



The University of the State of New York

The State Education Department
State Review Officer
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No. 12-203

**Application of the NEW YORK CITY DEPARTMENT OF
EDUCATION for review of a determination of a hearing officer
relating to the provision of educational services to a student with
a disability**

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail M. Eckstein, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parent's) son and ordered it to reimburse the parent for the costs of the student's tuition at the Manhattan Day School (MDS) for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

During the 2009-10 school year, the student attended kindergarten at MDS in a general education setting with 20 students, one teacher, and two assistants; to provide the student with extra assistance in kindergarten, MDS implemented a response to intervention program where the student participated in a small group of three to four students for reading for "most of the school

year" (see Tr. pp. 278, 289-90, 367, 380-84, 409-10).¹ For summer 2010, the student attended "summer camp" at MDS, and received "tutoring" three times per week (Tr. at p. 419).²

On July 22, 2010, the CSE convened to conduct the student's initial review and to develop an IEP for the 2010-11 school year (first grade) (see Dist. Ex. 3 at pp. 1-2). Finding the student eligible for special education and related services as a student with an other health impairment, the July 2010 CSE recommended a general education setting with five sessions per week of special education support services (SETSS), and the following related services: one 30-minute session per week of counseling in a small group and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1-2, 15, 17).³ The July 2010 CSE also developed annual goals and short-term objectives to address the student's needs (id. at pp. 9-14).

By final notice of recommendation (FNR) dated July 30, 2010, the district summarized the special education and related services recommended in the July 2010 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2010-11 school year (see Dist. Ex. 14).

In August 2010, MDS called the parent to schedule a meeting, which was attended by the MDS principal, an MDS associate principal, the MDS director of special education, the MDS director of early childhood, and the parent (see Tr. pp. 277, 330-31, 345-47, 352-53, 361-62, 419-20, 451).^{4, 5} The MDS director of early childhood testified that the August 2010 meeting took place to discuss the student's "program and placement" for the 2010-11 school year (Tr. pp. 355-54). She further testified that this type of meeting typically occurred in August because as the "start of the school year" approached, MDS wanted to have the "opportunity to revisit" students who were "significantly on [their] radar screen" to make sure MDS put the students in the "best place" (Tr. p. 353; see Tr. pp. 370-71). In this case, MDS had "more information" about the student as a result of his attendance at MDS summer camp and from the tutoring services the student

¹ The Commissioner of Education has not approved MDS as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The MDS special education department only offered special education services beginning in first grade for students generally described as having an "average to high average IQ" and "diagnosed with a language based learning disability" (Tr. p. 278). In addition, approximately 30 to 35 percent of the special education programs at MDS are devoted to religious studies (see Tr. pp. 280, 340-41).

² The MDS summer camp functioned as "big groups with counselors where [students] had to follow a schedule" and "camp routines" (Tr. pp. 290-91).

³ The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

⁴ None of the MDS staff who attended the August 2010 meeting attended the July 2010 CSE meeting (see Tr. pp. 384-90; compare Tr. p. 420, with Dist. Ex. 3 at p. 2). The MDS director of student services attended the July 2010 CSE meeting; however, this individual was not included in the August 2010 meeting with the parent (compare Dist. Ex. 3 at p. 2, with Tr. pp. 378, 381-84, 420).

⁵ The parent testified that prior to the August 2010 meeting with MDS, she intended to continue the student's enrollment at MDS (see Tr. pp. 442-43). In October 2009, the parent paid a deposit for the student's enrollment at MDS for the 2010-11 school year (see Parent Ex. N at p. 1). The parent paid another deposit in March 2010, and made an additional payment for "September" by check dated August 15, 2010 (id. at pp. 2-3).

received during the summer (see Tr. p. 353). The MDS director of early childhood indicated that based upon this new information—as well as information gathered throughout the school year indicating that the interventions used (reading group) with the student in kindergarten and the individual attention provided to the student in kindergarten were not "meeting his needs"—it "became clear" that the student needed a "small class in a special—in our special education program" with individual support provided throughout the day (Tr. pp. 353-54). At the August 2010 meeting the MDS principal advised the parent that the student required "more individual attention and more support throughout the school day" and that MDS had a "seat available" in its special education program, and the parent enrolled the student in the program (Tr. pp. 333-35).⁶ In addition, the MDS director of early childhood testified that at the August 2010 meeting, she understood that the parent was rejecting the public school's "recommended program" and instead, intended to put the student at MDS in the special education program (Tr. pp. 362-63). After the August 2010 meeting at MDS, the parent spoke with "some people" who told her that she "could appeal to the CSE again and find a better placement" (Tr. pp. 420-22).⁷ The parent testified that she wrote to the district "within days of that meeting" to make sure the district knew about the "change in recommendation" (Tr. pp. 421-22).

Shortly thereafter, by letter dated August 24, 2010 and sent to the district via facsimile on August 26, 2010, the parent notified the district that although the July 2010 CSE recommended "general education with SETSS," she did not believe that the "SETSS service" would be "enough" for the student to make progress (Parent Ex. C at p. 1). The parent indicated that she had been "advised" that the student required "more individual attention from a special ed[ucation] teacher throughout the day" (id.). In addition, although she was "willing to meet with the CSE again to discuss a full-time special ed[ucation] placement," the parent notified the district of her intentions to send the student to MDS in the "interim" and to seek tuition reimbursement "if the CSE d[id] not reconvene and offer a placement" that was appropriate (id.).⁸

A. Due Process Complaint Notice

By due process complaint notice dated August 23, 2011, the parent alleged that the district failed to offer the student a FAPE for the 2010-11 school year (see Parent Ex. A at pp. 1-3). More specifically, the parent asserted that the July 2010 CSE was not properly composed, the July 2010 CSE did not consider sufficient and appropriate evaluative information to support its recommendations and the annual goals, and the July 2010 CSE deprived the parent of the

⁶ The MDS principal testified that the parent executed an enrollment contract with MDS for the student's attendance during the 2010-11 school year, and if the parent had subsequently accepted a placement in a public school, MDS would have released the parent from further tuition payments under the contract (see Tr. p. 335).

⁷ The parent testified that at the August 2010 meeting with MDS staff, they were told that the student "could not function in a regular class," pull-out services would be too disruptive for the student, and the student "could not function in a mainstream environment even with all the supports in place" (Tr. pp. 420-21). The parent also testified that her conversations with "some people" after the August 2010 meeting with MDS arose, in part, from the financial hardship imposed by the MDS tuition special education program (Tr. pp. 421-22, 428, 443-44).

⁸ The hearing record contains several duplicative exhibits. For purposes of this decision, only the Parent exhibit will be cited in instances where a Parent and District exhibit are identical. As a reminder, it is the IHO's responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

opportunity to meaningfully participate in the decision-making process (*id.* at p. 1). In addition, the parent alleged that the July 2010 IEP did not accurately or fully reflect the student's current levels of performance, and failed to adequately describe and address the student's need for individualized intervention (*id.* at p. 2). The parent also alleged that the general education setting with SETSS recommended in the July 2010 IEP did not allow a sufficient level of individual support from a teacher, and the academic and social/emotional management needs did not adequately address the student's needs (*id.*). With regard to the annual goals, the parent asserted that the July 2010 IEP did not include a sufficient number of annual goals, and the annual goals were vague and generic, and failed to include measureable benchmarks (*id.* at pp. 2-3). Next, the parent contended that the annual goals in the July 2010 IEP failed to adequately address the student's anxiety, attention, behavioral difficulties, and self-control issues, and the July 2010 IEP lacked annual goals to identify and address the student's needs regarding independent living skills (*id.* at p. 3). In addition, the parent asserted that the July 2010 IEP recommendations did not provide sufficient support to allow the student to achieve the annual goals in the July 2010 IEP or to achieve the standard promotional criteria in the July 2010 IEP (*id.*). The parent alleged that the July 2010 IEP failed to include transition supports to assist the student's transition from a "smaller educational environment" to a "larger setting" and that the student required such supports due to his difficulty with "transitions and changes in routine, his distractibility, and his emotional and self-control issues" (*id.*).

According to the parent, MDS offered the student a program that "appropriately address[ed]" his needs and enabled him to make progress (*see* Parent Ex. A at p. 3). In addition, the parent asserted that equitable considerations weighed in favor of her request for funding or reimbursement of the costs of the student's tuition at MDS for the 2011-12 school year (*id.*). As relief, the parent requested prospective funding or reimbursement of the costs of the student's tuition at MDS, as well as funding or reimbursement for the costs of the student's related services and transportation (*id.* at p. 4).

B. Impartial Hearing Officer Decision

On November 22, 2011, the parties proceeded to an impartial hearing, which concluded on April 17, 2012, after five days of proceedings (*see* Tr. pp. 1-471). By decision dated September 18, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2010-11 school year (*see* IHO Decision at pp. 11-20). After setting forth the legal background for the decision, the IHO identified the central issues to resolve at the impartial hearing (*id.* at pp. 11-15). Initially, the IHO addressed procedural issues, and found that the absence of an additional parent member at the July 2010 CSE meeting constituted a procedural violation, which, under the circumstances of this case, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE (*id.* at pp. 17-19). More specifically, the IHO found that the parent required "assistance, protection of her rights and advice" at the July 2010 CSE meeting because she "lacked the aptitude [and] insight to advocate" for the student at the meeting and she had no "knowledge of her right to do so" (*id.* at pp. 17-18). In addition, the IHO considered that the parent did not, at the time of the July 2010 CSE meeting, fully acknowledge or recognize the "gravity of the need for a full-time special education program" for the student, and only "fully faced" the student's need for a full-time special education program when "confronted" by MDS staff "weeks later" (*id.* at pp. 18-19). As a result of the parent's "reticence to take a more aggressive position," the IHO indicated that the July 2010 CSE

"overlooked" the two "most important evaluations" of the student: a February 2010 educational evaluation and a February 2010 neuropsychological evaluation (*id.*). Given that the July 2010 CSE meeting convened to determine the student's initial eligibility for special education programs and related services, the IHO concluded that the absence of an additional parent member significantly impeded the parent's opportunity to meaningfully participate in the decision-making process (*id.* at p. 19).

Next, the IHO turned to the parent's substantive allegations, and concluded that the July 2010 CSE "missed significant documents"—including the February 2010 neuropsychological evaluation of the student—in developing the July 2010 IEP (IHO Decision at pp. 19-20). The IHO indicated that the evaluator who conducted the February 2010 neuropsychological evaluation recommended a "small class setting" for the student, which the IHO characterized as "thoughtful and worthy of consideration" (*id.* at p. 20). In addition, the IHO further noted that although the parent did not "fully participate" at the July 2010 CSE meeting, she did "belatedly object to the placement" and "invited the CSE to reconvene" to discuss the program recommendation (*id.*). Thus, based upon the evidence, the IHO concluded that the student required a "full-time special education program" and that the district failed to offer the student a FAPE by not adequately considering the available evaluative information and, "more importantly," by not reconvening a CSE when the parent "made it clear that the recommendation was not appropriate" (*id.*).

Having concluded that the district failed to offer the student a FAPE for the 2010-11 school year, the IHO analyzed whether the parent's unilateral placement of the student at MDS was appropriate (*see* IHO Decision at pp. 20-24). The IHO found that, according to testimony, MDS addressed the student's difficulties, and provided the student with small group instruction, seating within close proximity to the teacher, repetition of directions and content back to the teacher, preteaching and review of all subjects, and a multisensory approach to learning (*id.* at p. 21). The IHO also noted that the student received counseling services to address his anxiety, focus, self-control and socialization difficulties, and although the student made progress, he was not "flourishing" (*id.* at pp. 21-23). However, based upon the totality of the evidence, the IHO concluded that given the full-time special education program with individualized attention the student required, MDS was an appropriate unilateral placement for the student for the 2010-11 school year (*id.* at pp. 21-22).

With regard to equitable considerations, the IHO found that given the evidence in the entire hearing record the parent was entitled to reimbursement of 70 percent of the costs of the student's tuition at MDS for the 2010-11 school, and directed the district to reimburse the parent upon proper proof of payment (*see* IHO Decision at pp. 24-25).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that it failed to offer the student a FAPE for the 2010-11 school year. Specifically, the district asserts that the IHO erred in finding that the July 2010 CSE was not properly composed due to the absence of an additional parent member, and the IHO further erred in finding that the absence of the additional parent member significantly impeded the parent's opportunity to meaningfully participate in the decision-making process. The district also argues that the IHO erred in concluding that the July 2010 CSE failed to consider sufficient evaluative information to determine the recommendations and goals,

and the IHO mistakenly found that the July 2010 CSE did not consider the February 2010 neuropsychological evaluation and the February 2010 educational evaluation. Next, the district asserts that the IHO erred in finding that the July 2010 IEP failed to provide the student with sufficient support and adequate interventions to address his needs, and further, that the student required a full-time special education program. The district also argues that any allegations regarding the assigned public school site's ability to implement the July 2010 IEP were speculative, as the student was not educated under the IEP and he never attended the assigned public school site. In addition, the district asserts that the parent did not sustain her burden to establish that the student's unilateral placement at MDS was appropriate, and finally, equitable considerations did not weigh in favor of the parent's requested relief, as the parent did not intend to place the student in a district public school.⁹

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2];

⁹ Although the parent did not file an answer with the Office of State Review in response to the district's petition, the entire hearing record has been examined and an independent decision based on the entire hearing record has been rendered (Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i]).

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. CSE Process

1. July 2010 CSE Composition

The district asserts that the IHO erred in finding that the absence of an additional parent member at the July 2010 CSE meeting—as a procedural violation—significantly impeded the parent's opportunity to participate in the decision-making process. A review of the hearing record supports the district's assertion, therefore, the IHO's finding must, in part, be reversed.

At the time of the July 2010 CSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]).¹⁰ Assistive guidance from the Office of Special Education indicates that "[t]he additional parent member can provide important support and information to the parents of the student during the meeting and, in addition to the student's parents, participates in the discussions and decision making from the perspective of a parent of a student with a disability" ("Guide to Quality Individualized Education Program [IEP]

¹⁰ Effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

Development and Implementation," at p. 7, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

In this case, it is undisputed that an additional parent member did not attend the July 2010 CSE meeting in violation of both State law and regulations in place at the time of the meeting (see Dist. Ex. 3 at p. 2). Thus, the IHO correctly found that the July 2010 was not properly composed due to the absence of the additional parent member, and this inadequacy resulted in a procedural violation (see IHO Decision at pp. 15-17). However, as indicated above, 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]).

In this instance, the IHO found that the absence of the additional parent member significantly impeded the parent's opportunity to participate in the decision-making process because the parent—who "lacked the aptitude [and] insight to advocate" for the student at the meeting and evinced no "knowledge of her right to do so"—required the presence of the additional parent member for "assistance, protection of her rights[, and advice" (IHO Decision at pp. 17-18; see Tr. pp. 62-63 [explaining that the additional parent member served "to assist the parents to see if their rights [were] being protected and to give them any advice"]). The evidence in the hearing record does not support the IHO's findings or ultimate conclusion.

First, although the IHO cites to portions of the parent's testimony to conclude that she did not accurately or fully understand the role of the additional parent member or the complexities of the CSE process and placement options, the IHO did not appear to give any weight to evidence in the hearing record indicating that the parent completed college and obtained a Master's degree in Business Administration (MBA), she did not express any confusion about the CSE process or the placement recommendations at the July 2010 CSE meeting, and the parent did not allege that she failed to receive proper notice of the July 2010 CSE meeting (see IHO Decision at pp. 17-18; Dist. Ex. 7 at p. 3; see also Parent Ex. A at pp. 1-4). In Blackmon, the Court held that when a district provided parents with "proper notice explaining the purpose of the IEP meeting, the meeting [was] conducted in a language that the parents underst[ood], the parents [were] of normal intelligence, and they d[id] not ask questions or otherwise express their confusion about the proceedings," a district will not violate the IDEA's procedural requirements if it does not "apprehend and rectify that confusion" (see Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 656-57 [8th Cir. 1999]). Therefore, absent any evidence of district "wrongdoing," the parent's lack of understanding or misunderstanding of the process does not constitute a violation of the IDEA's procedural requirements (Blackmon, 198 F.3d at 657).

Second, by requiring the presence of an additional parent member at the July 2010 CSE meeting because the parent misunderstood the process or "lacked the aptitude [and] insight to advocate" for the student at the CSE meeting, the IHO improperly elevated the role of the additional parent member to that of an advocate for the parent, which is not consistent with either State law, regulation, or guidance documents issued. Finally, as explained more fully below, even if the IHO properly interpreted the role of the additional parent member, the evidence in the hearing

record does not support a conclusion that the absence of this CSE member significantly impeded the parent's opportunity to participate in the decision-making process.

Upon review, the hearing record indicates that the following individuals attended the July 2010 CSE meeting: a district school psychologist (who also acted as the district representative), a district special education teacher, a district regular education teacher, the MDS director of student services (MDS director) (via telephone), and the parent (see Dist. Ex. 3 at p. 2; see also Tr. pp. 59-60, 377, 384).¹¹ At the impartial hearing, the district special education teacher testified that all of those present at the July 2010 CSE meeting had the opportunity to participate in the review, and the July 2010 CSE considered all of the evaluative information available to the CSE, including: a February 2010 educational evaluation, a February 2010 speech-language evaluation, an undated initial social history,¹² a February 2010 neuropsychological evaluation, a March 2010 classroom observation, a March 2010 MDS teacher report, an April 2010 OT evaluation, a June 2010 MDS progress report, a July 2010 hospital progress note, and a July 2010 letter (see Tr. pp. 58-59, 64-69, 95-96, 121, 148; see also Dist. Exs. 4-7; 10-13; Parent Exs. D-E).¹³ Because the July 2010 CSE meeting occurred during the summer, the district special education teacher indicated that it lasted no more than "one hour" (Tr. p. 64). Other than speculating on the lack of availability, the district special education teacher did not know why an additional parent member did not attend the July 2010 CSE meeting (see Tr. pp. 62-63). She also could not recall if anyone objected to the absence of the additional parent member at the meeting, but testified, that generally, if a person objected, then the CSE meeting would not be held (see Tr. pp. 63, 108). Similarly, if a person objected at the CSE meeting regarding an evaluation or a report considered by the CSE, then the CSE would determine whether updated evaluations were needed and reconvene at a different time (see Tr. pp. 69-70).

According to the district special education teacher, the July 2010 CSE reviewed the portions of the July 2010 IEP drafted prior to the meeting, and created most of the annual goals at the meeting with "[e]verybody together" (see Tr. pp. 70-88, 112-16, 118-21).

The MDS director testified that she was "very familiar" with the student and his needs at the time of the July 2010 CSE meeting based upon her observations of the student during the 2009-10 school year, her interactions with the student's MDS classroom teacher and the MDS director of early childhood during the 2009-10 school year, and her conversations with the parent (Tr. pp. 380-81, 384-85). Prior to the July 2010 CSE meeting, the MDS director had the opportunity to review and discuss the teacher report with the student's MDS classroom teacher who prepared the

¹¹ The July 2010 IEP conference information page identified the MDS director as the director of "[l]earning [s]ervices;" however at the impartial hearing, the MDS director identified her position as the director of "student services" (compare Dist. Ex. 3 at p. 2, with Tr. pp. 377-79, 384). The MDS director was a licensed special education teacher (see Tr. p. 379).

¹² Although undated, the initial social history reflected that at the time of its completion, the student was undergoing a neuropsychological evaluation, which occurred in February 2010 (compare Dist. Ex. 7 at p. 2, with Parent Ex. D at p. 1).

¹³ The district special education teacher's testimony took place in January 2012—approximately 1.5 years after the July 2010 CSE meeting (see Tr. pp. 42, 63-64). Consequently, the district special education teacher, at times, relied upon what she referred to as the "usual practice" for conducting CSE meetings when she could not otherwise recall specific information pertaining to the July 2010 CSE meeting (see, e.g., Tr. pp. 69-70, 95-96, 106, 109-11).

report (see Tr. pp. 381-82; Dist. Ex. 13 at pp. 1-3). The MDS director testified that at the time of the July 2010 CSE meeting, the student worked hard but found school "challenging," and he exhibited difficulties in phonemic awareness, focusing, staying on task, and required "constant reminders for transitions and activities" (Tr. pp. 382-83).

The MDS director participated for the entire July 2010 CSE meeting by telephone from her home—as opposed to participating from school—and therefore, she did not have any documents available to her at the time of the meeting (see Tr. pp. 384-85, 390, 405). She confirmed that the parent attended the July 2010 CSE meeting, and although not certain, the MDS director thought she asked about the absence of the additional parent member at the meeting (see Tr. pp. 400-01). In addition, the MDS director testified that she remembered "hearing everyone's point of view" or "perspective" at the July 2010 CSE meeting, and discussing the interventions used with the student during the 2009-10 school year with minimal results (Tr. pp. 403-05). She also recalled that the July 2010 CSE discussed the student's progress, his needs, and "what help" would benefit him, as well as the March 2010 MDS teacher report submitted by MDS—but she had no recollection of discussions about other evaluations or reports (see Tr. pp. 385-86, 389, 391-92, 404; Dist. Ex. 13 at pp. 1-3). The MDS director characterized the March 2010 MDS teacher report—which indicated that the student would "benefit greatly" from speech-language therapy, OT services, and SETSS to address his "academic difficulties"—as a "completely accurate" description of the student, and the recommended services reflected what was considered to be the student's LRE at that time (Tr. p. 386; Dist. Ex. 13 at p. 3).¹⁴ When the July 2010 CSE recommended a regular education setting with SETSS and OT services for the student, the MDS director expressed her disagreement with the recommendations because she did not believe "it would provide him with enough support" based upon the student's "minimal progress" in response to the interventions already attempted during the 2009-10 school year at MDS (Tr. pp. 383-84, 386-87, 394, 399). The MDS director also told the July 2010 CSE that the student was "really struggling," and she was "concerned" about the student's ability to manage what was expected in first grade (Tr. p. 388). After objecting to the July 2010 CSE's recommendations, the MDS director asked the CSE to consider a "12:1+1 setting" because the student needed "more interventions, more multi-sensory learning, smaller classrooms, [and] teachers trained in different modalities" (Tr. p. 394). Although the July 2010 CSE "listened" to her concerns, the MDS director testified that the CSE did not change the recommendations because it was the student's "initial referral" for special education services, and the CSE determined that a general education setting with SETSS and related services, at least at the outset, constituted the least restrictive environment within which the student's needs could be met (Tr. pp. 388, 394, 401-02, 406-07). The MDS director did not think that the parent "agreed" with the recommendation, but without another option presented, the parent "said okay" (Tr. p. 389). The MDS director also testified that the July 2010 CSE indicated that the CSE could "reconvene" in a "few months" to review "how things [were] working with the services" that had been recommended (Tr. p. 407).

In addition to the above, the parent testified that she attended the July 2010 CSE meeting, and the July 2010 CSE explained that the student "had issues" and an attention deficit disorder

¹⁴ The MDS director further testified that the July 2010 CSE relied upon a July 2010 letter written by the MDS director of early childhood, which recommended SETSS and OT services for the student (see Tr. pp. 402-03; Dist. Ex. 9).

(ADD), and according to the "process," the CSE "always" looks to the LRE "first"—so the July 2010 CSE recommended a "mainstream class with different supports," such as OT services, speech-language therapy, counseling services, and SETSS (Tr. at pp. 414-17). According to the parent, although she did not initially understand the concept of SETSS, the July 2010 CSE explained that the student would be "pulled out of the class" for "extra help" (Tr. at pp. 415-16, 437-38).¹⁵ The parent acknowledged in testimony that the July 2010 CSE discussed the February 2010 neuropsychological evaluation, a July 2010 hospital progress note, and the March 2010 MDS teacher report (see Tr. at pp. 416-17; Dist. Exs. 13; Parent Exs. D-E). With respect to whether she agreed with the July 2010 CSE's recommendations for the student, the parent testified that she "didn't know enough about [the] kind of options," so she "just went along" (Tr. p. 417). She also testified that the July 2010 CSE did not discuss other placement options, such as integrated co-teaching services or a 12:1+1 special class setting (see Tr. pp. 417-18). The parent did indicate, however, that with regard to a recommendation in the February 2010 neuropsychological evaluation for a "small class" and "one-on-one" attention, the July 2010 CSE indicated that they "always start[ed] with the least restrict[ive]" (Tr. p. 418).

The parent further testified that the MDS director "adamantly disagreed" with the July 2010 CSE's recommendations because the student required a "small classroom setting" (Tr. pp. 418-19). In addition, the parent testified that although she had concerns in mind at the time of the July 2010 CSE meeting with respect to the CSE's recommendations, she did not express her opinion or concerns about "classes only get[ting] bigger" or ask questions about "how" the student would be "during all of those other periods" because the July 2010 CSE kept explaining the LRE (Tr. pp. 438-39). She finally concluded that the July 2010 CSE's recommendations were not appropriate as a result of the August 2010 meeting with MDS staff (see Tr. pp. 439-40).

Therefore, the hearing record establishes that the July 2010 CSE committed a procedural violation by failing to include the attendance of an additional parent member at the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). However, under the facts and circumstances of this case as described above, the hearing record also establishes that the absence of an additional parent member did not significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, as the July 2010 CSE provided the parent—and the MDS director—with the opportunity to meaningfully participate in the development of the July 2010 IEP. Here, although the parent chose to not express any concerns she may have had at the July 2010 CSE meeting, the hearing record demonstrates that the MDS director—a licensed special education teacher who was "very familiar" with the student and his needs—actively voiced her concerns, her disagreement with the recommendations, and directly asked the July 2010 CSE to consider a 12:1+1 special class. Consequently, while an additional parent member may have been able to provide support or information to the parent during the July 2010 CSE meeting, it is unclear from the hearing record how an additional parent member could have contributed any more knowledge, expertise, or support to the parent than she already had available to her, such that the absence of an additional parent member significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a

¹⁵ The parent later clarified that at the time of the July 2010 CSE meeting, she did have an understanding of SETSS, but did not fully understand the concept of a "CTT" or collaborative team teaching (compare Tr. pp. 417-18, with Tr. pp. 437-38). In addition, the parent testified that she knew the student would be receiving SETSS, which she understood to be a "resource room" (Tr. p. 438).

FAPE to the student and resulted in a failure to offer the student a FAPE for the 2010-11 school year.

2. Evaluative Information

The district correctly argues that, contrary to the IHO's findings, the July 2010 CSE considered sufficient evaluative information, including the February 2010 neuropsychological evaluation, in the development of the July 2010 IEP. A review of the hearing record supports the district's argument and the IHO's findings must be reversed.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *8 [S.D.N.Y. Feb. 14, 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student

has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The hearing record indicates that the July 2010 CSE reviewed, considered, and relied upon the following in the development of the July 2010 IEP: a February 2010 educational evaluation, a February 2010 speech-language evaluation, an undated initial social history, a February 2010 neuropsychological evaluation, a March 2010 classroom observation, March 2010 MDS teacher report, an April 2010 OT evaluation, a June 2010 MDS progress report, a July 2010 hospital progress note, and a July 2010 letter (see Tr. at pp. 58-59, 64-69; Dist. Exs. 4-7; 9-10; 12-13; Parent Exs. D-E). According to the district special education teacher, the July 2010 CSE had a "wealth of information" about the student and did not require further evaluative information (Tr. pp. 69-71).

As noted in the February 2010 educational evaluation, the student initially refused to go with the district school psychologist to the evaluation room; however, after relaxing for approximately 30 minutes with crayons and paper, he proceeded with the evaluation with the school psychologist and the parent (see Dist. Ex. 4 at p. 1). The parent then informed the school psychologist that MDS "recently" administered the Wechsler Preschool and Primary Scale for Intelligence—Third Edition (WPPSI-III) to the student, and she would provide a copy to the CSE (id. at pp. 1-2). Given the student's mood, the school psychologist decided to retest the student with the block and puzzle subtests of the WPPSI-III, in addition to administering the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) to the student to assess his academic functioning (id. at pp. 1-2). On the WPPSI-III puzzles, the student required "much praise and support," but when comfortable, he "welcomed going on to the next one" (id. at p. 2). On the final two, more difficult puzzles, the student quickly lost his enthusiasm, became frustrated, and lost interest (id.). However, the school psychologist indicated that the student responded "very well to praise and reinforcement," but "shut down and refused to participate" when he felt he could not do something (id.). The student was "quite successful" with the blocks subtest (id.). The school psychologist also asked the student to write his name, but he "just wanted to write his initials" and did not write anything more even with encouragement from the parent (id.). The student also wrote and recognized "several" numbers, but the school psychologist could not determine how many numbers or letters the student knew because he "declined several coaxing attempts" (id.). The school psychologist noted that the student appeared "aware of his difficulties" (id.).

Turning to the administration of the WJ-III ACH, although the student could not "sit through an entire session," the completed subtest scores revealed the student's academic skills fell within the average range in the following areas: math calculation skills, academic skills, letter-word identification, story recall, calculation, and spelling (Dist. Ex. 4 at pp. 2-6).¹⁶ The student easily drew a circle, a square, and a triangle; he identified all colors; and he knew his age and birthdate (id. at p. 2). Based upon teacher reports, the student demonstrated "poor attention and distractibility" in class, he could "barely" sit to listen to stories or participate in class discussions, and resisted attempting "new tasks" (id.). According to the evaluation report, "[s]ome of these

¹⁶ The table of scores reflected that the student received a raw score of zero in both the reading fluency and math fluency subtests; however, the school psychologist did not indicate in the report whether the student's scores resulted from a refusal to answer items or whether the student did not correctly answer any items in these two subtests (see Dist. Ex. 4 at pp. 1-6).

behaviors" were observed in the "1:1 setting" (id.). At the evaluation, the student did not participate when he was unsure or uncomfortable with the "requirements of a task" (id. at pp. 2-3). In the area of social/emotional functioning, the student presented as "very sweet and engaging;" in addition, the student interacted well with peers and adults, but had difficulty working "independently or in small or large groups" (id. at p. 3). The student also responded "very well to praise and positive reinforcement" (id.).

As part of a February 2010 speech-language evaluation, an administration of the Preschool Language Scale—Fourth Edition (PLS-4) to the student revealed scores within the average range in the areas of auditory comprehension skills (age equivalent score, 6.3 years) and expressive communication skills (age equivalent score, 5.8 years) (see Dist. Ex. 5 at pp. 1-2).¹⁷ The student's total language score also fell within the average range (age equivalent score, 6.4 years) (id.). At that time, the evaluator indicated that no speech-language intervention was required (id. at p. 2).

Next, the parent provided the information used to complete an initial social history of the student (see Dist. Ex. 7 at p. 1). According to the parent, the student did not qualify for "services" when evaluated at age three, and the current evaluation arose due to "difficulties with handwriting, concerns about focusing and being victimized" (id. at p. 1). The parent reported being advised by MDS that the student "might need" OT to help with handwriting and organizational skills and speech-language therapy to help with language (id. at pp. 1-2). At the time of the social history, the parent indicated that the student continued to have a "problem focusing and remembering what he said" (id.). The student also had "trouble working in a 1:1 situation" and was "sometimes unable to listen to sentences" (id.). The parent described the student's strengths as his athleticism and his sociability, and his weaknesses as attention issues, distractibility, and poor organizational skills (id. at p. 2). However, she also indicated that the student was sensitive and could be a "victim of bullying" (id.). The social history report further reflected that the parent requested OT and speech-language evaluations to determine if the student needed services in these areas to help him achieve academically (id. at p. 3).

In and around February 2010, the parent privately obtained a neuropsychological evaluation of the student (see Parent Ex. D at p. 1). An administration of the WPPSI-III to the student yielded the following standard scores: full-scale IQ, 103 (average range); verbal IQ, 106 (average range); and performance IQ, 108 (average range) (id. at pp. 2, 6). In addition to the WPPSI-III, the evaluation included the administration of the Developmental Neuropsychological Assessment Test—Second Edition (NEPSY-II) to the student to measure attention and executive functioning, language, visuospatial, and sensorimotor and memory functioning (id. at pp. 2-3, 10-16). Behaviorally, the student did not cooperate throughout the evaluation, at times crying or refusing to continue testing, and as such, the evaluator indicated it was "quite difficult to get an accurate read" of the student's abilities (id. at pp. 2, 6). However, based upon testing results, the evaluator noted that the student performed "equal to or a bit lower than his peers" on most visual spatial and verbal tests, and found no "significant areas" of difficulty related to verbal or visual perception (id. at p. 6). Due to "difficulty persevering" in more challenging areas for the student—such as writing and prereading activities—the evaluator noted that the student missed a "good deal of basic learning," and also identified attention and focus as primary areas of concern (id.). In

¹⁷ The student was 5.8 years old at the time of the evaluation (see Dist. Ex. 5 at p. 1).

addition, the student's memory skills fell within normal limits, although processing speed "may be slow due to inattention and hyperactivity" (id.). The evaluator described the student's behavior as that of a "much younger child," noting that the student often became "explosive and oppositional" and that redirection, at times, did not help (id.). Finally, the evaluator indicated that the student would have a "great deal of difficulty staying focused in a large class" due to his inability to work independently (id.). As a result, the evaluator recommended the following: the consideration of medication for inattention and hyperactivity, the incorporation of behavior modification to increase the student's ability to focus for longer periods of time and to teach him to cope with frustration, a "small class with 1-1 attention and individual teaching in reading and writing skills," the consideration of OT services, and additional testing of the student for visual and auditory attention at six years of age (id. at p. 7).

In March 2010, a district social worker conducted a classroom observation of the student at MDS (see Dist. Ex. 10 at pp. 1-2). According to the report, the student's kindergarten class consisted of 14 students, one head teacher, and one assistant teacher (id. at pp. 1-2). While in a group setting on the rug, the student remained seated but played constantly with his hands, looked around the room, and did not make eye contact with the teacher (id. at p. 1). The student required redirection to transition from the rug to the table for the next activity (cutting and coloring), and required redirection during the task, as he continued to look around the room (id.). The teacher also reminded the student to sign his name to his project, and when asked by the teacher to write a sentence, the student could not focus so the teacher "gave him a break and sent him to the computer" (id.). After his break, the student returned and the teacher worked with him to write a simple sentence about the project (id.). Upon meeting with the teacher, she reported that the student often "'zone[d] out,'" was "very distractible," could only follow one-step commands, and required "constant teacher refocusing;" however, the teacher also reported that the student was thoughtful and caring (id.).

In a teacher report dated March 2010, the student's then-current MDS kindergarten teacher characterized his decoding, comprehension, reading fluency, organization, computation, and problem solving skills as at a "pre-K[indergarten]" instructional level, while noting his grammar and syntax skills were at a "K[indergarten]" instructional level (Dist. Ex. 13 at pp. 1-2). In the area of decoding, the teacher noted the student's attending and persevering difficulties, as well as the student's need to work "one on one" (id. at p. 1). With regard to comprehension, the student attempted to understand, but the teacher indicated he needed a "long time to process information;" in the area of reading, the student enjoyed looking at picture books and exhibited "very weak" fluency skills (id.). In writing, the student had shown improvement since the beginning of the school year (id.). Organizationally, the student needed "constant reminders" during transitions, and the teacher noted the student lost his belongings (id. at p. 2). With regard to mathematics skills, the student exhibited difficulty attending to a lesson, and at that time, he could count to 10 (id.). In addition, although motivated to participate, the student's attentional issues interfered with his ability to work on problem solving (id.). With respect to his communication skills, the teacher indicated that the student would ask a teacher for help, but at times, he would not verbalize his needs and when overwhelmed, he would cry (id.). In the area of self-regulation and organization, the teacher noted that the student could not perform any of the listed tasks, such as listening, following directions, maintaining focus and attention, organizing work, participating in class, or completing tasks and assignments (id.). The March 2010 teacher report also included teaching strategies and proposed goals to assist the student: modifying the curriculum by breaking up tasks

into manageable parts, simplifying and shortening tasks, using multisensory instruction for letter identification, working "one on one," and playing "beat the clock" to empty his backpack in a timely fashion (*id.* at pp. 1-3). As additional information, the March 2010 teacher report noted that in order to participate in the "general education environment," the student would "benefit greatly" from speech-language therapy, OT, and SETSS to "address academic difficulties," as well as counseling as the student was "very sad all the time" (*id.* at p. 3).¹⁸

Based upon an April 2010 OT evaluation, the student presented with sensory modulation issues that affected his ability to perform "self-care tasks and school related activities at his optimum level of function," and he showed "selective attention" to tasks (*see* Dist. Ex. 6 at pp. 2, 4, 6). During the evaluation, the student did not exhibit any difficulty transitioning between activities, he independently carried out one to two step directions, and required verbal reminders or prompts to refocus (*id.* at p. 4). The student also remained seated during tabletop tasks without "fidgeting or moving about" (*id.*). In addition, the student independently wrote his first name, but with an "incorrect combination of upper and lowercase letters;" he could not write his last name independently (*id.* at p. 5). The student could also write numbers "1 to 10," with reversals of numbers "3" and "7," but could not write the number "9" (*id.*). The student could not write all of the letters of the alphabet from memory, but with a visual model, he displayed an incorrect formation for six letters and a reversal in forming one letter (*id.*). The OT evaluation revealed "delays" in fine motor skills, and in particular, graphomotor abilities (*id.* at p. 6). The student also demonstrated a "lack of planning and organization" for multi-step tasks (*id.*). At that time, the student could write in print form at a slow pace, but exhibited "problems with stroke formation, spacing, slant and size consistency," which the evaluator indicated would pose a "major hindrance" to the student in meeting the "increasing demands" in school (*id.*). The occupational therapist recommended the student receive two 30-minute sessions per week of individual OT services to improve "sensory integration, postural control, upper extremity strength and endurance, fine motor, graphomotor, organizational, and visual perceptual/ motor skills" (*id.* at pp. 6-7).

In a June 2010 MDS progress note, the reporting two teachers rated the student's functioning in various categories, including gross motor development, religious instruction, and intellectual development (*see* Dist. Ex. 12 at pp. 1-4).¹⁹ With regard to English reading readiness, the student made progress "since being taken out for reading groups" and appeared "more comfortable" in the "small reading group in a quiet room;" at that time, the teachers rated the student's performance as "progressing towards age appropriate" in all areas, including sound-symbol correspondence, recognizing upper and lower case letters, sight word recognition, comprehension of concepts in books, and meeting kindergarten reading expectations (*id.* at p. 3). With regard to writing, the teachers rated the student's performance as "progressing towards age appropriate" in his ability to write letters clearly and in using appropriate handwriting techniques; however, the student's ability to sound out and write words independently was rated as an "area of

¹⁸ The MDS director testified that she, rather than the student's teacher, wrote the recommendations in the additional information section of the March 2010 teacher report (*compare* Dist. Ex. 10 at p. 3, *with* Tr. pp. 391-92).

¹⁹ The two teachers identified on the June 2010 MDS progress note were not identified as teachers who prepared—or assisted in the preparation of—the March 2010 teacher report (*compare* Dist. Ex. 12 at p. 1, *with* Dist. Ex. 13 at p. 1).

concern" by the teachers (id.). In mathematics, the teachers rated the student's performance as "age appropriate" for all areas, including recognizing numerals, understanding one-to-one correspondence, patterning, categorizing, sequencing, understanding comparative terms (size, time), and recognizing shapes (id.). With regard to receptive language skills, the teachers rated the student's ability to follow directions and to follow multiple step directions as "areas of concern," while the teachers rated his ability to understand stories read aloud, understand classroom discussion, and his memory for events and information as "progressing toward age appropriate" (id. at p. 2). In the area of expressive language skills, the teachers rated the student's clarity of speech, fluency of expression, vocabulary, word retrieval and appropriate syntax as "areas of strength," while rating the student's ability to stay on discussion topic and tell story events in sequence as "progressing toward age appropriate" (id.).

In the June 2010 MDS progress note, the teachers also rated the student's social/emotional development (see Dist. Ex. 12 at p. 4). Here, the teachers rated the following as "areas of strength" for the student: acceptance of limits; interactions with peers and adults; separation from parents and caregivers; his ability to share, take turns, show respect for his and for others' property; his sense of humor; and his ability to easily make transitions (id.). The teachers rated the student's performance as "age appropriate" in the areas of internalizing classroom routine and attention span for a self-chosen activity (id.). In the areas of self-esteem, self-motivation, accepting responsibility for his actions, reacting well to new experiences, and accepting change, the teachers rated the student's performance as "progressing towards age appropriate" (id.). The teachers also rated the student's ability to work independently, to resolve conflicts verbally, and his attention span for assigned activities as "areas of concern" (id.). With regard to motor development, the teachers rated the student's ability to work with manipulatives and to participate in physical group activities as "age appropriate" (id. at p. 1). Next, the teachers rated the student's fine motor coordination; ability to draw with details; use of an appropriate pencil grip; gross motor coordination; sense of body in space; and gait, fluidity, and smoothness of movement as "progressing towards age appropriate" (id.). Additionally, the teachers described the student as a "sweet, caring, joyful, gentle child who love[d] being in school," and further noted that the student was "very cooperative," had a "wonderful sense of humor," and "embrace[d] the joy of each day" (id. at p. 4). Overall, the June 2010 MDS progress note reflected that of the nonreligious categories, the student received an "area of concern" rating in only 7 of the 58 skills identified in the report (id. at pp. 1-4).

According to a July 2010 letter written by the MDS director of early childhood, the student had not "mastered the [k]indergarten curriculum" because it was "hard" for the student to focus on tasks and lessons (Dist. Ex. 9). The MDS director of early childhood indicated that the student "learned many of his letters" but was not "comfortable with letters and sounds, number or number concepts" and was "easily frustrated" and "very easily distracted" (id.). In addition, the MDS director of early childhood indicated that during the past school year, teachers worked with the student "one on one" and used "behavior modification techniques"—such as positive feedback—as well as redirection; however, despite these interventions, the student continued to find "learning a challenge" (id.). At that time, the MDS director of early childhood "hope[d]" that the student would be considered for "occupational therapy services to help with his distractibility and for SETSS to help him with his academic work" (id.).

In a July 2010 hospital progress note, the student's pediatric neurologist briefly summarized the results of the student's recent testing (Parent Ex. E at pp. 1-2). The July 2010 hospital progress note reflected that the student had received a diagnosis of an ADHD, and noted that although the student presented with "no clear learning disabilities at the present time," his "academic achievements have to be followed" (*id.* at p. 2). In addition, the neurologist indicated the following "[p]lan" for the student: "focusing, redirection and help with following tasks in school;" he should have a "paraprofessional (SIAT)" in the classroom to assist him with tasks; "[o]ther 504 modifications for ADHD; a reading tutor; and continued pharmacological treatment for an ADHD but with the consideration that the student may need a longer acting medication" (*id.*).

In summary, the evidence in the hearing record demonstrates that the July 2010 CSE adequately considered and reviewed a variety of sources to ascertain information about the student's abilities and needs and developed the student's July 2010 IEP based on this information. Consequently, the IHO's findings regarding sufficiency of the evaluative information and its consideration by the July 2010 CSE—including the February 2010 neuropsychological evaluation—lack a basis in the hearing record and must be reversed (see *D.B.*, 2013 WL 4437247, at *13-*14; *J.C.S. v Blind Brook-Rye Union Free Sch. Dist.*, 2013 WL 3975942, at *10 [S.D.N.Y. Aug. 5, 2013]).²⁰

B. July 2010 IEP

1. General Education Setting with SETSS

Finally, the district argues that the IHO erred in determining that the student required a full-time special education placement, and therefore, that the July 2010 CSE's recommendation of

²⁰ In developing a student's IEP, a CSE must also consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (*T.S. v. Ridgefield Bd. of Educ.*, 10 F.3d 87, 89-90 [2d Cir. 1993], citing *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947 [1st Cir. 1991]; see *Michael P. v. Dep't of Educ.*, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 805-06 [8th Cir. 2011]; *Evans v. Dist. No. 17*, 841 F.2d 824, 830 [8th Cir. 1988]; *K.E. v. Indep. Sch. Dist. No. 15*, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; *C.H. v. Goshen Cent. Sch. Dist.*, 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; *T.B. v. Haverstraw-Stony Point Cent. Sch. Dist.*, 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], *aff'd*, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also *Pascoe v. Washingtonville Cent. Sch. Dist.*, 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; *Tucker*, 873 F.2d at 567; *Application of the Dep't of Educ.*, Appeal No. 12-165). Thus, while the July 2010 CSE was required to consider the February 2010 neuropsychological evaluation, it was not obligated to adopt the recommendation for a "small class with 1-1 attention and individual teaching in reading and writing skills," which appeared to be the basis upon which the IHO found that the July 2010 CSE "missed significant documents" in the development of the IEP (compare IHO Decision at pp. 19-20, with Parent Ex. D at p. 7). As explained more fully below, the hearing record also supports a finding that the July 2010 CSE considered this recommendation, as well as other information about the student, in making its recommendations.

a general education setting with SETSS was not appropriate. A review of the hearing record supports the district's contentions, and the IHO's determination must be reversed.

As noted above, the July 2010 CSE recommended a general education setting with five sessions per week of SETSS in an 8:1 staffing ratio (see Dist. Ex. 3 at pp. 1-2, 15). Initially, it must be noted that neither federal or State statutes nor regulations define SETSS. However, at the impartial hearing, the district special education explained that, technically, SETSS was a "resource room" service, which a student could receive as either a push-in or a pull-out service, and in this case, the July 2010 CSE recommended five sessions per week of SETSS to primarily address the student's difficulties in reading and mathematics (Tr. p. 153; see Tr. pp. 131-32, 139, 145-46; Dist. Ex. 3 at pp. 1-4, 9-12, 15).²¹ In addition, the parent testified that the July 2010 CSE explained to her that the SETSS recommendation meant the student would be "pulled out of the class and he would be getting extra help in like a workroom" and further testified that she understood the SETSS to be a resource room (Tr. pp. 416, 438).²²

Next, in reaching the decision to recommend a general education setting with SETSS, the hearing record demonstrates that the July 2010 CSE considered and weighed the evaluative information—which provided the CSE with the student's cognitive levels, academic levels, social/emotional and behavioral information, and progress at MDS—as well as recommendations included within the evaluative information and input from the MDS director (see Tr. at pp. 58-59, 64-69, 385, 387-89, 391-92, 416-17; Dist. Exs. 4-7; 9-10; 12-13; Parent Exs. D-E).

At the impartial hearing, when asked why the July 2010 CSE did not "accept" the recommendation in the February 2010 neuropsychological evaluation report for a "small class," the district special education teacher explained that the July 2010 CSE took "all the pieces of information" available to the CSE and "put them together" to determine the student's most appropriate placement in the LRE (Tr. p. 147; see Parent Ex. D at p. 7). In addition, she testified that the February 2010 neuropsychological evaluation was just one piece of information that weighed into the July 2010 CSE's considerations, noting in particular that both a March 2010 MDS

²¹ 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]).

²² Although the description of SETSS in the hearing record is generally consistent with the regulatory version of a resource room program provided as a pull-out service in a small group, the district is reminded that the use of the "SETSS" label to describe a special education service not otherwise defined in State or federal regulations may result in significant ambiguity and cause confusion (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]). Any lack of clarity in the terminology used in an IEP, especially when such terminology has not already been pre-defined among the inclusive list of options already set forth in State regulations, tends to weigh against finding in a district's favor, not for it, thus it would behoove the district to carefully explain its use of such terminology to both parents and administrative hearing officers.

teacher report and a July 2010 letter specifically included recommendations for OT and SETSS for the 2010-11 school year (see Tr. pp. 72-74, 91-92, 96-100, 135-36, 151-52; see also Dist. Exs. 9; 13 at p. 3). The district special education teacher also testified that notwithstanding the, at times, contradictory information presented about the student in the evaluative information, the July 2010 CSE "tried to get a really global perspective" of the student, and sought input from those attending the meeting to get an "accurate picture" of the student (Tr. pp. 157-58). Thus, given that the student demonstrated cognitive and functional skills within the average range based on his age and grade level at the time of testing, that he had attended a general education setting during the 2009-10 school year, and carefully weighing LRE considerations with the fact that the July 2010 CSE meeting was the student's initial evaluation, the July 2010 CSE recommended a general education setting with SETSS, together with academic management needs and related services, for the 2010-11 school year (see Tr. pp. 135-36, Dist. Exs. 3 at pp. 1-2, 17; 4 at pp. 5- 6; 5 at pp.1- 2; 7 at p. 1; 12 at pp.1-4; Parent Ex. D at pp. 2, 6).

In this case, the hearing record also demonstrates that the July 2010 CSE considered other placement options, such as a general education setting and a 12:1+1 special class placement—as suggested by the MDS director at the meeting—but rejected these options as either not sufficiently supportive or as overly restrictive (see Tr. pp. 92-93, 98, 392-94; Dist. Ex. 3 at p. 16). The MDS director also testified that the July 2010 CSE noted the ability to reconvene in a "few months" to review the recommended special education programs and services (Tr. pp. 406-07).

In addition to SETSS, the July 2010 CSE also recommended the following strategies in the academic and social/emotional management needs sections of the July 2010 IEP to further address the student's needs: repeated opportunities to practice newly taught skills, prompts and cues to remain on task, preferential seating close to the teacher for support, much praise and positive reinforcement in order to remain on task, much support and guidance in attempting new tasks, and encouragement and repeated efforts by teachers to assist the student in overcoming his fear of attempting new tasks (see Dist. Ex. 3 at pp. 3-4, 6).

The July 2010 CSE further recommended counseling and OT as related services (see Dist. Ex. 3 at p. 17). The district special education teacher testified that the July 2010 CSE recommended counseling services, in part, to address the student's distractibility and his tendency to shut down (see Tr. p. 88). In addition, the July 2010 IEP included annual goals to address the student's identified needs in the areas of reading, writing, sensory processing, sensory regulation, fine motor skills, handwriting skills, peer interactions, verbalizing social frustrations, and anxiety related to academic and social situations (see Dist. Ex. 3 at pp. 9-14).

Based upon the foregoing, the weight of the evidence in the hearing record does not support the IHO's finding that the student required a full-time special education placement. Instead, the weight of the evidence in the hearing record establishes that the July 2010 CSE considered the evaluative information, as well as other factors—including LRE considerations and inconsistent information about the student—in reaching the decision to recommend a general education setting with SETSS for the student for the 2010-11 school year, and further, that the recommendations in the July 2010 IEP were reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year. Therefore, the IHO's determination must be reversed.

VII. Conclusion

Having determined that the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at MDS was appropriate or whether equitable considerations supported the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED

IT IS ORDERED that the IHO's decision, dated September 18, 2012 is modified by reversing those portions which found the district failed to offer the student a FAPE for the 2010-11 school year and which ordered the district to reimburse the parent for 70 percent of the costs of the student's tuition at MDS for the 2010-11 school year.

Dated: **Albany, New York**
 June 12, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER