



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-124

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

The Law Offices H. Neal Rosenberg, attorneys for petitioners, Jenna L. Pantel, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for respondent, Brian J. Reimels, Esq., of counsel

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 the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2011-12 school year was appropriate. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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 student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this proceeding (Tr. p. 45; see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The student attended school in the district as a general education student from kindergarten through second grade (Tr. pp. 379-80). During the 2010-11 school year, (second

grade), due to reported difficulties with respect to keeping up in class, his handwriting, as well as the ability to follow instructions, particularly multi-step instructions, the district provided the student with once daily special education teacher support services (SETSS) five times per week (Tr. p. 380). In February 2011, the student's teacher advised the parents that the student would not be promoted to the third grade, unless he made "more progress toward meeting his IEP goals" (Tr. p. 381; Parent Ex. B). At that time, the student was experiencing difficulty completing his class work, required constant redirection, and could not keep pace with the rest of the class (Tr. pp. 381-82, 384). Upon learning that the student was at risk of repeating the second grade, the parent obtained an application for the student to attend the Churchill School (Churchill) (Tr. pp. 384, 420).¹ On April 25, 2011, the parents entered into an enrollment contract with Churchill for the student's admission for the 2011-12 school year (Tr. p. 425; Parent Ex. H at p. 2). On June 22, 2011, the parents met with the student's SETSS teacher and his classroom teacher (Tr. pp. 385, 422; Parent Ex. M at pp. 6-7). During the June 2011 meeting, the parents requested that the student be placed at Churchill or a nonpublic school (Tr. p. 431). The participants at the June 2011 meeting developed an IEP which indicated that the student's placement recommendation was deferred to the district's Central Based Support Team (CBST) (Tr. p. 386; Parent Ex. M at pp. 5, 7). The June 2011 meeting participants agreed that Churchill was an appropriate placement for the student (Tr. pp. 385-86). By e-mail to the student's SETSS teacher dated June 22, 2011, the parent thanked the teacher for meeting with her (Parent Ex. C). The parent further indicated that per the advice of Churchill personnel, if the SETSS teacher supported the recommendation that the student required a small classroom environment and a full-time special education curriculum, the SETSS teacher should write "Defer to CBST" in the space provided on the IEP designating the student's program recommendation (*id.*). The parent noted that she would provide the SETSS teacher with a copy of the student's acceptance letter to Churchill, and she instructed the teacher to send the student's packet to the CBST for approval, together with a copy of the student's acceptance letter (*id.*). In response, by e-mail dated June 22, 2011, the student's teacher advised the parent that she "was more comfortable now that [she knew] the required process" to recommend Churchill for the student for the upcoming school year (*see* Tr. p. 387; Parent Exs. C; D at p. 2).

According to the parent, the attendees at the June 2011 meeting advised the parents that a copy of the IEP would be available at the district school attended by the student during the 2010-11 school year a few days after the meeting (Tr. p. 386). Shortly after the June 2011 meeting, when the parent arrived at the district school to obtain a copy of the IEP developed at the meeting, the SETSS teacher advised the parent that the school principal had changed the educational placement on the student's June 2011 IEP to an integrated co-teaching (ICT) setting (Tr. pp. 388-89; Parent Ex. D at p. 2).² Thereafter, a district school psychologist advised the

¹ Churchill is a nonpublic school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 430-31; *see* 8 NYCRR 200.1[d], 200.7).

² For the sake of clarity, this decision will refer to the student's recommended placement on the continuum of services as an ICT classroom even though the hearing record, at times, refers to the recommended placement as a "collaborative team teaching" or "CTT" classroom (*see, e.g.*, Tr. pp. 388-89; Dist. Ex. 6 at p. 2). State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class .

parents that they could request a CSE review of the student's program recommendation (Tr. p. 391).

In a letter to the district dated July 7, 2011, the parents recounted the events that had transpired before they were advised that the student's program recommendation had been changed to reflect placement in an ICT classroom (Parent Ex. D). They requested a copy of the IEP generated at the June 2011 meeting and indicated their willingness to meet with the CSE (Tr. p. 391; Parent Ex. D at p. 3).

On July 12, 2011, the CSE convened and proposed placement for the student in an ICT classroom in a community school, combined with the provision of one session per week of group counseling (Dist. Exs. 1 at pp. 5, 9; 2). In a final notice of recommendation (FNR) to the parents dated July 12, 2011, the district summarized the July 2011 CSE's program recommendations and notified them of the particular public school site to which the student had been assigned (Dist. Ex. 3). The parents noted their objection to the July 2011 CSE's program recommendation (Tr. pp. 401-02; Dist. Ex. 3 at p. 2).

In a letter to the district dated August 23, 2011, the parents described their objections to the July 2012 IEP (Parent Ex. F). The parents indicated that they planned to place the student at Churchill for the 2011-12 school year, and request payment of his tuition to be provided at public expense (id. at p. 3). The parents further noted that they planned to visit the proposed ICT classroom; however, they maintained that the class size was too large for the student and that the July 2012 IEP did not provide him with sufficient support (id.).

On September 19, 2011, the parents visited the district-recommended ICT classroom at the assigned public school site (Tr. p. 403; Parent Ex. E at p. 3). By letter to the district dated September 28, 2011, the parents outlined their concerns with the proposed classroom, which included, among other things: (1) the class followed a general education curriculum and employed only general education materials without modifications; (2) the lack of special education support; (3) the size of the proposed class; (4) the pace of the instruction; and (5) the number of transitions throughout the day (Parent Ex. E at pp. 3-4). The parents reiterated their rejection of the district's proposed program and noted that they intended to seek reimbursement of the student's tuition at Churchill (id. at p. 4).

A. Due Process Complaint Notice

By due process complaint notice dated December 1, 2011, the parents commenced an impartial hearing (Dist. Ex. 6). As relief, among other things, they requested a Nickerson letter that would permit the student to attend Churchill for the 2011-12 school year, or alternatively, tuition reimbursement (id. at p. 4).³ With regard to their contention that the district deprived the

. . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). State policy guidance issued in April 2008, entitled "Continuum of Special Education Services for School-Age Students with Disabilities," provides more information about these services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

³ A "Nickerson letter" is a letter from the New York Department of Education authorizing a parent to place a

student of a free appropriate public education (FAPE), the parents claimed, in pertinent part, that on June 22, 2011, they participated in a CSE meeting, at which time, a valid IEP was formulated, that reflected a deferral of the student's placement recommendation to the district's CBST (*id.* at p. 1). The parents further asserted that subsequent to the June 2011 meeting, the student's program recommendation was unilaterally changed, without their consent, to reflect placement in an ICT classroom (*id.*). The parents submitted that by changing the IEP without their input, the district inhibited their ability to meaningfully participate in the development of an appropriate program for the student, which in turn, deprived him of a FAPE (*id.* at p. 2). The parents next alleged that they advised the district that they rejected the program recommendation, and further claimed that, in response, the district offered to evaluate the student (*id.*). However, the parents alleged that, rather than conducting new evaluations of the student, the district convened a CSE meeting that took place on July 12, 2011 (*id.*). Regarding the IEP developed as a result of the July 2011 meeting, the parents argued that the district deprived the student of a FAPE during the 2011-12 school year for the following reasons, which included, among other things: (1) the July 2011 CSE developed the IEP without sufficient evaluative data; (2) the July 2011 CSE made program recommendations for the student without taking into consideration the recommendations of the parents' private evaluators; (3) the July 2011 CSE did not recommend the provision of speech-language therapy or occupational therapy (OT) for the student; (4) the July 2011 IEP lacked an accurate depiction of the student's needs, namely with regard to his auditory processing and memory deficits; (5) the July 2011 CSE was not properly composed, because none of the participants were familiar with the student or his needs; (6) the goals and objectives contained in the July 2011 IEP were inappropriate and insufficient for the student; and (7) the proposed ICT class was not appropriate for the student, because the class size was too large and the class followed a general education curriculum (*id.* at pp. 2-3). Additionally, the parents raised a number of allegations regarding the appropriateness of the assigned school, including, among other things: (1) the proposed class followed a general education curriculum, and used only general education materials without modifications; (2) the proposed class did not provide special education support on a small group or individualized basis; (3) there were too many students in the proposed class; (4) the students in the proposed class had a wide variety of educational needs that were not necessarily similar to the student; (5) the proposed class lacked sufficient modifications to the curriculum or pace of instruction; and (6) the number of transitions throughout the day would distract the student (*id.* at pp. 3-4). Lastly, the parents maintained that Churchill provided the student with an appropriate program that was tailored to his educational needs (*id.* at p. 4).

On December 8, 2011, the district submitted a due process response to the parents' due process complaint notice (Dist. Ex. 7). The district argued, among other things, that the student would be functionally grouped for instruction within the proposed class, and that the parents were afforded an opportunity to participate in the development of the student's program at the meeting (*id.* at pp. 3-4).

student in a New York State approved nonpublic school at no cost to the parent (see *Jose P. v. Ambach*, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner (see *Application of the Dep't of Educ.*, Appeal No. 09-114; *Application of a Student with a Disability*, Appeal No. 08-020; *Application of the Bd. of Educ.*, Appeal No. 03-110; *Application of a Child with a Disability*, Appeal No. 02-075; *Application of a Child with a Disability*, Appeal No. 00-092).

B. Impartial Hearing Officer Decision

On February 10, 2012, the parties proceeded to an impartial hearing, and after five days of testimony, concluded on April 4, 2012 (Tr. pp. 1-498). On May 7, 2012, the IHO rendered her decision, in which she denied the parents' request for tuition reimbursement for Churchill for the 2011-12 school year, having determined that the district offered the student a FAPE (IHO Decision at pp. 16-17). Preliminarily, the IHO found that the June 2011 CSE meeting was not a validly constituted CSE meeting, nor was it duly constituted as a subcommittee of the CSE (*id.* at pp. 11-12). Under the circumstances, the IHO determined that "the IEP documents" prepared at the June 2011 meeting were invalid, because they were not developed by a validly composed CSE or properly composed subcommittee of the CSE (*id.* at p. 12). In view of the foregoing, the IHO concluded that the IEP created at the July 2011 CSE meeting was the IEP in dispute in the instant case (*id.*). The IHO noted that the July 2011 IEP contained the required elements, including evaluation results that described the student's present levels of performance, a general description of his needs and annual goals to measure his progress (*id.* at p. 14). She described the student as "a very bright child who reached or exceeded his grade level in all areas except for math, where he nearly reached his grade level" (*id.*). Under the circumstances, the IHO found that the July 2011 CSE's program recommendation that consisted of an ICT classroom, which provided the student with twice the amount of teacher support than he received the prior school year, was tailored to his unique needs and was likely to enable the student to make progress in accordance with the IDEA's least restrictive environment (LRE) mandates (*id.* at p. 15). Despite the parents' claim that the July 2011 IEP was inadequate, given the lack of OT or speech-language therapy, the IHO found that the July 2011 CSE did not deprive the student of a FAPE, because it did not recommend the provision of speech-language therapy and OT, particularly where the evidence did not suggest that such services were a necessary component of a FAPE for him (*id.*). Next, the IHO considered the parents' claims surrounding the composition of the CSE, and found although a provider who was familiar with the student and an additional parent member were not part of the July 2011 CSE, their absence from the CSE did not rise to the level of a deprivation of a FAPE (*id.*). With respect to implementation of the IEP, the IHO noted testimony from the teacher of the proposed class that the student would have been "a good fit" and that he would have received plenty of opportunities for 1:1 support and movement breaks to help the student refocus (*id.* at p. 16). Based on the foregoing, the IHO concluded that the July 2012 IEP was tailored to meet the student's unique educational needs for the 2011-12 school year, and that it provided him with a FAPE in the LRE (*id.*).

IV. Appeal for State-Level Review

The parents appeal and seek determinations that the district denied the student a FAPE, that Churchill served as an appropriate unilateral private placement for the student and that equitable considerations favor their request for relief. The parents request a reversal of the IHO decision. Initially, the parents assert that the IEP created at the June 2011 meeting was a valid IEP, and that by unilaterally changing the recommendation set forth on that document, the district impeded their ability to meaningfully participate in the development of the student's IEP, and deprived him of a FAPE. Assuming for the sake of argument that the July 2011 IEP was the IEP in dispute, the parents allege that the July 2011 CSE was not properly composed, due to the

absence of individuals who were familiar with the student's educational needs. They further argue that the IHO misapplied the burden of proof regarding this issue, because the IHO found that their absence did not result in a denial of a FAPE to the student. Moreover, the parents claim that the July 2011 CSE was invalidly composed due to the absence of an additional parent member. Next, the parents submit that the IHO failed to consider their arguments regarding the evaluative data on which the July 2011 CSE relied in order to make a program recommendation for the student. They maintain that the July 2011 CSE failed to review sufficient evaluative data, and did not seek the participation and recommendations of individuals who knew the student. As a result, the parents contend that the July 2011 IEP did not accurately and completely depict the student, nor did it reflect the documentation reviewed by the CSE. The parents also argue that the goals contained in the July 2011 IEP were not specific or complete, and note that the IHO failed to fully consider that the annual goals were insufficient and inappropriate. Specifically, they assert that the student required additional counseling as well as more specific writing and math goals. Moreover, the parents argue that despite the student's difficulties with fluency and comprehension, the July 2011 IEP did not contain reading goals. The parents further allege that the district denied the student of a FAPE, because the July 2011 CSE did not recommend the provision of speech-language therapy or OT. Next, the parents assert that the recommendation for placement in an ICT classroom was not appropriate for the student, because, in part, the July 2011 CSE failed to consider how the student's needs would affect his participation in the class. The parents also allege that placement in an ICT classroom was not appropriate for the student, given his distractible nature and need for individual attention throughout the day, and because an ICT classroom did not offer the student enough modifications to the curriculum.

Regarding the assigned public school site, the parents submit that the district's claim that any analysis regarding its appropriateness was speculative should not be considered on appeal, because the district did not raise it until its closing statement. In any event, the parents assert that the hearing record does not demonstrate that the assigned public school site was appropriate for the student, in part because, the hearing record lacks evidence showing the amount of individualized or specialized instruction that the student would receive. Moreover, the parents maintain that the student would not have been functionally grouped for instruction.

Next, the parents maintain that Churchill was appropriate for the student, in part, because the student received the necessary special education services to enable him to make progress. Contrary to the district's assertion that Churchill constituted an overly restrictive setting for the student, the parents submit that the student was placed with students who were academically and socially appropriate for him. Regarding equitable considerations, the parents allege that they favor their request for relief. Specifically, they assert that the evidence does not suggest that they obstructed the CSE process; rather, there is evidence in the hearing record that illustrates their cooperation. Moreover, they argue that equitable considerations weigh against the district, because the district unilaterally changed the student's IEP without their consent.

In an answer, the district maintains that it provided the student with a FAPE, that Churchill was not an appropriate unilateral private placement, and that the equitable considerations do not support the parents' request for relief. The district requests that the petition be dismissed in its entirety. The district alleges that the IHO's finding that it offered the student a FAPE during the 2011-12 school year should not be disturbed on appeal. Initially, the district

claims that the IHO properly determined that the June 2011 meeting did not constitute a properly formed CSE or subcommittee of the CSE, and therefore, the IEP generated as a result of that meeting was not a valid IEP. Moreover, the district maintains that it was superseded by the July 2011 IEP, which is the IEP at issue in the instant action. Regarding the composition of the July 2011 CSE, while the district concedes that an additional parent member did not serve on the committee, the district contends that the absence of an additional parent member did not result in a denial of a FAPE to the student. The district further argues that the July 2011 IEP was based on sufficient evaluative material and was therefore, appropriate. Furthermore, the district submits that the IHO properly found that the July 2011 IEP contained all of the required elements, including evaluation results that described the student's present levels of performance, a general description of the student's academic needs and annual goals to measure his progress. The district also asserts that the ICT classroom recommendation was appropriate for the student, because the July 2011 CSE considered that the student was exceptionally bright and had made substantial progress during the 2010-11 school year; however, the student required a more structured setting to aid his difficulty with distraction. Additionally, the district argues that the hearing record does not substantiate the parents' claim that the July 2011 IEP was inadequate, because it did not call for the provision of OT or speech-language therapy. Regarding the parents' allegations that the assigned public school site was not appropriate for the student, the district asserts that the student would have been appropriately grouped in the proposed class, and that the student would have received as much 1:1 instruction as necessary.

Next, the district argues that Churchill was not appropriate for the student, because the student was denied access to typically developing peers, and therefore, Churchill constituted an overly restrictive setting. Lastly, the district argues that equitable considerations do not support the parents' request for relief, because the hearing record indicates that the parents never seriously intended to enroll the student in a public school.

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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

Before discussing the merits of the instant case, I must first consider which matters are properly before me. Here, the IHO determined that while the evidence did not explain the absence of an additional parent member from the July 2011 CSE, the lack of an additional parent member did not "amount to a procedural violation so egregious as to deprive the parents of their opportunity to participate in the process" (IHO Decision at pp. 15-16). Similarly, on appeal, the parents now argue that the July 2011 CSE was not properly constituted due to the absence of an additional parent member. As expressed in greater detail below, a review of the hearing record reflects that the parents failed to include this particular claim in the due process complaint notice, and, accordingly, it will not be considered on appeal.

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Additionally, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised *sua sponte*.

Here, although the parents alleged that the July 2011 CSE was not validly constituted, the due process complaint notice may not be reasonably read to include an allegation that it was improperly composed in light of the absence of an additional parent member (Dist. Ex. 6 at p. 2). Further, the hearing record does not reflect that they requested, or that the IHO authorized a further amendment to the due process complaint notice to include this particular issue.⁴ Thus, the IHO should have confined her determination to the issues raised in the parents' due process complaint notice and erred in reaching the issues set forth above (*see* 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; *B.P. v. New York City Dep't of Educ.*, 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; *M.R. v. South Orangetown Cent. Sch. Dist.*, 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; *C.F. v. New York City Dep't of Educ.*, 2011 WL 5130101, at *12 [Oct. 28, 2011]; *C.D. v. Bedford Cent. Sch. Dist.*, 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; *R.B. v. Dep't of Educ.*, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; *M.P.G.*, 2010 WL 3398256, at

⁴ The Second Circuit has recently explained that "[t]he parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit them to add a new claim after the resolution period has expired would allow them to sandbag the school district. Accordingly, substantive amendments to the parents' claims are not permitted" (*R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 at 188 at n.4 [2d Cir. Sept. 20, 2012]). To the extent that the Second Circuit recently held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (*M.H. v. New York City Dep't of Educ.*, 2012 WL 2477649, at *28-*29 [2d Cir. June 29, 2012]), I note that district addressed the absence of an additional parent member from the July 2011 CSE, in a closing argument, thereby tacitly agreeing to include the issue in the instant matter (Tr. pp. 478-79). In any event, assuming without deciding the matter, the evidence contained in the hearing record did not suggest that the district's failure to secure the participation of an additional parent member did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; *see* 34 CFR 300.513; 8 NYCRR 200.5[j][4]). The parents, a district representative, a district regular and special education teacher participated in the July 2011 CSE meeting (Tr. p. 41; Dist. Ex. 1 at p. 11). According to the district representative, the July 2011 CSE afforded the parents an opportunity to provide input concerning the development of the student's IEP and the parents voiced their objection to the district's program recommendation for the student (Tr. pp. 45, 52, 58; Dist. Ex. 2). The district representative further explained that the committee discussed the student's needs "over and over" (Tr. pp. 55-56). Under the circumstances, the hearing record does not suggest that the lack of an additional parent member resulted in a denial of a FAPE to the student.

*8; Application of the Dep't of Educ., Appeal No. 11-156).⁵ Consequently, the IHO's determination with respect to this matter must be reversed.

B. CSE Process

1. June 2011 Meeting

Initially, the hearing record lacks sufficient evidence to substantiate the IHO's finding that the "IEP documents" developed during the June 2011 meeting were invalid, because they were not created in conformity with a duly constituted CSE or subcommittee of the CSE (IHO Decision at p. 12). As detailed herein, I find that contrary to the IHO's determination, the series of events depicted in the hearing record, which culminated in the school principal's decision to unilaterally change the student's IEP, resulted in a denial of a FAPE (Tr. pp. 387-90). According to the hearing record, the parents, the student's classroom teacher and SETSS teacher participated in the June 2011 meeting (Tr. p. 385; Parent Exs. D at p. 2; M at p. 7).⁶ Here, the hearing record reflects that the parents understood that the participants at the June 2011 meeting created an IEP, which they were informed they could pick up from the district shortly after the June 2011 meeting (Tr. pp. 385-86, 391; Parent Ex. M). Upon learning that the educational placement differed from what had been agreed upon by the June 2011 CSE, district personnel advised the parents that they could request another CSE review of the student's program (*id.*). While the outcome of the June 2011 meeting did not ultimately result in an IEP that was provided to the parents, based on the foregoing, the reflects that the primary elements of the IEP were in fact discussed and decided upon during the June 2011 meeting, but thereafter the educational placement recommendation was changed by the principal without action by the CSE (Tr. pp. 74, 388-89; Parent Ex. D at p. 2).⁷ Under the circumstances, the unilateral change in the student's program recommendation from "Defer to CBST" for placement in a nonpublic school to an ICT setting, significantly impeded the parents' meaningful participation in the CSE process (Tr. pp. 378-90; see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2).

2. July 2011 IEP

Notwithstanding my finding that the district's actions surrounding the development of the student's IEP resulted in a denial of a FAPE to the student, I have reviewed the July 2011 IEP, and find that it was not reasonably calculated to confer educational benefits on the student. More specifically, as explained in greater detail below, an independent review of the hearing record reveals that the July 2011 IEP lacked sufficient evaluative data specific to the student.⁸

⁵ Pursuant to a recent amendment of the New York Education Law, an additional parent member is only a required member of the CSE, if the parents request the attendance of an additional parent member 72 hours prior to the CSE meeting (Educ. Law § 4402[1][b][1][b]).

⁶ During the June 2011 meeting, the student's SETSS teacher signed in as district representative (Parent Ex. M at p. 7).

⁷ The IEPs contained in the hearing record bear the same date of June 22, 2011 (Parent Exs. L; M).

⁸ The July 2011 IEP described the CSE meeting as an "IEP Amendment" meeting and not as a "Reconvene of IEP Meeting" (Dist. Ex. 1 at p. 9).

As a result, in crafting the student's IEP, the July 2011 CSE inadequately identified the student's needs, and neglected to develop goals and classroom management strategies aligned to those needs.

a. CSE Process – July 2011 CSE Composition

Turning first to the procedural challenges, the parents allege that the individuals who participated in the July 2011 CSE meeting lacked familiarity with the student, which in turn resulted in an invalidly composed CSE and contributed to a denial of a FAPE to him. Participants at the July 2011 CSE meeting included a district special and regular education teacher, the parents, a district representative, who also acted as a school psychologist (Tr. pp. 41, 80; Dist. Ex. 1 at p. 11).

To the extent that the parents argue that the July 2011 CSE lacked the requisite special education teacher, I note that the IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

In this case, the hearing record is unequivocal that the district special education teacher who participated in the July 2011 CSE meeting did not know the student personally (Tr. pp. 87-88). Further, there is no indication in the hearing record that the district special education teacher in attendance at the July 2011 CSE meeting would have implemented the student's IEP (Tr. p. 87). Regardless of whether the special education teacher who attended the meeting was familiar with the student's needs or would have implemented his IEP, the evidence in the hearing record does not suggest the absence of one of the student's providers inhibited the parents' ability to meaningfully participate in the development of the student's IEP, thereby resulting in a denial of a FAPE. Here, the hearing record suggests that the district afforded the parents an opportunity to participate in the creation of the July 2011 IEP (Tr. pp. 45, 395-96).⁹ The hearing record further reflects that the parents offered input regarding the student's deficits, and vocalized their concerns with respect to the proposed program (Tr. pp. 49, 58, 55-56, 80, 395-96). In particular, with respect to the goals, although the hearing record indicates that the parents did not object to the goals, the parents expressed their dissatisfaction to the extent that the goals did not accurately reflect the student's difficulties (Tr. pp. 57-58, 91, 397). Additionally, the parents advised the July 2011 CSE of the student's teachers' recommendations including his need for a small, structured environment (Tr. pp. 396-97). The July 2011 CSE also had a copy of the student's IEP from the prior school year in addition to the student's teachers' notes (Tr. pp. 44, 78, 88; Dist. Ex. 8).

Although I find that the July 2011 CSE lacked a certified special education teacher who taught the student or could have personally implemented his IEP had the student attended the

⁹ There is conflicting testimony in the hearing record regarding the length of the meeting. According to the district school psychologist, the July 2011 meeting lasted over three hours, while the parent described the July 2011 CSE meeting as "short," and further testified that the meeting lasted only 30 minutes (Tr. pp. 45, 394).

district's proposed program, assuming without deciding that this constituted a procedural error, I am not persuaded by the evidence that it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

b. Adequacy of Evaluative Information and Present Levels of Performance

The parents next allege that in developing its program recommendation, the July 2011 CSE failed to rely on sufficient documentation and take into consideration the student's deficits as illustrated by the privately-obtained evaluations. They further maintain that the July 2011 IEP fails to accurately and completely depict the student's needs. Conversely, the district alleges that the July 2011 IEP was based on sufficient evaluative material. As set forth in more explicit detail herein, although the July 2011 IEP indicated that the CSE considered the results of the February/March 2010 private psychoeducational evaluation, further review of the IEP reveals that the July 2011 CSE considered some evaluation results but inappropriately minimized the significance or ignored other results (Dist. Exs. 1 at p. 1; 4 at p. 1). Moreover, the hearing record also supports the parents' claim that the July 2011 CSE made determinations regarding the student's special education program and services needs while lacking sufficient evaluative information to support the determinations.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

According to the district representative, in developing its program recommendation for the student, the July 2011 CSE considered a private February/March 2010 psychoeducational evaluation, an April 2011 psychoeducational reevaluation report, and a June 2011 teacher evaluation report (Tr. p. 42; Dist. Exs. 4; 5; 8). Consistent with the February/March 2010 psychoeducational evaluation report, the July 2011 IEP reflected that cognitively, administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a Full Scale IQ score in the high average range of intelligence (88th percentile), a Perceptual Reasoning Index score in the very superior range (98th percentile), a Verbal Comprehension Index score in the high average range (86th percentile), and a Working Memory Index (42nd percentile) and a Processing Speed Index (50th percentile), both in the average range (Dist. Exs. 1 at p. 1; 4 at p. 3).^{10, 11} Also consistent with the February/March 2010 private psychoeducational evaluation report, the July 2011 IEP included results the Woodcock-Johnson III Normative Update Tests of Achievement (W-J III NU), whereby the student's scores ranged from average in Broad Reading (Standard Score (SS) 105) and Broad Written Language (SS 99) to low average in Broad Math (SS 85) (Dist. Exs. 1 at p. 1; 4 at p. 7). According to the July 2011 IEP, the student presented with strengths in reading and writing, but exhibited a relative weakness in Math Fluency (SS 82) and Math Calculation (SS 84) (Dist. Exs. 1 at p. 1; 4 at pp. 7-8).

With regard to the student's academic achievement, functional performance, and learning characteristics, according to the July 2011 IEP, the student's public school teachers described the student as "bright and amiable," and they further noted that he read on grade level (Dist. Ex. 1 at p. 1). The July 2011 IEP further reflected teacher reports that the student had "some difficulty"

¹⁰ The February/March 2010 private psychoeducational evaluation report included in the hearing record was incomplete, and did not include evaluative information and omitted the evaluator's impressions and recommendations, but the evaluation report was accepted as evidence into the hearing record as the parties agreed testimony would not exceed "the four corners" of the document (Tr. p. 32; see Dist. Ex. 4 at pp. 1-13). The same exhibit also included duplicates of several pages (see Dist. Ex. 4 at pp. 6-9).

¹¹ Although the February/March 2010 private psychoeducational evaluation included additional information about a variety of formal tests administered to the student including the areas of visual motor integration, language, memory, attention, reading, and social/emotional, the July 2011 IEP is silent in regard to administration of these other formal diagnostic tools.

expressing his thought(s) in writing, and they further described him as "inconsistent in his accuracy" in math, despite strong number sense (id.). The July 2011 IEP further revealed that the student's teachers reported that the student tended to "zone out" and "sit quietly" during group work (id.). Additionally, according to the July 2011 IEP, per teacher report, the student was easily distracted and needed to be redirected to start his work (id.). In terms of the student's strengths, the July 2011 IEP characterized him as "exceptionally bright," and as an individual who demonstrated a strong interest in all subjects, especially science (id.). Regarding the student's academic needs, the July 2011 IEP indicated that the student needed to learn self-monitoring skills to help him stay focused and consistent; he needed to develop and practice math skills (id.).

In regard to the student's social development, the July 2011 IEP stated that the student had "many friends," and was included in play groups (Dist. Ex. 1 at p. 2). Per teacher report, the July 2011 IEP also noted that although it caused the student "some distraction," he played well with peers (id.). In terms of the student's social development strengths, the July 2011 IEP characterized the student as "friendly and cooperative;" however, the student needed to apply self-monitoring skills, given that he was easily distracted (id.).

With respect to the student's physical development, the July 2011 IEP noted that the student did not have a history of health concerns, and further described him as a healthy and athletic student, who did not have any physical needs at the time (Dist. Ex. 1 at p. 2). In regard to the student's management needs, the July 2011 IEP stated that in light of the student's tendency to "zone out" in class, difficulty starting his work, and become easily distracted, the student required redirection from his teachers (id.). According to the July 2011 IEP, the student worked best in a small group, and needed to learn self-directing skills, and work on his math skills (id.).

Notwithstanding the above information, further review of the hearing record shows that the CSE failed to identify the student's present levels of performance and needs specific to his language processing, expressive language formulation, and retrieval and memory difficulties, areas which were discussed in detail in the February/March 2010 psychoeducational evaluation report available to the July 2011 CSE (see Dist. 1 at pp. 1-11; Dist. Ex. 4 at pp. 7, 10-13). Consequently, the evidence contained in the hearing record reveals that the July 2011 IEP lacked goals, classroom management strategies, and recommendations for related services to specifically address those identified needs (see Dist. Ex. 1 at pp. 1-10).

A review of the February/March 2010 psychoeducational evaluation report reflected that, among other things, during administration of formal testing, the student's attention and motivation were excellent for short, structured and interactive tests (Dist. Ex. 4 at p. 6).¹² However, according to the evaluator, the student exhibited difficulty fully expressing his thoughts on many items, which resulted in scores lower than what the student might have achieved, given his level of knowledge and general aptitude (id.). The evaluator further

¹² The district representative confirmed that a psychoeducational evaluation was typically conducted in a quiet, distraction-free environment (Tr. p. 126). The hearing record does not offer any information about whether or not the July 2011 CSE considered strategies to address the student's academic performance and needs in a noisier environment.

explained that, with respect to additional testing in the areas of auditory processing and language, although the student was "extremely bright," and "underst[ood] everything," when overloaded by language demands, his ability to process declined (id.). Furthermore, the evaluator found that the student exhibited "a deficit in specific aspects of the expressive retrieval area (and working memory) [which] ma[de] it difficult for [the student] to register information, hold it in his mind and retrieve it accurately" (id.). At these times, she further found that the student tended to respond immediately, instead of waiting for the full direction, so that he did not lose or forget the information (id.). The evaluator reported that she observed the student's deficit in the area of expressive language, particularly in relation to syntax, word retrieval, and language formulation throughout testing (id.). In addition, the evaluator noted word retrieval weakness throughout testing, although the student attained some scores in the average range (id.). In light of all of these factors, the evaluator characterized the student's expressive formulation as weak (id.).

The psychoeducational evaluation report also revealed that although the student's receptive language was assessed to be in the average range, the student could not focus on salient details (Dist. Ex. 4 at p. 10). The evaluator opined that the student's receptive language scores were "discrepant with intellectual ability" (id.). The July 2011 IEP failed to address this discrepancy and how the student's educational performance was affected by it (see Dist. Ex. 1). The evaluation report further indicated that although formal language testing yielded results from the student's overall expressive language score in the average range, his expressive language score was "so much lower than other parts of [his] performance elsewhere in testing" (Dist. Ex. 4 at p. 10). Specifically, the evaluator found weaknesses in the student's ability to formulate sentences which required him to hold sentences and syntax in his mind and retrieve them accurately when he had to work with three words rather than one word (id.). In addition, the evaluator noted a deficiency in the area of word retrieval (id.). According to the psychoeducational report, the student also displayed weakness on tests that required him to hold letters and numbers in his head and rearrange them sequentially and chronologically, and with regard to his ability to do oral arithmetic problems (id.). In regard to auditory memory, the evaluator reported that the student demonstrated "great strengths as well as specific deficits" on a variety of formal tests (id. at pp. 10-11). She observed that the student worked well with contextualized information, overlearned information, and practical information (id. at p. 10). However, the evaluator also noted that the student experienced difficulty with identifying items he expressed without cues provided earlier in testing (id. at p. 11). The report further indicated that the student displayed the most difficulty with tasks that required him to retrieve and formulate information that had not been practiced over time (id.). In regard to processing speed, the evaluator found that although formal testing yielded scores in the average range that reflected the student's "deliberative processing style and slow speed, they [we]re significantly below the speed at which he [thought] and there [wa]s some discordance and lack of smooth integration between the two" (id.).

In regard to visual-perceptual-motor abilities, the evaluator noted that the student achieved scores on formal testing in the bright average range overall; however, he demonstrated stronger ability for tasks in this area without a motor component (Dist. Ex. 4 at p. 11). Although the evaluator reported that the student discriminated patterns, he exhibited "great difficulty" discriminating letters (b from d, n from u) and reversed numbers and letters, as well as difficulty with copying a sentence within a limited amount of time (id.). In regard to visual memory, while

the evaluator described the student's performance as "generally excellent," she further reported that the student had difficulty retrieving letters when asked to write the alphabet (id.).

According to the psychoeducational evaluation, despite the student's teachers and parents' concerns regarding the student's attention, formal assessment did not reveal the presence of an attention deficit disorder (ADD) (Dist. Ex. 4 at p. 12). In any event, the evaluator determined that the student's attention became more problematic when work demands increased and when the student anticipated and confronted his learning and language difficulties (id.). She further opined that the student would require additional support in this area (id.).

The evaluator determined that the student's performance during the psychoeducational evaluation "constitute[d] underachievement and reflect[ed] a learning disability in areas calling for receptive and expressive language functioning (and related memory functions), integrative functioning (i.e., writing) and ability to sustain attention when tasks are difficult" (Dist. Ex. 4 at p. 13). The evaluator also assessed the student's emotional/behavioral functioning, and she depicted the student as "kind, friendly and enthusiastic, [who] enjoy[ed] his classmate[s] company and they his," (id.). She further characterized the student as "attuned and conscientious," over-anxious to please, self-critical and a perfectionist, afraid to make mistakes, a show-off, and as someone who was "teased a lot" (id.).

On April 12, 2011, the same clinical psychologist who performed the February/March 2010 psychoeducational evaluation conducted a psychoeducational reevaluation of the student because, due to a notification to the parents from the student's school that the student might not be promoted from second to third grade (Dist. Ex. 5 at pp. 1-4). According to the report, the reevaluation was conducted to assess the student's progress and current educational needs (id. at p. 1).¹³ The evaluator noted that in 2010, the student received a diagnosis of a language-based learning disability and exhibited needs in integrative areas and fluency and academic areas (id. at p. 3). She further described the student's academic scores as highly variable at the time of the reevaluation (id.). According to the evaluator, higher scores reflected the student's conceptual abilities, motivation and ability to work with visual cues (id.). Without visual cues, the evaluator reported that the student was required to process auditory material and retrieve information quickly, with which he had significant difficulty (id.). As a result of formal testing, the student's memory was assessed at below the kindergarten level; math fluency was assessed at the 1.8 grade equivalent; writing fluency was assessed at the 2.1 grade equivalent; and writing samples were assessed at the 2.3 grade level (id.). Additional formal testing yielded a reading comprehension score at the 2.2 grade equivalent and a passage comprehension score at the 2.1 grade level (id.). In addition, the report indicated that the student continued to display some directional difficulties and that he continued to reverse numbers, which the evaluator described as "more unusual at his age" (id.). The evaluator opined that the student's learning disability had become more apparent, and she further determined that the student's performance was highly

¹³ The evaluator reported that the parents were surprised to receive notification in April 2011 that the student was in danger of not being promoted, because since the February/March 2010 psychoeducational evaluation, the parents communicated with the school about the student's needs, for which he received remediation four times per week (Dist. Ex. 5 at p. 1). In addition, the evaluator noted that the student's teacher commented to the parents that she had not looked at the student's IEP, which led the evaluator to conclude that the student's teacher did not implement the student's (2010-11) IEP, and that the school was "negligent" in following up on the recommendations (id. at pp. 1, 3).

discrepant with his intellectual ability, a reflection of his learning disability (id.). Additionally, the evaluator observed that in comparison to the initial evaluation results, the student's anxiety increased, as displayed in his acting out in regressed and avoidant behaviors (id.). She further found that the student self-esteem had been affected by the school's failure to implement recommendations, and proceeded to opine that if the student continued in a mainstream environment his negative and avoidant behaviors would increase, his self-esteem would diminish, and it would become harder to reach the student educationally and emotionally (id.). The evaluator recommended a small, self-contained, nurturing special education setting for the student, where teachers would be able to individualize work, attend to the student's auditory processing and memory disability, and design writing assignments so that the student's "rich thought [wa]s not lost" (id. at p. 4). She further suggested that the class should be conceptually at the student's level, and that teachers would need to repeat instructions, provide visual aids, and design tasks in manageable chunks for optimal processing (id.). Additional recommendations included the provision of OT to address the student's integrative and directional needs, as well as language therapy to address the student's auditory processing and memory retrieval needs (id.). The evaluator also recommended that the student's strengths should be reinforced by helping him to continue to develop his unusual conceptual abilities and social skills, and that the student's progress should be carefully monitored, and reevaluation should occur in two years (id.).

A June 27, 2011 teacher evaluation report written by two of the student's teachers during the 2010-11 school year revealed that the student made much progress with reading, and at the time of the report, was "right on grade level" for reading (Dist. Ex. 8). Although the student's classroom teacher described his writing as delayed, despite improvement, she further noted that the student continued to experience difficulty articulating his thoughts, and with his handwriting (Dist. Ex. 8; see Parent Ex. M at p. 6). The classroom teacher further explained because many classroom and homework tasks required writing, the student struggled during the school year and often did not complete tasks (Dist. Ex. 8). The classroom teacher added that the student was well-liked and had many friends, a situation which tended to distract him (id.). The classroom teacher also noted that the student became stressed during the latter part of the school year, "when things were moving quickly" and there were more transitions (id.). According to the classroom teacher, the student often appeared lost and confused about what to do (id.). Moreover, the classroom teacher reported that she was always required to redirect the student during the day, and individually provide him with instructions about what to do after she already gave the directions to the class (id.). With respect to the student initiating his class assignments, the classroom teacher stated that the student often had a peer to help him get started with his work and that the student was often unable to go directly to his seat and begin an assignment (id.). She further noted that the student often required redirection at his seat during class work (id.). Regarding attention, the classroom teacher reported that he often got distracted by any talking or moving at his table and she further opined that the 28 students in the class environment appeared to be a detriment to his success and progress (id.). The classroom teacher also wrote that during group work, the student usually did not participate during discussions or planning; rather, he tended to "zone out" and sit quietly (id.). In the same report, regarding a math evaluation, another teacher described the student's number sense as "strong;" however, she reported that the student was inconsistent in his accuracy during class work and assignments (id.). According to the teacher, the student often needed help getting started on assignments; however, once the student began, he could work independently (id.). The teacher found that this

characteristic was problematic during test taking, because the student often did not complete the test in the allotted time (id.).

Here, although the hearing record reflects that the May 2011 CSE had available and discussed the February/March 2010 psychoeducational evaluation report, the April 12, 2011 psychoeducational reevaluation, and June 2011 teacher evaluation report, the district representative's testimony supports the parents' claim that the district minimized or did not consider the private evaluator's detailed description of the student's specific error patterns and his aforementioned difficulties detailed in the psychoeducational evaluation reports (Tr. pp. 37, 39, 44; Dist. Exs. 1 at p. 11; 4 at pp. 1-13; 5 at pp. 1-4; 8). Further review of the district representative's testimony reflects that in developing the student's IEP, he focused on the student's average range scores (Tr. p. 109; Dist. Ex. 4 at pp. 1-13). Despite the student's eligibility for special education programs and services as a student with a learning disability, and given that the July 2011 CSE failed to glean information from the private evaluative data before it, the hearing record supports the parents' claims that the July 2011 IEP presented an inadequate description of the student's disabilities and did not accurately or completely depict his educational needs (compare Dist. Ex. 1 at pp. 1-10, with Dist. Ex. 4, with Dist. Ex. 5, with Dist. Ex. 8).¹⁴ Testimony by the school psychologist further suggests that the CSE was limited in its perspective in developing an IEP that identified and addressed the student's needs. For example, when asked if the student had sensory "issues," the school psychologist responded, " ... bright kids are over sensitive to stimuli-internal and external and that's part of why they are exceptionally bright ... [i]t comes with the territory of being...an exceptional kid" (Tr. pp. 108-09).

More specifically, in February/March 2010, the private evaluator concluded the student's performance during the psychoeducational evaluation "constitute[d] underachievement and reflected] a learning disability in areas calling for receptive and expressive language functioning (and related memory functions), integrative functioning (i.e., writing) and ability to sustain attention when tasks are difficult" (Dist. Ex. 4 at p. 13). However, in response to questioning related to the student's processing abilities, the school psychologist stated:

Again, because exceptionally bright kids do tend to get, you know over stimulated, they can get carried away, you know for example thinking of something and not, you know hearing what is going on next

(Tr. p. 108).

Furthermore, when questioned if the July 2011 CSE discussed the student's auditory processing skills, the school psychologist testified, as follows:

¹⁴ Testimony by the school psychologist indicated the July 2011 CSE did not "go into—into [the student's] classification during the meeting" (Tr. p. 109).

Again, it's auditory processing for a child who—who is over sensitive... there would be some issues. However, if you look at, you know at the scores, they are still within average....

(Tr. p. 109).

Under the circumstances, given that the evidence establishes that the July 2011 CSE had information before it reflecting the student's difficulties with auditory processing, and that the February/March 2010 psychoeducational evaluation report specified that while the student did not have a diagnosis of an ADD, concerns remained "in the attentional area from both teacher(s) and parents," I find that the July 2011 CSE should have obtained additional evaluative information regarding the student's specific auditory processing difficulties, to determine if his auditory processing difficulties were neurologically-based and if there existed a relationship to the student's reported difficulty attending in class to an auditory processing deficit, when he was observed to "zone out" (Dist. Ex. 8).¹⁵ In addition, in light of the documentation before it, I find that the July 2011 CSE was remiss in not providing for additional testing to probe the student's expressive language difficulties specific to formulating sentences, syntax, and memory and retrieval (see Dist. Ex. 4 at pp. 10-11). Furthermore, in light of information before it regarding the student's OT needs, the hearing record also suggests that the July 2011 CSE should have conducted further testing in this domain. While the district representative characterized the student's possible OT needs as not being a "real deficiency," based solely on his interpretation of standardized test scores, in contrast, teacher reports illustrated the student's struggles with handwriting in the classroom, and the psychoeducational evaluator also found that the student displayed stronger ability for visual-perceptual-motor tasks if there was no integrative demand (i.e., no motor component) (Tr. pp. 60, 109, 120, 127; compare Dist. Ex. 1, with, Dist. Ex. 4 at p. 11). Moreover, the district representative's testimony suggests that the July 2011 CSE did not meaningfully consider the private evaluator's finding that although the student discriminated patterns, he had "great difficulty" discriminating letters (b from d, n from u) and he reversed numbers and letters, and also experienced difficulty with copying a sentence within a limited amount of time (Tr. p. 120; compare Dist. Ex. 1, with, Dist. Ex. 4 at p. 11).¹⁶ Under the circumstances, the lack of an OT evaluation prevented deeper probing in regard to the student's specific difficulties, as well as hindered the possibility of a CSE recommendation for the provision of OT to the student. Moreover, the district representative testified that the July 2011 CSE did not engage in any discussion regarding the private evaluator's recommendation for the

¹⁵ Testimony by the school psychologist indicated he was aware that the student's SETSS teacher for 2010-11 believed the student needed to learn in small groups (Tr. p. 101). The hearing record includes a SETSS report from the SETSS teacher from the 2010-11 school year (Parent Ex. K). According to the report, in spite of a united approach by the student's providers, the student continued to be confused by and/or forgot instruction and needed someone to repeat instructions several times (*id.*). The student's SETSS teacher added that the student needed individual attention to help him organize himself, focus on, and complete an assignment (*id.*). The SETSS teacher further recommended the provision of small group and 1:1 instruction in an environment with as few distractions as possible, and emphasis on visual and kinesthetic instructional modalities (*id.*).

¹⁶ Additionally, although the evaluator described the student's performance in the area of visual memory as generally excellent, she also reported that the student had difficulty retrieving letters, a deficiency also not reflected on the July 2011 IEP (compare Dist. Ex. 1, with Dist. Ex. 4 at p. 11).

provision of OT and speech-language therapy for the student (Tr. pp. 127-28).¹⁷ Based on the foregoing, the hearing record supports a conclusion that the CSE had information before it that suggested that the student exhibited auditory processing, expressive language and OT difficulties which the CSE did not incorporate into the July 2011 IEP.

c. Appropriateness of Annual Goals

Regarding the appropriateness of the goals and objectives contained in the July 2011 IEP, although the IHO did not make any findings with respect to their sufficiency, she noted testimony from the teacher of the proposed class that the July 2011 IEP should have contained additional goals in math, as well as a goal to address the student's difficulty with attention. The parents maintain that the IHO failed to fully consider that the goals were insufficient and inappropriate and further argue that the goals contained in the July 2011 IEP were not specific, nor were they complete.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

In the instant case, a review of the July 2011 IEP reveals that it included three global goals in the areas of counseling, mathematics, and writing (Dist. Ex. 1 at p. 4). Specifically, the counseling goal targeted the student's use of undefined self-monitoring strategies (id.). The mathematics goal addressed the student's use of graphic organizers and unspecified "other strategies" to enable him to plan, organize, and complete an assignment in math class (id.). The writing goal was directed at the student's ability to use a graphic organizer and a checklist to plan and organize a simple writing project (id.). The special education teacher of the second/third grade ICT class at the assigned public school site opined that based upon her review of the student's July 2011 IEP, the student needed additional goals that addressed focusing and redirection, rote drills for multiplication and addition facts, and the use of five steps to read a story problem in order to check his work (Tr. pp. 142-43, 191-93; Dist. Ex. 3 at p. 1). In addition, the student's teacher from Churchill opined that the July 2011 IEP was inappropriate for the student because the goals were incomplete, based on the lack of goals specific to reading decoding and reading comprehension, attention, math comprehension, math problem solving, and speech and language (Tr. pp. 333-34). In addition, the Churchill teacher described the math

¹⁷ When asked about the appropriateness of the recommendations for related services on the student's 2011-12 IEP, the student's teacher from Churchill opined the student needed speech-language therapy and OT (Tr. pp. 337-38).

goal listed on the IEP as insufficiently specific and she further noted that the writing goal "jumped ahead and missed some steps" which the student needed to specifically target (Tr. pp. 335-37). In view of the foregoing, the annual goals and short-term objectives contained on the student's July 2011 IEP failed to address the student's identified areas of need, namely in the areas of reading and attention, and provide information sufficient to guide a teacher in instructing the student (see Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).

d. ICT Class Placement

Lastly, the hearing record supports the parents' assertion that although the July 2011 CSE reviewed documentation that illustrated the student's deficits, the July 2011 CSE failed to consider how the student's auditory processing and attention needs would affect him the ICT class. They further maintain that the July 2011 IEP lacks the modifications or supports that would enable the student to make educational progress. A review of the July 2011 IEP indicates that except for testing accommodations included on the July 2011 IEP which called for the provision of extended time, questions and directions read and reread aloud, and on-task focusing prompts, the July 2011 IEP does not offer any intervention or management strategy to address the student's auditory processing, language, memory and retrieval, and integrative functioning difficulties (see Dist. Ex. 1). Instead, the July 2011 IEP reflected that the onus for improvement was placed on the student's ability to self-monitor and self-redirect (id. at pp. 1-2).

Based on all of the above, given the July 2011 CSE's failure to consider the full panoply of evaluative data before it in crafting its program recommendation, I find that the hearing record does not substantiate the IHO's finding that despite the student's cognitive strength, the student could obtain an educational benefit from placement in an ICT class, particularly, where as here, the July 2011 IEP did not provide for related services such as speech-language therapy and OT, and classroom strategies such as preferential seating, provision of an increased latency of response time and visual cues to accommodate the student's auditory processing/attention needs in the classroom.

Based upon my independent review of the evidence in the hearing record, I am constrained to disagree with the IHO's conclusion that the district failed to offer the student a FAPE during the 2011-12 school year.

C. Appropriateness of Churchill

Having determined that the district failed to offer the student a FAPE during the 2011-12 school year, I must next consider whether the evidence in the hearing record shows that Churchill addressed the student's special education needs. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419).

A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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., 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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 the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that 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 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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; see Frank G., 459 F.3d at 364-65).

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; see Frank G., 459 F.3d at 364-65). In the instant case, as detailed herein, there is sufficient evidence to illustrate how Churchill's program was tailored to address the student's unique special education needs during the 2011-12 school year, namely with respect to his difficulties in processing, language needs and attention. According to the Churchill director of admissions, Churchill is described as State-approved special education school that accepted students within the average to above-average range of intelligence who have been offered a diagnosis related to a learning disability or a speech-language impairment, but the school did not accept students who exhibited significant emotional or behavioral needs (Tr. pp. 235, 237). At the time of the impartial hearing, Churchill had an enrollment of 396 students between the ages of five and 18 (Tr. pp. 237, 239-40). The admissions director indicated Churchill provided related services to students such as counseling, speech-language therapy and OT (Tr. p. 239). According to the student's third grade head teacher, Churchill offered a curriculum based on State standards, which was modified and designed to meet the needs of each student's individual learning style (Tr. pp. 247, 249-51).

The hearing record corroborates the parents' claim that the student was grouped accordingly with students who exhibited similar educational needs. For example, the student's teacher at Churchill testified that the student was in a 12:2+1 class taught by a head teacher and an assistant teacher, and both individuals held dual certifications in general and special education (Tr. pp. 247, 252). In addition, the teacher indicated that all teachers who worked with the student were certified in the areas in which they were trained and had training in special education (Tr. p. 255). The age range of the students in the class at the beginning of the 2011-12 school year was between seven to nine years old (Tr. p. 252). Three students in the class had been diagnosed as having a speech and language disorder, and nine students were learning disabled (Tr. pp. 253-54).¹⁸ The student participated in small groups of six to seven children for academic and non-academic subjects, and in groups between three and six for related services (Tr. pp. 253-54; Parent Ex. G at pp. 12-14). In addition, the student received 1:1 help on an as needed basis (Tr. pp. 267, 276, 347-48, 353-54). According to the student's teacher, students were grouped based on the similarities of their needs, age, and social/emotional level (Tr. p. 253). She indicated the student had learning challenges that were similar to the other students in the class (Tr. p. 263).

¹⁸ The admissions director from Churchill testified that not all students attending the school have an IEP, but that all students have a disability (Tr. p. 238). In response to a question about the special education classifications of her students, the student's teacher's testimony that "if they have IEPs" was made in reference to diagnoses as opposed to classification (Tr. pp. 252-53).

The hearing record further reflects that Churchill personnel fully assessed the student's educational needs and provided him with appropriate interventions in response to those educational needs. The teacher noted that when the student entered her class, she conducted formal or informal reading and math assessments, and continued to do so throughout the school year (Tr. p. 258). In addition, as a result of assessments conducted at the school for both OT and in the area of speech-language, the student attended an OT sensory group and he also participated in a small group speech-language therapy to work on his expressive and receptive language skills (Tr. pp. 259-60, 313-14).¹⁹ The teacher indicated that the assessments revealed that with regard to reading, the student tended to lose focus as he was reading and struggled with comprehension; however, he was better able to answer literal questions rather than inferential questions (Tr. pp. 260-61). In math, the student was found to be at a beginning third grade level (Tr. p. 261). In speech-language, the student struggled with receptive language and multi-step directions, assessments revealed that the student "would really get lost by the end of the direction," and that he benefited from strategies such as asking for repetition, as well as trying to visualize what was being asked of him (*id.*). According to the student's teacher, assessments revealed that receptively, the student required complex language to be broken down into smaller chunks (*id.*). Expressively, the student struggled to focus on the essential wording of information of the text or of speech and that he exhibited difficulty sequencing and organizing his ideas to the point of losing focus and needing redirection to task (*id.*). To address the student's academic needs, the teacher described strategies such as reading instruction in a group of six with one teacher who provided multisensory instruction in reading that incorporated phonics, spelling, fluency and comprehension, the provision of extra time for the student in order for him to process information, organize his thought before orally responding to teachers as well as before responding through written answers (Tr. pp. 253, 265-69, 272). According to the teacher, the student received 1:1 instruction in the small reading group as often as needed (Tr. p. 267). His teacher also testified that the student had extra time to practice fluency (Tr. pp. 267-68). The student's teachers also ensured that his comprehension questions were scaffolded and reviewed with a teacher (Tr. p. 268). Additionally, the teacher also described the use of a Smartboard to allow the student to see/track how the teacher is filling in the same paper he has in front of him (Tr. p. 268). To address the student's inferential comprehension needs, the student pre-read and re-read text to ensure that he understood the small and big ideas in a story (Tr. pp. 270-71). To support the student's sequencing needs, the teacher described how aspects of the story were written out on paper, and the student would cut the paper containing the events into strips and physically move the strips around to put the story pieces in order (Tr. p. 271).

The student's teacher also testified that Churchill provided the student with multisensory math instruction using a spiraling math program in a group of seven with one teacher (Tr. pp. 276-77, 285). According to the teacher, the spiraling math program gave the student repeated practice with concepts, which she deemed especially helpful for the student in light of his slower processing ability (Tr. p. 279). The teacher further explained that the student was taught one concept at a time to allow for mastery of topics (Tr. pp. 279-80). In addition, the teacher noted that the student practiced math facts regularly, which she explained gave the student the

¹⁹ The student's teacher testified that the student participated in a morning OT sensory group, after which time he returned to the classroom and appeared more alert, and more "able and ready to learn" (Tr. pp. 315-16). The student worked on fine motor skills including handwriting, and gross motor skills when the occupational therapist pushed-in to the classroom (Tr. pp. 315-16, 318).

repetition that he needed and gave him time to review what the teacher had given him and refresh his recollection (Tr. p. 281). The teacher added that with regular practice of math facts, she could ensure that the student understood what the class had gone over and that she had given him enough exposure to a subject (*id.*). The teacher also described the use of guided practice in math, with use of the Smartboard, which allowed her to highlight information for the student, as well as read the information a few times to help the student pick out the parts of the information on which the student needed to focus (Tr. pp. 282-83). She further testified that homework practice was consistent with classroom guided practice (Tr. p. 290). The teacher also described strategies she employed to help the student pick out salient details, including discussing the story with him and explaining important points from a story (Tr. p. 298).

In addition, according to the student's teacher, to address the student's needs, modifications made across curricula areas included repetition of information and directions to assist him with word retrieval, as well as the provision of additional time to process the information (Tr. pp. 263-64). Churchill personnel also employed repetition of directions and the provision of "fill in the blank" language structures to assist the student with formulating sentences (Tr. p. 264). The student's teachers also ensured that they presented material to the student in a multisensory manner (*id.*). The hearing record also reveals that Churchill personnel "constantly" used teacher modeling and brainstorming to help the student generate ideas (*id.*). Furthermore, in light of the student's tendency to lose focus and become distracted, she explained that he "really benefit[ed]" from sitting in close proximity to a teacher (Tr. p. 263).

The student's teacher also testified that she taught writing in groups ranging from six to 12 students, with two teachers in the classroom (Tr. p. 291).²⁰ According to the student's teacher, Churchill school utilized a formal writing program that provided "anchor text" which emphasized the type of writing worked on during the lesson which allowed students to see what was being asked of them to generate and incorporate into their own writing (Tr. pp. 291-92). The teacher further testified that every writing period included group work whereby the group generated ideas for writing to be included in each student's writer's notebook (Tr. pp. 293-95).²¹ The teacher also described the provision of teacher models of the writing lesson targeted through presentation through use of a Smartboard (Tr. p. 294). Churchill personnel worked on spelling during the phonics portion of reading instruction, and prior to a student "publishing" a completed piece of writing (Tr. pp. 295-96). Specific to the student's needs in regard to sequencing written and oral events, the teacher testified that she provided him with a "scaffolded" paper that asked him to sequence a series of events, in addition to interactive graphic organizers and interactive checklists specific to the needs of the assignment (Tr. pp. 296-98, 363-64). In addition, the teacher testified that during writing instruction, she addressed writing mechanics such as capitalization, proper ending punctuation, and she engaged in 1:1 work with the student on sentence construction, generating ideas, and organization (Tr. pp. 298-301, 353-54).²²

²⁰ The student's teacher from Churchill indicated instructional groups might also be as small as three or four students (Tr. p. 352).

²¹ The hearing record describes the writer's notebook as composition notebook dedicated for the student's writing (Tr. p. 295).

²² The student's teacher also indicated that during 1:1 work with the student in generating ideas for a writing assignment, she might act as a scribe for the student (Tr. pp. 300-01).

Additional testimony by the student's teacher from Churchill indicated that in science and social studies, the student received multisensory instruction (Tr. p. 303). The science and social studies teachers also broke down information for the student into smaller chunks, so that he could better process it (Tr. p. 304). Similarly, those teachers broke down directions into smaller pieces, so that the student could follow them (id.). The student was also afforded extra time to process in the classroom (Tr. pp. 304, 310-11). During social studies, the teacher testified that Churchill personnel worked on literal and inferential comprehension with the student, particularly through the use of nonfiction texts (Tr. p. 309). Furthermore, the teacher discussed how the social studies curriculum was tied to the science curriculum (Tr. pp. 305-06). The teacher also described how Churchill addressed the student's difficulties with organization, such as the use of coding in all academic subjects throughout the day to highlight important information (Tr. p. 343-44). She added that the student's team formally met every other week to discuss the student and his classmates (Tr. p. 306). The student's teacher further testified that she was in "constant contact" with the student's counseling, speech-language, and OT related services providers about how the student was progressing in each area, and about instructional strategies (Tr. pp. 314, 317-323, 325-27).

To address the student's difficulties with attention, the teacher described methods she used to refocus or recue the student, such as saying his name, tapping his shoulder, tapping the desk, the provision of preferential seating near a teacher, the use of repetition, and by keeping him involved and sometimes literally "on his feet" (Tr. pp. 328-29). The teacher also noted that during non-instructional times, such as lunch or recess, the student was provided with adult support as needed, and reminded to use an appropriate voice and to not touch other people, even in a playful manner (Tr. pp. 331-32).

A January 2012 Churchill elementary school mid-year report card reflected information consistent with the student's teacher's testimony (Parent Ex. G at pp. 1, 3). Academically, in reading, the January 2012 Churchill report card indicated the student required a "frequent" level of teacher support specific to the student's ability to read fluently, identify story elements (character, setting, problem, solution), summarize and retell a story, answer inferential questions, find the main idea, define vocabulary words in isolation, use context clues to figure out meanings of unknown vocabulary, and use capitalization and punctuation (id. at p. 5). The report further reflected that student required a "continuous" level of teacher support in regard to checking his work and making corrections (id.).

In math, the January 2012 Churchill report card revealed that the student required a "frequent" level of teacher support specific to reading, writing and comparing numbers, his use of vocabulary (i.e., most, fewest) and estimation, his ability to classify and draw shapes, his ability to understand and use standard measure (half-inch, inch and foot), his ability to use data to problem solve and solve problems using a variety of strategies, and his ability to use an appropriate computational model (Parent Ex. G at p. 6).

With respect to writing, the January 2012 Churchill report card showed that the student required a "frequent" level of teacher support specific to his ability to write smoothly and efficiently, edit his work for neatness, use capitalization and punctuation, produce complete

sentences, categorize words by parts of speech (noun, verb, adjective), choose descriptive words (adjectives) to share ideas, generalize learned skills and strategies, share work with others for purposes of giving and receiving feedback, and clearly express the main idea (Parent Ex. G at p. 7). The student required a "continuous" level of teacher support in regard to his ability to rereads written work, revise his written work for word choice and content, and proofread and edit for spelling and conventions (id.).

In social studies, the January 2012 Churchill report card noted that the student required a "frequent" level of teacher support regarding his capacity to learn and use vocabulary, recall information, generalize skills and information to new topics, use map symbols/map key in order to read a variety of maps, use cardinal and intermediate directions in order to navigate in 3-D space, categorize information about continents, and compare and contrast life in communities around the world (Parent Ex. G at p. 8). According to the January 2012 report card, the student's science teacher reported that the student performed various skills independently or required minimal teacher support (id. at p. 9). In non-academic subjects such as library, physical education, art, and music, the student demonstrated an array of "satisfactory," "good," or "outstanding" skills (id. at pp. 10-11).

With respect to OT, the student's therapists reported in the January 2012 report card that the student received OT two times per week for 30 minutes in a small group (6:1) (Parent Ex. G at p. 12). In OT, the therapists reported that they reinforced the student's handwriting, scissor cutting, and keyboarding skills while supporting the academic curriculum (id.). For example, in OT, the student reviewed grammar concepts, use of capitals, spaces and periods while practicing handwriting (id.). Specific to the student's progress in OT, the report card revealed that in December 2011, the student copied a nine-word sentence in print with increased speed (41 seconds as compared to one minute five seconds in September 2011) (id.). The therapists described the quality of the student's writing as good, and they deemed his letter formation to be 88 percent accurate (id.). In December 2011, the student demonstrated increased speed when cutting with scissors without a decline in quality (it took him 53 seconds to cut out a circle as compared to one minute 37 seconds in September 2011) (id.). In addition, the therapists characterized the student as an active participant in the morning sensory group, and they also reported that per teacher feedback, the student exhibited a greater ability to focus and follow directions after attending the group (id.). Behaviorally, the therapists described the student as hard-working and cooperative; however, he required verbal cues to focus on his work (id.). The report noted that it was anticipated that the student would be discharged from OT for the following school year (id.).

Additionally, according to the January 2012 report card, the student received speech-language therapy twice per week for 30 minutes in a small group (3:1) (Parent Ex. G at p. 13). The student's speech-language pathologist reported that she targeted receptive language skills such as following multi-step directions, comprehension of paragraph-length information/stories, and making simple inferences, and she noted improvement in the student's receptive language skills (id.). According to the therapist, the student worked on processing auditory information, whereby he was generally able to recall several details from a paragraph or short story but sometimes missed critical information (id.). The therapist further reported that the student was challenged by integrating information in order to form conclusions and inferences (id.).

Although the therapist found that the student was able to follow simple oral directions, as directions grew in length and complexity, difficulty was noted (id.). According to the therapist, she taught the student listening strategies such as asking for repetition and visualization and provided him with reminders to use them in order to help the student retain and process auditory information (id.). The student's therapist further indicated that the student's comprehension improved when information was repeated and complex language was broken down (id.). Expressively, although the therapist found that student displayed progress, she reported difficulty in his ability to focus on the most essential information and his use of precise wording in his writing (id.). The therapist also reported that as language demands increased (i.e., telling a story), the student's language precision reduced as he experienced breakdowns in syntax and grammar (id.). Additionally, the therapist found that the student experienced difficulty with his ability to sequence and organize ideas while formulating discourse (id.). The speech-language pathologist recommended the provision of clinician models and visual aids, and redirection to task to assist the student (id.). She further recommended that the continued provision of speech-language therapy twice weekly in his a group (3:1) (id.).

In regard to counseling, the January 2012 Churchill report card indicated that all elementary school students met once weekly in a small HHR group (6:1) run by the private school's social worker outside of the classroom (Parent Ex. G at p. 14).²³ Targeted skills included showing respect for others, following rules, initiating interactions, demonstrating turn-taking in play or conversations, cooperating and compromising with peers, problem-solving with peers, and understanding the perspective of others (id.). The report card characterized the student as cheerful, outgoing, who enjoyed socializing with peers, and relaxed and comfortable in his interpersonal relationships (id.). When attentive, the report indicated that the student brought a positive energy to the group, actively participated in discussions and activities, and offered contributions that reflected thoughtfulness and insight (id.). However, the report also revealed that when easily distracted, the student could be tempted to respond to others in a "playful and frivolous manner and engage in side conversations" (id.). At these times, according to the report, the student benefitted from redirection and reminders to stay focused on task during group discussion (id.).

Lastly, although the Second Circuit has indicated that a student's progress in a private school is a relevant factor that may be considered when reviewing whether a private school is appropriate, and while progress alone does not suffice to demonstrate that such a placement is appropriate, the hearing record reflects that the student made progress at Churchill School with all of the supports provided to the student (Tr. p. 342; Gagliardo, 489 F.3d at 115).²⁴ Testimony by his teacher and the parent indicated the student has progressed in the areas of self-confidence and self-advocacy when he needed to ask questions or have information repeated, as well as with respect to his reading, writing, organization skills, and in academic subjects and related services (Tr. pp. 273, 288, 301-02, 306-07, 311-12, 315-16, 318, 327,

²³ The hearing record refers to counseling as "Health and Human Relations" (HHR) at Churchill (Tr. pp. 313, 325).

²⁴ A finding of progress is not required for a determination that a student's private placement is adequate (G.R. v. New York City Dept of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; see also Frank G., 459 F.3d at 364).

342-44, 411-12; Parent Ex. G at pp. 1-14).

Accordingly, for the reasons discussed above, I find that the hearing record contains sufficient evidence to conclude that the parents have met their burden to show that Churchill was an appropriate unilateral placement for the student for the 2011-12 school year. In reaching this conclusion, I have considered the "totality of the circumstances" (see Frank G., 459 F.3d at 364) and have determined that the evidence shows that the parents' unilateral placement reasonably served the student's individual needs, providing educational instruction specially designed to meet the student's unique needs, supported by such services as are necessary to permit the student to benefit from instruction.

D. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 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"]). 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]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that 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 removing 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. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The parties dispute whether equitable considerations favor the parents' request for relief. The district argues, in pertinent part, that the parents had no intention of placing the student in a district school. In contrast, the parents allege that their actions demonstrate that they never obstructed the CSE process; rather, they facilitated it. In this case, the hearing record reveals that in June 2011, the parents obtained from the district what they deemed to be an appropriate program for their son; however, the program recommendation was later modified (Tr. pp. 386-90; Dist. Ex. 1; Parent Exs. L; M). By letter to the district, dated July 7, 2011, the parents detailed their concerns regarding the development of the student's IEP; however, they also expressed their willingness to continue to work with the CSE to create an appropriate program for the student (Parent Ex. D). The parent testified that this correspondence went unanswered by the district (Tr. p. 392). The parents also participated in the July 2011 CSE meeting (*id.*). Based on the foregoing, the evidence in the hearing record intimates that the parents continued to utilize the CSE process, which afforded the district the opportunity to develop an appropriate program; however, there is nothing in the hearing record to demonstrate that the district took advantage of this opportunity. Under the circumstances, equitable considerations do not preclude granting the parents' requested relief in this matter.

VII. Conclusion

Having concluded that the district did not offer the student a FAPE, that the parents' unilateral placement at Churchill was appropriate, and that equitable considerations favored the parents, I will direct that the district reimburse the parents for tuition payments made to Churchill for the 2011-12 school year. I have considered the parties' remaining contentions and find that it is not necessary to address them in light of the determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 7, 2012 is reversed and that the district shall reimburse the parents for any portion of the tuition paid by the parents to Churchill for the 2011-12 school year upon submission of proof of attendance and payment.

Dated: **Albany, New York**
 September 5, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER