The University of the State of New York

The State Education Department
State Review Officer
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No. 12-233

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Ithaca City School District

Appearances:
Edward E. Kopko, Lawyer, PC, attorney for petitioner, Edward E. Kopko, Esq., of counsel

Bond, Schoeneck & King, PLLC, attorneys for respondent, Jonathan B. Fellows, 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 Greenbrier Academy For Girls (Greenbrier) for the 2012-13 school year. The appeal must be dismissed.

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

In this case, the parent executed an enrollment contract with Greenbrier on July 6, 2012 for

the student's attendance during the 2012-13 school year (see Parent Ex. 13 at pp. 411-13).[1, 2] On July 26, 2012, the parent requested a CSE meeting for the student with proposed dates (see Dist. Ex. 50). On July 27, 2012, the parent informed the district that Greenbrier was the "most appropriate educational setting" for the student, and as she worked toward this "educational setting," the parent requested that the district evaluate the student to address the "appropriateness of Greenbrier" to meet the student's educational needs (Dist. Ex. 51).

On August 21, 2012, the CSE convened pursuant to the parent's request and developed an IEP (see Dist. Ex. 49 at pp. 1-2).[3] According to the August 2012 CSE meeting minutes, the parent indicated that she was not "interested in participating in developing the [IEP] in the committee" but wanted a copy of the IEP as "soon as possible" (Dist. Ex. 45 at p. 3). The meeting minutes then noted the parent's departure from the CSE meeting, as well as the continuation of the CSE meeting without the parent's attendance (id.). Finding that the student remained eligible for special education and related services as a student with a learning disability, the August 2012 CSE recommended daily resource room services, daily direct consultant teacher services, and one session per week of individual counseling (see Dist. Ex. 49 at pp. 1, 6).[4] In addition, the August 2012 IEP included annual goals, as well as supplementary aids and services and program modifications or accommodations, and a recommendation for assistive technology devices or services (id. at pp. 1, 5-8).

On August 21, 2012, the parent thanked the district for its "efforts in considering and evaluating" the student's educational needs (Dist. Ex. 56). In addition, the parent recounted that she delivered her consultant's "analysis" to the CSE that morning, and she requested that the district "evaluate and address each of [the consultant's] recommendations, most particularly [the student's] placement at Greenbrier" and provide a "detailed, well-reasoned explanation for the reason rejecting this placement" (id.). In response, the district suggested that the CSE reconvene on

[1] The Commissioner of Education has not approved Greenbrier as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] In this case, although the parent identified her exhibits with written descriptions on tabs—such as "Grade 1" and "Grade 2"—and appeared to consecutively paginate the exhibits, the IHO—in both the hearing transcript and in the IHO decision—replaced the parent's written descriptions with numbers, i.e., the parent's exhibit originally identified by a tab labeled "Grade 1" became Parent Exhibit 1 (see Tr. pp. 8-9; 16-17; IHO Decision at p. 1). In addition, instead of using the numbers the parent already assigned to the individual pages of each exhibit, the IHO replaced the numbers with consecutive letters of the lower-case alphabet (id.). However, the IHO did not change the original written descriptions or page numbers on the parent's actual exhibits to reflect the changes referred to in the hearing transcript or the IHO's decision. For clarity, the parent's exhibits will be referred to with numbers—and thus, consistent with the hearing transcript and the IHO's decision—but will use the original page numbers the parent assigned to the individual pages of each exhibit throughout this decision and not letters from the alphabet as so designated by the IHO.

[3] The August 2012 IEP indicated an implementation date of August 22, 2012 through November 18, 2012, as the projected date of the student's annual review was August 12, 2012 (see Dist. Ex. 49 at p. 1). Prior to the August 2012 CSE meeting, the district conducted the student's previous annual review in November 2010 (see Dist. Exs. 40 at pp. 1-2; 41 at pp. 1-6).

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

August 28, 2012 to review the "consultant's recommendations" (August 2012 consultant report) (Dist. Ex. 57 at p. 1; see Dist. Ex. 58 at pp. 1-3; see also Dist. Ex. 46 at pp. 1-28).

On August 23, 2012, the parent reiterated her intentions to place the student at Greenbrier and to seek tuition reimbursement (see Dist. Ex. 57 at p. 2).

