDIX A- REDACTION IDENTIFICATION PAGE**

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| --- | --- |
| **Term Used In FOFD** | **Redacted Information** |
| Student | «First\_Name»«Last\_Name» |
| Parents/Guardians | «Parents\_Name» |
| Parent Attorney/Representative | «Parents\_Counsel» |
| District Attorney/Representative | «DOE\_Attorney» |
| School |  |
| Private School | «SchoolName» |
| Service Provider |  |
| District, DOE | «DOE\_CSE» |
| Director (for the Rebecca School) |  |
| Chairperson |  |
| Principal |  |
| Case Manager |  |
| Psychologist |  |
| Occupational Therapist |  |
| Physical Therapist |  |
| Speech-Language Therapist |  |
| [Fill in] |  |
| [Fill in] |  |
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**Submit this page to the parent and doe only.**

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**APPENDIX B- DOCUMENTATION ENTERED INTO THE RECORD**

**PARENT EXHIBITS**

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| **Exhibit** | **Title of Document** | **Date** | **Number of**  **Pages** |
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**DOE EXHIBITS**

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| **Exhibit** | **Title of Document** | **Date** | **Number of**  **Pages** |
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**IHO EXHIBITS**

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| **Exhibit** | **Title of Document** | **Date** | **Number of**  **Pages** |
| I | Order | DATE | 5 |
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1. Personally identifiable information is attached as Appendix A, “Redaction Identification Page,” to this decision and must be removed prior to public distribution. [↑](#footnote-ref-1)
2. Exhibits shall be referred to as follows: Ex. followed by lettered designations for Parent’s Exhibits, numbered designations for DOE’s Exhibits, and roman numeral designations for Impartial Hearing Officer’s Exhibits. Exhibit designations will be followed by the page numbers as needed and appropriate. For example, Parent’s Exhibit A, page 1, will be referred to as Ex. A-1. [↑](#footnote-ref-2)
3. Settlement conferences are conducted by an OATH Special Education Attorney or OATH IHO not assigned to the case whose purpose is to aid the parties in exploring and facilitating a resolution to the DPC.  Settlement Conference discussions are confidential, and the parties are directed to attend with knowledge of the dispute and settlement authority should there be an interest in resolution.  Settlement conferences are not recorded. [↑](#footnote-ref-3)
4. The instant decision is being issued prior to the completion of the «Hearing\_Date» transcript. OR References to the transcript of the DPH conducted on «Hearing\_Date» are denoted “Tr.” [↑](#footnote-ref-4)