The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-212

Application of a STUDENT WITH A DISABILITY, by his 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:
Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

Michael A. Cardozo, Corporation Counsel, and Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 her request to be reimbursed for the costs of the student's tuition at the School for Children with Hidden Intelligence (SCHI) for the 2011-12 school year. 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

On May 12, 2011, the CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 1 at p. 13). Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the May 2011 CSE recommended a 12-month school year program in a 12:1+4 special class placement in a specialized school, along with the following related services: four 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a small group; four 30-minute sessions per week of individual occupational therapy (OT); four 30-minute

sessions per week of individual physical therapy (PT); and 1:1 direct nursing services, as needed (id. at pp. 8-10, 13-14).[1, 2]

In a final notice of recommendation (FNR) dated June 3, 2011, the district summarized the recommendations made by the May 2011 CSE and identified the public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 13). On the FNR in a handwritten notation, dated June 29, 2011, the parent indicated that she could not "accept or reject this placement" until she could visit in September 2011 (Parent Ex. C).[3]

In a letter dated August 22, 2011, the parent notified the district of her intentions to unilaterally place the student at SCHI for the 2011-12 school year (Parent Ex. B at p. 1).[4] According to the letter, the parent "could not observe the recommended placement because the school was not in session," but further indicated that she would "visit the school in September" (id.). The parent executed an enrollment contract with SCHI for the student's attendance from September 1, 2011 through June 24, 2012 "[s]ometime in September of 2011" (Tr. p. 116; Parent Ex. E at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated February 22, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A at p. 1). The parent asserted that the May 2011 CSE was not properly composed because neither the student's related service providers nor the student's then-current special education teacher were present at the May 2011 CSE meeting (id. at pp. 1-2). The parent further asserted that the May 2011 CSE did not discuss the student's level of maturity, the "[p]romotional [p]olicy," or the student's participation in State and local assessments (id. at p. 2).

Next, the parent alleged that the CSE did not consider sufficient evaluative information when preparing the IEP (Parent Ex. A at p. 2). More specifically, the parent alleged that: the level of performance sections of the May 2011 IEP were not based on relevant information; the annual goals could not serve as a "basis for the recommendations" and did not address all of the student's areas of need; and the student's need for toilet training was not included in the IEP (id.). The parent further alleged that the May 2011 CSE failed to recommend counseling as a related service (id.). The parent additionally alleged that the May 2011 CSE failed to complete the following sections of the IEP: "Student Needs Relating to Special Factors," "Supplementary Services," "Special

[1] The student's eligibility for special education and related services as a student with multiple disabilities is not in dispute in this proceeding (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[2] The hearing record contains duplicative exhibits (compare Dist. Exs. 5-8; 10; with Parent Exs. L-P). For purposes of this decision, only Parent exhibits were cited in instances where both District and Parent exhibits were identical. Pursuant to regulation, it is the IHO's responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

[3] The parent testified that she visited the assigned public school site in July 2011 (Tr. p. 109).

[4] The Commissioner of Education has not approved SCHI as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The parent first learned about SCHI after receiving the district's "placement" notice (Tr. pp. 108-11; see Dist. Ex. 13).

Transportation," and "Testing Accommodations" (id.). As for the recommended 12:1+4 special class placement, the parent asserted that it was not appropriate because the class size was "too large" to allow the student to receive the individualized academic attention he required (id.). The parent also asserted that the assigned public school site was not appropriate because the number of children and adults in the classroom would "overwhelm" and "distract" the student (id.).

As relief, the parent requested an order directing the district to: directly pay the student's tuition at SCHI or reimburse the parent for the costs of the student's tuition at SCHI for the 2011-2012 school year; provide the student with the related services recommended on the last agreed upon IEP or reimburse SCHI for the costs of providing the student with his mandated related services; and provide the student with school bus transportation to and from SCHI (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

The impartial hearing convened on June 8, 2012 and concluded on August 21, 2012, after three days of proceedings (see Tr. pp. 1-122). [5] In a decision dated September 27, 2012, the IHO determined that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 6-7). Specifically, the IHO determined that the May 2011 CSE conducted a "valid review and issued an IEP with an appropriate classification and placement" for the student (id. at p. 6). Additionally, the IHO found that the parent had the opportunity to participate in the May 2011 CSE meeting (id.).

With regard to the "proposed class," the IHO determined that the district addressed the student's needs for a "high level of support" in the least restrictive environment (LRE), in a special class among other students with similar needs (IHO Decision at pp. 6-7). The IHO also indicated that, although the parent objected to the "recommended placement" due to the large class size, the evidence revealed that additional staffing within the proposed class would allow the student to receive the "individualized attention" he required and would similarly address the parent's expressed concerns regarding the student's "stamina issues" (id. at p. 7). In addition, the IHO found that the speech-language therapist worked collaboratively with the classroom teacher, "several nurses" on staff could address the student's medical needs, and the student would have received all of the related services recommended in his 2011-12 IEP at the assigned public school site (id.). Finally, the IHO noted that the proposed classroom had a seat available for the student had he attended the assigned school (id.).

Notwithstanding the determination that the district offered the student a FAPE for the 2011-12 school year, the IHO also concluded that the parent failed to establish that the student's unilateral placement at SCHI was appropriate to meet the student's special education needs or was reasonably calculated to enable him to make "meaningful educational progress" (see IHO Decision at pp. 7-8). The IHO found that the hearing record did not reflect that the academic program at SCHI addressed the student's needs in a manner "that demonstrated consistent progress" (id. at p. 7). The IHO noted the lack of testimony or evidence regarding SCHI's curriculum for mathematics and science or the professional development and continuing staff training of SCHI staff (id.). In

[5] As of June 1, 2012, the parent had not made any tuition payments to SCHI for the 2011-12 school year (see Parent Ex. R).

summary, the IHO concluded that the parent failed to establish "that the educational program provided by [SC]HI during the 2011-2012 school year was reasonably calculated to enable t[he student] to make meaningful educational progress (id.).

Lastly, the IHO determined that equitable considerations did not weigh in favor of the parent's request for relief because the district "issued an IEP after consideration of reports and evaluations at the CSE review, and issued an [FNR] in a timely fashion with an appropriate placement" (IHO Decision at p. 8). Consequently, the IHO denied the parent's request for tuition reimbursement (id.).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year, that SCHI was not an appropriate placement for the student, and that equitable considerations did not weigh in favor of the parent's request for relief. Initially, the parent alleges that the IHO erred in finding that the May 2011 CSE conducted a valid review and issued an IEP with an appropriate placement for the student. The parent alleges that the district failed to establish what evaluative information was considered in preparation of the May 2011 IEP. The parent also asserts that the CSE was improperly composed because the student's special education teacher was not present at the CSE meeting.

With respect to the May 2011 IEP, the parent alleges that the IHO erred in finding that the recommended 12:1+4 special class placement provided the "additional support of seven adults" in the classroom because the "additional support," as described, would not meet the student's need and the IHO should have evaluated the adequacy of the IEP prospectively at the time of the parent's placement decision. The parent also argues that the CSE failed to recommend counseling for the student as a recommended service despite the student's needs. In addition, the parent asserts that the CSE failed to conduct a functional behavioral assessment (FBA), develop a behavior intervention plan (BIP), and consider assistive technology for the student despite his needs as outlined in the student's psycho-educational evaluation.

In its answer, the district responds to the parent's allegations, and asserts that the IHO properly concluded that the district offered the student a FAPE for the 2011-12 school year. The district also alleges that there was valid CSE review and the IEP was appropriate because the CSE participants considered sufficient evaluative data in developing the student's IEP. With respect to the 12:1+4 special class placement, the district contends that it was recommended specifically due to the extra support that the program would provide the student. Next, the district asserts that the annual goals were aligned with those recommended in reports from the student's related service providers. The district further asserts that the parent's claim that the district failed to offer a FAPE because the CSE failed to conduct a FBA, develop a BIP, or consider assistive technology for the student should not be considered because these issues were not raised in the due process complaint notice. Additionally, the district contends that the CSE did not recommend counseling for the student because the student was non-verbal. The district further contends that the IHO correctly found that the parent failed to meet her burden to establish that SCHI was an appropriate placement for the student and that equitable considerations did not favor the parents.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with

disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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. May 2011 IEP

1. CSE Composition

On appeal, the parent argues that the IHO erred in finding that the May 2011 CSE was properly composed and that the absence of a special education teacher did not result in a denial of a FAPE. At the time of the May 2011 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student or, where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR § 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider, in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).[6]

Attendees at the May 2011 CSE meeting included a district special education teacher (who also served as the district's representative), a district school psychologist, an additional parent member, and, by telephone, the parent, the parent's advocate, and the director from the United Cerebral Palsy School (UCP), the student's preschool (Dist. Ex. 1 at p. 16). The hearing record reflects that the UCP director participated in the May 2011 CSE meeting because the student's then-current UCP classroom teacher was not available (Tr. p. 54). Furthermore, the district special education teacher who participated in the May 2011 CSE meeting did not, at the time of the CSE meeting, teach in a classroom (Tr. p. 49). Thus, the May 2011 CSE lacked a special education teacher who was or would be responsible for implementing the student's IEP. Nevertheless, to the extent such an absence constitutes a procedural violation of the IDEA, the hearing record does not provide a basis upon which to conclude that such an inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits, and the parent does not assert any arguments as to how or why this procedural violation rose to the level of a denial of a FAPE (Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2-*3 [2d Cir. June 3, 2011]; see also 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[2]; 8 NYCRR 200.5[j][4][ii]). On the contrary, the hearing record reflects that the May 2011 CSE incorporated information from the UCP teacher's report into the student's IEP (compare Dist. Ex. 1, with Parent Ex. K). Additionally, the hearing record reflects the active participation of the parent, the parent's advocate, and the UCP director, who was personally familiar with the student (see Dist. Ex. 1 at pp. 1-2; see also A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *6-*7 [Mar. 19,

[6] The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

2013]; C.T. v. Croton-Harmon Union Free School Dist., 812 F.Supp.2d 420, 430-31 [S.D.N.Y. 2011]; Application of the Dep't of Educ., Appeal No. 11-040; Application of the Dep't of Educ., Appeal No. 08-105). Accordingly, the evidence in the hearing record does not support a finding that, as a result of improper composition of the May 2011 CSE, the district failed to offer the student a FAPE.

2. Evaluative Information and Present Levels of Performance

Turning next to the parties' dispute regarding the sufficiency of the evaluative information available to the May 2011 CSE and the adequacy of the present levels of performance in the IEP, a review of the hearing record.

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

A review of the hearing record reflects that the May 2011 CSE referred to the evaluations conducted by the student's preschool providers, physician's reports, and district evaluations in developing the student's IEP: (Dist. Exs. 2-4; 10; 11; Parent Exs. H; I; L; N-P). With respect to the student's preschool providers, the hearing record includes a February 2011 speech-language evaluation, conducted by the student's preschool speech-language pathologist; a February 2011 educational evaluation, conducted by the student's preschool teacher; a March 2011 OT progress report, completed by the student's preschool occupational therapist; and a March 2011 PT evaluation conducted by the student's preschool physical therapist (Dist. Ex. 10; Parent Exs. L, N, O). Additionally, the hearing record includes district progress reports/checklists completed by the student's therapists (Dist. Ex. 11). The hearing record also includes the results of a February 2011 cardiac evaluation conducted by the student's physician (Parent Exs. H; I). Lastly, the hearing

record includes a psychoeducational evaluation and a social history update, both of which were completed by the district school psychologist in March 2011 (Dist. Exs. 2; 3). Cumulatively, the above reports detailed the results of formal and informal assessments of the student, provided a description of the student's present skills and abilities, and suggested goals to address the student's needs.

With respect to the student's annual review conducted by the student's preschool speech-language pathologist, the student was assessed by means of formal testing, informal clinical observation, a review of previously documented information, and teacher input (Dist. Ex. 10). The speech-language pathologist described the student as a "sweet happy child who sometimes display[ed] low frustration tolerance" (id. at p. 1). She reported that the student's frustration was characterized by deliberately moving from sitting in a chair to sitting on the floor, protesting, whining, and/or throwing items (id.). The speech-language pathologist noted that these behaviors were evidenced in some, but not the majority of the student's individual therapy sessions (id.). According to the speech-language pathologist, the student's voice and fluency were within normal limits (id. at p. 2). With respect to the student's oral-peripheral mechanism, the student had low tone in his oral-facial musculature, an open mouth posture, inconsistent lingual protrusion, and moderate drooling (id. at p. 1). The speech-language pathologist further noted that the student demonstrated reduced strength, coordination, and range of motion of the lips, tongue, and jaw (id. at p. 2). While the speech-language pathologist reported that the student had made "[n]oticeable gains in his feeding," she did not otherwise describe those gains (id.). She assessed the student's language skills using the Preschool Language Scale-Fourth Edition (PLS-4), which yielded a receptive language standard score of 50, which the speech-language pathologist reported was indicative of a severe receptive language delay (id.). According to the speech-language pathologist the student identified objects given concrete or pictured stimuli; understood verbs in context with concrete items; identified some clothing, early spatial concepts, and pictured actions, and showed an understanding of several pronouns using concrete objects (id. at p. 1). In addition, the student was able to comprehend functional use of objects and follow two step related commands without cues (id. at p. 2). However, the speech-language pathologist reported that the student had difficulty responding to items that relied on picture-only stimuli such as descriptive concepts, quantitative concepts, negation, inference, and categories (id.). With respect to the student's expressive language, the speech-language pathologist reported that administration of the expressive communication portion of the PLS-4 yielded an expressive language standard score of 54, which was indicative of a severe expressive language delay (id. at p. 3). The speech-language pathologist indicated that the student was able to imitate words, use words more often than gestures to communicate, use words for a variety of pragmatic functions, use the "ing" verb form, and use a variety of nouns and verbs in spontaneous utterances (id.). According to the speech-language pathologist, the student's speech was characterized by the use of words and simple phrases (id.). However, she reported that, among other things, the student did not use different word combinations, answer questions, name pictured objects, tell how objects were used, or use possessives (id.). In conclusion, the speech-language pathologist stated that the student presented with severe receptive and expressive language delays, as well as significant oral motor feeding delays secondary to his medical diagnoses (id.). The recommended objectives for the student were to increase his receptive language, expressive language, and oral motor feeding skills to age appropriate levels (id.).

The student's preschool teacher also conducted an evaluation in February 2011, in which she commented on the student's development (Parent Ex. L). With respect to the student's cognitive development the teacher reported that the student demonstrated the ability to recognize, name, and point to some body parts, objects, and pictures (id. at p. 1). She further noted that the student was able to recognize his name and the name of most other students in written form (id.). According to the teacher, the student used words, including two to three word sentences, to express himself (id.). She noted that the student tried to sing some songs during circle time and was able to repeat sounds and simple new words on request (id.). The student was also able to name his peers and teachers (id.). The teacher reported that the student was able to follow two-step simple related commands and stated that the student made "good" eye contact (id.). According to the teacher, the student's learning process was interrupted by his aggressive and stubborn behavior (id.). The teacher noted that at times the student had difficulty following requests and directions due to behavioral problems (id.). The teacher commented on the student's activities of daily living (ADLs), noting specifically that the student could: feed himself using a spoon, with some spillage; drink from a cup or straw; put his jacket and hat in his cubby; wash and dry his hands; and wipe or dry the table (id. at p. 2). She also reported that the student liked being a classroom helper (id.). With respect to the student's motor development, the teacher reported that the student was ambulatory and could run and jump when held by his hands (id.). The teacher noted, however, that the student had balance and coordination difficulties which could result in tripping or falling (id.). According to the teacher, the student did not enjoy fine motor activities and required a lot of encouragement and assistance to engage in fine motor tasks and some sensory motor activities (id.). She reported that the student had a good attention span and independence for tasks he enjoyed (id.). As part of her evaluation the teacher offered goals and objectives related to improving the student's cognitive, fine motor and social/emotional skills (id. at p. 2).

In an evaluation report dated March 4, 2011, the student's preschool physical therapist described him as "an ambulatory and physically active child;" however, she noted that the student had "low" endurance and tolerance for physical activities (Parent Ex. O at pp. 1-2). According to the physical therapist, the student was able to walk independently, but with an unstable gait; and he often tripped and fell (id.). In addition, the student had poor motor planning and diminished body awareness and proprioception, as well as decreased balance and coordination of movements (id.). The physical therapist described the student's skills with respect to body control, locomotion, and object manipulation and concluded that the student exhibited significant delays in gross motor development (id. at pp. 1-2). The report listed several desired outcomes for the student, including that the student would: improve the muscle tone and strength throughout his body; walk with a more stable gait pattern, as well as up and down stairs; and jump in place; and catch a ball thrown at chest level goals for student that targeted his weaknesses in muscle tone and strength, ambulation, and object manipulation skills (id. at p. 2). In addition to the evaluation report, the physical therapist completed a district "Turning Five" progress report checklist in which she further detailed the student's gross motor strengths and weaknesses and suggested annual goals (Parent Ex. P at pp. 1-6).

In a progress report dated February 2, 2011, the student's occupational therapist reported that the student presented with decreased fine motor, visual-perceptual motor, self-help, motor planning, and sensory motor skills (Parent Ex. N at p. 2). Notably, he stated that the student used either extremity freely and did not demonstrate a hand preference at the time the report was written (id. at p. 1). The occupational therapist reported that the student was unable to imitate vertical

lines, horizontal lines or circles, and required had-over-hand assist to manipulate scissors (id.). The occupational therapist also completed a district "Turning Five" progress report checklist in which he further described, among other things, the student's fine motor skills, pre-writing skills, ADLs, response to sensation and ability to attend and self-regulate (Parent Ex. P at pp. 7-14). The occupational therapist included recommended long term goals in his March 2011 report, related to the student improving his fine motor skills, bilateral eye-hand coordination, visual motor/perceptual skills and sensory processing skills (Parent Ex. N at p. 2).

The psychoeducational evaluation, conducted by the district school psychologist in March 2011 described the student's behavior during the evaluation, as well as the student's intellectual functioning, cognitive skills, academic skills, adaptive behavior, and social skills (Dist. Ex. 2 at pp. 1-4). The psychologist indicted that her evaluation methods included an attempted administration of the Stanford-Binet Intelligence Scale-Fifth Edition (SB-5) and the Kaufman Survey of Early Language Skills (K-SEALS); administration of the Vineland Adaptive Behavior Scales-Second Edition (Vineland II) and the Developmental Assessment of Young Children (DAYC); a parent interview; and a review of prior evaluations and progress reports (id. at p. 1). With respect to the student's behavior during the evaluation, the psychologist reported that, while the student made eye contact, he did not respond to attempts to engage him in any tasks (id.). As noted by the psychologist, attempts to engage the student in formal testing were unsuccessful (id.). As a result, the psychologist reported the outcome of a prior assessment of the student's intellectual functioning (April 2009), in which the student received a full scale IQ score of 55 and his intellectual functioning was classified as "[m]ildly [d]elayed" (id. at p. 2). In relation to the student's cognitive skills, administration of the DAYC cognitive subtest yielded a standard score of less than 50, which was below the first percentile (id.). The psychologist gleaned information regarding the student's academic skills from the parent and the student's May 2010 IEP (id.). Based on this information, the psychologist reported that the student knew major body parts, identified 10 letters of the alphabet, partially recited the ABCs, and inconsistently identified shapes and colors, and communicated using single words and gestures (id.). The psychologist reported that, according to the student's May 2010 IEP, the student could recognize and match colors by pointing and sometimes by verbally labeling (id.). The psychologist also indicated that the student could recognize and sometimes name farm animals and enjoyed coloring, painting, and playing with play dough. (id.). In order to assess the student's adaptive behavior, the psychologist completed the Vineland-II, with the student's mother serving as the respondent (id.). The student received an adaptive behavior composite score of 57 which placed his overall adaptive functioning in the "[l]ow [r]ange. According to the psychologist, all of the domain scores were approximately the same and the scales revealed no relative strengths or weaknesses in the student's adaptive abilities (id. at p. 4). In order to assess the student's social skills including awareness, social relationships, and social competence, the psychologist administered the DAYC social skills subtest (id.). According to the psychologist, the student attained a standard score of less than 50, which was below the first percentile (id.). The psychologist stated that, according to parent report, the student played alongside others (id.). However, the psychologist noted that the student did not interact appropriately with peers, frustrated easily, and threw things when frustrated, banged his head, or threw himself on the floor (id.). The psychologist also noted that the student demonstrated a high level of impulsivity, as well as many perseverative, self-stimulatory behaviors (id.). The school psychologist who authored the psychoeducational evaluation report concluded that the student's intellectual functioning appeared to fall in the mildly delayed range and that he had a severe language delay (id.). The school psychologist also indicated that the student appeared to rely on

frequent verbal prompts, redirection, and cues to exhibit skills and, further, that the student was not consistently demonstrating learned readiness skills (id.). The psychologist stated that for kindergarten it appeared that the student would benefit from a "small special class setting with additional adult support in a specialized setting where he c[ould] get the individualized attention and support that he need[ed]" (id.).

Notably, in the social history update, the psychologist reported that the parent felt the student had made slow progress (Dist. Ex. 3 at p. 1). According to the psychologist, the parent was concerned that the student needed more intensive services and that she, as the parent, needed to be more involved in the program (id.). The psychologist encouraged the parent to look at various programs and to talk with the student's current providers (id.). The psychologist reported that she discussed "a very small class size" and the student's management needs with the parent (id.).

Although not specifically identified by the district, the hearing record shows that the district and preschool provider reports detailed above were considered by the May 2011 CSE in developing the student's IEP for the 2011-12 school year. The district special education teacher testified that the CSE "had all of the related service provider reports and the teacher reports and the medical documentation" (Tr. p. 50). Furthermore, the district special education teacher testified that the student's speech-language goals were copied "exactly" from the February 2011 speech-language evaluation, completed by the student's preschool speech-language pathologist (Tr. p. 54-55). In addition, she indicated that, although the PT goals were not taken "word for word" from the preschool provider's report, they were "basically the same" (Tr. pp. 55-56). With respect to OT, the district special education teacher explained that the goals were the same as in the preschool provider's report but, because they did not include short-term objectives, the CSE team had to create them (Tr. pp. 56-57).

"Both the IDEA and New York law prohibit school districts from using a 'single measure or assessment as the sole criterion for determining . . . an appropriate educational program for the child.'" (E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *9 [S.D.N.Y. Sept. 29, 2012] [citations omitted]; F.B. v. New York City Dep't of Educ., 2013 WL 592664 at *7-*8 [S.D.N.Y. Feb. 14, 2013]; S.F., 2011 WL 5419847, at *10); however, in this case, as described above, the hearing record shows that the May 2011 CSE appropriately reviewed a variety of sources to ascertain information about the student's academic, language, gross and fine motor, sensory processing, ADL, and social/emotional skills and developed the student's May 2011 IEP based on this information (Tr. p. 50; Dist. Exs. 3-12). Based upon the evidence, the parent's assertions regarding the insufficiency of the evaluative data and its consideration by the May 2011 CSE are not supported by the hearing record.

3. Present Levels of Performance

The parent also contends that the student had significant special education needs that were not included in the May 2011 IEP. Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their

child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

However, a review of the evidence in the hearing record indicates that, although the May 2011 CSE considered relevant information to develop the student's IEP, the May 2011 CSE did not accurately or sufficiently describe the student's academic achievement, functional performance, or how the student's disability affects his progress in the general education curriculum within the present levels of performance in the May 2011 IEP.

First, the hearing record reflects that the student's communication needs are insufficiently represented in the May 2011 IEP. With respect to the student's language ability, the IEP merely stated that the student could follow one step commands, inconsistently label shapes and colors, and had a limited vocabulary of single words (Dist. Ex. 1 at p. 1). The IEP did not include additional, significant information from the speech-language evaluation, which indicated: that the student: could identify numerous objects and some verbs; demonstrated an understanding of some pronouns and the functional use of objects; and could imitate words and produce words to convey a variety of intentions (Dist. Ex. 10 at pp. 2-3). Nor did the May 2011 IEP highlight the student's language needs regarding his inability to identify part and whole relationships, descriptive concepts, quantitative terms or pronouns depicted in pictures, or to use different word combinations, or formulate or answer questions (id.). The IEP also failed to describe the student's oral-motor weaknesses, which included low facial and intra-oral tonicity, and reduced strength, coordination, and range of motion of the lips, among other things (Parent Ex. M at p. 2). Instead, the IEP included only a general statement that the student sometimes used a utensil to eat (Dist. Ex. 1 at p. 1). The present levels of performance also lacked sufficient descriptive content to allow the receiving teacher and related service providers to implement the IEP, including how to develop an appropriate program to address the student's feeding and oral-motor needs. Moreover, the present levels present levels do not identify sufficient speech, language, or feeding needs to support the recommended delivery of five speech-language therapy sessions per week (Dist. Ex. 1 at p. 1).

In addition, the physical development section of the May 2011 IEP reflected the medical needs of the student, indicated that the student was ambulatory, and stated that he could go up and down stairs using a handrail (Dist. Ex. 1 at p. 2). However, the IEP neither indicated that the student demonstrated poor motor planning and diminished body awareness and proprioception, nor described the student's fine motor and sensory motor weaknesses, as found in the February 2011 OT progress report and March 2011 PT evaluation (compare Dist. Ex. 1 at p. 2, with Parent Exs. N; O).

Further, although the CSE recommended a 12:1+4 special class, which is designed for students with multiple disabilities and consists primarily of habilitation and treatment (8 NYCRR 200.6[h][4][iii]), the May 2011 IEP failed to sufficiently articulate the student's needs with respect to ADLs (see Dist. Ex. 1 at pp. 1-2). While the IEP states that the student "sometimes use[d] a utensil to eat", was beginning to groom independently, demonstrated an understanding of safety, and was not yet toilet trained, this information was not sufficiently specific to allow the receiving teacher and related service providers to implement the IEP.

Finally, the present levels of performance stated both that the student frustrates easily and would throw things, bang his head, or throw himself on the floor and that the student was cooperative and friendly, without distinguishing the circumstances under which these differing behaviors occur (Dist. Ex. 1 at pp. 1-2). The IEP also failed to note the student's attending difficulties (see Parent Exs. L at p. 1; N at p. 1).

As noted above, the provider reports that were available for the CSE contained substantive information regarding the student's then current abilities and needs in all required domains. However, the information in the reports provided by the student's providers was not sufficiently used in the IEP to document the student's present levels of performance.

4. Consideration of Special Factors—Interfering Behaviors

The parent contends that the May 2011 CSE's failure to conduct an FBA or develop a BIP denied the student a FAPE.[7] Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., Region 9 (Dist. 2), 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, the "student's need

[7] Contrary to the district's assertion that the parent did not properly raise the issue of the lack of an FBA or BIP, a review of the parent's due process complaint notice reveals that she challenged the failure of the May 2011 CSE to complete or discuss the student's need relating to special factors (Parent Ex. A at p. 2). Although the parent could have been more clear, and an IHO would well within his or her discretion to require a party to further clarify such an allegation, I find that this was sufficient to raise the issue in this instance.

for a [BIP] must be documented in the IEP" (id.).[8] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 394 Fed. App'x at 722). The Second Circuit has explained that when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors" (id.).

As described above, the student exhibited behaviors such as throwing himself on the floor, engaging in tantrums, banging his head, and displaying impulsivity (see Dist. Ex. 2 at p. 4). In addition, the evidence in the hearing record shows that the student's learning was interrupted by his aggressive and stubborn behaviors (see Dist. Ex. 1 at p. 2). However, the May 2011 IEP failed to describe the student's behavior, conduct an FBA, develop a BIP, or even identify the student's need for a BIP (Dist. Ex. 1 at p. 1). Furthermore, the May 2011 IEP failed to otherwise address the student's social/emotional needs and behaviors, as discussed below with respect to the annual goals included in the May 2011 IEP (see generally Dist. Ex. 1). Based on these facts, the hearing record supports the parent's contention that the May 2011 CSE's failure to conduct an FBA or develop a BIP contribute to a finding that the district failed to offer the student a FAPE for the 2011-12 school year (see Dist. Ex. 1 at p. 2). However, there is no support for the parent's assertion that the May 2011 CSE also failed to consider assistive technology. There is no indication in the

[8] While the student's need for a BIP must be documented in the IEP and, prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student is enrolled at the proposed district public school placement]).

hearing record with respect to the student's need for any type of assistive technology to address the student's communication needs.

5. Annual Goals

I will now turn to the parent's contention that the hearing record showed that the annual goals contained in the May 2011 IEP were not appropriate for the student. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The district representative testified that the student's May 2011 IEP goals were developed based on the recommended goals put forth by the student's preschool providers (Tr. pp. 54-59). However, after further review, the hearing record shows that the annual goals do not adequately address the student's significant needs (see Dist. Ex. 1 at pp. 3-8).

With respect to the student's social development, the May 2011 IEP indicated that the student became "frustrate[d] easily and [would] throw things, bang his head or throw himself on the floor" (Dist. Ex. 1 at p. 1). In addition the IEP indicated that the student esd "very" impulsive, that he became upset easily when asked to do something he did not want to do, and demonstrated many perseverative and self-stimulatory behaviors (id. at pp. 1-2). The student also had difficulty attending (Parent Exs. L at p. 1; N at p. 1). While there was substantial information that the student's behaviors interfered with his educational program the May 2011 IEP only marginally addresses these needs through annual goals. Specifically, the May 2011 IEP included one annual goal whereby the student would improve his "play and socialization skills to an age appropriate level" (Dist. Ex. 1 at p. 5). Relating to that annual goal, the May 2011 IEP included a short-term objective that the student "use words in place of tantrumming when frustrated" (id.). Relative to an annual goal that the student "improve find motor skills," another short-term objective required the student to sit and "complete a 5-10 minute table top activity without exhibiting oppositional behaviors given no more than 3 verbal and tactile cues" (id. at p. 7). Despite the severity of the student's behavioral needs, the May 2011 CSE failed to include additional annual goals and short-term objectives targeted to address these particular needs. Furthermore, the May 2011 IEP did not otherwise address the student's behavioral needs through the identification of the student's management needs, the development of a BIP, or the recommendation of additional related services (see Dist. Ex. 1 at pp. 1-2). In addition, according to the district special education teacher, the student received counseling during preschool but that the May 2011 CSE discontinued the service because the student was nonverbal (Tr. p. 64). Nothing in the hearing record shows that the district contemplated a modified form of counseling or any other alternative to simply discontinuing the service.

Furthermore, other than feeding, the May 2011 IEP lacked goals that addressed the student's needs with respect to ADLs. The IEP reported the parent's concern that the student was not toilet trained and further indicated that the student's exhibited delays with respect to ADL skills (see Dist. Ex. 1 at p. 2). However, the May 2011 IEP did not contain a goal or otherwise address the student's toileting needs.

Based on the foregoing, the evidence in the hearing record reveals that the May 2011 IEP contained deficiencies, including the inadequate description of the student's needs, the failure to indicate the student's need for a BIP, and the deficiencies in the annual goals, which, by themselves, might not render the May 2011 IEP as a whole inappropriate. However, under the circumstances of this case, the deficiencies in the May 2011 IEP, when considered in the aggregate contribute to a finding that the district impeded the student's right to a FAPE or otherwise caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

B. Unilateral Placement

Turning now to the appropriateness of the student's unilateral placement at SCHI, the parent argues that the IHO erred in concluding that SCHI was not appropriate because it did not provide a program that was reasonably calculated to enable the student to make meaningful educational progress. The parent contends that SCHI was appropriate because the student demonstrated sufficient levels of progress from the program. The district asserts that as a result of attending SCHI, the student did not demonstrate "consistent academic progress" in the SCHI program. As discussed in greater detail below, the parent's assertions are supported by the hearing record and are founded on sufficient evidence to overturn the IHO's finding that SCHI was not an appropriate placement for the student for the 2011-12 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Student with a Disability, Appeal No. 12-036; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]; see also Educ. Law § 4404[1][c]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207 [identifying exceptions]. Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d

at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see M.B., 2013 WL 1277308, at *2; D. D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; M.B., 2013 WL 1277308, at *2; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The parent asserts that the IHO erred in determining that SCHI was not an appropriate placement for the student.

A review of the hearing record supports the parent's contention that the IHO erred in determining that SCHI was not an appropriate placement for the student. As explained more fully below, the program and services the student received at SCHI during the 2011-12 school year were specially designed to address the student's unique needs. Furthermore, contrary to the district's contention, the record shows that the student made progress at SCHI.

With respect to the program and services provided at SCHI, the student attended a preschool classroom for eight children, who were between three and five years old and who were eligible for special education and related services as preschool students with a disability (Tr. p. 10). There were also two typically developing peers in the classroom for nearly three hours per

day, and who serviced as peer role models for the student (Tr. pp. 10-11). The classroom staff included one teacher, one co-teacher and three aides (Tr. pp. 17-18). In addition, the student received related services at SCHI, including OT, speech-language therapy, PT, and feeding therapy (Parent Ex. G at p. 1). In addition, SCHI offered a 12-month school year program (Tr. p. 31).

With respect to the student's levels of achievement, an undated Present Level of Academic Achievement and Functional Performance summary was completed by the student's providers at SCHI (Parent Ex. J at pp. 2-8). The educational report included the student's skills regarding cognition and attention, social communication, and behavior provided by his teacher (id. at pp. 2-3). With respect to the student's speech and language needs, the report described the student's receptive language, expressive language, oral motor, and feeding needs (id. at pp. 4-5). The OT portion of the report addressed the student's neuromuscular development, fine motor and visual motor skills, sensory processing, and ADL needs (id. at p. 6). The PT portion of the report provided information relative to the student's neuromuscular status, gross motor and mobility skills. (id. at p. 7).

Providers at SCHI also developed performance goals and objectives for the student, which included carrying out two-step directions, improving problem solving skills, developing early concepts such as size, shape and colors, grouping objects, understanding one-to-one correspondence, using words and gestures to share and obtain information about pictures and texts, using opposite concepts, and filling in missing words in rhymes (Parent Ex. K at pp. 2-3).[9] In addition, SCHI's OT goals and objectives for the student included developing proximal stability, buttoning, donning socks, spearing with a fork, developing fine motor and visual motor skills by imitating a vertical line and circle, completing a three to four block design, completing a four to five piece puzzle, and cutting across a line (id. at pp. 3-4). SCHI's social development goals for the student included playing with toys appropriately, responding with socially appropriate affect to peers, observing peers playing close by, and requesting desired objects from a peer (id. at p. 5). In addition, the SCHI's PT goals included imitating and pedaling a tricycle, jumping forward, ascending stairs in a reciprocal manner, hopping, traversing a wide balance beam, throwing a ball five to six feet, and catching a ball thrown by an adult from five feet away (id.). The SCHI speech-language goals were designed to support the student's expressive language skills and included combining two to three words, answering "what" questions, and commenting on surroundings (id. at p. 6). The SCHI speech-language goals designed to address the student's receptive language included identifying items in a category, following one to two-step directions with spatial concepts, and constructing "wh" questions referring to the immediate environment (id.). SCHI also developed goals to address the student's feeding skills, which included chewing crunchy textures, drinking with not anterior leakage, and swallowing bolus before taking the next piece (id. at p. 7). Goals targeting the student's speech intelligibility included increasing the range of motion of the lips, jaw, and tongue and producing two to three syllable words while keeping all syllables intact (id.).

The student's classroom teacher at SCHI testified that the student's goals at SCHI were developed based on the Assessment Evaluation and Programming System (AEPS) curriculum (Tr.

[9] Contrary to the IHO's finding that the hearing record lacked evidence of SCHI's math or science curriculum (IHO Decision at p. 7), I note that several of the goals developed by SCHI addressed skills relevant to math and science (see Parent Ex. K at pp. 2-3).

pp. 17-18). The goals and objectives developed by SCHI addressed the student's needs as described in the Present Level of Academic Achievement and Functional Performance summary, completed by the providers of the student at SCHI (compare Parent Ex. K at pp. 2-7, with Parent Ex. J at pp. 2-7).

With respect to the student's progress at SCHI, a finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B., 2013 WL 1277308, at *2; D. D-S., 2012 WL 6684585, at *1; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at *5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).[10] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). In this case, the evidence in the hearing record demonstrates that the student made progress during the 2011-12 school year at SCHI (IHO Decision at p. 7).

While the student's teacher at SCHI indicated that the student did not achieve his goals, she clarified that "he definitely made progress" (Tr. p. 14). The initial progress report for the first reporting period reflected that some of the goals had not yet been introduced or had just been introduced, but the student had "partially achieved" other goals, making particular progress in some areas of speech-language and motor skills (Parent Ex. K at pp. 2-7). In addition, the student's teacher testified that the student made progress in that he could follow two-step directions with assistance, group objects by color and functions with a model, understand one-to-one correspondence and some opposite concepts (Tr. p. 14). Also, the student's teacher testified that the student made progress socially and emotionally (Tr. p. 15).

Based on the above, the hearing record supports a finding that the parent sustained her burden to establish the appropriateness of SCHI for the student. In particular, the hearing record shows that SCHI offered the student an educational program which met the student's special education needs and that, overall, the student made progress in the SCHI setting.

C. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2011-12 school year and that SCHI was an appropriate placement for the student, the next issue to consider

[10] The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

is whether equitable considerations support the parent's request for reimbursement of the student's tuition costs.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district argues that equitable considerations do not weigh in favor of the parent's request for tuition reimbursement, in part, because the parent's 10-day notice, dated August 22, 2013, did not meet statutory requirements because it did not identify specific issues or concerns related to the student's IEP. In this case, the hearing record establishes that the parent provided the district with timely notice of her intentions to unilaterally place the student at the SCHI school for the upcoming school year, both by letter and by communication to the May 2011 CSE (Tr. pp. 42-44; Parent Ex. B at p. 1). However, the parent's letter failed to indicate any specific concerns or reasons as to why the parent was unilaterally placing her child at SCHI, other than that the

parent had not yet had an opportunity to tour the proposed public school site (see Parent Ex. B at p. 1).

Based on the foregoing, I find that, while the parents timely provided the district with a 10-day notice prior to removing the student from the district, I agree with the district that the 10-day notice did not give any hint at all with regard to what might be needed to correct its IEP because it did not set forth any actual concerns about the special education programs and related services recommended in the student's 2011-12 IEP (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). As noted above, without this information, the district had no reasonable opportunity—before the student was removed from the public school—to assemble a team, devise an appropriate program, or otherwise remedy concerns expressed by the parents with respect to the recommended special education programs and related services in the student's IEP in order to offer the student a FAPE.

Consequently, the parent's failure to provide an adequate10-day notice requirement weighs against her with respect to equitable considerations, particularly when the due process complaint in February 2012 was the first time the parent made significant effort to provide her concerns with the IEP to the district. As such, in the exercise of my discretion, a twenty-five percent reduction of the parent's requested relief is warranted in these circumstances.

D. Relief

The district asserts that the parent is not entitled to the direct payment of the student's tuition. With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 360). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430). Since the parent selected SCHI as the unilateral placement, and her financial status is at issue, it is the parent's burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of SCHI and whether she is legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal

No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, the parent executed an undated enrollment contract with SCHI (Parent Ex. E).[11] The parent testified that she was responsible for the amount of the tuition and that she was informed by SCHI that the student would not be able to return to SCHI in September 2012, unless the tuition was paid (Tr. p. 116). The parent further testified that she did not pay the student's tuition but had conversations with the secretary of SCHI in order to reach "some sort of agreement" or make a "payment plan" (Tr. p. 119). The parent further testified that she was not working, had six children, and her husband has a yearly income of $30,000 to $40,000 (Tr. pp. 114-115). In addition to the testimonial evidence submitted regarding the financial circumstances of the parent's household, the parent also submitted three pages of their 2011 income tax return that reflect self-employment income of approximately $30,000 (see Parent Ex. Q at pp. 1-3).

In this case, the parent submitted evidence showing that she was legally obligated to pay the student's tuition costs and regarding the financial status of both her and her husband including income of approximately $30,000 (Parent Exs. E; Q). Under the circumstances of this case, I find that equitable considerations do not preclude the parent's claim for direct funding of the student's tuition for the 2011-12 school year at SCHI under the factors described in Mr. and Mrs. A.

VII. Conclusion

Based on the above, the hearing record shows that the district failed to offer the student a FAPE for the 2011-12 school year, SCHI was an appropriate unilateral placement for the student, and equitable considerations warrant a reduction of tuition reimbursement.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 27, 2012 is modified by reversing that portion which determined the district offered the student a FAPE for the 2011-12 school year, SCHI was an appropriate unilateral placement, and equitable circumstances fully supported the parent's request for reimbursement; and

IT IS FURTHER ORDERED that the district shall directly fund seventy-five percent of the student's SCHI tuition for the 2011-12 school year.

Dated: **Albany, New York**
January 31, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[11] The parent testified that the enrollment contract was signed in September 2011 (Tr. p. 116).