The University of the State of New York

The State Education Department
State Review Officer
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No. 14-079

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail M. Eckstein, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Meredith B. Duchon, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the district failed to notify respondents' (the parents), of the public school site to which the district assigned their daughter to attend for the 2013-14 school year and ordered relief to compel her attendance at the Churchill School (Churchill) for the 2013-14 school year. The parents cross-appeal from that portion of the IHO's decision which determined that the district offered an appropriate educational program for the student for that year. The appeal is 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

With regard to the student's educational history, for the 2009-10 and 2010-11 school years (kindergarten and first grade), the student attended a general education classroom in a district public school and received integrated co-teaching services (ICT) (Dist. Ex. 5 at p. 10; 13 at p. 1). The student began attended Churchill in the fall of 2011 (Tr. p. 329; Dist. Exs. 5 at p. 10; 10 at p.

1).[1] According to the hearing record, a CSE recommended that the student attend a State-approved nonpublic school for the 2012-13 school year and, as a result, the student continued at Churchill (Tr. p. 329; Parent Ex. A at p. 1).

On April 15, 2013, the parents signed an enrollment contract with Churchill for the student's attendance during the 2013-14 school year (Parent Ex. H at pp. 1-2).

On May 3, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Exs. 1 at p. 9; 2 at p. 1). Finding the student eligible for special education as a student with speech or language impairment, the May 2013 CSE recommended a 12:1+1 special class placement in a community school, along with two 30-minute speech-language therapy sessions per week in a group of three (Dist. Ex. 1 at pp. 1, 6, 9).[2] The May 2013 CSE also recommended supports for the student's management needs, such as small group instruction, direct instruction in small increments, concepts broken down into chunks, visual and multi-sensory supports, frequent review and repetition, directions read and re-read, double time to complete tests, and consistent implementation of a school-wide behavior management program (id. at p. 3). The May 2013 IEP also included 10 annual goals targeting the student's needs in mathematics computation and problem solving, reading decoding and comprehension, writing, listening, expressive and receptive language, and social/emotional (to improve peer relations) (id. at pp. 4-6).

By letter dated August 12, 2013, the parents informed the district that, although they received a copy of the May 2013 CSE meeting minutes, that they had not yet received the student's IEP for the 2013-14 school year (Dist. Ex. 7).[3] In addition, the parents described their impression that the May 2013 CSE recommended a State-approved nonpublic school for the student but that, in contrast, the meeting minutes indicated a recommendation for a 12:1+1 special class placement in a community school, to which the parents objected (id.). The parents further notified the district that they had secured a spot for the student at Churchill for the 2013-14 school year and planned to seek public funding of the student's tuition if the CSE failed to recommend "an appropriate IEP and placement" for the student (id.).

By prior written notice dated August 14, 2013, the district summarized the 12:1+1 special class placement and speech-language therapy recommended in the May 2013 IEP (see Parent Exs. J at p. 1; K at p. 1).

According to the district, a final notice of recommendation (FNR) dated August 14, 2013, was also sent to the parents, identifying the particular public school site to which the student had been assigned for the then-upcoming 2013-14 school year (see Dist. Ex. 9). The parents have maintained throughout this matter that they did not receive the August 14, 2013 FNR.

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[1] The Commissioner of Education has approved Churchill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The student's eligibility for special education programs and services is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][11]).

[3] The parent testified at the impartial hearing that she received the May 2013 CSE meeting minutes at the end of July (Tr. p. 335).

By letter dated August 20, 2013, the parents informed the district that they had "just received" a copy of the "proposed IEP" for the student and indicated again that the recommendation for a 12:1+1 special class placement in a community school did not reflect the State-approved nonpublic school placement recommendation discussed at the May 2013 CSE meeting (Dist. Ex. 8). In addition, the parents expressed concern that, although the May 2013 IEP included counseling goals, the CSE did not recommend that the student receive counseling services and that the IEP did not reflect the results of a private neuropsychological evaluation report (id.). Further, the parents informed the district that they had not yet received any notification identifying a school site for the student to attend (id.). The parents reiterated that, "absent an appropriate IEP and placement recommendation," the student would start the 2013-14 school year at Churchill (id.).

On October 7, 2013, after the parents filed their initial due process complaint notice but prior to their submission of the amended version, described below, the district mailed the parents a copy of the August 14, 2013 FNR, which was manually marked "Second Mailing" (Tr. pp. 189-90; Parent Ex. P).[4]

A. Due Process Complaint Notice

By amended due process complaint notice dated October 15, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. B at p. 1).[5] As an initial matter, the parents alleged that the district failed to submit a timely response to the parents' September 9, 2013 original due process complaint notice (id. at p. 2).

With regard to the May 2013 IEP, the parents alleged that the IEP did not contain sufficient evaluative data and that the CSE failed to incorporate a private neuropsychological report (Parent Ex. B. at p. 1). Next, the parents alleged that the recommendation for a 12:1+1 special class placement was made without parental participation and was in contrast to the State-approved nonpublic school placement discussed during the May 2013 CSE meeting and understood by the parents to constitute the CSE's recommendation (id. at pp. 1-2). The parents also claimed that the annual goals and management needs in the May 2013 IEP were discussed in the context of the student's educational program at Churchill and constituted inappropriate recommendations to the extent they would be implemented in a community school setting (id. at p. 1). The parents also alleged that, although the May 2013 IEP included counseling annual goals, the CSE did not recommend counseling services (id.).

[4] By letter dated October 16, 2013, the parents informed the district that they had received a copy of the "Second Mailing" on October 7, 2013 from the parents' attorney but had not received an FNR prior to the start of the 2013-14 school year (Parent Ex. C at p. 1). By prior written notice and a separate FNR, both dated October 22, 2013, the district informed the parents of the program and services recommended by the May 2013 CSE and of the assigned public school site (Parent Exs. E; F; see also Dist. Ex. 1; Parent Ex. D).

[5] The parents initially filed a due process complaint notice dated September 9, 2013 (see Dist. Ex. 10), which was superseded by the amended due process complaint notice dated October 15, 2013 (see Parent Ex. B). According to the IHO's decision, the parents filed a second amended due process complaint notice on January 10, 2014, which is not a part of the hearing record, but neither the IHO nor the district consented to the amendment (see IHO Decision at p. 4; see also 8 NYCRR 200.5[i][7][i]).

In addition, the parents alleged that they never received the August 14, 2013 FNR or any notification of the public school site to which the district assigned the student to attend prior to the start of the 2013-14 school year (Parent Ex. B at p. 2). The parents also alleged that, upon receiving an FNR subsequent to their filing the original due process complaint notice, they visited the assigned public school site on October 15, 2013 and rejected it because they were not permitted to go inside the proposed classroom and were provided no classroom profile or information on methodology used in the classroom for teaching students with language-based learning difficulties (id.).

As relief, the parents requested a "Nickerson letter" authorizing continued placement at Churchill for the 2013-14 school year or, in the alternative, tuition reimbursement (Parent Ex. B at p. 2). The parent also invoked the student's right to a pendency placement at Churchill (id.).[6]

B. Impartial Hearing Officer Decision

On October 22, 2013, an impartial hearing convened in this matter and concluded on March 25, 2014, after four days of proceedings (Tr. pp. 1-433). By decision dated April 30, 2014, the IHO found that the parents were entitled to public funding of the cost of the student's attendance at Churchill for the 2013-14 school year (see IHO Decision at pp. 11-16).

Initially, the IHO found that the May 2013 IEP was appropriate and meaningfully calculated to enable the student to receive educational benefit, despite procedural errors in its development (IHO Decision at p. 13). For instance, the IHO found that, although the CSE should have incorporated the results of the private neuropsychological evaluation into the IEP, the CSE discussed the private evaluation at the May 2013 CSE meeting and the May 2013 IEP accurately described the student's present levels of performance based on sufficient evaluative information, including information about the student provided by Churchill (id.). Next, the IHO found that the 12:1+1 special class placement recommended by the CSE was appropriate to address the student's needs and was extensively discussed at the CSE meeting (id. at pp. 13-14). The IHO credited testimony that the May 2013 CSE agreed to "'defer to the [central based support team (CBST)] for another pair of eyes'" for the purpose of further considering the parents' preference for a State-approved nonpublic school but that the CSE did not ultimately recommend such a placement (id. at p. 14). The IHO also found that the annual goals, which were developed by staff at Churchill, could be implemented in a district public school setting and were appropriate for the student (id.). The IHO found that the May 2013 CSE should have recommended counseling services for the student but that, because of the inclusion of counseling annual goals on the IEP, the omission did not rise to the level of a denial of FAPE (id.).

With regard to the parents' receipt of the May 2013 IEP and the FNR, the IHO found that there was no explanation or excuse for why the CSE waited three months after the CSE meeting to send the parents a copy of the May 2013 IEP and that such delay impeded the parents' opportunity to participate in the development of the student's IEP for the 2013-14 school year (IHO Decision at pp. 14-15). The IHO also found that the district failed to offer the parents timely notice of the particular public school site to which it assigned the student to attend for the 2013-14 school year (id. at pp. 11, 15). In particular, the IHO did not credit the testimony of a district's witness

[6] It is undisputed by the parties that the student's pendency (stay put) placement was Churchill (see Interim IHO Decision at p. 1; see also Tr. p. 16).

that the FNR was mailed on August 14, 2013 and further found that the presumption of receipt of the FNR was rebutted by the parents' August 20, 2013 letter informing the district that they had not received notice of an assigned public school site (id. at p. 15). The IHO also noted that the district's internal computer system log of events included no record of the August 14, 2013 mailing of an FNR but indicated that a second copy of the FNR was mailed to the parent on October 7, 2013 (id. at p. 15).

Having found the district failed to inform the parents of the assigned public school site prior to the start of the 2013-14 school year, the IHO found that the student was denied a FAPE and that the parents were entitled to a "Nickerson letter" authorizing continued placement at Churchill at public expense for the 2013-14 school year (IHO Decision at pp. 11, 15-16). The IHO also ordered the CSE to reconvene to incorporate the student's private neuropsychological evaluation into the student's IEP, to add counseling services to the IEP, and to address the parents' concerns regarding the 12:1+1 special class placement recommendation (id. at p. 16).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year. As a preliminary matter, the district acknowledges that the IHO made several determinations in favor of the district, which it does not appeal. Relative to the IHO's finding that there was an unreasonable delay in providing the parents with a copy of the May 2013 IEP, the district argues that there is no legal requirement that the district must send the IEP to the parents in advance of the start of the school year and that the parents' August 2013 receipt of the IEP did not run afoul of federal or State regulations. As to the IHO's finding relating to the parents' receipt of the August 14, 2013 FNR, the district argues that the IHO erred in declining to credit its witness's testimony and afford the district the presumption of mailing. The district argues that the witness testified as to the standard office practices and procedures relative to the production and mailing of FNRs. Furthermore, the district asserts that the IHO erred in finding that the parents rebutted the presumption based on their letter informing the district that they had not received notice of an assigned public school site, arguing that the parents were required to show more than a general denial that they did not receive the FNR. Instead, argues the district, the parents failed to rebut the presumption by evidence showing that district's routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed. Finally, the district asserts that a Nickerson letter was not an appropriate remedy.

In an answer and cross-appeal, the parents respond to the district petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year. As an initial matter, the parents argue that the parties' dispute is moot because the district was required to fund the student's placement (Churchill) for the 2013-14 school year during the pendency of the underlying proceedings and, as such, the parents have received all of the relief sought in this matter.

As for their cross-appeal, the parents argue that the IHO erred in finding that the May 2013 IEP was appropriate. Specifically, the parents argue that: the May 2013 CSE did not rely on sufficient evaluative information when describing the student's needs and that the CSE should have incorporated information from the private neuropsychological evaluation in the student's IEP; the CSE inappropriately recommended a 12:1+1 special class placement on the IEP, notwithstanding

the parents' impression that the CSE intended to recommend a State-approved nonpublic school placement; the 12:1+1 special placement recommendation was not appropriate for the student because it would not afford the student adequate support and small group instruction; the annual goals were not appropriate, in that they were not intended to be implemented in a 12:1+1 special class in a public school setting; and counseling should have been included in the IEP. Further, the parent asserts that the relief awarded by the IHO was appropriate but that, if deemed improper, relief in the form of an award of the costs of the student's tuition was also appropriate and should be awarded by the SRO or the IHO after remand. In this regard, the parents also argue that the hearing record supports a finding that the student's unilateral placement at Churchill was appropriate for the 2013-14 school year and that equitable considerations weighed in favor of the parents' request for relief.

In the district's answer to the parents' cross-appeal, the district: repeats the substance of its arguments raised in its district's petition; argues that the matter is not moot because a decision in this case will affect the student's pendency placement going forward; and requests that the parents' cross-appeal be dismissed.

V. Applicable Standards

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

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

694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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. Mootness

As an initial matter, the parents argue that this matter is moot and that the district's petition should be dismissed on this basis. In support of their claim, the parents argue that the district was required to fund the student's unilateral placement at Churchill during the pendency of the underlying proceedings, which spanned the entire 2013-14 school year (Parent Ex. A; see also IHO Decision at p. 3-4; Tr. p. 16) and, therefore, that all of the relief sought by the parents in this matter has been achieved and the dispute between the parties is no longer real or live (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84-85 [2d Cir. 2005]).

To be sure, it is unclear at this juncture the value of this proceeding as the district is responsible for the 2013-14 costs of the student's tuition at Churchill, and the adequacy of the May 2013 IEP is only marginally relevant to any future IEP generated by a different CSE conducting an annual review because each school year must be treated separately for purposes of a tuition reimbursement claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Board of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Application of a Student with a Disability, Appeal No. 13-199). However, in light of recent district court decisions holding that tuition reimbursement cases may, in some circumstances, not be moot even when the requested relief has been achieved as a result of pendency, in the interest of administrative and judicial economy, I have addressed the merits of the parties' appeal and cross-appeal (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. July 29, 2011]; but see V.M. v No. Colonie Cent. Sch. Dist., 2013 WL 3187069, at *13-*15 [N.D.N.Y. June 20, 2013] [explaining that claims seeking changes to the student's IEP/educational programing for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested

tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254-55[S.D.N.Y. 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010] [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]).

B. May 2013 IEP

Relative to the parents' cross-appeal, upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly held that the district sustained its burden to establish that the May 2013 CSE developed an appropriate IEP for the student for the 2013-14 school year (see IHO Decision at pp. 11-15). The IHO accurately recounted the facts of the case, addressed the specific issues identified in the parent's due process complaint notice, and set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2013-14 school year, and applied that standard to the facts at hand (id. at pp. 2-15). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify these particular determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, except where otherwise indicated below, the findings and conclusions of the IHO are hereby adopted. In particular, the findings and conclusions of the IHO with respect to the following findings are adopted without further discussion: that the district afforded the parents a meaningful opportunity to participate in the development of the student's May 2013 IEP; that the May 2013 CSE reviewed sufficient evaluative information in developing the student's IEP; that the May 2013 IEP included an accurate and sufficient description of the student's present levels of performance; that the May 2013 CSE developed appropriate annual goals for the student; that the omission of counseling in the IEP did not rise to the level of a denial of a FAPE because of the inclusion of two counseling goals in the May 2013 IEP; and that the 12:1+1 placement recommendation was appropriate to address the student's needs (IHO Decision at pp. 11-15).

C. Transmittal of the June 2011 IEP

With respect to IEP transmittal, the gravamen of the parties' dispute is whether the parents timely received a copy of the IEP, and, secondly, whether the parents received any notice prior to the start of the 2013-14 school year identifying the public school site to which the district assigned the student to attend. First, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6). There is no legal authority requiring districts to produce an IEP at the time that the parents demand; districts must only ensure that a student's IEP

is in effect at the beginning of each school year and that the parents are provided with a copy (34 CFR 300.322[f], 300.323[a]; 8 NYCRR 200.4[e][1][ii]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

Here, the evidence in the hearing record demonstrates that, consistent with federal and State regulations, the district had an IEP in effect at the beginning of the school year. The evidence not in dispute includes the August 14, 2014 prior written notice package mailed to the parents informing them of the special education program and related services recommendations for the student for the 2013-14 school year (Parent Exs. J; K).[7] Furthermore, the parents acknowledged receipt of the May 2013 IEP in their letter to the district, dated August 20, 2013 (Dist. Ex. 8). The parents also acknowledged in their August 12, 2013 letter having received the May 2013 CSE meeting minutes, which included information regarding the CSE's recommendations (Dist. Ex. 7; see also Dist. Ex. 8). Accordingly, while there is no explanation in the hearing record for the passage of three months prior to the district's provision of a copy of the May 2013 IEP to the parents, the parents nevertheless received notice of the student's educational program for the 2013-14 school year prior to September 2013 when the student was scheduled to begin the school year (see 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6). Therefore, to the extent that the timing of the transmittal of the May 2013 IEP contributed to the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year, that determination is reversed.

D. Access to Special Education Services

As to the district's challenge to the IHO's finding that the parents received no notice of an assigned public school site prior to the beginning of the 2013-14 school year, although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student 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). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th

[7] I noted that the prior written notice provided to the parents by the district is lacking in much of the information required by State and federal regulations (see Parent Exs. J; K). A district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent an obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).

Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see 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, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

However, although not explicitly stated in federal or state regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an the IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see Tarlowe, 2008 WL 2736027, at *6 [stating a district's delay does not violate the IDEA so long as an public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and state regulation, for example, by an FNR which is the mechanism adopted by the district in this case, it nonetheless must be shared with the parent before the student's IEP may be implemented.

The district argues that testimony presented at the impartial hearing demonstrates: that it mailed the FNR on August 14, 2013 consistent with standard office practice and procedure; that the FNR was not returned in the mail; and that, therefore, a presumption arises that the FNR was received by the parents (see Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]). The district correctly argues that denial of receipt of the FNR, standing alone, is insufficient to rebut the presumption that the parents did not receive the FNR (Nassau Ins. Co., 46 N.Y.2d at 829-30). However, the IHO did not credit the district witness's testimony that an FNR was mailed and further found that the presumption of receipt was rebutted by the parents' credible testimony, as well as their letter dated August 22, 2013 informing the district that they had yet to receive notification of the assigned public school site (IHO Decision at p. 15). The IHO also noted that the parents' denial of receipt was corroborated by the district's computer system log of events, which included the October 2013 mailing but contained no entry indicating that the FNR was mailed on August 14, 2013 (id.; Parent Ex. I at p. 1). An SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). While another fact finder may or may not have made the same credibility finding as the IHO, it is clear that review of the non-testimonial evidence and the entire hearing record does not justify or compel a contrary conclusion to the IHO's reasonable credibility determination. Thus, as the IHO based his determination that the district was not entitled to the mailing presumption at least in part on a credibility determination, this finding is entitled to deference and will not be disturbed.

Based on the foregoing, the evidence in the hearing record shows that in the absence of notification, either written or oral, that explained how the student could access her IEP services constitutes a procedural inadequacy, which, under different circumstances might not have risen to the level of a denial of a FAPE. However, unlike other cases where the parents had actual knowledge of the location at which they could access special education services for a student, in this case, the district presented no independent, reliable evidence that the parents possessed such information (see, e.g., Application of a Student with a Disability, Appeal No. 13-016; Application of the Dep't of Educ., Appeal No. 12-111). This case is also distinguishable from others in that it is clear by the parents' communication to the district that the lack of notice of an assigned public school site informed the parents' ultimate decision to reject the May 2013 IEP and to unilaterally place the student (see Dist. Ex. 8 at p. 1; see e.g., Application of the Dep't of Educ., Appeal No. 12-111). Moreover, the only reliable evidence in the hearing record that the parents received an FNR indicates that such transmittal occurred in early October 2013, long after the district was required to implement the IEP services (see Parent Exs. P at p. 1; V at p. 1; see also Dist. Ex. 9). Assuming that the parents subsequently consented to the district's provision of special education services, given the timing, the delay in implementation of the student's IEP during the 2013-14 school year would constitute a deviation from substantial or significant and material provisions of the student's IEP, that is, all of the services (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see 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 at 349 [5th Cir. 2000]). Therefore, under these unique circumstances, the evidence in the hearing record shows that this procedural inadequacy (a) impeded the student's right to a FAPE, and resulted in 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]).

E. Nickerson Letter

Notwithstanding the foregoing, the IHO erred by not applying the Burlington/Carter test when deciding the parents' claim for the costs of the student's tuition at Churchill. A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E., 694 F.3d at 192 n.5). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). . The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P., 553 IDELR 298; see R.E., 694 F.3d at 192 n.5; M.S., 734 F. Supp. 2d at 279). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd R.E., 694 F.3d 167), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L., 2012 WL 4891748, at *11; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]). Therefore, neither the IHO nor SRO have the jurisdiction to resolve a dispute regarding whether the student is a

member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd, R.E., 694 F.3d 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L., 2012 WL 4891748, at *11-*12; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]). Accordingly, the IHO's order directing the district to provide a Nickerson letter is reversed and the questions of whether the unilateral placement selected by the parents was appropriate and whether equitable considerations support the parents' request for tuition reimbursement are addressed below.

F. Unilateral Placement

In this case, because the district failed to offer the student a FAPE for the 2013-14 school year for the reasons noted above, I now turn to the issue of whether the parents' unilateral placement of the student at Churchill was appropriate. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). 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, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). 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; 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, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the

> child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

By way of background, the student's educational needs were identified by a number of evaluative documents, which included a February 2013 private neuropsychological evaluation, an April 2013 Churchill speech and language progress report, an April 2013 Churchill counseling update, and an April 2013 Churchill draft IEP (see generally Dist. Exs. 3; 4; 5; 14).[8] The description of the student's special education needs included in these documents informs the following discussion, and it is presumed that the parties are familiar with the content of such evaluations. Briefly, as measured by the Stanford Binet Intelligence Scales, Fifth Edition (SB5), the student was found to have average intelligence with moderate delays in the areas of expressive language and language structure as well as global academic delays in the areas of reading, mathematics, and written expression (Dist. Ex. 5 at p. 10). Further retesting confirmed the presence of an auditory processing disorder characterized by challenges in the area of auditory integration, auditory figure ground listening (which causes difficulty listening to the teacher in a large classroom setting), and tolerance fading memory (which underlies difficulties in reading and hampers overall language comprehension) (id.). A review of the information provided by Churchill in the April 2013 progress reports shows that the school's understanding of the student's cognitive, academic, and executive functioning deficits was generally commensurate with the results of the February 2013 private neuropsychological evaluation (compare Dist. Ex. 5 at pp. 28-30 with Dist. Exs. 3; 4; 14 at pp. 1-3).

The director of admissions for Churchill testified that the school was State-approved and consisted of approximately 397 students (Tr. pp. 219-20, 226-27). According to the director, Churchill accepts children whose IQs are in the average range, who have been diagnosed with either a language-based learning disability or a speech and language impairment, and who have been unsuccessful in the mainstream due their learning disabilities (Tr. p. 220). According to the director, the Churchill philosophy includes teaching students strategies to apply and providing them with the tools they need to be successful (Tr. p. 221). The director explained that the school "attack[s] [students] weaknesses through acknowledging their strengths" (id.). The director indicated that students at Churchill have access to a general education curriculum (id.). The

[8] If an IHO is faced with concern over whether a student's special education needs can be addressed in a unilateral placement, and there is a lack of evidence on the issue, the IHO is vested under federal and State law with the discretionary authority to order an independent educational evaluation of the student at district expense (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Application of the Bd. of Educ., Appeal No. 12-033).

director explained that: a typical Churchill class consisted of twelve students and two teachers and the students were broken into smaller groups for reading and mathematics based on their level of functioning (Tr. pp. 221-22). According to the director, Churchill provided counseling, OT, and speech-language a(Tr. p. 223).

The student's Churchill teacher for the 2013-14 school year testified that the student's class consisted of 12 students, one teacher, and one assistant teacher (Tr. p. 262). Similar to the student in the instant case, who was 9 years old during most of the 2013-14 school year and classified as a student with a speech or language impairment, the students in the Churchill class ranged in age from nine to eleven years old and were classified as students with a speech or language impairment or a learning disability (Tr. pp. 262-263). The Churchill teacher indicated that the student was similar to her classmates with regard to social/emotional and academic functioning (Tr. pp. 284).

The student's co-head teacher from Churchill described the student as well-liked by her peers but noted that she needed teacher support in situations that she deemed unfair, as well as help to "move on" after a conflict (Tr. p. 261). With respect to academics, the teacher reported that the student was willing to learn and interested in presented topics, but that she needed verbal and gestural reminders to stay with the group (id.). When asked about the type of supports the student required in the group of twelve, the teacher responded that the entire curriculum was modified (Tr. p. 263). She reported that the student required a lot of small group and direct instruction, as well as teacher reminders to begin and stay on a task (Tr. pp. 263, 267). The teacher also noted that the student required wait time to answer a question and needed to be in close proximity to a teacher due to her tendency to become distracted (Tr. p. 264).

To address the student's reading needs, the teacher testified that the student required direct multisensory and explicit phonics instruction and support to track words, because she often omitted words or read them incorrectly (Tr. p. 264). The student's teacher testified that she used the Wilson multi-sensory phonics-based reading program, known as "Fundations Level 2" in her classroom (Tr. pp. 264-65; Parent Ex. L at p. 2). She described how the program addressed the student's needs, noting that, pursuant to the program, language was broken down and each lesson built upon itself, with previously learned work reviewed at the beginning of each lesson (Tr. pp. 264-65; Parent Ex. L at p. 2). The teacher further explained that the program included work on phonemic awareness, decoding, vocabulary, spelling, fluency, comprehension, critical thinking, speaking and listening skills (Tr. pp. 265-66).

The student's teacher testified that, in mathematics, the student had trouble adding and subtracting with regrouping, getting confused on how to carry over a number (Tr. p. 270). According to the teacher, word problems, especially multi-step word problems were difficult for the student and she required the language broken down and "a lot" of teacher support to solve them (Tr. p. 270). At Churchill, the student was placed in a small class of seven students for mathematics where she received one-to-one help, teacher modeling, and seating next to the teacher such that the teacher could remind the student to stay focused (Tr. p. 271). The teacher testified that the student was grouped based on her strengths and weaknesses and was working on recognizing mathematics vocabulary, adding and subtracting with regrouping, basic multiplication and division facts, and word problems (Tr. p. 272).

The teacher reported that for writing instruction she employed a multisensory program called "Being a Writer," as well as teacher created lessons (Tr. p. 274; Parent Ex. L at p. 3). As

detailed by the teacher, the students were exposed to "mentor texts," which helped to illustrate how good writers write, and they also engaged in "think, pair, share" exercises, which involved talking to classmates about a given topic (Tr. p. 274). According to the teacher, she supported the students during these exercises as a means of facilitating language during the writing period (id.). The Churchill teacher testified that she used brainstorming, graphic organizers, sentence starters, and fill-in-the-blanks to address the student's difficulty with transferring her thoughts to paper (Tr. p. 275). The teacher also used scaffolding and teacher modeling to aid the student (Tr. p. 287).

According to the student's Churchill teacher, the student's science teachers loosely followed the grade three State science curriculum, covering units on plants and flowers and electricity (Tr. p. 277; Parent Ex. L at p. 6). The teacher testified that the science lessons were modified in that there were a lot of hands-on opportunities and information presented visually and the students worked in small groups (Tr. pp. 277-78). In social studies, the curriculum included the study of basic geography skills and world communities (Tr. p. 276). According to the teacher, the curriculum was modified in that language was broken down, the student got a lot of "check ins" with the teacher, and many of the lessons centered on individual photographs and experiential learning (Tr. pp. 276-77). Among other things, the student's social studies teacher reported that the student benefitted from re-cueing by the teacher and check-ins to ensure that she was attending and processing incoming information (Parent Ex. L at p. 4).

The hearing record shows that during the 2013-14 school year the student received speech-language therapy two times per week for 30 minutes at Churchill (Tr. p. 282; Parent Ex. G; see Parent Ex. L at p. 10). According to the student's January 2014 mid-year report card, the student's speech-language therapy targeted the student's: receptive language skills, including her ability to comprehend "wh" questions, follow multi-step directions, and understand paragraph length information; expressive language skills, including her word skills, narrative discourse, and expressive reasoning; and conversational skills, including her ability to initiate a conversation, advance a conversation with comments and questions and develop her awareness of non-verbal cues (Parent Ex. L at p. 10).

According to teacher testimony, the student received counseling once a week for forty-five minutes, where she worked on social skills and ways to engage appropriately with peers, as well as conflict resolution skills (Tr. pp. 280, 282; Parent Ex. L at p. 11). In addition, the teacher explained that the student received social support in the classroom and during unstructured times when conflicts arose (Tr. p. 280). The teacher further reported that staff supported the student throughout the entire day with respect to her language needs, assisting the student with how to speak appropriately to peers and teachers (Tr. pp. 280-81). The teacher testified that the student could become visibly upset if she did not understand something that a friend was saying and often required language to be repeated (Tr. p. 281).

Accordingly, in view of the evidence in the hearing record detailed herein, the parents have established that the Churchill provided the student with specially designed instruction designed to meet her unique needs (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365).

Furthermore, the evidence in the hearing record establishes that the student made progress in several domains during the 2013-14 school year. While a finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v.

R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [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, at *2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364).[9] 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].

According to the student's Churchill teacher, in mathematics, the student demonstrated progress in her ability to add and subtract without regrouping and solve some basic multiplication facts (Tr. pp. 272, 283; see Parent Ex. L at p. 4). In addition, the student made progress in writing, specifically in her ability to apply known phonic patterns, although she still required teacher reminders to do so (Tr. p. 275). The January 2014 mid-year report card indicated that the student had written several different stories and with teacher support had selected one to take through the writing process, all the way to publishing (Parent Ex. L at p. 3). The teacher further testified that the student made progress in her decoding and comprehension skills (Tr. p. 283). She described how she assessed the student's progress through the use of unit tests, running records and observation of the student in her reading group (Tr. p. 269). She indicated that, in terms of reading, the student had moved from a Fountas and Pinnell level "I" at the beginning of the school year to a level "L" in March (Tr. p. 283; see Tr. p. 267-68). In addition, the student made progress spelling and decoding one syllable and multi-syllable words containing vowel-consonant-e syllables, r-controlled syllables and double vowel syllables (Parent Ex. L at p. 2). With respect to the student's social/emotional development, the teacher reported that the student did not appear as anxious, although noted that there were still times when the student "shut down" (Tr. p. 284). However, the teacher reported that the student was improving in the school's small group setting where she had a lot of support (id.). As reported by the student's teacher in the January 2014 mid-year report card, the student built many new friendships with classmates, and her easy going and playful nature made her an eagerly sought after partner in social and academic groupings (Parent Ex. L at p. 5).

Based on the above, the hearing record shows that the student benefitted from the instructional strategies and supports provided by Churchill that included such things as additional teacher support, positive reinforcement, continuous review of previously learned material, visual support, language broken down into smaller chunks and maintaining close proximity to a teacher for help with attending. Furthermore the hearing record demonstrates that the student was making academic and social/emotional progress at the school. Accordingly, the hearing record contains sufficient evidence to conclude that the parents have met their burden to show that Churchill was an appropriate unilateral placement for the student for the 2013-14 school year.

[9] The Second Circuit has also found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 115 [2d Cir. 2007]; see Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006] [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"]).

G. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C., 226 F.3d at 68; 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]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger, 2007 WL 4208560, at *4; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 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 M.C., 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 ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267, 271-74 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27); see Frank G., 459 F.3d at 376; M.C., 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Turning to the issue of whether equitable considerations weigh in favor of the parents' requests for relief, there is no evidence in the hearing record that would suggest that the parents did not: fully cooperate with the CSE; participate and cooperate in the IEP development process; provide the CSE with any copies of progress reports and other documents that the CSE needed to consider in developing the student's educational program; and provide adequate and timely notice of their intent to unilaterally place the student at Chuchill (see Dist. Exs. 3; 4; 5; 7; 8). Thus, based upon the evidence contained in the hearing record, the parents acted reasonably under the circumstances of this case and that the hearing record contains no indication that they did not cooperate with the district in good faith to attempt to develop an appropriate IEP for the student. Therefore, equitable considerations do not bar an award of tuition reimbursement under the

circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *8-*9 [S.D.N.Y. Jan. 3, 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 679-80 [S.D.N.Y. 2012]; R.K., 2011 WL 1131522, at *4; see also N.R., 2009 WL 874061, at *7 [The "[district] has not cited, and the [c]ourt is unaware of, any case in which equitable considerations favored a school district that failed to offer a disabled child a school placement prior to the commencement of the school year."]).

VII. Conclusion

Having concluded that the district did not offer the student a FAPE, that the parents' unilateral placement at Churchill was appropriate, and that equitable considerations weighed in favor of the parents' request for relief, I will direct that the district pay for the costs of the student's tuition at Churchill for the 2013-14 school year. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated April 30, 2014, is modified by reversing that portion that ordered the district to issue a Nickerson letter to the parents for the 2013-14 school year; and

IT IS FURTHER ORDERED that the district shall pay directly to Churchill, pursuant to the student's pendency entitlement, the student's tuition costs for the 2013-14 school year, to the extent that such tuition costs have not already been paid by the parent; and

IT IS FURTHER ORDERED that, to the extent that the parent has paid any portion of the student's tuition costs at Churchill for the 2013-14 school year, the district shall reimburse the parent for such costs upon the submission of proof of payment to the district.

Dated: **Albany, New York**
September 9, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER