The University of the State of New York

The State Education Department
State Review Officer
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No. 13-111

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Pelham Union Free School District

Appearances:
Law Office of Peter D. Hoffman, PC, attorneys for petitioners, Jamie Mattice, Esq., of counsel

Keane & Beane, PC, attorneys for respondent, Stephanie M. Roebuck, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the student's tuition costs at the Aaron School for the 2010-11 and 2011-12 school years. Respondent (the district) cross-appeals from the IHO's determinations that it failed to offer an appropriate educational program to the student for the 2009-10 school year and directed the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2009-10 school year. The appeal must be sustained in part. The cross-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

For kindergarten during the 2007-08 school year, the student attended a 12:1+1 special class placement and received related services consisting of occupational therapy (OT), physical therapy (PT), and speech-language therapy at a district elementary school (see Joint Ex. 1 at pp. 1-2; see also Joint Ex. 16).[1]

[1] For the purpose of clarity, the term "district" in this decision refers only to the student's school district of residence, which is a party to this proceeding.

On April 23, 2008, the parents completed an application for the student's admission to the Aaron School for the 2008-09 school year (see Dist. Ex. 2 at pp. 1, 4).[2]

On April 30, 2008, the CSE convened to conduct the student's annual review and to develop an IEP for the 2008-09 school year (Joint Ex. 7). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the April 2008 CSE recommended that the student repeat kindergarten in an 8:1+1 special class placement with related services consisting of OT, speech-language therapy, and PT (id. at pp. 1-2, 4).[3]

For the 2008-09 school year, the parents enrolled the student at the Aaron School, and the student began attending the Aaron School in September 2008 (see Joint Exs. 75-77; see also Tr. p. 808).[4,5]

By letter dated February 4, 2009, the district wrote to advise the parents—as parents of a student placed in a nonpublic school located "outside of the district [of residence]"—about "important changes" in the law that could affect the student's "right to receive special education" (Joint Ex. 69 at p. 1).[6] The district noted that if the parents planned to withdraw the student from the nonpublic school and enroll the student in the district, the parents should contact the district as soon as possible to schedule a "CSE annual review meeting" to discuss "placement and services for the 2009-2010 school year" (id.). If, however, the parents did not plan to reenroll the student in the district and the parents did not plan to seek special education services from the district of location, then the parents were instructed to complete "form 'A'" and return it by March 2, 2009 (id. at pp. 1-2). Alternatively, if the parents intended to reenroll the student in the nonpublic school and wanted the district to conduct a CSE meeting to "recommend services for the 2009-2010" school year, then the parents were instructed to complete "form 'B'" and return it by March 2, 2009 (id. at pp. 1, 3).[7]

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[2] The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). In this case, the Aaron School is located within another school district; to avoid confusion, the school district where the Aaron School is located will be referred to in this decision as the "district of location."

[3] The district assistant superintendent of pupil personnel services (district superintendent) testified at the impartial hearing that shortly after the April 2008 CSE meeting in May 2008, the student's father contacted her to advise that the student would not be "attending" the district (Tr. pp. 146, 171). She told the student's father that "we were sorry to see him go" and "hoped he'd returned" (Tr. p. 171). According to her testimony, the student's father made it "very clear" he would not "really need anything from the [district] schools at that time" (Tr. pp. 171-72). In addition, the district superintendent testified that she did not engage in any discussion at that time with the student's father regarding the district of location's responsibility, if any, toward educating the student (see Tr. p. 172).

[4] The student's father testified that during the 2008-09 school year, they did not "directly communicate or seek to communicate" with the district (Tr. pp. 740, 808-10).

[5] There is no evidence in the hearing record indicating that the parents sought tuition reimbursement for the student's placement at the Aaron School for the 2008-09 school year (see Tr. pp. 1-1912; Dist. Exs. 1-10; Parent Exs. A-L; Joint Exs. 1-88).

[6] Prior to sending the February 2009 letter to the parents, the district superintendent had no communications with the parents since her conversation with the student's father in May 2008 (see Tr. pp. 173-74).

[7] The student's mother testified that she could not recall whether she contacted the district to seek clarification of

On March 15, 2009, the parents completed a district application requesting transportation services to the Aaron School for the student for the 2009-10 school (see Joint Exs. 8; 10).[8] In a letter dated March 30, 2009, the district assistant superintendent of business denied the parents' request for transportation services to the Aaron School because it was located more than 15 miles from the parents' home (see Joint Ex. 45; see also Joint Ex. 9).

In a letter dated April 27, 2009, the parents requested an evaluation of the student by the district of location, noting that he was a "special ed[ucation] student" attending the Aaron School (Dist. Ex. 4). On May 30, 2009, the district of location completed an initial social history and a psychoeducational evaluation of the student (see Dist. Ex. 5 at pp. 1-4; 6 at pp. 1-4). Among other things, the following was noted in the "Reason for Referral" section of the May 2009 initial social history: "It was clarified that the family was seeking 'equitable special education services' from [the district of location]" and that the district remained the student's "district of residence, and therefore responsible for providing a FAPE" (Dist. Ex. 5 at p. 1). In addition, the social history reflected that "[i]t was further explained that in these circumstances, parental placement of a child in a non-public school, with the family assuming financial responsibility, required the creation of an Individualized Education Services Plan or IESP" (id.). Finally, as noted in the social history, the parents received a copy of the "Procedural Safeguards," the parents agreed to provide the CSE with certain documents, and the parents "indicated the intention to keep [the student] at the Aaron School (as a parentally placed student) for the next academic school year (2009-2010)" (id. at pp. 3-4).

By letter dated June 1, 2009, the parents notified the district that as a "part of [the student's] evaluation by the new school district" within which "his school" was located, they required copies of certain documents, which they listed in the letter (Joint Ex. 11).[9] The parents also permitted the district to "release additional information" about the student (id.). In a letter of the same date, the district provided the parents with the requested documents (see Joint Ex. 12).[10]

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the February 4, 2009 letter or if the district contacted her because they had not returned the February 4, 2009 letter (see Tr. p. 1261). The student's father testified that they did not sign or return either form "A" or form "B" because neither offered an "option we could use" (Tr. pp. 812-13; 1257-62). The student's father further stated the following as the "option" he was looking for in the letter: "Your son is going to be privately placed next year. If you need an IEP for him from [the district], contact this office" (Tr. p. 813). While explaining her own understanding of the February 4, 2009 letter and the options available, the student's mother testified that form "B" was not appropriate because they did not intend to enroll the student at the district (Tr. pp. 1259-60).

[8] The form instructed the parents to return it to the district transportation office (see Joint Ex. 8).

[9] The district superintendent testified that after sending the February 2009 letter to the parents, the June 1, 2009 letter from the parents was the next communication she had with them (see Tr. pp. 173-74).

[10] The district superintendent testified that based upon the receipt of the parents' June 1, 2009 letter, "we did not do anything in terms of an IEP or anything for [the student] because we believed at this point that the parents were working with a separate school district to develop his IEPs" (Tr. p. 174-75). The district superintendent testified that she did not engage in any discussion at that time with the parents regarding the district of location's responsibilities (see Tr. p. 175).

On July 21, 2009, a CSE from the district of location convened and developed an IESP for the student for the 2009-10 school year, with an expected implementation date of September 2009 (see Joint Ex. 14 at pp. 1-13).[11]

During the 2009-10 school year, the student attended the Aaron School beginning in September 2009 (see Joint Exs. 78-80; 85 at pp. 1-2).

By notice dated October 14, 2009, the district of location requested information from the parents regarding whether—as parents of a student placed in a nonpublic school at their own expense—they wanted the student to continue to receive special education services in that school for the "next school year" (Dist. Ex. 3 at p. 1).[12] The parents signed the notice and returned it to the district of location in or around December 2009 (see id.). The parents' signature permitted the district of location to share information about the student with the district (id.).

On March 1, 2010, a CSE from the district of location convened and developed an IESP for the student for the 2010-11 school year, with an expected implementation date of September 2010 (see Joint Ex. 15 at pp. 1-15).[13]

By notice dated March 2010, the district of location requested information from the parents regarding whether—as parents of a student placed in a nonpublic school at their own expense—they wanted the student to continue to receive special education services in that school for the "next school year" (Dist. Ex. 7 at pp. 1-2). The parents executed this notice on March 23, 2010 (id. at p. 2). In addition, the parents' signature permitted the district of location to share information about the student with the district (id. at p. 2).

During the 2010-11 school year, the student attended the Aaron School beginning in September 2010 (see Joint Exs. 31-33; 86 at pp. 1-2).

In a letter dated December 7, 2010, the parent requested that the district develop an IEP for the student (see Joint Ex. 16).[14]

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[11] Finding the student eligible for special education and related services as a student with a speech or language impairment, the July 2009 CSE recommended a regular education setting, special education teacher support services (SETSS), and related services consisting of speech-language therapy, OT, and PT (see Joint Ex. 14 at pp. 1-2, 11, 13). The July 2009 CSE also indicated in the IESP that the student was "parentally placed" (id. at p. 12). The student's father testified that he did not "access any of the services" recommended in the July 2009 IESP for the student during the 2009-10 school year (Tr. pp. 1009-12).

[12] This notice was originally dated March 2009 (see Dist. Ex. 3 at pp. 1-2).

[13] Finding the student eligible for special education and related services as a student with a speech or language impairment, the March 2010 CSE terminated the SETSS services previously recommended in the July 2009 IESP, and only recommended related services consisting of speech-language therapy, OT, and PT for the student (see Joint Ex. 15 at pp. 1-2, 13, 15). The March 2010 CSE also indicated in the IESP that the student was "parentally placed" (id. at pp. 1, 14). The student's father testified that he could not "recall" whether he accessed the services recommended in the March 2010 IESP for the student during the 2010-11 school year (Tr. p. 1018).

[14] A review of the evidence in the hearing record indicates that the December 7, 2010 letter from the parents was the next communication received by the district since its receipt of the parents' June 1, 2009 letter (see Tr. pp. 1-1912; Dist. Exs. 1-10; Parent Exs. A-L; Joint Exs. 1-88).

In a letter to the district dated March 7, 2011, the parents rejected the "IEP for [the student] as currently drafted" and advised that they would seek reimbursement for the costs of the student's tuition at the Aaron School (Joint Ex. 47).

On March 10, 2011, a CSE from the district of location convened and developed an IESP for the student for the 2011-12 school year, with an expected implementation date of April 16, 2011 (see Joint Ex. 18 at pp. 1-15).[15, 16]

In a letter dated March 15, 2011, the parents requested that the district provide the student with transportation services to the Aaron School for the 2011-12 school year (see Joint Ex. 20). The district denied the parents' request for transportation services for the student in a letter dated March 17, 2011, noting that the Aaron School was located more than 15 miles from the student's home (see Joint Ex. 21). Thereafter, the parties continued to exchange letters regarding the parents' request for transportation services to the Aaron School; although the district continued to deny the parents' request, the district acknowledged that the student may be eligible for transportation services if the student's program at the Aaron School was comparable to the program recommended in his most recent IEP (see Joint Exs. 22-24). In a letter dated April 4, 2011, the parents repeated their request for transportation services for the student and provided the district with a copies of the student's 2008-09 IEP, as well as the student's 2010-11 and 2011-12 IESPs (see Joint Ex. 25). The parents also requested "transportation costs to the Aaron School to be paid going forward," and indicated that they would seek reimbursement for the costs of the student's transportation services for the 2008-09, 2009-10, and 2010-11 school years (id.).

By letters dated April 22, 2011, the parents notified the district and the district of location that the student's "2010-2011 IESP" was not appropriate and they would seek reimbursement for the costs of the student's tuition—and transportation services—for his attendance at the Aaron School (Joint Exs. 26-29).[17]

Shortly thereafter in a notice dated April 28, 2011, the district invited the parents to attend a CSE meeting scheduled for May 17, 2011 for the student's annual review (see Joint Ex. 30 at pp. 1-2).[18]

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[15] As a student eligible for special education and related services as a student with autism, the March 2011 CSE recommended a general education setting; SETSS services; and related services of speech-language therapy, OT, and PT (see Joint Ex. 18 at pp. 1-2, 18, 20). The March 2011 CSE also indicated in the IESP that the student was "parentally placed" (id. at pp. 1, 19).

[16] The district of location also provided the parents with a "Parentally Placed Final Notice of Recommendation: Annual Review and Reevaluation" document dated March 10, 2011, which summarized the special education and related services recommended in the March 2011 IESP and required the parents' signature in order for the student to receive the described services (Joint Ex. 19). The parents did not sign the notice (see id.).

[17] In letters dated May 9, 2011, the parents resent the April 22, 2011 letters to both the district and the district of location (compare Joint Exs. 26-29, with Joint Exs. 35-38).

[18] In a second notice dated May 9, 2011, the district invited the parents to attend a CSE meeting scheduled for June 3, 2011 for the student's annual review; the second notice also invited the district's attorney and the parents' attorney to the meeting (compare Joint Ex. 30 at p. 1, with Joint Ex. 34 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated May 16, 2011, the parents alleged that both the district and the district of location failed to offer the student a free appropriate public education (FAPE) for the 2009-10, 2010-11 and 2011-12 school years (see Joint Ex. 42 at pp. 5-7, 23-25). Generally, the parents asserted that both the district and the district of location failed to provide the services recommended in the student's 2009-10 IESP, 2010-11 IESP, and the 2011-12 IESP, and that the services recommended in the same IESPs were not appropriate (id. at pp. 7-8).

Pertaining solely to the district, the parents alleged that the district "never engaged in any type of search for an appropriate program" for the student, and "informed" the parents that "such things were not possible" (Joint Ex. 42 at p. 23). In addition, the parents asserted that the district failed to provide the student with transportation services to the Aaron School (id. at pp. 24-25). Next, the parents alleged that the Aaron School was appropriate and that they cooperated with the district (id. at p. 27).

As relief, the parents sought findings that the district and district of location failed to implement the 2009-10, 2010-11, and 2011-12 IESPs, and that the Aaron School was an appropriate placement (see Joint Ex. 42 at p. 27). In addition, for all three school years in dispute the parents requested that the district and the district of location provide reimbursement for the costs of related services obtained for the student, reimbursement for the costs of independent evaluations of the student, reimbursement for the costs of the student's tuition at the Aaron School, compensatory educational services for two years, and an order directing the provision of transportation services for the student (id. at p. 28).

B. Events Post-Dating the Due Process Complaint Notice

On June 3, 2011, the district convened a CSE meeting to conduct the student's annual review and to develop an IEP for 2011-12 school year (see Joint Ex. 61 at p. 1). Finding the student eligible for special education and related services as a student with a speech or language impairment, the June 2011 CSE recommended a 12-month school year program consisting of two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT; for the remainder of the school year, the June 2011 CSE recommended an 8:1+1 special class placement with the following related services: three 30-minute sessions of individual OT; two 30-minute sessions of individual speech-language therapy, and one 30-minute session of speech-language therapy in a small group (id. at pp. 1, 6-7). The June 2011 CSE also recommended strategies to address the student's management needs, developed annual goals, recommended assistive technology devices or services (access to a computer), and recommended supports for school personnel on behalf of the student (team meetings) (id. at pp. 4-7).

On June 7, 2011, the parents visited the assigned public school site, and in a letter to the district dated June 9, 2011, the parents indicated that the observed "classrooms" at the district public school were not appropriate (see Joint Ex. 39). The parents further advised that the student's "appropriate classification should be autism" (id.). At that time, the parents requested a "written description of the program" and class profiles to help determine whether "this would be an appropriate placement" for the student (id.).

Pursuant to the parents' request, a subcommittee of the CSE convened on June 13, 2011 to review the student's program and to allow the student's then-current Aaron School teacher "provide information about the student and participate in setting goals for the coming school year" (Joint Ex. 44 at p. 1). The June 2011 CSE subcommittee discussed the student's current levels of functioning and needs, and revised the annual goals based upon "input from the teacher" (id.). In addition, the June 2011 CSE subcommittee recommended updated speech-language and OT evaluations of the student to "provide accurate [annual] goals" for the student and planned to reconvene to review the results of the updated evaluations (id.).

By letter dated July 13, 2011, the parents indicated that due to the district's "failure to provide an IEP" for the student, they were "forced" to enroll the student at a summer camp and notified the district of their intention to seek reimbursement for the costs of the summer camp, including transportation (Joint Ex. 57; see Joint Exs. 49-50; 52-55).

On July 28, 2011, a CSE subcommittee reconvened to review the updated speech-language therapy and OT evaluations of the student (see Joint Exs. 51; 62 at pp. 1-2; 66-67). Based upon a review of the updated evaluative information, the July 2011 CSE subcommittee modified the academic achievement, functional performance and learning characteristics section of the IEP; added annual goals to the IEP; recommended additional supplementary aids and services or program modifications or accommodations for the student; and recommended testing accommodations (compare Joint Ex. 62 at pp. 2-10, with Joint Ex. 44 at pp. 2-8).

In a letter dated August 10, 2011, the parents rejected the July 2011 IEP, and notified the district of their intentions to place the student at the Aaron School and "demand reimbursement for the 2008-2009, 2009-2010, 2010-2011, and 2011-12 school years" (Joint Ex. 56 at p. 1). The parents indicated that the July 2011 IEP was not appropriate because the student's "appropriate classification should be autism," the July 2011 IEP did not address the student's dyslexia," the July 2011 IEP omitted particular subtest scores, and the July 2011 IEP did not specifically address the student's "significant language retrieval issues" (id.). Next, the parents asserted that the July 2011 IEP failed to recommend sufficient speech-language therapy services and did not include a recommendation for the use of "PROMPT" therapy (id. at p. 2).[19] In addition, the parents objected to the July 2011 IEP because the IEP did not provide for the use of sensory gym, the student's participation in adapted physical education, or a recommendation for PT services (id.). The parents further cited the July 2011 IEP's lack of a specific reading instruction program, and noted that the IEP misidentified the student's reading level (id.). Furthermore, the parents noted that the July 2011 IEP lacked a specific methodology to address the student's needs as a student with an autism spectrum disorder (ASD) (id.). The parents also noted that the July 2011 IEP did not reference the student's language processing disorder or his "visual-motor integration issues" (id.). Next, the parents indicated that the July 2011 IEP was not appropriate because it failed to explain the "coordination of the work expected to be done outside of the class and inside the class," and therefore, the July 2011 IEP made no assurance demonstrating that speech-language "strategies" would be "carried through in the classroom" (id.). Finally, the parents asserted that the recommended 8:1+1 special class placement was not appropriate because it was "too large" and the student-to-staff ratio was "too high" (id).

[19] "PROMPT" is an acronym for Prompts for Restructuring Oral-Muscular Phonetic Targets.

During the 2011-12 school year, the student attended the Aaron School beginning in September 2011 (see Joint Exs. 81-84; 87 at pp. 1-2).

C. Impartial Hearing Officer Decision

On January 4, 2012, the parties proceeded to an impartial hearing, which concluded on February 13, 2013, after 15 days of proceedings (see Tr. pp. 1-1912).[20, 21] Briefly, in a decision dated May 19, 2013, the IHO found that the district failed to offer the student a FAPE for the 2009-10 school year, that the Aaron School was an appropriate placement, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement for the 2009-10 school year (see IHO Decision at pp. 43-49). However with regard to the 2010-11 school year, the IHO determined that the district had no obligation to offer the student a FAPE, and denied the parents' request for tuition reimbursement (id. at pp. 49-50). With respect to the 2011-12 school year, the IHO determined that the district offered the student a FAPE, and denied the parents' request for tuition reimbursement (id. at pp. 50-52).

Initially, the IHO rejected the district's motion to dismiss the parents' claims for the 2009-10 school year as time barred by the statute of limitations (see IHO Decision at pp. 45-48). More specifically, the IHO found that the district's "misrepresentation of the applicable transportation law, its failure to inform the parents of their rights, and the [d]istrict's letter with misinformation and its general refusal to evaluate [the student] and convene a CSE meeting to develop an IEP for [the student] for the 2009-2010 school year cumulatively tolled the statute of limitations" (id. at p. 48). As the parents' claims regarding the 2009-10 school year remained viable, the IHO concluded that the district failed to offer the student with a FAPE for the 2009-10 school year (id.). Next, the IHO found that the Aaron School "correlated well to the student's academic, social and emotional needs" and provided the student with a "small, nurturing structured program, with some individualized instruction" and similarly functioning peers (id.). In addition, the student received "onsite related services" at the Aaron School (id.). The IHO also noted that the parents "acted in good faith" seeking an IEP from the district, but were "thwarted in their efforts" (id.).

[20] On February 8, 2012, the second day of the impartial hearing, the district consented to the parents' request to amend the May 2011 due process complaint notice (see Tr. pp. 142-44). In the amended due process complaint notice, the parents repeated the allegations set forth in the May 2011 due process complaint notice, and added the following with respect to the IEP developed by the district for the 2011-12 school year: the district continued to find the student eligible for special education and related services as a student with a speech or language impairment, the July 2011 IEP did not indicate that the recommended "'Special Class'" was designed for "students with dyslexia and [ASD]" or that the special class would be taught by a "certified special education teacher" experienced in these areas, and the July 2011 IEP did not reflect the use of particular methodologies recommended in a privately obtained evaluation report (compare Joint Ex. 68 at pp. 1-23, with Joint Ex. 42 at pp. 1-28).

[21] On the final day of the impartial hearing, the parents withdrew the request for reimbursement for the costs of related services obtained for the student during the 2009-10, 2010-11, 2011-12 school years, as well as any relief pertaining to transportation costs or services (see Tr. pp. 1888-89). The IHO requested that the parties specify the "remaining claims" in closing briefs (Tr. p. 1889). In a post-hearing brief, the parents alleged that the district failed to offer the student a FAPE for the 2009-10, 2010-11, and 2011-12 school years, and as relief, the parents sought reimbursement for the costs of the student's tuition at the Aaron School (see Parent Post-Hr'g Br. at pp. 2-3, 10-19, 30). The parents also noted in the post-hearing brief that the "Due Process Demand" filed against the district of location had been "settled and withdrawn" (id. at p. 3).

Consequently, the IHO found that the Aaron School was appropriate and equitable considerations weighed in favor of the parents' request for relief (id. at p. 49).

With respect to the 2010-11 school year, the IHO found that the parents did not communicate with the district to seek an IEP for the 2010-11 school year based upon their "prior communications" with the district during the 2009-10 school year (IHO Decision at p. 49). In addition, the IHO determined that the parents participated in an "IESP meeting" with the district of location with respect to the 2010-11 school year, noting that the parent "only s[ought] related services and that the Aaron School was their choice to provide [the student's] special education program" (id.). The IHO further found that the evidence in the hearing record did not suggest that the parents would have "considered a public school placement at that time" (id.). Consequently, the IHO concluded that the district was not required to offer the student a FAPE for the 2010-11 school year because the student was "parentally placed" at the Aaron School, the district of location developed an IESP—which the parents "fully accepted"—and the parents made no attempt to communicate with the district for the 2010-11 school year (id.).

Finally, with respect to the 2011-12 school year, the IHO determined that the district offered the student a FAPE (see IHO Decision at pp. 50-52). The IHO concluded that although the parents wanted the student's classification changed from speech or language impairment to autism, the student remained appropriately classified as a student with a speech or language impairment (id. at pp. 51-52). She further determined that, for the 2011-12 school year, the district offered the student a program that was "substantially similar" to the program that he received at the Aaron School, and while the 8:1+1 special class placement did not address all of the recommendations made through privately obtained evaluations of the student, neither the district's recommended program nor the Aaron School program addressed all of the recommendations (id. at p. 51). As a result, the IHO denied the parents' request for tuition reimbursement for the 2011-12 school year.

IV. Appeal for State-Level Review

The parents appeal, and contend that the IHO erred in finding that the district was not required to offer the student a FAPE for the 2010-11 school year, and the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. Initially, the parents contend that the IHO properly found that the district failed to offer the student a FAPE for the 2009-10 school year, that the Aaron School was an appropriate placement, and that equitable considerations did not preclude relief in this matter for the 2009-10 school year.

With respect to the 2010-11 school year, the parents assert that based upon the district's "material misrepresentations," they continued to reasonably believe the district took no responsibility for creating an IEP for the student for the 2010-11 school year, and thus, they were forced to obtain an IESP from the district of location.

With respect to the 2011-12 school year, the parents contend that the IHO erred, in part, by failing to consider testimonial evidence establishing that the student's eligibility classification as a student with a speech or language impairment was not appropriate. Next, the parents assert that the IHO failed to consider that the July 2011 IEP did not list the student's diagnosis of pervasive developmental disorder, not otherwise specified (PDD-NOS), or that the July 2011 IEP did not address the student's diagnosis of dyslexia. The parents further contend that the IHO failed to

consider that "many of the goals" in the July 2011 IEP were not appropriate. The parents also disagreed with the IHO's finding that the district's recommended program was substantially similar to the Aaron School program. The parents also raise concerns related to the assigned public school site. Finally, the parents argue that the Aaron School was an appropriate placement for the 2011-12 school year and equitable considerations weighed in favor of their request for tuition reimbursement for the 2011-12 school year.

In an answer, the district responds to the parents' allegations with general admissions and denials. In a cross-appeal, the district asserts that the IHO erred in concluding that it failed to offer the student a FAPE for the 2009-10 school year. The district argues that the IHO misstated legal arguments, as well as facts in the hearing record, with respect to the district's motion to dismiss the parents' claims regarding the 2009-10 school year. Next, the district argues that it had no obligation to offer the student a FAPE during the 2009-10 school year because the parents communicated their intentions to enroll the student at the Aaron School and to seek special education and related services from the district of location. Finally, the district asserts that it never made any material misrepresentation to the parents regarding its responsibility to offer the student a FAPE for the 2009-10 school year. As relief, the district seeks to overturn the IHO's finding that it failed to offer the student a FAPE for the 2009-10 school year and to uphold the IHO's decision as it related to the 2010-11 and 2011-12 school years.

In an answer to the cross-appeal, the parents respond to the district's allegations with admissions and denials. In addition, the parents generally argue to uphold the IHO's findings related to the 2009-10 school year—including that the Aaron School was appropriate and that equitable considerations weighed in favor of their request for relief. The parents further argue that the Aaron School continued to be an appropriate placement for the student for the 2010-11 and 2011-12 school years, the student made progress at the Aaron School during 2010-11 and 2011-12 school years, and that equitable considerations also weighed in favor of their requests for reimbursement for the 2010-11 and 2011-12 school years.[22]

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.

[22] Although the parents included a request for reimbursement for the costs of independent educational evaluations of the student obtained during the 2009-10, 2010-11 and 2011-12 school years, the IHO did not address this issue, nor have the parents advanced this as either an issue to be resolved on appeal or as a form of relief on appeal (see Joint Ex. 68 at p. 23; Parent Post-Hr'g Br. at pp. 1-3, 30).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. 2009-10 School Year

1. CSE Process

Turning first to district's cross-appeal of the IHO's determination that it failed to offer the student a FAPE for the 2009-10 school year, the district argues that it had no obligation to create an IEP for the student because the parents placed the student in a nonpublic school and obtained an IESP from the district of location. However, while legal precedent addressing the district's responsibility to offer the student with a FAPE in this circumstance is not entirely free from doubt, a review of the evidence in the hearing record in light of the current legal authority does not support the district's position.

In 2007, New York State amended Education Law § 3602-c to comply with the reauthorization of 20 U.S.C. § 1412(a)(10) ("Children in Private Schools") and its implementing regulations, 34 CFR 300.130-300.147 (see Educ. Law § 3602-c as amended by Ch. 378 of the Laws of 2007).[23] Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). The district of location's CSE must review the request for services and develop an IESP based upon the student's individual needs and "in the same manner and with the same contents" as an IEP (id. § 3602-c[2][b][1]).

In support of its position that it was not obligated to offer the student a FAPE for the 2009-10 school year, the district relied upon a September 2007 State guidance document, arguing that the parents made clear their intent to keep the student enrolled at the Aaron School by referring the student to the district of location for an evaluation, which found the student eligible for special education and related services and created an IESP for the student for the 2009-10 school year, and thereby divested the district of its obligation to either develop or annually review the student's IEP (see Answer ¶¶ 63-88; see generally Tr. pp. 4-74; "Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c," VESID Mem. at p. 17 [September 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf [question 12]).

Recognizing, however, "'that residency, rather than enrollment, triggers a district's FAPE obligations,'" (E.T. v. Bd. of Educ., 2012 WL 5936537, at *14-*15 [S.D.N.Y. Nov. 26, 2012] [collecting cases]), courts more squarely place the question of parents' intentions within the balancing of equitable considerations "rather than whether the district had an obligation" to the student under the IDEA (E.T., 2012 WL 5936537, at *15-*16).

Therefore, in this case, the parents were entitled under both State and federal law, to place the student in a nonpublic school, and to seek a FAPE from the district, presumably as part of plan to bring the student home to a public placement (J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. 2011]). Accordingly, neither the IDEA nor Education Law § 3602-c divested the district of its responsibility to offer the student a FAPE for the 2009-10 school year.

2. Unilateral Placement and Equitable Considerations

Since neither party appeals the IHO's findings that the Aaron School was an appropriate placement for the student for the 2009-10 school year or that equitable considerations weighed in favor of the parents' requested relief for the 2009-10 school year, the IHO's determinations are final and binding upon the parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR

[23] In September 2007, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID)—now under the auspices of the Office of Special Education—issued a guidance document entitled "Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c," to inform school districts of their "responsibilities to provide special education services to students with disabilities who are enrolled in nonpublic elementary or secondary schools by their parents" (available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf).

200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]; see also IHO Decision at pp. 48-49, 52; Pet. ¶¶ 6-10; Answer ¶¶ 4-8, 56-88). As such, there is no reason to disturb the IHO's decision directing the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2009-10 school year.

B. 2010-11 School Year

1. CSE Process

Turning next to the 2010-11 school year and based upon the legal principles set forth above, the IHO's conclusion that the district was not required to offer the student a FAPE for the 2010-11 school year must be reversed.

2. Unilateral Placement for the 2010-11 School Year

Having concluded that the district failed to offer the student a FAPE for the 2010-11 school year, a determination must be made regarding whether the Aaron School was an appropriate placement for the student for the 2010-11 school year. A review of the evidence in the hearing record supports a finding that the Aaron School was an appropriate placement for the student for the 2010-11 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 offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15

[noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

a. The Student's Needs and the Aaron School Program

The hearing record reflects the student demonstrated needs in the areas of cognition; reading; mathematics; writing; fine and gross motor skills; attention; sensory regulation; articulation; social skills; and receptive, expressive, and pragmatic language skills (Tr. pp. 155-56, 202-04, 622, 626-30, 752; Joint Ex. 17 at p. 19; see Joint Exs. 31-33; 66-67).

During the 2010-11 school year at the Aaron School, the student attended a class comprised of 10 students (see Joint Ex. 31 at p. 1). According to a May 2011 Aaron School spring report for 2010-11 (May 2011 report), the student received instruction in the areas of reading, language arts, writing, handwriting, mathematics, social studies, science, social skills, computer, art, movement, music, and library (id.). During the 2010-11 school year, the student also received two 30-minute sessions per week of both speech-language therapy and OT (once individually and once in a small group) (id.). With respect to reading, the student was learning to blend and segment consonant vowel consonant words with minimal support and to comprehend stories (id.). In the area of language arts, the report noted the student was working on creative writing and reading comprehension, including studying "wh" questions and story elements (id. at pp. 1-2).

To address the student's academic needs, Aaron School personnel implemented several accommodations and supports for the student including multisensory tools, interactive learning tools, direct instruction to assist with language needs, instructional material presented in small chunks, use of simple language paired with multisensory activities, modeling, prompting, and additional teacher supports (see Joint Ex. 31 at pp. 6-7). To address the student's socialization

skills, the teacher provided the student with direct instruction in social skills and social thinking strategies through scenario analysis, role-plays, and teacher modeling (see id. at p. 7). Additionally, although the student made progress in the area of socialization, he continued to require teacher facilitation, including modeling and prompting to sustain a dialogue and interactive play (id.). The May 2011 report also noted that the student continued to demonstrate difficulties with attention to task during large and small group activities (id. at pp. 6-7). To address the student's attention and distractibility, the teacher provided the student with preferential seating, a "cardboard office" to minimize visual distractions, frequent teacher check-ins, clear and consistent expectations, visual and verbal cues, and participatory lessons that required active engagement (id. at p. 7).

With respect to the student's speech-language needs, during the 2010-11 school year the student received speech-language therapy and participated in a weekly "speech therapy directed social skills group within the classroom" (Joint Ex. 32 at p. 1). While the student's speech-language therapist noted that the student was an active participant during social skills lessons, she also indicated that he continued to require cues to maintain attention (id.). As reported by the student's therapist, the student "readily greet[ed] teachers and peers by initiating eye contact and saying 'hello'" (id. at p. 2). She also characterized the student as "very expressive" and further reported that he "frequently comment[ed] on people and his environment" (id. at p. 3). The student's speech-language therapist also reported that the student tended to repeat himself often when commenting and asking questions, and at times, he could be scattered or disconnected in his thoughts (id.). Although the student sounded out words, his speech-language therapist noted that the student found manipulating sounds and syllables more difficult (id. at p. 4).

To address the student's difficulties with language and attention, his therapists and teachers at the Aaron School provided him with several accommodations and supports, such as repeating and rephrasing of information, verbal cues, role plays, periodic check-ins for comprehension, providing additional time to process, scaffolding, structured activities, pictures, modeling, a language-rich environment, hands-on materials, visuals, and the use of an amplification device during whole classroom instruction (see Joint Ex. 32 at pp. 1, 3-4). Additionally, the student's related service therapists and teachers met frequently to discuss the student's goals and strategies to assist the student academically (id. at p. 1). During social skills instruction, the teacher directly taught social rules to the student, including whole body listening, giving personal space, understanding feelings, expressing feelings, being friendly, and problem solving, among others (id.). The student exhibited improvement in problem solving regarding hypothetical situations; however, he experienced more difficulty during social problem solving (see id. at p. 4).

According to a May 2011 Aaron School OT progress report (May 2011 OT report), the student demonstrated difficulties with sensory regulation, fine motor skills, graphomotor skills, upper body strength, sensory processing, motor planning, body awareness, and gross motor skills in addition to difficulty with handwriting (see Joint Ex. 33 at p. 2). As noted previously, the student received two 30-minute sessions per week of OT during the 2010-11 school year (id. at p. 1). The report noted the student demonstrated difficulty with handwriting, but further indicated that his fine motor difficulties related to decreased confidence, motivation, and attention (id. at p. 2). To address the student's difficulties with sensory processing, Aaron School personnel provided the student with sensory activities, movement breaks, one-to-one support, and positive reinforcement (see id. at p. 4). To improve the student's fine and gross motor skills, the student engaged in fine and gross motor activities during OT sessions (id. at pp. 1, 5). Moreover, to assist the student

academically and with generalization of skills, the student's team of teachers and related services providers met twice per month to discuss the student's needs (id. at p. 1).

Based on the foregoing, the evidence in the hearing record demonstrates that the Aaron School offered specially designed instruction that addressed the student's needs in the areas of academics, speech-language skills, social skills, motor skills, and sensory regulation during the 2010-11 school year, and therefore, constituted an appropriate placement for the student.

b. Progress

With respect to the student's progress at the Aaron School, a finding of progress is not required for a determination that a student's unilateral 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. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 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., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[24] 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]).

Here, the May 2011 report reflected that the student demonstrated progress in academics, including reading, language arts, participation in class activities, and social skills, and interacting with peers (see Joint Ex. 31 at pp. 1-2, 7). Similarly, the parents' private evaluator noted that the student had improved with respect to cognitive skills as well as in reading and in mathematics (Tr. p. 1640). Moreover, in testimony, the private evaluator summarized the student's progress as reflected in the November/December 2010 psychological evaluative report compared to the January/February 2012 psychological evaluation of the student (Tr. pp. 1639-40). According to the private evaluator, the student increased his cognitive abilities in the areas of verbal and nonverbal reasoning skills (Tr. p. 1639). She also testified that the student's reading and mathematics grade equivalencies increased from a prekindergarten level to approximately a first and second grade level (Tr. p. 1640). In the speech-language area, while the student demonstrated progress in phonological processing, expressive language, and language processing, his ability to process and attend to auditory information was often variable (see Joint Ex. 32 at pp. 1-5). Furthermore, according to his occupational therapist, the student demonstrated progress in sensory processing, fine motor skills, and graphomotor skills, despite some continued difficulties in these

[24] The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral 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"]).

areas (see Joint Ex. 33 at pp. 2, 4). Under the circumstances, the evidence in the hearing record supports a finding that the student made progress in his areas of need during the 2010-11 school year at the Aaron School.

3. Equitable Considerations for the 2010-11 School Year

Having determined that the district failed to offer the student a FAPE for the 2010-11 school year and that the Aaron School was an appropriate placement for the student, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Here, there is no evidence in the hearing record that the parents provided the district with adequate, let alone any 10-day notice regarding their intention to place the student at the Aaron School for the 2010-11 school year (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1];

see also J.S., 826 F. Supp. 2d at 671-76 [concluding that the parents' actions and the failure to provide the district with adequate 10-day notice justified a 75 percent reduction of an award of tuition reimbursement]). 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 in order to offer the student a FAPE. Consequently, the parents' failure to provide the district with an adequate 10-day notice weighs against them with respect to equitable considerations.

In addition, the evidence in the hearing record indicates that the parents made clear their intent to keep the student enrolled at the Aaron School for the 2010-11 school year by signing and returning the district of location's October 2009 notice, which indicated that— as parents of a student placed in a nonpublic school at their own expense—they wanted the student to continue to receive special education services in that school for the "next school year" (Dist. Ex. 3 at p. 1). For the 2010-11 school year, the evidence in the hearing record also establishes that in March 2010, a CSE from the district of location convened and developed an IESP for the student for the 2010-11 school year, with an expected implementation date of September 2010 (see Joint Ex. 15 at pp. 1-15). Moreover, during the 2010-11 school year, the student attended the Aaron School beginning in September 2010 (see Joint Exs. 31-33; 86 at pp. 1-2). Therefore, in addition to the failure to provide the district with adequate 10-day notice, the parents' actions reflect a clear intention to parentally place the student at the Aaron School for the 2010-11 school year. As such, the evidence in the hearing record weighs against the parents' request for tuition reimbursement in this instance for the 2010-11 school year.

C. 2011-12 School Year

1. July 2011 IEP

a. Eligibility Classification

With respect to the 2011-12 school year, the parents contend that the IHO erred to the extent that she failed to consider that the student's classification category of speech or language impairment was not appropriate. As discussed more fully below, the parents' contentions must be dismissed.

The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]). While federal and State regulations do not require the district to offer the student a "diagnosis," they do require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR § 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP

"will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]).[25]

State regulation defines speech or language impairment as a "communication disorder, such as stuttering, impaired articulation, a language impairment or a voice impairment, that adversely affects a student's educational performance" (8 NYCRR 200.1[zz][11]). A review of the hearing record indicates that the student demonstrated delays in communication, receptive, expressive, and pragmatic language, as well as articulation (see Joint Ex. 64 at pp. 1-5; see also Joint Ex. 17 at p. 18). Moreover, the student's difficulties with verbal communication, language processing, and articulation adversely affected his educational performance (see Joint Exs. 62 at p. 5; 63 at p. 6; 64 at pp. 1-5; 66 at p. 6). Specifically, the student's needs related to language, communication, and auditory processing—as well as his ability to engage academically, socially, and behaviorally within the school setting—are consistent with the regulatory definition of the eligibility classification of speech or language impairment. Moreover, as noted above the special education programs and related services recommended in the July 2011 IEP to address a student's individual needs is often of more import than the student's actual eligibility classification (see Fort Osage, 641 F.3d at 1004; Draper, 480 F. Supp. 2d at 1342). As described more fully below, the hearing record demonstrates that the July 2011 IEP identified and addressed the student's needs in the areas of academics, sensory regulation, language skills, articulation, fine and gross motor skills, and social skills, thus enabling the student to be involved in and progress in the general education curriculum.[26] Therefore, given that the special education programs and related services recommended to address a student's individual needs is often of more import than the student's actual eligibility classification or failure to include a diagnosis in the IEP (see Fort Osage, 641 F.3d at 1004; Draper, 480 F. Supp. 2d at 1342), the failure to change the student's classification category, alone, would not result in a failure to offer the student a FAPE for the 2011-12 school year.

[25] Relying upon this same rationale, to the extent that the parents argue that the July 2011 IEP was not appropriate because it failed to list the student's diagnoses of PDD-NOS or ASD or dyslexia on the IEP, the parents' argument must be dismissed. In this instance, the July 2011 IEP provided for accommodations and offered related services of OT and speech-language therapy, as well as annual goals, to address the student's delays related to sensory integration and language processing needs, which manifested as a result of the student's diagnosis of PDD-NOS (Joint Ex. 62 at pp. 5-9). In addition, the CSE recommended that the student receive structure and routine, in addition to the provision of directions repeated/clarified throughout the school day, to address issues related to the student's diagnosis of ASD (id. at p. 9). Furthermore, the July 2011 IEP also noted that the student benefitted from the provision of visual prompts, in addition to redirection and refocusing during instructional time (id.).

[26] To the extent that the parents argue that the classification category of speech or language impairment was not appropriate because "it missed the degree of motoric involvement" associated with the student's difficulty with writing, a review of the July 2011 IEP indicates that it identified and addressed the student's fine motor needs and difficulty with writing (compare Pet. ¶ 35, with Joint Ex. 62 at pp. 2, 4-5, 7-9).

b. 8:1+1 Special Class Placement

In this instance, although neither the sufficiency of the evaluative information available to the CSE nor the description of the student's present levels of academic performance in the July 2011 IEP are in dispute, a review thereof facilitates the discussion of the ultimate issue to be resolved, namely, whether the 8:1+1 special class placement recommended in the July 2011 IEP was appropriate.

In developing the July 2011 IEP, the hearing record demonstrates that the June 2011 CSE and the July 2011 CSE subcommittees (collectively referred to herein as the "CSE") relied upon a June 2011 OT evaluation, a June 2011 speech-language evaluation, a May 2011 educational update, a May 2011 OT progress summary, a May 2011 speech-language progress summary, a December 2010 psychological evaluation, and a March 2011 IESP (Joint Ex. 62 at p. 2; see Joint Exs. 17, 31-33; 66-67).

The present levels of performance described the student's needs as reflected in the evaluative information before the July 2011 CSE (Joint Ex. 62 at p. 2; see Joint Exs. 17, 31-33; 66-67). With respect to the student's cognitive skills, the July 2011 IEP reflected the results of a December 2010 psychological evaluation (see Joint Ex. 62 at p. 3). The July 2011 IEP also reflected the results of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) administered to the student as part of the December 2010 psychological evaluation, which revealed the following standard scores: early reading skills, 40; math problem-solving, 43; and numerical operations, 42 (id.). Additionally, the July 2011 IEP indicated the student's reading skills were at the prekindergarten level (id.).

Consistent with the June 2011 speech-language evaluation, the July 2011 IEP noted the results of the administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-IV) to the student, which yielded the following standard scores: core language, 54; expressing language, 55; language content, 70; and receptive language, 70 (see Joint Ex. 62 at pp. 2-3). Additionally, the Goldman Fristoe Test of Articulation-Second Edition (GFTA-2) and the Receptive One Word Picture Vocabulary Test (ROWPVT) results indicated the student achieved standard scores of 86 in sounds of words and a total score of 83 respectively (id. at p. 3). In addition, the July 2011 IEP indicated the student continued to exhibit articulation errors and that his language skills fell within the "low/severe range" (id.). The July 2011 IEP also noted the parents' concerns, such as the student's needed for several repetitions in order to learn a new concept, and given that the student "did not naturally retain or intuit the information," he needed direct instruction in all areas of need (id. at p. 4). The July 2011 IEP reflected that the student needed to increase the intelligibility of his speech, improve his receptive and expressive language abilities, demonstrate age-appropriate social communication skills, identify and use word retrieval strategies, and strengthen his pragmatic language abilities (id.).

Additionally, as reflected in the June 2011 OT evaluation report, the July 2011 IEP included the results of the Beery-Visual Motor Integration test (Beery VMI), which indicated the student achieved standard scores of 48 in visual motor integration and 45 in visual perception (Joint Ex. 62 at p. 2). Further, the July 2011 IEP indicated that the student presented with "significant delays in motor and perceptual functioning" (id. at p. 3). According to the July 2011 IEP, the student exhibited needs in the areas of motor coordination, stamina, endurance, body awareness, self-care, and fine motor skills (id. at p. 4). The July 2011 IEP further reflected that

although the student was "enthusiastic about learning" and showed a "strong desire to communicate with others," he needed to improve in the areas of maintaining eye contact, interactions with peers, and turn-taking during social conversations (id.). Additionally, the July 2011 IEP indicated that the student demonstrated difficulties with attention and sensory processing (id. at pp. 4-5).

To address the student's global developmental delays—including his difficulties with cognition, academics, language processing, communication, articulation, socialization, and fine and gross motor delays—as well as significant concerns with attention, distractibility and difficulty with sensory processing—the CSE recommend an 8:1+1 special class placement for the student for the 2011-12 school year (see Joint Ex. 62 at pp. 1-6). In addition, the CSE recommended numerous strategies to address the student's management needs, including repetition to learn new concepts, tasks broken down in an environment with minimal distractions, multisensory instruction, and visuals to support verbal instruction (id. at p. 5). To address the student's receptive, expressive, and pragmatic language deficits, as well as his communication and articulation delays, the CSE recommended individual and small group speech-language therapy services (id. at pp. 4, 9). To address the student's sensory integration and motor deficits, the CSE recommended individual OT services (id. at pp. 5, 9). Additionally, the July 2011 IEP included annual goals targeting the student's identified needs in the areas of reading, mathematics, writing skills, speech-language skills, social interactions, fine motor skills, cognitive abilities, and daily living skills (id. at pp. 6-8).

In reaching the decision to recommend an 8:1+1 special class placement, the CSE considered the evaluative information available, which reflected the student's then-current functioning related to cognitive ability, academic skills, attention, motor skills, social development, language processing, and sensory regulation (Joint Exs. 17; 62 at p. 1; 31-33; 66-67).[27] According to the district superintendent, the June 2011 CSE specifically discussed the public school location of the recommended 8:1+1 special class placement and referred to it as the "ACE program" (Tr. pp. 209-10). According to the district superintendent, the CSE described the Academic Communication Experiential ("ACE") program to the parents at the June 2011 CSE meeting (Tr. pp. 199, 210-11). The district special education teacher testified that the teachers designed the ACE program for students with delays in communications, social skills, and academics who required small group instruction, all of which was consistent with the student's July 2011 IEP (Tr. p. 633; see Joint Ex. 62). The district superintendent also testified that after reviewing the student's evaluative information, the CSE discussed the needs of the student, his strengths and weaknesses, and based upon these discussions, recommended an 8:1+1 special class placement in the ACE learning program (Tr. pp. 201-05, 209-11).

According to the district superintendent, the parents provided "a great deal of information" about the student that was consistent with the evaluative reports (Tr. p. 203). Similarly, the district special education teacher testified that the parents provided input into the development of the student's present levels of performance by contributing information regarding the student's functioning (Tr. p. 626). In addition, the district superintendent noted that the parents had concerns regarding the student's reading ability and that the CSE recognized the student's strengths, despite

[27] According to State regulation, an 8:1 or an 8:1+1 special class placement is designed for "students who management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b]).

his performance on the standardized test of intellectual functioning (Tr. p. 203). Moreover, the district superintendent testified that the Aaron School teacher provided input to the CSE regarding the student's academic abilities, especially in mathematics, and based on her input, the CSE modified the annual goals for mathematics and writing in the IEP (Tr. pp. 212-13; see Tr. p. 660). After considering the input of the Aaron School teacher, the CSE believed more strongly that the student's program recommendation was appropriate (Tr. p. 213). Additionally, the district superintendent testified that the new evaluative information—namely, the June 2011 OT evaluation and the June 2011 speech-language evaluations—only "further confirmed" that the 8:1+1 special class placement was appropriate to address the student's needs (Tr. pp. 222-23).

In addition to the foregoing, the evidence in the hearing record reveals that the CSE recommended further strategies, including the use of visual prompts, directions repeated and clarified, redirection, and refocusing to address the student's needs (Joint Ex. 62 at p. 9). The CSE also recommended that the student have access to a computer for writing (id.). Recognizing the student's academic needs, the July 2011 IEP noted the student required structure and a routine throughout the school day (id.). The CSE also recommended testing accommodations for the student, including flexible scheduling; flexible setting; test passages, questions, items, and multiple choice responses read to him; use of a scribe; directions read and clarified; frequent breaks; and extended time (id. at p. 10).

To the extent that the parents argue that the July 2011 IEP was not appropriate because it did not address the student's dyslexia or otherwise recommend the "use of approach recommended by the experts on dyslexia," a review of the hearing record as a whole does not support the parents' contentions. Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045; see also K.L. v New York City Dep't of Educ., 2012 WL 4017822 at *12 [S.D.N.Y. Aug. 23, 2012], affd, 2013 WL 3814669 [2d Cir. July 24, 2013]). Notwithstanding the parents' concerns, the hearing record reflects that the CSE did, in fact, recommend that the student receive multisensory instruction (Joint Ex. 62 at p. 5). Furthermore, the evidence shows that while the student attended the Aaron School, he demonstrated slow and steady progress with the use of multisensory instruction and with the provision of accommodations similar to those recommended in the student's July 2011 IEP—such as visual and verbal cues (Joint Exs. 62 at pp. 1, 5; see Joint Ex. 31 at pp. 1, 6).

In addition, the CSE further addressed the student's needs related to dyslexia, including his delays in reading and language, by providing numerous academic-based accommodations, as set forth above (see Joint Ex. 62 at pp. 5, 9). In addition, as set forth above, to address the student's reading and language needs, the CSE recommended the provision of speech-language therapy, and created annual goals designed to address language processing (id. at pp. 6-9). For example, the district superintendent testified that consistent with the student's needs related to dyslexia, the student exhibited difficulty with the ability to manipulate symbols for reading (Tr. p. 206). Therefore, the July 2011 IEP included annual goals related to letter identification, reading aloud sight words, following five verbal commands, and the ability to listen to a story and respond to the "wh" questions related to that story (Tr. p. 206; Joint Ex. 62 at p. 6). Accordingly, the hearing

record does not substantiate the parents' contentions that the recommended program did not address the student's needs associated with dyslexia.

Based on the foregoing, the evidence in the hearing record establishes that the structure and support offered in the 8:1+1 special class placement, together with the related services and accommodations in the July 2011 IEP, were reasonably calculated to enable the student to receive educational benefits, and therefore, offered the student a FAPE for the 2011-12 school year.

D. Challenges to the Assigned Public School Site

Finally, the parents contend that the IHO failed to consider testimonial evidence demonstrating that the assigned public school site was not appropriate because the student would not be appropriately functionally grouped; the student's "extreme sensory issues, distractibility and resulting anxiety" made it inappropriate for him to receive "small class instruction" with related services support in a "mainstream building;" and the teacher at the assigned public school site lacked training to teach students with "autism, apraxia or dyslexia." As explained more fully below, the parents' contentions must be dismissed.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[28] When the Second Circuit spoke recently with regard to the topic

[28] While the IDEA and State regulations provide parents with the opportunity to offer input in the development

of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the March 2011 IEP because a retrospective analysis of how the district would have implemented the student's March 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the March 2011 IEP (see Parent Exs. D; F). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C.,

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of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the March 2011 IEP.[29]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

In summary, an independent review of the evidence in the hearing record supports the IHO's ultimate conclusion that the district failed to offer the student a FAPE for the 2009-10 school year, and therefore, the IHO properly directed the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2009-10 school year. However, an independent review of the evidence in the hearing record does not support the IHO's conclusion that the district was not required to offer the student a FAPE for the 2010-11 school year. Furthermore, while the evidence in the hearing record supports a finding that the Aaron School was an appropriate placement for the student for the 2010-11 school year, the evidence in the hearing record also supports a finding that equitable considerations do not weigh in favor of the parents' request for relief. Finally, an independent review of the evidence in the hearing record demonstrates that, consistent with the IHO's determination, the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, and therefore, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's placement at the Aaron

[29] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

School for the 2011-12 school year was appropriate or whether equitable considerations supported the parents' request for tuition reimbursement (Burlington, 471 U.S. at 370; M.C., 226 F.3d at 66).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated May 19, 2013 is modified by reversing that portion which found that the district was not required to offer the student a FAPE for the 2010-11 school year.

Dated: **Albany, New York**
July 29, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER