The University of the State of New York

The State Education Department
State Review Officer
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No. 12-184

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Office of Erika L. Hartley, attorneys for petitioner, Erika L. Hartley, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied portions of the parent's requests for relief. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

With regard to the student's educational history in this case, the student has continuously received special education services in a district public school since 2007 (Dist. Ex. 8 at p. 2; see also Tr. pp. 200-01).[1] The hearing record reflects that the student demonstrated difficulties with reading; namely, decoding and sight word vocabulary, as well as auditory processing, tolerance fading memory, and writing (Tr. pp. 167-69, 240-41, 310; Dist. Ex. 8 at pp. 6-13; see also Dist. Exs. 2 at pp. 1-2; 6 at pp. 2-3; 7 at pp. 1-2; Parent Exs. F at pp. 5, 7-8, 10; G at p. 4; H at p. 4; Q at

[1] The parent testified that the district had developed an IEP for the student for every school year since the 2006-07 school year, during which year the student was first evaluated and referred to the CSE (Tr. p. 201).

pp. 1-2). The student received diagnoses of dyslexia, a reading and spelling learning disorder, rule/out generalized anxiety disorder, and migraines, as well as attention, executive functions, and auditory processing deficits (Tr. pp. 228, 287-88; Dist. Ex. 8 at p. 13; Parent Ex. F at p. 10).

The student attended a district public high school for the 2010-11 school year (seventh grade) (Tr. p. 231-32). Because the student started attending the particular public school site for the first time in September 2010, the parent provided the school with a copy of the student's November 2009 IEP (Tr. p. 233). In October 2010, the parent requested in writing that the CSE reconvene to consider the results and recommendations of a privately obtained August 2010 central auditory processing evaluation (Parent Ex. N). Despite the parent's request, there is no evidence in the hearing record that the CSE convened or developed an IEP for the student for the 2010-11 school year and, in fact, district witnesses acknowledged at the impartial hearing that they could not produce any such evidence; however, the hearing record indicates that the student received special education teacher support services (SETSS) during the 2010-11 school year (see Tr. pp. 79, 95, 107, 218-19, 233-34).

For the 2011-12 school year, the student began his eighth-grade year at a district public school (Tr. pp. 227; Dist. Ex. 8 at p. 2). There is no evidence in the hearing record that there was an IEP in effect for the student at the start of the 2011-12 school year (see Tr. pp. 1-356; Dist. Exs. 1-8; Parent Exs. A-Q; see also IHO Decision at p. 8).

On October 28, 2011, the CSE convened to conduct the student's triennial review and to develop an IEP for the 2011-12 school year (Tr. p. 50; Dist. Ex. 2 at pp. 1, 11).[2] Finding the student eligible for special education as a student with a learning disability, the October 2011 CSE recommended a general education classroom with five sessions per week of direct group SETSS in a separate location for English language arts (ELA) (Dist. Ex. 2 at pp. 1, 7, 11; see Tr. p. 230).[3] The October 2011 IEP included strategies to address the student's management needs, including: modification of academic tasks; checking for understanding; redirection; task analysis; teaching new concepts in small and manageable amounts; repetition; clarification and simplification of directions; use of graphic organizers, visual aids, as well as verbal, physical, and visual prompts; control by proximity; preferential seating; allowance of ample opportunity for practice and mastery; and offering praise, encouragement, and reward for positive attempts, efforts, and mastery of tasks ((Dist. Ex. 2 at p. 3). In addition, the October 2011 IEP indicated that the student would participate in State and district wide assessments with accommodations, including extended time, separate location, direction repeated, tests read, use of a scribe, and preferential seating (id. at pp. 8-9). The October 2011 IEP also included annual goals related to reading, spelling, and writing (id. at pp. 4-6).

[2] Attendees at the October 2011 CSE meeting included a district representative, a district school psychologist, a district special education teacher, a district general education teacher, the principal from the student's school, the parent, and the student's grandmother (Dist. Ex. 3 at p. 1). The grandmother of the student testified she acted as an advocate for the parent at the October 2011 CSE meeting (Tr. p. 209).

[3] The student's eligibility for special education and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

A. Due Process Complaint Notice

By amended due process complaint notice dated March 28, 2012, the parent alleged that the district failed to offer the student a FAPE for the 2011-12 school year (see Dist. Ex. 1 at pp. 1-2).[4] With regard to the development of the student's October 2011 IEP, the parent alleged that CSE failed to address her concerns regarding the student's accommodations and predetermined the student's educational program for the 2011-12 school year, which in turn denied the parent an opportunity to meaningfully participate at the CSE meeting (Dist. Ex. 1 at p. 2). The parent also alleged that the October 2011 CSE failed to consider certain privately obtained evaluations provided to the CSE by the parent (id.). The parent further alleged that the "educational placement in [the district] was . . . not appropriate for the student and caused him to regress" (id.).

As relief, the parent requested: (1) deferment of the matter to the district's central based support team (CBST) for a specific non-public school placement;[5] (2) a "P-1 Nickerson Letter";[6] (3) an order providing that the CSE reconvene to develop and appropriate educational program for the student, with inclusion of the requested deferment to the CBST on the IEP document; (4) a "P-3 letter" for compensatory additional services consisting of tutoring at the "enhanced rate" with a "reading specialist in dyslexia" certified in the Orton-Gillingham approach;[7, 8, 9] (5) reimbursement to the parent of all monies expended for the privately obtained neuropsychological evaluation of the student; (6) reimbursement to the parent for all monies expended for the private central auditory processing evaluation of the student; (7) "assistive technology for [central auditory processing

[4] The parent initially filed a due process complaint notice dated March 16, 2012 (Parent Ex. A).

[5] Although the hearing record does not contain a description, the CBST has been described in other appeals as an office that receives cases from the CSE and then works with families and non-public schools to find appropriate programs for students (see, e.g., Application of the Dep't of Educ., Appeal No. 09-033).

[6] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

[7] A "P-3 letter" that is issued by the district authorizes a parent to obtain SETSS from an approved tutor at the district's expense (see Application of a Child with a Disability, Appeal No. 05-097; Application of a Child with a Disability, Appeal No. 05-039).

[8] At the impartial hearing, the parent's attorney stated, without objection from the district, that "the enhanced rate" is eighty-five dollars per hour (Tr. p. 40).

[9] Evidence in the hearing record reflects that the Orton-Gillingham approach includes "explicit multisensory" instruction involving repetition of basic and higher level concepts to provide instruction in reading and writing based on the needs of the student (see Tr. pp. 289-90). With the Orton-Gillingham approach, instruction can be provided to the student using repetitive-based techniques that "break down the steps" to reading, involving the skills needed for reading fluency, reading comprehension, and writing related to grammar, outlining, and editing (see Tr. pp. 290-91).

disorder] at the [district's] expense with the [Fast ForWord] software"; (8) "assistive technology for dyslexia at the [district's] expense at the enhanced rate" (9) compensatory additional services in the form of "vision therapy" at the enhanced rate; (10) compensatory additional services in the form of auditory processing therapy "at the enhanced rate" through a related service authorization (RSA); (11) compensatory additional services in the form of speech-language therapy services with a speech pathologist certified in central auditory processing disorder at the enhanced rate through an RSA ; (12) reimbursement for costs associated with travel in order to attend and participate in the impartial hearing; (13) an "FM unit" provided at district expense; (14) compensatory additional services in the form of SETSS "at the enhanced rate"; (15) "legal fees" arising out of the proceedings (Dist. Ex. 1 at pp. 2-3).[10]

B. Impartial Hearing Officer Decision

On May 30, 2012, an impartial hearing convened and, following three nonconsecutive days of proceedings, concluded on July 13, 2012 (Tr. pp. 14-356).[11] In a decision dated August 23, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year and awarded the parent various forms of relief (see IHO Decision at pp. 8-11). The IHO initially found that, although the parent had indicated at the impartial hearing her intent to seek relief for the 2009-10, 2010-11, and 2011-12 school years, she failed to mention or raise any challenge with respect to the 2009-10 or 2010-11 school years in her amended due process complaint notice (id. at pp. 2 n.1, 7-8). Therefore, the IHO found that the scope of the impartial hearing was limited to the parent's claims arising out of the 2011-12 school year (id. at p. 8).[12]

Noting the district's concession at the impartial hearing that it failed to develop an IEP for the student's 2010-11 school year, the IHO found that the district failed to develop an IEP prior to the commencement of the 2011-12 school year and, as such, denied the student an "educational opportunity for the 2011-12 school year" (IHO Decision at pp. 8-9).

Next, with regard to the development of the October 2011 IEP, the IHO found that it was "clear that the parent and grandparent were not denied an opportunity to participate in the IEP process for the 2011-12 school year" (IHO Decision at p. 8). The IHO determined that the CSE conducted and considered several timely evaluations in developing the student's October 2011 IEP (id. at p. 10).[13] However, the IHO also determined that the October 2011 CSE should have

[10] In this case, the parent's due process complaint notice also contained requests for numerous forms of relief; yet, the due process complaint notice included little identification of the grounds supporting each of the parent's requests for relief. The parent is reminded that in addition to the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint" notice (R.E., 694 F.3d at 187-88 n.4), in cases involving numerous types of relief requested, each type of relief requested should correspond to "a description of the nature of the problem . . . including the facts relating to such problem" (8 NYCRR 200.5[i][1][iv]).

[11] On May 2 and May 7, 2012, the IHO attempted to conduct a scheduled prehearing teleconference, but the parties did not appear (Tr. pp. 3, 7).

[12] The IHO also noted that the parent was "free to pursue relief for additional years in a separate impartial hearing request" (IHO Decision at p. 8 n. 3).

[13] The IHO also found that because the student received timely evaluations, there was no basis to order the district to provide the parent with a P-1 or Nickerson letter (IHO Decision at p. 10).

considered the August 2010 private central auditory processing evaluation, notwithstanding that the evaluation was conducted approximately 14 months before the October 2011 CSE meeting and particularly because the district caused the delay by failing to timely convene the CSE (id. at p. 9). The IHO reasoned that the August 2010 private central auditory processing evaluation was nearly identical to a similar evaluation conducted in September 2008, which suggested that there would not have been much change in the student's needs between the date of the evaluation and the October 2011 CSE meeting (id.). The IHO also noted that the October 2011 CSE should have considered the August 2010 private central auditory processing evaluation because it "tested for things" that the district's evaluations did not measure (id.).

The IHO also addressed the appropriateness of the October 2011 IEP (see IHO Decision at pp. 9-10). First, the IHO rejected the parent's claim that the student required "additional reading instruction" using the Orton-Gillingham approach (id. at p. 10). The IHO reasoned that: the student's score of 2.9 on his ELA assessment was nearing State standards; the parent had rejected after-school academic intervention services (AIS) that were offered by the district even though there had been evidence that the student exhibited progress after participating in AIS during previous school years; and the Orton-Gillingham approach to reading instruction was not the only effective approach to reading instruction that the district could have used for this student (id.).

With respect to implementing the October 2011 IEP, the IHO noted that the district "did not show that the [student] was provided with a scribe" during his examinations, as mandated on his October 2011 IEP (IHO Decision at p. 9).

As to relief, the IHO ordered the district (1) to reimburse the parent for the cost of the August 2010 central auditory process evaluation;[14] (2) to reconvene the CSE to modify the student's October 2011 IEP to reflect that the student "should have an FM unit made available to him in the classroom for one year to compensate him for the services [that] he was not provided with [during the 2011-12 school year,] as well as [speech–language therapy] services for at least one year three times a week for thirty minutes"; (3) to provide the parent with an RSA for speech-language therapy "by a therapist who can give the student auditory training" or, in the alternative, pay for the cost of a provider obtained by the parent at the enhanced rate (if necessary), upon receipt of proof that the parent exhausted the approved provider list; and (4) to provide the student with a scribe as a testing accommodation as mandated on the student's October 2011 IEP (IHO Decision at pp. 10-11).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn certain findings of the IHO and obtain additional relief not awarded by the IHO.[15] As an initial matter, the parent argues that the IHO erred in limiting the scope of the impartial hearing to the parent's claims arising out of the 2011-12 school

[14] The IHO also ordered that after one year, the district could elect to obtain a new central auditory processing evaluation at its own expense and convene the CSE to consider the new evaluation (IHO Decision at p. 10).

[15] As discussed below, the parent filed an affidavit sworn to by the parent (notarized by the parent's attorney) and labeled that affidavit as a "Petition" (Parent Aff. at pp. 1, 7). In support of the parent's affidavit, the parent's attorney filed an unverified "Attorney Affirmation in Support of Petition" (Attorney Aff. at p. 14).

year because the parent's due process complaint notice spoke of the district's "long-standing notice of the student's disabilities," and that, despite such notice and parental requests that the district evaluate the student, the district failed to conduct such evaluations or provide the student with accommodations.

Relative to the student's triennial reevaluation, the parent argues that the IHO erred in finding that the CSE had before it several timely evaluations that were sufficient for development of the student's October 2011 IEP. In addition to the IHO's finding that the CSE failed to consider the central auditory processing evaluation, the parent asserts that the IHO also should have found that the CSE failed to consider the private neuropsychological evaluation. The parent also argues that the CSE should have conducted and requests that the CSE be ordered to conduct "all necessary testing," including occupational therapy (OT) and assistive technology evaluations.

Relative to the October 2011 IEP, the parent argues that the educational program recommended for the student was not appropriate because it was not designed to remediate the student's reading deficits and because the student's progress in the areas of decoding and reading comprehension had stagnated since the second grade. The parent asserts that the October 2011 IEP should also have specified that the student receive reading instruction using the Orton-Gillingham approach, as recommended in private neuropsychological evaluation, which was before the CSE. Furthermore, the parent argues that the district's AIS program, on which the IHO relied in denying the parent's request for additional reading services for the student, lacked structured reading support and failed to offer support specific to students who had received diagnoses of a reading disorder or dyslexia. The parent also argues that the October 2011 CSE failed to recommend assistive technology, OT, or counseling for the student, despite her requests that the CSE consider the same.

As relief, the parent requests (1) deferment of the matter to the district's CBST for a specific non-public school placement; (2) a Nickerson Letter;[16] (3) additional services consisting of tutoring at the "enhanced rate" with a reading specialist in dyslexia certified in the Orton-Gillingham approach; (4) additional services in the form of SETSS for remediation at district expense at the enhanced rate; (5) assistive technology (laptop) with Fast ForWord software and other unspecified software targeted to address deficits associated with a diagnosis of dyslexia at district expense; (6) compensatory additional services in the form of auditory processing therapy at the enhanced rate; (7) additional services in the form of speech-language therapy with a speech-language pathologist certified in central auditory processing disorder; and (8) reimbursement for

[16] Neither an IHO nor an SRO has the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order, including the remedy of a Nickerson letter (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom. R.E., 694 F.3d 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; P.K. v. New York City Dept. of Educ. (Region 4), 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]). Therefore, this portion of the parent's request for relief will not be further addressed, and the parent's attorney should refrain from seeking a Nickerson letter in future appeals (see generally Application of a Student with a Disability, Appeal No. 13-167; Application of a Student with a Disability, Appeal No. 12-235).

all monies expended for the privately obtained September 13, 2011 neuropsychological evaluation of the student.[17]

In its answer, the district responds to the parent's "Petition" and "Affirmation in Support of Petition" by admitting or denying the allegations raised by the parent. The district also represents that it does not cross-appeal the IHO's determination that it did not provide offer the student a FAPE for the 2011-12 school year or the relief awarded.

Initially, the district argues that the parent's appeal should be dismissed with prejudice because the parent's pleadings do not conform with State regulations applicable to proceedings before the Office of State Review. Next, the district argues that the IHO properly limited the impartial hearing to issues relative to the 2011-12 school year because the parent's due process complaint notice failed to mention any issues regarding any other school year and because the district did not agree to expand the scope of the impartial hearing or otherwise "open the door" to the issues relating to years prior to the 2011-12 school year.

Finally, the district argues that the IHO has already awarded sufficient relief to remedy the deprivation of a FAPE for the 2011-12 school year and that no further relief should be awarded on appeal. In particular, the district asserts that the parent's requests for a Nickerson letter and deferment to the CBST for a nonpublic school placement are not appropriate remedies under the circumstances of this case.

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

[17] In the parent's due process complaint notice, she requested (1) compensatory vision therapy at district expense at the enhanced rate; and (2) parental reimbursement for costs associated with travel in order to attend and participate in the impartial hearing (Dist. Ex. 1 at p. 2). These requests were neither addressed by the IHO, nor advanced by the parent on appeal. Under these circumstances, the parent has effectively abandoned these claims for relief by failing to identify them in any fashion or by making any legal or factual argument as to how the parent is entitled to such relief. Therefore, these requests for relief will not be further considered (see 8 NYCRR 279.4[a] [requiring the petitioner to "clearly indicate" the relief sought before the SRO]; cf. 34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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. Form and Pleading Requirements

In its answer, the district challenges the parents' petition as noncompliant with the form requirements set forth in the practice regulations applicable to proceedings before the Office of State Review. State regulations require that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). In addition, a petition, answer, reply, and memorandum of law "shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (8

NYCRR 279.8[b]). State regulations further require that "[a]ll pleadings shall be verified" and that the "petition shall be verified by the oath of at least one of the petitioners" (8 NYCRR 279.7).

In this case, the parent served an affidavit sworn to by the parent (notarized by the parent's attorney) and labeled as a "Petition" (Parent Aff. at pp. 1, 7). In support of the parent's affidavit, the parent's attorney filed an "Attorney Affirmation in Support of Petition" (Attorney Aff. at p. 14). Neither the affidavit nor the affirmation qualify under State regulations as a properly filed and verified "petition for review" (8 NYCRR 279.4[a], 279.7[b]). The parent's affidavit, which consists entirely of factual allegations, fails to include any citations to the hearing record or to legal authority (Parent Aff. at pp. 1-7). While the attorney's "Affirmation in Support of Petition" more closely resembles a petition for review in that it identifies the findings and conclusions to which exceptions are taken and indicates the relief sought by the parent (8 NYCRR 279.4[a]), the affirmation is not verified, which is required for "[a]ll pleadings" filed with the Office of State Review (see 8 NYCRR 279.7; see also Attorney Aff. at p. 14).

State regulations provide that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer" (8 NYCRR 279.8[a]). However, in this instance, I decline to exercise my discretion to dismiss the parent's pleadings.[18] Although the parent's affidavit and the attorney's affirmation are not consistent with the practice regulations governing the initiation of an appeal, the attorney's affirmation can be reasonably read to set forth the information required in a petition and it appears that the parent's attorney has taken steps to familiarize herself with the proper form requirements in other matters before the Office of State Review since the petition in this case was filed.[19] Therefore, the parent's attorney is again reminded to comply with the pleading requirements expressly prescribed by State regulations or risk dismissal of an appeal (see Application of a Student with a Disability, Appeal No. 11-117).

B. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. As noted above, the district does not appeal the portion of the IHO's decision finding that the district denied the student a FAPE for the 2011-12 school year or any of the relief awarded by the IHO (Ans. ¶ 22; see also IHO Decision at pp. 10-11). Accordingly, the IHO's determinations, which were adverse to the district, and the relief granted by the IHO are final and binding on the parties and will not be further addressed (see 34 CFR

[18] Because the factual allegations in the parent's affidavit lack any citation to the hearing record, any of those allegations deemed inconsistent with the evidence in the hearing record will not be considered because the parent has provided no argument regarding why evidence of these allegations could not have been proffered at the impartial hearing or why consideration of these factual allegations are necessary to the decision in this appeal (see 8 NYCRR 279.10[b]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]; see also, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024).

[19] For purposes of this decision, the "Attorney Affirmation in Support of Petition" shall be referred to and cited to as the "petition."

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

Next, the parent argues that the IHO erred in limiting the scope of the impartial hearing to the parent's claims arising out of the 2011-12 school year. The IDEA provides that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]). A review and plain reading of the parent's original and amended due process complaint notices demonstrates that the IHO did not err in limiting the parent's claims at the impartial hearing to the 2011-12 school year because no other justiciable claims were raised as to the 2009-10 or 2010-11 school years (see generally Dist. Ex. 1; Parent Ex. A). Indeed, the parent's due process complaint notice dated March 28, 2012 references only "[t]he current IEP," one "educational placement in" the district, and "the student's most recent annual review of his IEP" (Dist. Ex. 1 at pp. 1-2). Accordingly, the IHO properly limited the scope of the impartial hearing to claims concerning the 2011-12 school year (IHO Decision at pp. 7-8). Moreover, the parent did not seek the district's agreement to expand the scope of the impartial hearing or seek to include the assertions in a further amended due process complaint notice and, to the extent that the Second Circuit has 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 (see M.H., 685 F.3d at 250-51 [holding 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]; see N.K v. New York City Dep't of Educ., 961 F. Supp.2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), a review of the hearing record does not reveal that the district raised any of these issues at the impartial hearing as a defense to a claim that was identified in the due process complaint notice.

C. October 2011 IEP

1. Evaluative Information and Present Levels of Performance

While the district does not challenge the determinations of the IHO with regard to the October 2011 IEP or challenge the compensatory relief awarded by the IHO for the district's failure to offer the student a FAPE for the 2011-12 school year, adjudication of the additional relief sought by the parent in this appeal requires an examination of the appropriateness of the October 2011

IEP.[20] To that end, although the sufficiency of the evaluative information available to the October 2011 CSE or the description of the student's present levels of performance in the IEP are not at issue, a review thereof facilitates the discussion of the issue to be resolved—the appropriateness of the program recommendations set forth in the October 2011 IEP.

The hearing record reflects that the October 2011 CSE considered a May 2011 speech-language evaluation, a privately obtained September 2011 neuropsychological evaluation report, an October 2011 social history update, an October 2011 classroom observation, and an October 2011 vocational assessment (Tr. pp. 51-52, 84, 267-68; see generally Dist. Exs. 5-8; Parent Ex. L). Summaries of these evaluative reports are set forth below seriatim. Briefly, the hearing record reflects that the student demonstrated significant delays in decoding, sight word vocabulary, and tolerance fading memory (Dist. Ex. 8 at pp. 6, 18; Parent Ex. H at p. 4), whereas the student demonstrated overall average cognitive and mathematics skills (Dist. Ex. 8 at pp. 4, 7, 17-18). As noted above, the student has also received diagnoses of dyslexia and a reading disorder (Dist. Ex. 8 at p. 13; Parent Ex. F at p. 10).

The May 2011 speech-language evaluation provided a description of the student's abilities and needs in language processing based on review of records, parent interview, observation, and results from a standardized tests (Dist. Ex. 7 at pp. 1-5). The report indicated that, at the time, the student did not receive speech-language therapy services (id. at p. 1). The speech-language pathologist reported that the parent expressed concerns regarding the student's speech-language abilities, in that the student tended to mumble words, needed repetition of spoken directions, exhibited poor use of grammar, and used vocabulary in an incorrect context (id. at 2). As part of the evaluation, the speech-language pathologist administered the Comprehensive Assessment of Spoken Language (CASL) to the student, which yielded scores indicating that the student performed in the average to above average range on all subtests with the exception of borderline average performance in the antonyms subtest (id. at p. 3). The report indicated that the student achieved a core composite score of 99, indicating that the student's overall language ability fell within the average range (id. at p. 3). Specifically, the student demonstrated receptive and expressive language skills within the average range (id. at pp. 3-4). The report also indicated the student's articulation, voice, and fluency were within normal limits (id. at p. 5). The speech-language pathologist did not recommend speech-language therapy for the student (id.).

The privately obtained September 2011 neuropsychological evaluation report of the student reported that, behaviorally, the student's speech was within normal limits but that the student demonstrated difficulty with verbal expression of complex concepts (Dist. Ex. 8 at p. 4). In addition, the psychologist reported that the student was cooperative, motivated, maintained attention and effort, and responded well to praise (id.). The psychologist interviewed the parent

[20] To the extent that the parent argues on appeal that the IHO erred in finding that the district clearly afforded the parent and grandparent an opportunity to participate in the development of the student's October 2011 IEP (see IHO Decision at p. 8), the evidence in the hearing record confirms that both the parent and grandparent participated at the October 2011 CSE meeting and had an opportunity to voice their requests and their disagreement with the recommendations of the October 2011 CSE (see Tr. pp. 50-51, 207, 211, 214; see also P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 210 Fed. App'x 1, 3, 2006 WL 3697318 [D.C. Cir. Dec. 6, 2006]).

to gain background information regarding the student's developmental and educational history (id. at pp. 2-4). The parent indicated that the student exhibited a low frustration tolerance and became easily upset (id. at pp. 3-4). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded standard scores (percentile rank) of 87 (19) in verbal comprehension, 100 (50) in perceptual reasoning, 110 (75) in working memory, 128 (97), and a full scale IQ of 105 (63) (id. at p. 17). With respect to cognition, the student demonstrated strengths in processing speed and working memory, average nonverbal reasoning skills, and low average verbal reasoning and visuomotor analysis skills (id. at pp. 11-12).

The September 2011 neuropsychological evaluation report also included results from administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) to the student, which yielded standard scores (percentile rank) of 82 (12) in word reading, 93 (32) in mathematics problem solving, 103 (58) in numerical operations, 92 (30) in reading comprehension, 78 (7) in spelling, and 73 (4) in pseudoword decoding (Dist. Ex. 8 at p. 18). The psychologist reported that the student demonstrated "significant deficits in phonological processing, which . . . affected his reading and spelling skills," as well as his processing of word problems (id. at p. 12). The psychologist also reported that the student focused on speed rather than accuracy, which negatively affected reading comprehension with respect to inaccuracy and dysfluency (id.). The psychologist also noted that the student wrote sentences but required structure with text organization (id.).

The psychologist administered several other standardized measures to assess the student's executive functions, language, memory, fine motor, and social/emotional functioning (Dist. Ex. 8 at p. 1). The psychologist indicated that the student's short and long-term memory, in the areas of verbal and visual information, were within normal limits but that the student demonstrated deficits in language processing (id. p. 12). The psychologist also indicated that the student's listening comprehension and expressive vocabulary skills were in the average range but that his comprehension of instructions fell within the borderline range (id. at pp. 7-8). With respect to attention and executive functions, the psychologist reported that the student exhibited "good speed" but significant difficulties with attention, cognitive flexibility, and inhibitory control (id. at p. 12). The student's graphomotor skills were within normal limits regarding speed but borderline range in the area of precision (id. at p. 8). The psychologist indicated that the student "clearly sacrificed accuracy for speed" with respect to the task (id.). The Behavioral Assessment System for Children-Second Edition (BASC-2) results, with the student and the parent serving as informants, indicated the student's externalizing composite fell within normal limits; however, the student's T-scores fell in the clinically significant range in the area of somatization and in the at-risk range in the area of attention (id. at p. 10). Additionally, the student's T-scores fell within the at-risk range in adaptability, activities of daily living, and functional communication (id. at p. 11). The psychologist provided diagnostic impressions of the student, which included a reading disorder, rule/out generalized anxiety disorder, auditory processing difficulties by report, attention and executive function deficits, and migraines by report (id. at p. 13).

The psychologist's recommendations for the student, included in the September 2011 neuropsychological evaluation report, consisted of one-to-one or small-group instructional interventions, additional time for direct language arts instruction, direct phonics instruction, vocabulary building activities, reinforcement and rewards, model previewing, and strategies for writing assignments including semantic mapping, planning exercises, and computer programs

(Dist. Ex. 8 at pp. 14-15). The psychologist also recommended several accommodations and modifications for the student, including preferential seating, extended time, separate location for tests, verbal, visual, and tactile prompts, graphic organizers, emphasis on accuracy rather than speed, shorter assignments, chunking, and verbal and visual aids (id. at p. 14). The psychologist noted, among other things, that the student required assistance in organizing his academic work product and external support for desired work behaviors, as well as teaching of self-monitoring strategies, reminders, and an increase in reading time (as well as possible benefit from use of books on tape) (id. at pp. 15-16). The psychologist recommended consideration of a speech-language evaluation and speech-language therapy to address auditory phonological processing needs (id. at p. 16). The psychologist also recommended consideration of school-based counseling or outside psychotherapy to address the student's needs related to anxiety, psychosomatic symptoms, and coping skills (id.).

In an October 2011 social history update, the school psychologist reported the parent's concerns regarding the student's education, the student's family and his health status, as well as the student's behavior and recreational interests (Dist. Ex. 6 at pp. 1-3). The social history update reported that the parent requested assistive technology, including a laptop, speech-language therapy to address the student's auditory processing needs, Orton-Gillingham tutoring, counseling services, OT services, a scribe, vision therapy, and additional SETSS from the district (id. at p. 1). As part of the social history update, the school psychologist interviewed the parent who indicated the student had not exhibited progress since attending the district public school site beginning in the 2010-11 school year (id. at p. 2). The parent believed that the student only made progress when he had previously received instruction using the Orton-Gillingham method during the fourth grade (id.). The parent reported that the student performed well with mathematics concepts but demonstrated difficulties with mathematics problems, decoding, reading comprehension, reading fluency, and writing (id.). The parent also reported that the student's "handwriting is a little sloppy" (id.). The parent indicated that the student was well behaved and interacted well with adults and peers (id.).

In October 2011, the school psychologist conducted a classroom observation of the student in his then eighth-grade classroom during mathematics class (Dist. Ex. 5). The observation report indicated that the student was on time for class, that the teacher placed the students in groups of five, and that the students appeared engaged in the class lesson (id.). The student did not initially engage in the lesson because he did not have a pencil but, as directed by the teacher, he completed the lesson with a pen instead (id.). According to the report, the student listened well, copied notes, and participated in the lesson, including by answering questions in an accurate manner (id.). The observation report indicated that the student was on task and attentive throughout the lesson (id.). The classroom teacher indicated to the school psychologist that the student's performance in class was representative of his typical functioning within the classroom (id.). The teacher indicated the student was a "top math student[]" and always completed his classwork and homework (id.). The teacher reported that the student did not require SETSS for mathematics because he had an adequate understanding of mathematics concepts and procedures (id.). The school psychologist summarized the observation by indicating that the student worked hard, maintained attention, and completed assignments within timelines (id.).

In October 2011, the district school psychologist completed a Level 1 vocational interview with the student (Parent Ex. L at pp. 1-2). The student reported to the school psychologist that his

favorite subjects were mathematics and social studies and that his least favorite subjects were ELA and science (id. at p. 1). The interview revealed that the student completed chores in the home, including cooking, cleaning, and babysitting his little sister, and played football on a team in his leisure time (id.). The student reported that he preferred to work in a group because he could compare solutions with peers (id.).

The present levels of performance in the October 2011 IEP were consistent with the evaluative information before the October 2011 CSE (compare Dist. Ex. 2 at pp. 1-3, with Dist. Exs. 5-8). For example, the October 2011 IEP reflected evaluative information in the September 2011 neuropsychological evaluation report by including the WIAT results, which indicated that the student achieved a borderline performance in decoding and low average performance in word reading (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 8 at p. 18).[21] Also consistent with the September neuropsychological evaluation, the October 2011 IEP also reflected that the student needed to improve his skills in phonological processing, structural analysis of words, and word recognition to improve reading comprehension (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 8 at pp. 6-7, 12, 18). Additionally, as reflected in the September 2011 neuropsychological evaluation report, the October 2011 IEP indicated that the student exhibited a relative weakness in reading skills (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 8 at p. 6-7, 12). The October 2011 IEP also indicated the student related well with adults and peers (compare Dist. Ex. 2 at p. 2, with Dist. Exs 5; 6 at p. 2; 8 at p. 4).

Based on the foregoing, to the extent that the parent continues to assert on appeal that the October 2011 CSE failed to consider the September 2011 neuropsychological evaluation, the evidence in the hearing record does not support such a finding. Moreover, the evidence in the hearing record reveals that the CSE considered sufficient and timely evaluative information.[22]

2. General Education Placement with SETSS

On appeal, in support of her requests for relief, the parent argues that the educational placement recommended by the October 2011 CSE, which include five sessions per week of SETSS for the student, was not appropriate because the student required services that targeted his reading deficits and because the student required additional sessions of SETSS each week. The district counters that the CSE's recommendation of five sessions per week of SETSS was appropriate because the student's removal from the classroom for additional sessions was not

[21] As part of the September 2011 neuropsychological evaluation, the psychologist administered the WIAT-III to the student but the IEP noted "WIAT-II" instead of WIAT-III (Dist. Ex. 2 at p. 1).

[22] To the extent that the parent appeals the IHO's statement that the CSE considered timely evaluations, initially, it does not appear that the IHO intended to render a dispositive holding related to disputed fact in this regard but rather intended to set forth a preliminary finding before reaching the matters at issue (see IHO Decision at p. 10). This interpretation is consistent with a review of the parent's due process complaint notice, which reveals that the parent never raised an issue with regard to the sufficiency or timeliness of the evaluative information before the October 2011 CSE but, rather, asserted claims relating to the CSE's failure to consider private evaluations (see generally Dist. Ex. 1). In any event, as the hearing record supports such a finding, there is no reason to disturb the IHO's decision in this regard.

consistent with reports of the student's academic and social/emotional functioning, as well as his performance on the New York State ELA test.

As noted above, the October 2011 CSE recommended that the student attend a general education classroom in a public community school with direct SETSS in ELA for five periods per week in a separate location (Dist. Ex. 2 at p. 7). As an initial matter, "SETSS" is not specifically identified in State regulations describing the continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]). Moreover, the October 2011 IEP failed to specify the student-to-teacher ratio for the student's recommended SETSS (Dist. Ex. 2 at p. 7). However, the hearing record indicates that the SETSS would consist of the services of a special education teacher in a group of no more than eight students for one period each day to work on those skills that he still needed to develop (Tr. p. 184). This description is consistent with a view that SETSS in the instant case consists of a version of a resource room program provided as a pull-out service in a small group (see Application of the Dep't of Educ., Appeal No. 13-165; see also W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *2-*3 [S.D.N.Y. Mar. 31, 2014] [finding that SETSS "entailed removing [the student] from her general education classroom for one period of forty minutes each day and placing her with a special education teacher and a group of six students to address areas that [the student] needed the most help in"] [internal quotation marks omitted; alteration omitted]; B.W. v. New York City Dep't of Educ., 716 F. Supp. 2d 336, 340 (S.D.N.Y. 2010); Valtchev v. City of New York, 2009 WL 2850689, at *2 [S.D.N.Y. Aug. 31, 2009] [noting in that particular case that a resource room was also referred to as pull-out SETSS and was described as a service whereby special education teachers provide assistance to students in their areas of weakness]).[23]

Upon a review of the evaluative information that was before the October 2011 CSE, the evidence in the hearing record establishes that, although the October 2011 IEP identified the student's needs in the area of reading, the recommended placement of a general education environment in conjunction with SETSS did not address the student's reading needs and was not appropriate for this student.

First, the district failed to introduce anything more than anecdotal evidence in the hearing record demonstrating how the district's provision of SETSS to the student targeted his significant and particular needs in reading. For example, the SETSS teacher, who attended the October 2011 CSE meeting, testified that she provided five sessions per week of SETSS to the student during the 2011-12 school year (Tr. p. 164; see also Dist. Exs. 2 at p. 7; 3).[24] The SETSS teacher testified that the student's SETSS group consisted of four students but it could have consisted of up to eight students during the 2011-12 school year (Tr. p. 184).[25] She testified that the student demonstrated deficits in comprehension, vocabulary, and writing and that, during the SETSS sessions, the

[23] State regulation describes the purpose of a resource room program as "supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

[24] The SETSS teacher also testified that she provided SETSS to the student during the 2010-11 school year (Tr. p. 164).

[25] According to the SETSS teacher, a SETSS session consisted of a class period, which was approximately 43 minutes in length (Tr. p. 166).

teacher worked on the student's ELA skills, including vocabulary, writing, sentence structure, and mathematics word problems (Tr. pp. 166-68, 184-85). The SETSS teacher indicated that the district did not use a specific program to address students' needs related to diagnoses of dyslexia and reading disorders (Tr. pp. 171-72, 196). She testified that the student received SETTS because he was not on grade level in ELA; however, she was unable to explain how SETSS was assisting the student's effort to reach grade level (Tr. p. 169). The SETSS teacher testified that she could not speculate as to whether the student's performance in reading would improve if the student received additional SETSS sessions because he passed his classes, worked well in class, and performed adequately on the ELA State-wide testing (Tr. p. 193). The SETSS teacher indicated that, due to the student's performance on both the State ELA test and reading in class, he did not require supports in addition to those included on the October 2011 IEP; however, the hearing record does not provide any evidence as to how the SETSS addressed the student's needs in decoding and sight word vocabulary (see Tr. p. 169). The SETSS teacher acknowledged that the October 2011 CSE continued to recommend five sessions per week of SETSS for the student despite the parent's request for additional SETSS (Tr. pp. 176, 183).

Second, the hearing record establishes that, despite having received SETSS since the third grade, the student did not demonstrate progress. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed.Appx. 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation" at p. 18 [NYSED Office of Special Education, December 2010]). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

In the present case, although the district failed to develop an IEP for the student for the 2010-11 school year to which the October 2011 IEP could be compared, the hearing record shows that student received SETSS from third grade through eighth grade (Tr. pp. 201-203, 228-30,

233).[26] When the student began the third grade, a neuropsychologist assessed the student's reading abilities utilizing the WIAT-II in a neuropsychological evaluation report dated September 2006 (Parent Ex. F at p. 8). The WIAT-II results indicated that the student's decoding and word reading ability were within the average range compared to same age peers (id.).[27] In January 2007, a school psychologist conducted a psychological report update of the student as part of his initial evaluation (Parent Ex. Q at p. 1). Administration of the WIAT-II to the student yielded standard scores of 90 in word reading, 109 in reading comprehension, and 98 in pseudoword decoding, all of which fell within the average range compared to same-age peers (id. at p. 2).[28] Both evaluative reports consistently showed the student exhibited average skills in decoding and word recognition compared to same age peers during his third grade year (see Parent Exs. F at p. 8; Q at p. 2).

In addition, a review of the evaluative data from the 2006 neuropsychological and January 2007 psychological evaluations, compared to the more recent September 2011 neuropsychological evaluation of the student, reveals that the student regressed in the areas of decoding and word recognition skills (compare Parent Exs. F at p. 8; Q at p. 2, with Dist. Ex. 8 at p. 18). Specifically, the student's standard scores were within the average range on both the 2006 and 2007 evaluations; however, the September 2011 neuropsychological evaluation indicated the student demonstrated a 73 in decoding (borderline range) and 82 (low average range) in word reading, which indicated a significant decline in the student's reading performance (see Parent Exs. F at p. 8; Q at p. 2; Dist. Ex. 8 at p. 18). Additionally, the 2011 neuropsychological evaluation indicated that the student exhibited "significant decoding deficits" and "low average" sight word vocabulary compared to same-age peers, indicating that the student "ha[d] not acquired grade-appropriate knowledge of the alphabetic principle or an appropriate fund of sight words" (Dist. Ex. 8 at pp. 6, 18). Further, the student's October 2011 IEP indicated that the student demonstrated fourth-grade reading skills during his eighth-grade school year (Dist. Ex. 2 at p. 11).

Third, the evidence in the hearing record indicates that the October 2011 CSE did not have before it any measurement of the student's progress. The evaluative reports before the CSE were conducted in spring and fall 2011, an insufficient duration of time to measure the student's progress over the entirety of the 2010-11 school year and they did not contain a summary or review of the student's progress (see Dist. Exs. 5; 6 at p. 1; 7 at p. 1; 8 at p. 1). Because the district failed to develop an IEP for the 2010-11 school year, the October 2011 CSE was unable to effectively measure the student's progress towards annual goals (see Tr. pp. 95, 107). The parent also testified that district did not provide her with any progress reports during the 2010-11 and 2011-12 school years, and no progress reports or report cards were introduced into the hearing record (Tr. pp. 210,

[26] In fourth grade, the student received integrated co-teacher (ICT) services in addition to receiving SETSS and in the sixth grade the student reportedly received instruction using Orton-Gillingham as well as SETSS (Tr. pp. 203, 228-29, 231).

[27] Based on the grade equivalencies, the neuropsychologist also reported that the student was below grade level in reading (Parent Ex. F at p. 8).

[28] Although the student's standard scores fell within the average range the school psychologist noted that the student performed below grade level in decoding and sight word vocabulary, apparently based on grade equivalencies alone (Parent Ex. Q at p. 2).

235).[29] Indeed, while the October 2011 IEP reported that the student's "expected rate of progress in acquiring skills and information [wa]s within normal limits" (Dist. Ex. 2 at p. 1), there was no indication of the actual progress exhibited by the student which would form the basis for such a statement. Further, the October 2011 IEP only indicated that the student "continue[d] to have difficulty" with decoding unfamiliar multisyllabic words and word endings, as well as providing accurate responses to grade level literal and inferential reading passages, and did not indicate areas of progress (id. at p. 2). The only area in which the IEP noted progress was in the area of behavior, where the IEP noted that the student's cooperation and ability to maintain attention increased (id.).

Fourth, the evidence in the hearing record does not support the district's argument that no more than five sessions per week of SETSS was appropriate because, according to the district school psychologist and the SETSS teacher the student would not have benefited from missing additional class instruction (Tr. pp. 88, 192).[30] The October 2011 IEP indicated that the parent and the student's grandmother believed the student would benefit from three additional sessions per week of SETSS with an educator trained in Orton-Gillingham but that the CSE rejected this option due to the amount of time out of the classroom (Dist. Ex. 2 at p. 12).[31] However, the private psychologist, who conducted the September 2011 neuropsychological evaluation of the student, testified that five SETSS sessions per week failed to address the student's reading needs. The private psychologist testified that one session of SETSS per day would not allow the student to reach grade level skills in reading (Tr. pp. 145, 148). The psychologist further testified that, although the student had received SETSS in previous school years, the SETSS had not helped the student because he required "intensive intervention" (Tr. p. 145).

Under the circumstances of this case, the evidence in the hearing record demonstrates that the five sessions of SETSS per week included in the October 2011 IEP was not sufficient to address the student's reading needs for the 2011-12 school year. While the October 2011 IEP provided the student with access to nondisabled peers and while mainstreaming is an important objective of the IDEA, the CSE is required to properly balance the IDEA's requirement of placing the student in the LRE with the importance of providing an appropriate educational program that addressed the student's reading needs (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 143 [2d Cir. 2013]). Moreover, had the CSE recommended, for example, integrated co-teaching (ICT) services[32] for the student, it is not entirely clear whether such a placement would be considered any more restrictive under the IDEA than the student's placement in a general education classroom with SETSS five times per week (see M.W. 725 F.3d at 144-45). For the reasons expressed above and, under the circumstances of this case, the evidence in the hearing record does not support the

[29]A November 2009 IEP was contained in the hearing record, but there is no evidence suggesting that the October 2011 CSE reviewed it during the CSE meeting.

[30] The district school psychologist testified that there was disagreement regarding whether SETSS should be pull-out or push-in but that the CSE decided to keep the SETSS as pull-out (Tr. p. 51).

[31] The hearing record indicates that the principal from the student's school suggested at the October 2011 CSE meeting that the CSE reduce the student's SETSS sessions to three times per week based on the student's mathematics performance, whereas the parent requested eight sessions per week (Tr. pp. 50-51).

[32] ICT services "means the provision of special designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

appropriateness of the CSE's recommendation of five sessions per week of SETSS to address the student's reading deficits and needs, and the CSE should have also addressed whether, for example, the student required push-in services or different special education supports.

3. Orton-Gillingham Approach

Turning to the parent's claims relating to the Orton-Gillingham approach, under the IDEA a student entitled to special education services should receive "specially designed instruction," which requires "adapting, as appropriate to the [student's] needs . . . the content, methodology, or delivery of instruction" (34 CFR 300.39[a][3]; see also 8 NYCRR 200.1[vv]). Generally, while an IEP must provide for specialized instruction in a student's areas of need, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.H., 685 F.3d at 257; accord M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]; R.B. v. N.Y. City Dep't of Educ., 2013 WL 5438605, at * 11 [S.D.N.Y. Sept. 27, 2013]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]).

In this case, the IHO concluded that the student did not require additional reading instruction using the Orton-Gillingham approach because the student achieved a score of 2.9 on the New York State ELA test which approached reading standards; because the district's after-school AIS were offered to the student but rejected by the parent; and because the evidence in the hearing record established that the Orton-Gillingham approach was not the only methodology under which the student's needs could appropriately be met (IHO Decision at p. 10). The parent challenges each of these findings made by the IHO and argues that the IHO should have awarded additional reading instruction using the Orton-Gillingham approach to remediate the student's reading deficits because the recommended five sessions per week of SETSS was inadequate to meet the student's needs and failed to target the student's needs associated with dyslexia.

As to the IHO's finding that the student's State ELA test score approached reading standards during the 2010-11 school year, the student's test score alone does not indicate that the student did not require reading instruction to address his needs. The SETSS teacher testified the student achieved a 2.91 on the State ELA test, indicating that he was close to grade level (Tr. pp. 169-71). The student's performance of 2.91 on the State ELA test was classified a level II performance, which indicates that the student had partially met learning standards (id.). However, this score is only reflective of one test score and one method of assessment and does not alone determine the appropriateness of an educational program. In addition, the September 2011 neuropsychological

evaluation report revealed that the student was well below average in decoding and low average in word recognition compared to same-age peers (see Dist. Ex. 8 at pp. 6, 18). Accordingly, a review of the test results included in the hearing record demonstrates that the student was below grade level in reading on all measures and, when the student's ELA test score is considered along with the rest of the evidence, the IHO's finding that the student did not require additional reading instruction is not supported by the evidence in the hearing record.

The IHO also concluded that the student did not require additional reading instruction using the Orton-Gillingham approach because, although the district offered the student AIS, which had supported the student's progress in previous school years, the parent rejected those services (IHO Decision at p. 10; Tr. p. 173). The CSE did not include AIS in the student's October 2011 IEP (see Dist. Ex. 2). Nonetheless, the hearing record demonstrates that the district offered an after-school AIS program to assist students with reading, that AIS was available to the student, but that the student did not attend the program during the 2011-12 school year (Tr. p. 173). To the extent that the parent declined AIS services during the 2011-12 school year, the IHO's reliance on this fact was misplaced because AIS is not a special education service (id.). The availability of AIS to the student did not abdicate or diminish the CSE's responsibility under the IDEA to develop an appropriate IEP for the student.

Next, the evidence in the hearing record confirms that, while the Orton-Gillingham approach was not necessarily the only methodology appropriate for the student, the student's needs in decoding and word recognition indicated that he would benefit from direct multisensory instruction. For example, although the September 2011 neuropsychological report did not specifically recommend Orton-Gillingham services, the private psychologist testified that she recommended 1:1 or small-group instruction in reading, including direct instruction in ELA to address the student's needs in reading fluency, phonological awareness, vocabulary, comprehension, and writing (Tr. p. 143; see also Dist. Ex. 8 at pp. 14-16). Additionally, the psychologist testified that the student required direct ELA instruction and phonics instruction (Tr. pp. 144-45). The psychologist further testified that the student might not receive direct instruction in a general education setting because such a setting was generally not structured to provide such supports (id.).

The hearing record also contains testimony from a certified Orton-Gillingham specialist (specialist), who described the Orton-Gillingham approach and discussed her review of two neuropsychological reports of the student (Tr. p. 287-90). The specialist stated that Orton-Gillingham instruction would be appropriate for the student to address the student's needs in decoding, phonological awareness, reading fluency, reading comprehension, and writing (Tr. pp. 288-89).[33] The specialist described the Orton-Gillingham approach as "explicit multisensory" instruction involving repetition of basic and higher level concepts to provide instruction in reading and writing based on the needs of the student (Tr. pp. 289-90). The specialist testified that instruction could be provided to the student using activities that "break down the steps" to reading regarding the skills needed related to reading fluency and comprehension and writing related to grammar, outlining, and editing exercises (Tr. pp. 290-91). The specialist testified that, based on

[33] The hearing record indicates that the specialist never met the student but reviewed two private neuropsychological evaluation reports of the student, including the September 2011 private neuropsychological evaluation report (Tr. pp. 288-90, 298).

the student's difficulty with decoding and the recommendations made within the September 2011 neuropsychological report regarding reading comprehension and scaffolding for writing, "Orton-Gillingham [wa]s ideal" for the student and that four sessions per week of Orton-Gillingham throughout high school would be appropriate because the student was well below grade level and would need such instruction to reach grade level (Tr. pp. 291, 293-94, 299-300). The specialist acknowledged that practitioners could use other methodologies besides Orton-Gillingham to improve the student's reading skills; however, the specialist stated that there was less research to support the efficacy of other methodologies (Tr. p. 298).

Consistent with the foregoing and in consideration of the entire hearing record, there is no evidence that the Orton-Gillingham approach would be inappropriate for this student. On the other hand, there is little evidence in the hearing record to suggest that the Orton-Gillingham approach was the only methodology appropriate for the student. For example, it is unclear from the hearing record what, if any, specific methodologies the student's instructors utilized, aside from the parent's testimony indicating that the student exhibited progress during the sixth grade when he was instructed with the Orton-Gillingham approach (see Tr. p. 231). Moreover, the specialist opined that it would be "ideal" for the student to receive reading instruction using the Orton-Gillingham approach (Tr. p. 291); however, as noted above, the IDEA 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, 873 F.2d at 567 [citations omitted]; see Grim, 346 F.3d at 379). Indeed, the testimony of the specialist and the psychologist established that other direct 1:1 multisensory approaches, aside from Orton-Gillingham, could be effective for the student (see Tr. pp. 131, 298). Accordingly, there is insufficient evidence in the hearing record to indicate that the student's teachers should be limited to educating the student by using only one particular approach or methodology (see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]).

D. Relief

Having found that the CSE failed to develop an appropriate IEP for the student for the 2011-12 school year for reasons in addition than those set forth by the IHO, the inquiry proceeds to the appropriate remedy.

1. Placement in a Nonpublic School

First, for the reasons set forth below, the parent's request for deferment of the matter to the district's CBST for a specific non-public school placement must be denied. When determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as

nonpublic programs"]). Thus, a directive to prospectively require placement of a student in a nonpublic school unnecessarily runs roughshod over the important statutory purpose of attempting, whenever possible, to have disabled students meaningfully access the public school system each year by first attempting placement in a public school (see Cooke Center for Learning and Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] ["The federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; Matter of Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] ["Indeed, the central purpose of the IDEA . . . and article 89 of the Education Law is to afford a 'public' education for children with disabilities"]). Moreover, the evidence in the hearing record does not demonstrate that removal from the public school was warranted at the time that the CSE meeting was conducted in order to provide the student with a FAPE (see Application of the Dep't of Educ., Appeal No. 12-157). As such, prospective placement relief was not, and is not, appropriate under the circumstances of this case.

As to the parent's request that a new CSE meeting be held for the purpose of developing an appropriate educational program for the student, it would be inappropriate at this juncture to dictate specifically to the district what such a placement should be; however, the district is reminded that promptly after the CSE next convenes, it should issue, consistent with State regulations a prior written notice explaining any action that it takes in the future and the basis for that decision (see 34 CFR 300.503[a]; 8 NYCRR 200.5[a]). Further, an appropriate remedy to address the deficiencies in the student's October 2011 is discussed below.

2. Compensatory Education

Relief request by the parent which could be characterized as compensatory relief includes additional services in the form of tutoring with a reading specialist certified in the Orton-Gillingham approach; SETSS; provision of assistive technology (laptop) with Fast ForWord and other software; auditory processing therapy; and speech-language therapy.

When a school district deprives a disabled child of a FAPE in violation of the IDEA, the IDEA allows "appropriate" relief to be awarded, which includes compensatory education or additional services—specifically, the "replacement of educational services that the child should have received in the first place" (Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005]; accord Newington, 546 F.3d at 123). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to

provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

As to the parent's request for tutoring with a reading specialist certified in the Orton-Gillingham approach, as indicated above, instruction utilizing the Orton-Gillingham approach may be appropriate for the student, but a methodology other than Orton-Gillingham may also be appropriate. To remedy the district's failure to develop an appropriate IEP for the student for the 2011-12 school year, the district is ordered to provide a bank of 103 hours of direct 1:1 multi-sensory instruction.[34, 35] Because this relief is targeted to the October 2011 CSE's failure to recommend an educational program with sufficient support for the student's reading needs, which also underlies the parent's relief for additional services in the form of SETSS, no further relief in the form of SETSS is warranted under the circumstances of this case.

Neither the IHO nor the district addressed the parent's request for assistive technology or explained why such relief would not be appropriate for this student. Accordingly, relative to the parent's request that the district be ordered to provide assistive technology (laptop) with Fast ForWord software, the parent's request is granted. Specifically, the district shall provide at public expense the student with assistive technology in the form of a laptop with Fast ForWord software. The district is not precluded from providing to the student any additional software for deficits associated with dyslexia that might be beneficial to the student; however, as the parent has not offered elaboration as to what software is encompassed in her request, such additional relief is denied.

The parent's request for additional services in the form of auditory processing therapy appears to be unnecessary and redundant in light of the IHO's order that the district provide to the parent an RSA for speech-language therapy with a pathologist who could provide the student with auditory training (see IHO Decision at pp. 10-11). Because there is no indication in the hearing record or in the parent's petition as to how the parent's request for auditory processing therapy is different from the relief awarded by the IHO or how such relief would further addresses an

[34] This award approximates four forty-three minute sessions per week, for one school year.

[35] Notwithstanding that the parties may have agreed, or agree in the future, that the "enhanced rate" would be sufficient, the provision of services consistent with this decision is still the responsibility of the district regardless of any rate structure in effect.

independent need of the student, the parent's request for compensatory auditory processing therapy is denied. Moreover, to the extent that the petition continues to seek an order of speech-language therapy, the hearing record does not support an award in excess of that set forth in the IHO's decision and, as such, such request is denied.

3. Reimbursement for IEE (September 2011 Neuropsychological Evaluation)

Finally, the parent appeals the IHO's failure to order the district to reimbursement the parents for the privately obtained September 2011 neuropsychological evaluation report. The IDEA as well as State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]). IEEs are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). A parents has the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]; see also Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 590 [3d Cir. 2000]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 550 [D. Conn. 2002]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see also Letter to Anonymous, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE"]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]).

As noted above, two statutory predicates for IEE reimbursement are that a district conducts an evaluation and that the parents disagree with it. In this case, the parent pursued an IEE prior to any evaluation performed by the district and then provided the district with a copy of that September 2011 evaluation. It appears, then, that the parent unilaterally pursued this private evaluation before the district completed an evaluation of the student. This decision was understandable given the district's failure to evaluate the student.[36] Nevertheless, the language of the IDEA and State regulations unequivocally indicates that the parents must disagree with a district-conducted evaluation before they are eligible for reimbursement for an IEE (see, e.g., T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902, 929 [C.D. Ill. 2012] [reimbursement denied where there "had not yet been a[ ] [district] evaluation with which to disagree"], aff'd sub nom., Giosta v.

[36] It would appear that the best option under such circumstances of protracted, repeated delay would be to file either a State complaint or a due process complaint notice for the purpose of compelling the district to conduct immediately the initial evaluation of the student.

Midland Sch. Dist. 7, 542 Fed. App'x 523 [7th Cir. 2013]; Tyler V. v. St. Vrain Valley Sch. Dist. No. RE-1J, 2011 WL 1045434, at *4 [D. Colo. Mar. 21, 2011] [reimbursement denied because "[p]arents d[id] not contend that the IEE was performed to rebut a [d]istrict evaluation"]; R.H. v. Fayette Cnty. Sch. Dist., 2009 WL 2848302, at *3 [N.D. Ga. Sept. 1, 2009] [parents failed to request IEE but, "[i]n any event, such a request would have been inappropriate because there was no existing evaluation with which the parents disagree"]; Krista P. v. Manhattan Sch. Dist., 255 F. Supp. 2d 873, 889 [N.D. Ill. 2003] [no reimbursement where district decided not to conduct an evaluation and "there was no evaluation . . . to disagree with"]). Here, because there was no district-conducted evaluation that the parent could object to, the parent's request for reimbursement of the September 2011 neuropsychological evaluation report must therefore be rejected for the reasons expressed above.[37]

VII. Conclusion

In sum, having determined that the district failed to demonstrate that the October 2011 CSE designed an appropriate IEP that met the student's individual needs, the parent is entitled to an award of additional services as set forth above. The parent's other requests for relief, including nonpublic school placement of the student and reimbursement for the neuropsychological evaluation are denied.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 23, 2012 is modified to the extent that, in addition to the relief already awarded by the IHO, the district is ordered to reimburse the parent for the costs of remedial direct 1:1 multi-sensory instruction, which shall be provided as a bank equal to the sum total of 103 hours; which shall be used by the student before June 31, 2015, and which shall be delivered by the provider identified by the parent or another provider with similar qualifications upon consent of the district, at a rate not to exceed $100 per hour; and

IT IS FURTHER ORDERED that the district shall provide the student at public expense with assistive technology in the form of a laptop bundled with Fast ForWord software.

Dated: **Albany, New York**
June 13, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[37] Of note, federal and State regulations limit parents to one IEE per year; therefore, additional requests would not be permissibly reimbursed in any event (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).