On August 28, 2012, the CSE reconvened to review the August 2012 consultant report (see Dist. Ex. 48 at p. 1; see also Dist. Exs. 46 at pp. 1-28). According to the August 2012 CSE meeting minutes, the parent stated her concern that the student did not have "seventh grade writing skills," as suggested by a formal assessment (Dist. Ex. 48 at p. 1). In addition, the meeting minutes documented that as the parent departed from the CSE meeting she expressed that the student would attend Greenbrier, and as on August 21, 2012, the CSE continued with the meeting (compare Dist. Ex. 48 at pp. 1-6, with Dist. Ex. 45 at pp. 1-6). Based upon the August 2012 CSE's review and consideration of the August 2012 consultant report—as well as an August 2012 addendum (August 2012 addendum) to the August 2012 consultant report, the August 2012 CSE continued to recommend the special education and related services previously set forth in the IEP developed at the August 21, 2012 CSE meeting (see Dist. Ex. 48 at pp. 4-5, 7; see also Dist. Ex. 49 at pp. 1-9).[5]

A. Due Process Complaint Notice

By due process complaint notice dated September 6, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex. 59 at pp. 1-3). The parent asserted that the district failed to adequately consider the student's "individual education needs," and failed to propose "appropriate educational interventions" in the August 2012 IEP (id. at p. 3). In addition, the parent asserted that the district failed to consider and evaluate the parent's "written submissions" to the CSE (id.). The parent also alleged that the district's "proposed actions and settings" in the August 2012 IEP did not meet the student's educational needs (id.). Furthermore, the parent asserted the district failed to "adequately consider" the parent's "demand" and the student's "need for private placement at Greenbrier," and the district failed to conduct "testing and evaluations sufficient to deny the [parent's] demand for private placement at Greenbrier" (id.). Finally, the parent alleged that the district failed to "maintain a special education program" that met State requirements (id.). As relief, the parent requested that the district develop an IEP designating Greenbrier as "providing FAPE," and reimbursement for the costs of the student's tuition, expenses, attorney fees, and consultant fees (id.).

B. Impartial Hearing Officer Decision

On October 3, 2012, the IHO conducted a prehearing conference, and on October 17, 2012, the parties conducted the impartial hearing (see IHO Decision at p. 1; Tr. pp. 1-258). By decision dated November 17, 2012, the IHO concluded that the district offered the student a FAPE for the 2012-13 school year, and thus, the IHO denied the parent's request for reimbursement of the costs

[5] For clarity, this decision will only refer to the August 2012 CSE for actions collectively taken by both the August 21, 2012 CSE and the August 28, 2012 CSE.

of the student's tuition at Greenbrier for the 2012-13 school year (see IHO Decision at pp. 1, 11-16).

Initially, the IHO found that the CSE "relied upon and referenced the results of, and adopted many of the recommendations" in a March 2012 psychological evaluation report, an August 2012 psychological evaluation report, and the August 2012 consultant report in developing the August 2012 IEP (IHO Decision at pp. 5-8, 12). Consequently, the IHO determined that the August 2012 IEP was based on a "current and detailed understanding of [the student's] academic strengths and weaknesses" (id. at p. 12). As for the parent's allegation that the district failed to conduct testing and evaluations sufficient to deny the parent's "demand" for the student's placement at Greenbrier, the IHO found that the hearing record contained no evidence upon which to "question the validity" of either the March 2012 or the August 2012 psychological evaluations of the student; moreover, the IHO found that the parent did not identify any "additional test instruments that should have been administered" or "any suspected areas of disability that were not evaluated" (id.). The IHO also found that regardless of the parent's argument with respect to test scores, the student made "[s]atisfactory [a]cademic [p]rogress" (id.).

Overall, the IHO concluded that the August 2012 IEP was appropriate and reasonably calculated to enable the student to receive educational benefits (see IHO Decision at pp. 13-15). The IHO rejected the parent's argument that the student could not "benefit from any education" offered by the district because "its special education staff" was not "formally trained" in nonverbal learning disability or moreover, that staff required such training in order to understand the student's "needs" or offer the student a FAPE (id. at p. 13 [emphasis in original]). The IHO also found that the August 2012 IEP addressed all of the student's "areas of concern"—as identified in the March 2012 psychological evaluation, an August 2012 psychological evaluation, and the August 2012 consultant report—and the IEP was tailored to the student's present levels of academic achievement and unique learning characteristics (id.). The IHO also determined that the August 2012 IEP "appropriately offered program modifications and testing accommodations to maximize [the student's] opportunity to succeed;" the annual goals in the August 2012 IEP were "substantially different" from those in the student's prior IEPs; and the evaluative criteria related to the annual goals were "clear and measurable" (id. at pp. 13-14).

Next, the IHO indicated that the August 2012 CSE recommended special education programs and services in response to the recommendations in the August 2012 consultant report, as well as in both the March 2012 and August 2012 psychological evaluations of the student (see IHO Decision at p. 13). With regard to the district staff, the IHO noted that the special education teachers were "qualified" and could provide the student with the "direct instruction, redirection, and cuing" recommended in the August 2012 consultant report (id.). In addition, the IHO rejected the parent's argument that students with nonverbal learning disabilities could not benefit from the "continuum of special education services" and could only be educated in a "segregated setting composed of students with similar profiles" (id. at pp. 13-14). Next, the IHO also found that the CSE had "no need to evaluate the [p]arent's request for a placement in a private school" if it determined that the student could receive "educational benefits" in a district public school (id. at p. 14). Also, the IHO concluded that the district's "refusal to respond in writing" to the August 2012 consultant report did not indicate that the district impermissibly engaged in predetermination of the August 2012 IEP or that the district "refused to address [the student's] educational needs" (id.). Finally, the IHO found that the August 2012 CSE's failure to recommend a particular

methodology in the August 2012 IEP did not constitute a failure to offer the student a FAPE for the 2012-13 school year (id. at pp. 14-15).

Having determined that the district offered the student a FAPE for the 2012-13 school year, the IHO nonetheless found that the parent failed to establish that Greenbrier was an appropriate unilateral placement for the student, and that based upon the evidence in the hearing record, equitable considerations did not weigh in favor of the parent's requested relief (see IHO Decision at pp. 15-16).

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 2012-13 school year. Generally, the parent argues that the IHO erred in making several findings of fact because the IHO "misapprehended or overlooked uncontradicted evidence" that district personnel—and in particular, the August 2012 CSE members—did not have any training, education or experience with a nonverbal learning disability, which prevented the August 2012 CSE from "understanding the nature and scope of the student's unique needs" and from developing an appropriate IEP for the student. The parent also asserts that the IHO erred in "excusing" the August 2012 CSE's failure to adopt the recommendation in the August 2012 consultant report, including the recommendation to place the student at Greenbrier. More specifically, the parent asserts the IHO erred in finding that the August 2012 CSE relied upon, referenced, and adopted the testing results and many recommendations in a March 2012 psychological evaluation, an August 2012 psychological evaluation, and the August 2012 consultant report in the development of the August 2012 IEP. In addition, the parent argues that the IHO erred in finding that the hearing record contained no evidence upon which to question the "validity" of the March 2012 or August 2012 psychological evaluations of the student. Next, the parent asserts that the IHO lacked the credentials or knowledge to conclude—based upon the student's testing results—that the student made academic progress. The parent also asserts that the IHO erred in finding that the August 2012 IEP was appropriate and reasonably calculated to enable the student to receive educational benefits. Next, the parent argues that the IHO erred in finding that the August 2012 IEP addressed all of the student's areas of concern and was "tailored" to the student's present levels of performance. The parent further argues that the IHO erred in shifting the burden of proof to the parent, and the IHO misunderstood the least restrictive environment (LRE) requirement as it applied to the district. Finally, the parent asserts that the IHO erred in finding that the district's failure to respond in writing to the August 2012 consultant's report did not constitute predetermination, that the annual goals in the August 2012 IEP were different from previous IEPs and included clear and measureable evaluative criteria, and that the August 2012 CSE's failure to recommend a particular methodology in the August 2012 IEP did not constitute a failure to offer the student a FAPE. Additionally, the parent asserts that the IHO erred in finding that Greenbrier was not an appropriate unilateral placement and that equitable considerations did not weigh in favor of her request for relief.

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's decision in its entirety. The district also asserts that the parent raised issues in the petition for the first time on appeal, which are outside the scope of this review and must be dismissed.

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. Preliminary Matters

1. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, a review of the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte addressing in the decision whether the student made academic progress, whether the annual goals in the August 2012 IEP were appropriate, whether the August 2012 CSE impermissibly engaged in predetermination, and whether the August 2012 CSE failed to recommend a particular methodology in the August 2012 IEP because the parent did not raise these as issues in dispute in the due process complaint notice (compare IHO Decision at pp. 12, 14-15, with Dist. Ex. 59 at pp. 1-3).

Second, a review of the hearing record also reveals that the parent now raises the following issues in the petition—which she did not raise in the due process complaint notice and upon which the IHO did not issue findings—for the first time on appeal: whether the August 2012 CSE members possessed sufficient training, education, or experience with a nonverbal learning disability to contribute to the development of the student's IEP; and whether the district failed to provide prior written notice to the parent (compare Pet. ¶¶ 4-28, 41-44, with Dist. Ex. 59 at pp. 1-3).[6]

With respect to the issues raised and decided sua sponte by the IHO in the decision as well as the allegations now raised by the parent in the petition for the first time on appeal, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08- 056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City

[6] The parent submitted a memorandum of law with the petition for review (see Parent Mem. of Law at pp. 1-20). To the extent that the parent or her attorney incorporated or argued additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year solely within the memorandum of law, the parent and her attorney are reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). Thus, any arguments included solely within the memorandum of law—such as whether the district failed to establish the functional grouping of the students within the resource room at the assigned public school site and whether the district failed to conduct a functional behavioral assessment of the student—have not been properly asserted and will not be considered or addressed in this decision.

Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 77-78 [2d Cir. 2014]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issues raised sua sponte by the IHO regarding the student's academic progress, the annual goals in the August 2012 IEP, predetermination, and the failure to recommend a particular methodology in the August 2012 IEP, or the challenges indicated above that have been raised in the parent's petition for the first time on appeal (see Dist. Ex. 59 at p. 3). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-258; Dist. Exs. 1-3; 5-12; 14-60; Parent Exs. 1-14; IHO Exs. 1).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues, or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded her jurisdiction by addressing in the decision the student's academic progress, the annual goals in the August 2012 IEP, predetermination, and methodology, and these particular findings must be annulled. In addition, the parent's allegations as indicated above and raised now, for the first time, on appeal are outside the scope of my review, and therefore, these allegations will not be considered (see N.K., 961 F. Supp. 2d at 584-86; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at *7 [D. Maryland Sept. 29, 2009]).[7]

B. CSE Process

1. Evaluative Information and Present Levels of Performance

Turning to the issues properly before me, the parent asserts that the IHO erred in finding that the August 2012 CSE relied upon, referenced, and adopted the testing results and many of the recommendations in a March 2012 psychological evaluation, an August 2012 psychological evaluation, and the August 2012 consultant report in the development of the August 2012 IEP. The parent also argues that the IHO erred in finding that the August 2012 IEP addressed all of the student's areas of concern and was "tailored" to the student's present levels of performance. The district rejects the parent's assertions. A review of the evidence in the hearing record does not support the parent's contentions, and thus, there is no reason to disturb the IHO's conclusions.

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]). 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

[7] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-29 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84[S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *5-*6), the issues raised and addressed sua sponte by the IHO in the decision and the allegations raised in the parent's petition for the first time on appeal were initially raised by counsel on cross-examination of a district witness, or through testimony of witnesses for the parent (see, e.g., Tr. pp. 36-37, 41-46, 51, 94-95, 128-30, 145-46, 170-75, 242-44, 247, 256-57). Here, the district did not initially elicit testimony, and therefore, the district did not "open the door" to these issues under the holding of M.H.

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]).

In this case, the evidence in the hearing record reflects that the August 2012 CSE reviewed and considered the following evaluative information to develop the student's August 2012 IEP: a March 2012 psychological evaluation, an August 2012 psychological evaluation, and as discussed more fully below, the August 2012 consultant report and an August 2012 addendum (see Dist. Ex. 49 at pp. 1-4; see also Tr. pp. 32, 90, 115-16; Dist. Exs. 43 at pp. 1-8; 44 at pp. 1-8; 45 at pp. 1, 3; 46 at pp. 1-28; 47 at pp. 1-2; 48 at pp. 1-9). In addition, a review of the present levels of performance and individual needs section of the August 2012 IEP reflects that the August 2012 CSE relied upon the evaluative information to identify the student's individual needs (compare Dist. Ex. 49 at pp. 2-4, with Dist. Ex. 43 at pp. 2-7, and Dist. Ex. 44 at pp. 2-5, and Dist. Ex. 46 at pp. 2-19).

As part of the March 2012 psychological evaluation, the evaluator administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student, as well as the Wechsler Individual Achievement Test, Third edition (WIAT-III) (see Dist. Ex. 43 at pp. 2-7). Based upon the WISC-IV results, the evaluator indicated that the student demonstrated a significant scatter between her high average verbal skills and her extremely low perceptual reasoning skills, borderline working memory, and low average processing speed (id. at p. 4). Similarly, based upon the results of the WIAT-III, the student performed within the low average range to the average range in the areas of reading, mathematics, and writing (id. at p. 5). More specifically, the student's listening comprehension skills fell within the above average range, while her math problem-solving skills fell within the low average range (id.). The student's performance on all other subtests—including reading comprehension, sentence and essay composition, spelling, math fluency (addition, subtraction, and multiplication), and numerical operations yielded scores within the average range (id.). In summary, the evaluator noted that the student's "academic performance appear[ed] commensurate with her cognitive abilities," the student presented with "some anxiety," and her "attendance and tardiness ha[d] been highly inconsistent" throughout the school year (id. at p. 7). The evaluator also offered recommendations to support the student at school, such as allowing breaks during longer assignments and allowing access to a word processor (id. at p. 8).

A review of the present levels of performance and individual needs section of the August 2012 IEP reflects information obtained from the March 2012 psychological evaluation report. For example, the August 2012 IEP indicated that, consistent with the March 2012 psychological evaluation, the student scored within the average range in the areas of reading, mathematics, and written expression, although the student's math problem-solving score fell within the low average range (compare Dist. Ex. 49 at p. 3, with Dist. Ex. 43 at pp. 5, 7). The August 2012 IEP also noted that when engaged in writing tasks, the student needed to "verbally rehearse her written responses" and have access to "graphic organizers" to help organize her thoughts, which the evaluator recommended in the March 2012 psychological evaluation (compare Dist. Ex. 49 at p. 3, with Dist. Ex. 43 at p. 8). In the area of social development, the August 2012 IEP reflects observations made by the evaluator who conducted the March 2012 psychological evaluation, which indicated that "once rapport and trust [was] established," the student was "more willing to actively participate and/or attempt novel/challenging tasks" (compare Dist. Ex. 49 at p. 4, with Dist. Exs. 43 at p. 2). The August 2012 IEP also reported the evaluator's observation that the student appeared to

experience "some anxiety, especially with new situations/learning" (compare Dist. Ex. 49 at p. 3, with Dist. Ex. 43 at p. 7). Finally, consistent with the March 2012 psychological evaluation report, the August 2012 IEP noted the student's need for medication to address "mood stability," her history of pneumonia, and concerns associated with the student's absenteeism and "inconsistent attendance" (compare Dist. Ex. 49 at p. 4, with Dist. Ex. 43 at pp. 1-2).

In August 2012, a district school psychologist administered selected subtests from the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III COG) to the student to assess her cognitive abilities; in addition, the evaluator administered the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) to the student to assess her academic achievement and the Behavior Assessment System for Children, Second Edition (BASC-2) to assess the student's social/emotional and behavioral needs (see Dist. Ex. 44 at pp. 1, 3-4, 6-7).

Results of the August 2012 evaluation report indicated the student's overall performance on tasks assessing visual spatial thinking fell within the average range, although the component scores ranged from the average range (visual auditory learning and picture recognition) to the low average range (spatial relations and visual matching) (id. at pp. 3, 7). In addition, the student's mathematics and writing skills fell within the average range to the high average range (id.). Consistent with the August 2012 psychological evaluation, a review of the present levels of performance and individual needs section of the August 2012 IEP reflects that the student demonstrated "average to above average verbal reasoning abilities" across multiple prior evaluations, as well as the student's decreased success with perceptual reasoning tasks, which fell within the low average to average range (compare Dist. Ex. 49 at p. 3, with Dist. Ex. 44 at p. 2). Based upon the August 2012 psychological evaluation report, the August 2012 IEP further noted that the student exhibited "poor attention to detail"—in particular, while solving mathematics problems resulting in "careless errors"—and limited or inconsistent task perseverance when presented with tasks she perceived as challenging (id.).

As background information, the evaluator reviewed the student's school records, including educational evaluations and interviewed the student (see Dist. Ex. 44 at pp. 2-3). The evaluator identified "common themes regarding behavioral observations and test results," noting that the student had been described as "cooperative, confident and engaged when presented with tasks she perceived as easy" and as demonstrating "low task persistence when challenged" (id. at p. 2). During the August 2012 psychological evaluation, the student continued to demonstrate "low task persistence when challenged" (id.). In addition, the evaluator reported that the student "made many careless errors when completing math problems," and when asked to "check her work, [the student] looked at the paper but changed nothing" (id.).

Interpreting the BASC-2 results, the evaluator noted that the parent's responses reflected "[c]linically [s]ignificant" concerns about the student in the areas of anxiety and depression and an "at risk" status with regard to atypicality, withdrawal, and attention problems (Dist. Ex. 44 at p. 3). The parent's responses also indicated "[c]linically [s]ignificant" concerns regarding the student's skills in the areas of adaptability and functional communication (id.). However, in contrast, the evaluator indicated that the student's responses on the BASC-2 placed her "within normal limits in the areas of anxiety, depression and self-esteem and interpersonal relationships" (id. at p. 4). The student's responses indicated "[c]linically [s]ignificant" concerns in the areas of attitude toward teachers and school, attention problems, and relations with parents (id.). The

student's responses to the behavioral survey fell within the "at risk" range in the area of "locus of control" as reflected by responses regarding the parent-child relationship (id.). In summary, the evaluator recommended supports that may assist the student in accessing the general education curriculum, such as re-teaching new mathematics concepts, allowing the use of a calculator, access to a computer, and efforts to engage the student more actively in her academic endeavors (id. at pp. 4-5). Consistent with the August 2012 psychological evaluation, the social development section of the August 2012 IEP reported, in part, both the student's and the parent's responses to the BASC-2 (compare Dist. Ex. 49 at p. 3, with Dist. Ex. 44 at pp. 3-4, 7-8). More specifically, the August 2012 IEP noted areas of the student's functioning that fell within normal limits, as well as the student's concerns regarding conflicts with adults and a feeling of lack of control (id.). In addition, the August 2012 IEP reported the student's recent experiences at summer camp, where the student made "close friendships" and enjoyed "new challenges" (compare Dist. Ex 49 at p. 3, with Dist. Ex. 44 at p. 2). Consistent with both the March 2012 psychological evaluation and the August 2012 psychological evaluation, the August 2012 CSE recommended counseling to ease the student's transition into a new school setting and to "provide her with strategies to help her manage her anxiety" (compare Dist. Ex. 49 at p. 4, with Dist. Ex. 43 at pp. 7-8, and Dist. Ex. 44 at p. 5).

Notwithstanding that the August 2012 CSE reviewed and considered the student's most recent evaluative information in the development of the August 2012 IEP consistent with State regulation, a section of the August 2012 CSE meeting minutes referred to as "Re-Evaluation Planning Decision" denoted a request for "[u]pdated testing" of the student in the following areas: social/emotional, attention, academic/achievement, and OT "for assistive technology" (see Dist. Ex. 45 at p. 5). However, the evidence in the hearing record does not otherwise explain how or why these notations appeared in the August 2012 CSE meeting minutes; moreover, the evidence in the hearing record does not indicate that the CSE conducted any updated testing in these noted areas after the August 2012 CSE meetings (see Tr. pp. 1-258; Dist. Exs. 1-3; 5-12; 14-60; Parent Exs. 1-14). Thus, to the extent that the evidence suggests that the August 2012 CSE found a need to conduct additional evaluations or assessments of the student but failed to do so, such failure constitutes a procedural violation. However, as noted above, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacy (a) impeded the student's right to a FAPE, (b) significantly impeded the parent's 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]). Under the circumstances of this case, the evidence in the hearing record does not provide any basis upon which to conclude that this procedural violation rose to the level of a failure to offer the student a FAPE for the 2012-13 school year. Initially, it is unclear what further information the August 2012 CSE needed or what further information the August 2012 CSE would derive from additional evaluations of the student particularly in the areas of "social/emotional," "attention," and "academic/achievement" in light of the psychological evaluations of the student conducted in March 2012 and August 2012, which provided the August 2012 CSE with the most recent assessments of the student in these areas (see generally Dist. Exs. 43-44). Moreover, while the August 2012 CSE did not conduct the additional OT evaluation for assistive technology, the August 2012 CSE recommended that the student have access to a computer and a word processor to complete written assignments, which both the March 2012 and the August 2012 psychological evaluations offered as a recommendation (compare Dist. Ex. 49 at pp. 6-7, with Dist. Ex. 43 at p. 8, and Dist. Ex. 44 at p. 4). Additionally, given that the parent chose to not participate in the

development of the student's August 2012 IEP, the evidence in the hearing record cannot support a finding that the August 2012 CSE's failure to conduct the additional evaluations significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (see Dist. Exs. 45 at p. 3; 48 at pp. 1-2).[8]

Accordingly, the evaluative information reviewed and considered by the August 2012 CSE provided it with sufficient functional, developmental, social/emotional, and academic information about the student and her individual needs to enable it to adequately and accurately identify the student's present levels of performance and individual needs and to otherwise develop the student's August 2012 IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

2. Consideration of Evaluative Information

Turning to the parent's allegations that the August 2012 CSE failed to consider the August 2012 consultant report, a review of the evidence in the hearing record does not support the parent's contentions.

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]; 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., 2013 WL 1285387, at *15; 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, 142 Fed. App'x 9, 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).

Contrary to the parent's assertion, the evidence in the hearing record indicates that the August 2012 CSE reviewed and considered the August 2012 consultant report and the August

[8] If it has not already done so, the district should conduct the additional testing indicated in the August 2012 CSE meeting minutes prior to the student's next annual review (see Dist. Ex. 45 at p. 5).

2012 addendum, and moreover, the August 2012 CSE responded to the recommendations in the August 2012 consultant report—as explained more fully below—by recommending special education supports and services to address the student's needs (see Dist. Exs. 46 at pp. 1-26; 47 at pp. 1-2; 48 at pp. 1-9; 49 at pp. 2-4, 6-7).[9] Consistent with the August 2012 consultant report, the August 2012 IEP reflected that the student exhibited a "nonverbal learning disability" and the consultant's opinion that the student attend Greenbrier (compare Dist. 49 at p. 3, with Dist. Ex. 46 at pp. 16, 18-19). The August 2012 IEP also characterized the student as a hard worker who required "regular breaks especially during writing tasks," which reflected the difficulties the student experienced with handwriting as noted in the August 2012 consultant report (compare Dist. Ex. 49 at p. 4, with Dist. Ex. 46 at pp. 9). Additionally, the August 2012 consultant report included recommendations for the student's "Educational Placement Criteria," which while not directly incorporated into the August 2012 IEP, served as a basis upon which the August 2012 CSE recommended components of the student's IEP, including—as noted in the IHO's decision—daily consultant teacher services for mathematics and daily resource room for mathematics, writing, and to provide the student with direct instruction, redirection, and cuing; daily resource room to address the student's need for a small setting, decreased stimuli, a low student-to-teacher ratio, individualized instruction, and reteaching; and individual counseling to address the student's social and behavioral needs (i.e., a relationship-based model to navigate her social work and to learn to self-regulate emotions, and social skills training to learn self-regulation and appropriate responses to stress) (compare Dist. Ex. 46 at pp. 18-19, with IHO Decision at p. 13, and Dist. Ex. 49 at pp. 3-4, 6). According to the evidence in the hearing record, the August 2012 CSE recommended resource room services to primarily support the student in mathematics and writing and direct consultant teacher services to be provided in the student's mathematics class to address the nonverbal learning areas of her disability (see Tr. pp. 33, 73, 91; Dist. Ex. 49 at p. 6). Moreover, a review of the August 2012 IEP demonstrates that the CSE incorporated recommendations from the August 2012 consultant report, including the need for a routine, chunking of information, breaks, shorter homework assignments, and the use of assistive technology (compare Dist. Ex. 49 at pp. 7, with Dist. Ex. 46 at pp. 18-19). In addition, the August 2012 CSE recommended counseling services—consistent with the August 2012 consultant report—to provide the student with "appropriate responses to stress" (see Tr. p. 126; Dist. Exs. 46 at p. 19; 49 at pp. 4, 6).

C. August 2012 IEP

1. Resource Room and Direct Consultant Teacher Services

Generally, the parent asserts that the IHO erred in finding that the August 2012 IEP was appropriate and reasonably calculated to enable the student to receive educational benefits. However, a review of the evidence in the hearing record supports the IHO's finding that the recommended special education services—together with the recommended related services, program modifications, and testing accommodations—in the August 2012 IEP offered the student a FAPE in the LRE for the 2012-13 school year.

[9] The consultant did not administer formal assessments to the student or conduct an evaluation of the student in order to generate the August 2012 consultant report; instead, the consultant provided an overview of the student's grade-by-grade school experiences based upon her review of the student's evaluation history and interviews of, among others, the student, the parent, and a "close family friend" (Dist. Ex. 46 at pp. 2-19).

In this case, the August 2012 CSE recommended daily resource room services and daily direct consultant teacher services together with weekly individual counseling to address the student's special education needs (see Dist. Ex. 49 at pp. 6, 9). State regulation defines resource room as a "special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). 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]). In the present case, the evidence in the hearing record demonstrates that the student required "additional support in the areas of writing and math," and to primarily support the student in "math and writing," the August 2012 CSE recommended daily resource room services (Tr. p. 91; Dist. Ex. 49 at pp. 3, 6). In addition, the August 2012 CSE documented the student's need for "pre-teaching, re-teaching, and supplemental instruction" in the August 2012 IEP, and recommended daily resource room to provide this support (see Tr. p. 81; Dist. Ex. 49 at pp. 3, 6). Furthermore and consistent with State regulation, the August 2012 CSE recommended daily resource room in a small group (5:1 student-to-teacher ratio), which would provide the student with a "small classroom setting" on a daily basis—as recommended in the August 2012 consultant report—and with specialized supplementary instruction in an individual or small group setting for a portion of the school day for writing and mathematics (see Tr. pp. 69-70, 91; Dist. Exs. 46 at p. 18; 49 at p. 6). Additionally, the August 2012 CSE determined that resource room services offered the student "some social, emotional, and behavioral support around motivation and task focus" (Tr. p. 117).

State regulations provide that consultant teacher services are designed to provide services to students with disabilities who attend regular education classes, or to their regular education teachers (8 NYCRR 200.6[d]). "Direct consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher, to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]). In the instant case, the August 2012 CSE recommended daily direct consultant teacher services to be provided in the student's mathematics class (see Dist. Ex. 49 at p. 6). According to the evidence in the hearing record, the August 2012 CSE recommended direct consultant teacher services, in part, to address the "nonverbal areas" of the student's "learning disability" (Tr. p. 73). In addition, direct consultant teacher services offered the student the opportunity for "one-to-one interaction," which provided support to address the student's "poor attention to detail when completing math problems" and hesitation in attempting "multiplication and division problems" (Tr. p. 78; Dist. Ex. 49 at pp. 3, 6). Finally, the evidence in the hearing record reflects that the August 2012 CSE recommended direct consultant teacher services during mathematics class to provide the student with the "direct support within the classroom in order to provide modification of materials and additional explanations and modeling" (see Dist. Ex. 49 at pp. 3, 6).

In addition to demonstrating a need for academic support, the student presented with some degree of anxiety, especially when confronted with new situations or new learning (see Dist. Ex. 49 at p. 3). As described in the August 2012 IEP, the student appeared reluctant to participate or fully engage in academic tasks when "feeling uncomfortable, misunderstood or unsupported by others" (id.). However, as further described in the August 2012 IEP, the student demonstrated a "higher level of performance/skills and was more willing to actively participate and/or attempt

novel/challenging tasks" once she established a "rapport" and a level of "trust" (id. at p. 4). Therefore, in order to facilitate the student's full participation in academic tasks, the August 2012 CSE recommended counseling to assist in "transitioning to a new school environment and [to] provide her with strategies to help her manage her anxiety" (Dist. Ex. 49 at p. 4).

In addition to daily resource room services, daily direct consultant teacher services, and weekly counseling, the August 2012 CSE also recommended supplementary aids and services and program modifications or accommodations to further support the student (see Dist. Ex. 49 at pp. 6-7). For example, the August 2012 CSE recommended that the student should have access to a computer with spell check throughout the school day (id. at p. 6). In addition, the August 2012 CSE recommended instructional strategies and modifications, including chunking information into manageable portions, providing opportunities to take breaks during writing tasks, "'talk[ing] through'" assignments prior to their completion, "concrete verbal strategies for mathematical tasks," reducing mathematics homework assignments, and providing the student with a "familiar and predictable routine" in a structured setting (id. at pp. 6-7). The August 2012 CSE also recommended assistive technology devices and services through the provision of a "Neo" or "other portable word processor" for classwork and homework (id. at p. 7). A review of the evidence in the hearing record demonstrates that the above-mentioned modifications or accommodations were consistent with recommendations made in both the March 2012 psychological evaluation and August 2012 psychological evaluation (compare Dist. Ex. 49 at pp. 6-7, with Dist. Exs. 43 at p. 8, and Dist. Ex. 44 at p. 4).

Finally, with respect to the parent's contention that the August 2012 CSE failed to consider a nonpublic school placement for the student for the 2012-13 school year, the district was not required to consider placing the student in a nonpublic school if it believed that the student could be satisfactorily educated in the public schools (W.S. v. Rye City Sch. Dist., 454 F.Supp.2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F.Supp.2d at 430-31).

Here, other than the parent's preference that the student attend Greenbrier—an out-of-State, residential nonpublic school—and the recommendation in the August 2012 consultant's report, the evidence in the hearing record does not support that the August 2012 CSE should have recommended that the student be provided services in a residential placement in order to receive

educational benefits. A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22).[10] Here, there is no indication in the hearing record that the student's special education needs were so severe that they could only be appropriately addressed in a residential placement. Rather, the evidence reveals that the August 2012 CSE believed that the student could be satisfactorily educated in the public schools (see Tr. pp. 47, 102, 146; Dist. Exs. 45 at p. 3; Dist. Ex. 48 at pp. 4-5, 7; 49 at p. 9). However, even assuming, for the sake of argument, that the student could have made greater progress in a residential setting if she was removed from the public school and placed in a nonpublic residential setting, that, alone, is insufficient to overcome the district's obligation under the IDEA to offer a less restrictive alternative within the public school system in which the student is likely to experience more than trivial advancement. Therefore, as the IHO correctly held, after the August 2012 CSE determined that the student could be satisfactorily educated in the public school, the August 2012 CSE had no obligation to consider placing the student in a residential, nonpublic school.

Based upon the foregoing, the evidence in the hearing record demonstrates that in light of the student's academic and social/emotional needs, the August 2012 CSE's decision to recommend daily resource room services and daily direct consultant teacher services—together with the related services and supplementary aids and services and program modifications or accommodations—were reasonably calculated to enable the student to receive educational benefits in the LRE for the 2012-13 school year.

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 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 Greenbrier was an appropriate placement 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 DISMISSED.

[10] The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).

IT IS ORDERED that the district shall, unless the parties agree otherwise, conduct additional testing as identified in the August 2012 CSE meeting minutes in the areas of social/emotional, attention, academic/achievement, and occupational therapy for assistive technology prior to the student's next annual review.

Dated: **Albany, New York**
September 17, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER