The University of the State of New York

The State Education Department
State Review Officer
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No. 16-009

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 New York City Department of Education

Appearances:
Lawrence D. Weinberg, Esq., attorney for petitioner

Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 their daughter's tuition costs at the Stephen Gaynor School (Stephen Gaynor) for the 2015-16 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

The student exhibits weaknesses in expressive and receptive language, academic skills, and social-emotional functioning (Dist. Exs. 2 at pp. 8-9; 14). In addition, the student has received diagnoses of language disorder; attention deficit/hyperactivity disorder, combined type, mild; and specific learning disorder, with impairment in reading (dyslexia), moderate (id.). At age five, the student was found eligible for special education and related services as a student with a speech or

language impairment and began receiving speech-language therapy (Dist. Ex. 2 at p. 1). The student attended a district public school program from kindergarten through the first grade.[1]

On January 20, 2015, a CSE convened and formulated an IEP for the student with an implementation date of February 3, 2015 and a projected annual review date of January 19, 2016 (Dist. Ex. 1 at pp. 1, 10, 13). Having determined that the student remained eligible for special education and related services as a student with a speech or language impairment, the January 2015 CSE recommended a 10-month school year program in a general education class at a community school with special education teacher support services (SETSS) four periods per week for English language arts (ELA), as well as individual speech-language therapy two times per week and speech-language therapy in a group once a week (Dist. Ex. 1 at p. 10).[2] The student attended the public school for the remainder of the 2014-15 school year, where she received the services recommended by the January 2015 CSE (see Parent Ex. E).

On June 8, 2015, the parents executed an enrollment contract with Stephen Gaynor for the student's attendance for the 2015-16 school year (Parent Ex. F at pp. 1-4).[3]

By letter to the district dated July 22, 2015, the parents requested that the CSE reconvene in order to consider two documents: an academic reevaluation and a classroom observation obtained by the parents in June 2015 (Parent Ex. D).[4] In a subsequent letter dated August 25, 2015, the parents referenced their July 2015 letter and reiterated their previous request for the CSE to reconvene (Parent Ex. E). Additionally, the parents indicated that at the end of the 2014-15 school year, the student was "below standards" in math and reading and thus the recommended program had not been able to meet the student's unique needs (id.). Further, the parents stated that they were "willing" to consider appropriate recommendations from the CSE for the 2015-16 school year, but given the "late date," they had no alternative but to unilaterally place the student at Stephen Gaynor in September due to the CSE's failure to offer an appropriate placement for the student (id.). The parents also indicated they would seek reimbursement from the district for the cost of the student's tuition and requested transportation to Stephen Gaynor (id.).

The student attended Stephen Gaynor for the 2015-16 school year (Parent Ex. I at p. 1).

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[1] At the time of the January 20, 2015 CSE meeting the student attended a first grade general education class where she received the related service of speech-language therapy (Dist. Exs. 2 at p. 1; 5 at p. 4). The student also met with a guidance counselor once a week to address social issues (Dist. Ex. 2 at p. 1). In addition to the services provided at school, the parents privately obtained vision and speech-language therapy for the student (Dist. Exs. 2 at pp. 1-2; 5 at p. 4; 6 at p. 2).

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] The Commissioner of Education has not approved Stephen Gaynor as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] Although the academic reevaluation was not entered into evidence, the classroom observation was entered into evidence as Parent Exhibit C. The academic reevaluation appears to have been completed by a psychologist who conducted a neuropsychological and psychoeducational evaluation of the student in October 2014 (compare Parent Ex. D, with Dist. Ex 2 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated December 16, 2015, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2015-16 school year, that Stephen Gaynor was an appropriate unilateral placement, and that equitable considerations supported an award of tuition reimbursement (Parent Ex. A at pp. 2-6).

With regard to the process by which the January 2015 IEP was developed, the parents contended that the January 2015 CSE meeting was held prematurely because the January 2015 CSE was unable to consider the student's performance during the second half of the 2014-15 school year (Parent Ex. A at p. 3). Next, the parents argued that the CSE was not duly constituted and predetermined its recommendations (id. at p. 3). The parents further argued that the CSE's recommendations were not consistent with the "opinions" of the professionals who had "direct knowledge" of the student (id. at p. 4). Next, the parents argued that the CSE denied the parents meaningful participation by ignoring their concerns during the CSE meeting (id.). The parents also contended that the CSE did not possess sufficient, recent, and/or accurate evaluative information to develop the student's IEP (id. at p. 3). The parents argued that the CSE failed to conduct a classroom observation of the student (id.). The parents further argued that the CSE failed to provide them with a copy of the January 2015 IEP during or immediately after the CSE meeting and also failed to provide information about "the proposed classroom placement" (id.). The parents further contended that the district failed to respond to their request for the CSE to reconvene in order to consider the evaluations attached to their letter dated July 22, 2015 (id. at pp. 3, 5).

As for the January 2015 IEP, the parents contended that the annual goals in the IEP were not appropriate because they were vague, immeasurable, and failed to include evaluative criteria, evaluation procedures, and schedules to measure the student's progress (Parent Ex. A at p. 4). The parents further argued that the student's speech-language goals were identical to the goals in the June 2014 IEP and did not meet the student's needs (id. at pp. 3, 4). Next, the parents argued that the management needs and related services were not appropriate for the student (id. at p. 4). The parents also argued that the IEP failed to include the following: (1) a group size for SETTS; (2) an appropriate curriculum; (3) an appropriate methodology; (4) adequate opportunity for 1:1 instruction; (5) appropriate functional grouping; (6) appropriate related services; and (7) information regarding the size of the assigned public school site (id. at pp. 3-4). The parents also argued that the IEP failed to address the student's diagnoses and include support for the student's transition to the recommended assigned public school site (id. at p. 4). With respect to the CSE's program recommendation of a general education program with SETTS for the student, the parents argued that it was not appropriate because (1) the student required 1:1 support; (2) the student to teacher ratio was too large; and (3) the student did not previously make progress in a general education program with SETTS (id. at pp. 3, 5).

Turning to the unilateral placement, the parents alleged that Stephen Gaynor was an appropriate placement for the student because it provided instruction specially designed to meet the student's unique needs and that the student made progress at the school (Parent Ex. A at p. 6). The parents also argued that equitable considerations favored their request for relief because they cooperated with the CSE and did not impede the CSE from offering the student a FAPE (id). As relief, the parents requested payment of the costs of the student's tuition at Stephen Gaynor for the

2015-16 school year; reimbursement for the costs of private evaluations; an interim order directing the district to provide for special transportation for the student; provision of door-to-door special transportation to and from Stephen Gaynor; reimbursement for transportation costs if the district did not provide special transportation; reimbursement for the costs of related services and/or services obtained via related service authorizations (RSAs); reimbursement for attorneys' fees, and any other relief deemed appropriate by the IHO (id. at pp. 6-7).[5]

B. Impartial Hearing Officer Decision

On January 22, 2016, an impartial hearing convened and concluded after one day of hearing (Tr. pp. 1-50). In a January 29, 2016 decision, the IHO denied the parents' request for tuition reimbursement (see IHO Decision at pp. 7-11).[6] Initially, the IHO determined that the district's failure to conduct a speech-language evaluation for the student resulted in a denial of a FAPE for the 2015-16 school year because, without such an evaluation, the district "could not address the student's special needs and provide a FAPE" (id. at p. 8). The IHO then considered the appropriateness of the parents' unilateral placement of the student at Stephen Gaynor and determined that the parents did not meet their burden to establish that Stephen Gaynor was an appropriate unilateral placement in the least restrictive environment (LRE) for the student (id. at pp. 10-11). Regarding equitable considerations, the IHO noted that, in a January 2015 social history update, the parent requested SETTS for the student, but in a January 2016 affidavit, she indicated that she informed the January 2015 CSE that SETTS was not appropriate for the student (id.). Next, the IHO found the following forms of requested relief "abandoned" because the parents' counsel provided no information or testimony to support it: (1) cost of evaluations; (2) door-to-door special transportation; (3) reimbursement for transportation; and (4) reimbursement for related services and/or RSAs (id. at p. 11). Lastly, the IHO ordered the district to conduct a speech-language evaluation within 20 days of the IHO's decision and convene a CSE meeting within 15 days after the speech-language evaluation was completed (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that they failed to meet their burden to prove that Stephen Gaynor was an appropriate unilateral placement for the student for the 2015-16 school year. The parents argue that the district did not offer the student a FAPE. They assert that the district failed to meet its burden of proving the appropriateness of the program recommended by the January 2015 CSE and that the district also failed to reconvene the CSE after it received the parents' July 2015 letter requesting a new meeting to review the parents' privately obtained evaluations. The parents further assert that Stephen Gaynor was an appropriate unilateral placement for the student and that it did not violate LRE requirements because the student would not have benefited from being in a general education setting and required a special class in order to make progress. The parents posit that the student made progress at Stephen Gaynor. The parents further argue that the student is entitled to door-to-door special transportation. Finally, the parents

[5] As one District Court has explained, an RSA permits a parent "to contract with an outside therapist to schedule [related service] session[s]—not during school hours—at the [district's] expense" (S.E. v. New York City Dep't of Educ., 113 F. Supp. 3d 695, 702 [S.D.N.Y. 2015]).

[6] The IHO Decision is incorrectly dated January 29, 2015 (IHO Decision at p. 12).

argue that equitable considerations weigh in favor of their requested relief because they participated during the January 2015 CSE meeting and provided timely notice to the district of their intention to unilaterally place the student at Stephen Gaynor. As relief, the parents request reimbursement for the costs of the student's tuition at Stephen Gaynor for the 2015-16 school year and door-to-door special transportation to and from Stephen Gaynor.

In an answer and cross-appeal, the district responds to the parents' petition by admitting and denying the parents' assertions and arguing that the IHO correctly determined that Stephen Gaynor was not an appropriate placement for the student for the 2015-16 school year. The district further asserts that the IHO correctly denied the parents' request for door-to-door special transportation. In its cross-appeal, the district argues that the IHO incorrectly found that the district failed to offer the student a FAPE for the 2015-16 school year. More specifically, the district asserts that the IHO erred in finding that the district's failure to conduct a speech-language evaluation for the student resulted in a denial of a FAPE. The district argues that the January 2015 CSE had sufficient evaluative information to recommend an appropriate program for the student. Additionally, the district argues that the CSE's recommendation of a general education classroom with SETSS four periods per week for ELA was appropriate for the student. The district attaches a document as additional evidence to its answer and cross-appeal.

In an answer to the district's cross-appeal, the parents respond to the district's allegations with general admissions and denials, asserting that there is no evidence in the hearing record demonstrating that the CSE possessed sufficient evaluative data or that the student's speech-language needs were addressed in the January 2015 IEP. The parents also contend that the student needed a specialized school in order to make progress and that the parents' claims regarding the student's assigned public school for the 2015-16 school year are limited to the student's lack of progress while attending the public school during the prior school year and are therefore not speculative.[7] The parents attach two documents to their answer to the cross-appeal as additional evidence to support their claims regarding the student's need for special education transportation.

In a reply, the district indicates that it does not object to the consideration of the parents' additional documentary evidence; however, the district asserts that it should only be considered for the limited purpose of rendering a decision with respect to the parents' claims regarding door-to-door special transportation to and from Stephen Gaynor for the 2015-16 school year.

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

[7] To the extent the parents do not raise arguments regarding issues not reached by the IHO, they have effectively waived their right to have these issues considered on review by not identifying them with specificity in either the petition or the answer to cross-appeal. Some issues that were referenced in the due process complaint notice that the IHO did not issue findings on, and which are not raised on appeal, include allegations that: (1) the January 2015 CSE meeting was held prematurely; (2) the CSE was not duly constituted and predetermined its recommendation; (3) the CSE failed to conduct a classroom observation of the student; and (4) the CSE failed to provide the parents with a copy of the January 2015 IEP during or immediately after the CSE meeting as well as information about "the proposed classroom placement" (see Parent Ex. A at pp. 3-4).

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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

465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Preliminary Matters - Additional Documentary Evidence

Both the district and the parent have included additional documentary evidence in their pleadings for consideration on appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

The district's answer and cross-appeal includes a February 2016 speech-language evaluation report conducted by the district pursuant to the IHO's order (Answer Ex. 1). While the February 2016 speech-language evaluation report is probative of the fact that the district complied with the IHO's order, neither party disputes this on appeal. Additionally, the evaluation report is not probative of the sufficiency of the evaluative information available to the January 2015 CSE. The sufficiency of evaluative information is determined based on the information available to the CSE (see e.g., J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013][holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]). Accordingly, while the report could not have been offered at the time of the impartial hearing, it is not necessary to render a decision in this matter; as such, I decline to accept the additional evidence proffered by the district.

Along with their answer to the district's cross-appeal, the parents submitted two exhibits which include meeting minutes from a March 2016 CSE meeting and an April 2016 special transportation form. The parents offer this additional evidence in support of their position that the student is entitled to special transportation. Although these documents post-date the impartial hearing, they are not necessary in order to render a decision. Additionally, they are not relevant as they only relate to the time period after completion of the hearing and do not identify any of the factors or considerations that are taken into account in determining a student's need for special transportation. Accordingly, I decline to accept the additional evidence proffered by the parents.

B. Request to Reconvene

For the reasons that follow, the evidence in the hearing record supports a conclusion that the district significantly impeded the parents' right to participate in the development of the student's IEP by failing to reconvene the CSE in response to the parents' requests.

In addition to a district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter, the United States Department of Education indicated that parents

may request a CSE meeting at any time and that, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). Although neither the IDEA nor State regulations address the type or amount of information that a district can ask a parent to provide prior to granting a parental request for a CSE meeting (see 20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[e]-[g]), the U.S. Department of Education's Office of Special Education has opined that "[i]n general, . . . such requests for information would need to be reasonable based on the individual student's circumstances" (Letter to Anonymous, 112 LRP 52263 [OSEP 2012]). A district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In the instant case, the CSE convened on January 15, 2015 to develop the student's IEP for the remainder of the 2014-15 school year, as well as for the beginning of the 2015-16 school year (see Dist. Ex. 1). The January 2015 CSE considered an October 2014 neuropsychological evaluation report, a December 2014 teacher report, a December 2014 OT evaluation report, an undated speech-language report, a January 2015 social history and a January 2015 classroom observation report (Dist. Exs. 1 at pp. 1-3; 12 at p. 1; see Dist. Exs. 2; 5- 8; 14). After reviewing the evaluative material, the January 2015 CSE recommended a general education setting with SETTS and related services (Dist. Ex. 1 at p. 14).

By letter to the district dated July 22, 2015, the parents requested that the CSE reconvene in order to consider the parents' two privately-obtained evaluations, including an "Academic Re-Evaluation" and classroom observation (Parent Ex. D). In a subsequent letter dated August 25, 2015, the parents referenced their July 2015 letter and reiterated their previous request for the CSE to reconvene (Parent Ex. E). Additionally, the parents indicated that at the end of the 2014-15 school year, the student was "below standards" in math and reading areas and thus the recommended program was not able to meet the student's unique needs (id.). The CSE did not subsequently reconvene and there is no written notice from the district indicating a decision not to reconvene the CSE in the hearing record. Accordingly, the district violated the IDEA by failing to either reconvene the CSE in response to the parents' request or responding with written notice stating the reasons why the district did believed it was not necessary to reconvene the CSE (see Application of the Dep't of Educ., Appeal No. 12-128; Application of a Student with a Disability, Appeal No. 13-172; cf. Application of a Student with a Disability, Appeal No. 12-071 [finding no violation where the parents stated only that they were "willing to meet" with the CSE to discuss their concerns]). By failing to even acknowledge the parents' concerns the district undermined the "cooperative process" between parents and districts that the Supreme Court has held constitutes the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5] [stating Congress' finding that the education of students with disabilities can be improved by "strengthening the role and responsibility of parents and ensuring that families of such children at school and at home"]). Thus, the district's failure to respond to the parents' request to convene, where the parents submitted specific evaluative information for the CSE's consideration and raised concerns regarding the student's progress under

the January 2015 IEP, significantly impeded the parents' ability to participate in the decision-making process regarding the student's placement and thereby denied the student a FAPE (20 U.S.C. § 1415[f][3][E][ii][II]; 34 CFR 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]).

The district cross-appeals from the IHO's determination that the January 2015 CSE lacked sufficient evaluative information regarding the student due to the CSE not conducting or reviewing a speech-language evaluation. The sole relief awarded by the IHO was a direction that the district conduct a speech-language evaluation and that the CSE convene to review the evaluation (IHO Decision at p. 11). The parties' pleadings confirm that the district conducted a speech-language evaluation after the issuance of the IHO's decision and that the CSE convened to develop a program recommendation for the student after the conclusion of the evaluation. Considering that the district has complied with the relief ordered by the IHO, and thus resolved the dispute regarding the lack of a speech-language evaluation going forward, and as I have already determined that the student was denied a FAPE based on the district's failure to convene the CSE at the parents' request prior to the start of the 2015-16 school year, the issue raised in the district's cross-appeal is no longer "real and live" and is "academic" and, therefore, moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]).[8] Thus, the district's cross-appeal is dismissed.

C. Special Transportation

The parents also assert that the IHO erred in failing to address the issue of special transportation for the student. The parents maintain that the student requires door-to-door special transportation to and from Stephen Gaynor.

Initially, although the parents alleged in the due process complaint notice that the district failed to provide the student with suitable transportation (Parent Ex. A at p. 5), on appeal the parents did not specifically challenge the January 2015 CSE's decision not to include special transportation on the student's January 2015 IEP, and are requesting door to door transportation to and from Stephen Gaynor. The district asserts that the January 2015 CSE determined that the student did not require special transportation and further contends that the evidence in the hearing record does not demonstrate a need for special transportation.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a

[8] Additionally, the parents have not requested additional or compensatory relief on appeal for the period that the January 2015 IEP was implemented. If the parents had sought additional relief, it would be necessary to address the district's cross-appeal as it is generally accepted that a claim for compensatory education or additional services presents a live controversy (Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *15 [E.D.N.Y. Oct. 30, 2008]; see Lesesne v. Dist. of Columbia, 447 F.3d 828, 833 [D.C. Cir. 2006]; Lillbask, 397 F.3d at 89-90; Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 17-18 [1st Cir. 2003]; Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774 [8th Cir. 2001]; Fullmore v. Dist of Columbia, 40 F. Supp. 3d 174, 178-79 [D.D.C. 2014]).

disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]).

The State Education Department has indicated that a CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that an IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1375 [11th Cir. 1997]; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]). When reviewing the transportation provisions made for a student by a district, the relevant question is whether the transportation arrangements are appropriate to meet the student's needs (Application of a Child with a Disability, Appeal No. 03-054).

In this case, although the parent and the student's teacher at Stephen Gaynor executed affidavits stating that the student needs door to door special transportation due to her age, attention, and difficulties with reading (Parent Ex. I at p. 1; L at p. 3), there is no indication in the hearing record as to the student's need for special transportation during the 2014-15 school year or any indication that special transportation was requested at the January 2015 CSE meeting. Additionally, there is no evidence in the hearing record as to how the student was transported to and from the public school each day during the 2014-15 school year. Accordingly, the hearing record does not support a finding that the district denied the student a FAPE due to the lack of provision for special transportation in the January 2015 IEP. However, this does not constitute a determination regarding the student's entitlement to transportation as available to regular education students or suitable transportation as available to students attending nonpublic schools "for the purpose of receiving services or programs similar to special education programs recommended" by the CSE (see Educ. Law 3635; 4402[4][[d]). If the district has not done so already, it should consider transportation of the student to Stephen Gaynor in accordance with the above.[9]

D. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2015-16 school year, the next inquiry is whether the parents' unilateral placement of the student at Stephen Gaynor for the 2015-16 school year was appropriate. The IHO found that the parents did not meet

[9] Although it does not factor into my decision, the additional documentation provided by the parents with their reply indicate that the CSE met in March 2016 and agreed to provide the student with special transportation as a part of the March 2016 IEP (Reply Exs. 1; 2).

their burden of proving that Stephen Gaynor addressed the student's speech-language needs and that Stephen Gaynor was not appropriate because it was not the student's LRE (IHO Decision at pp. 9-11). The parents seek to overturn the IHO's decision on these issues and a review of the evidence in the hearing record supports the parents' arguments and further supports finding that Stephen Gaynor was an appropriate unilateral placement for the 2015-16 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 develop its own IEP for the student (Carter, 510 U.S. at 13-14). 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 at 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 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 instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; 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).

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).

1. The Student's Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, whether the student's unilateral placement at Stephen Gaynor was appropriate for the 2015-16 school year.

As noted above, the student exhibited weaknesses in expressive and receptive language, academics and social/emotional functioning (Dist. Ex. 2 at pp. 6, 8-9, 14). A neuropsychological evaluation report, obtained by the parents in October 2014, provided detailed information regarding the student's cognitive functioning, memory, language processing, attention, executive functioning, sensorimotor and visual-motor skills, and academic achievement (see Dist. Ex. 2). In addition, the evaluation included an assessment of the student's social/emotional functioning and behavior (id. at p. 8).

The evaluating psychologist reported that the student's full scale IQ fell within the "[a]verage range" as measured by the Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV), as did all of her composite scores (Dist. Ex. 2 at pp. 3, 8, 11). However, the psychologist noted significant variability among the student's subtest scores, a factor which potentially placed the student at risk for learning disabilities (id. at p. 3). Regarding academics, the psychologist reported that as measured by the Wechsler Individual Achievement Test- Third Edition (WIAT-III) the student's composite scores for reading, writing and math were significantly below expectations given the student's cognitive ability (id. at pp. 9, 13). The psychologist further reported that the majority of the student's subtest scores were below grade level expectations (id.). The psychologist concluded that the significant discrepancy between the student's ability and achievement was another indicator of a learning disability (id. at p. 6).

According to the psychologist, the student's reading skills were variable; the student was able to identify letters and their sounds, but was unable to rhyme words (Dist. Ex. 2 at p. 6). The psychologist characterized the student's decoding skills as "very weak," reported that the student read slowly and made many errors when reading aloud and opined that the student's reading comprehension suffered due to her weak decoding skills (id. at pp. 6-7). The psychologist stated that the student's weaknesses were typical of a student with dyslexia and noted that the student's reading was impacted by weaknesses in language processing (id. at p. 7). The psychologist indicated that the student's writing skills were also inconsistent (id.). Specifically, the psychologist noted that despite adequate alphabet fluency and spelling the student demonstrated weak writing skills at the sentence level (id. at pp. 7, 9, 13). With respect to math, the psychologist reported that the student's problem solving skills were at grade level, but that she had to count on her fingers to solve addition problems and was unable to perform subtraction problems (id. at p. 7). During testing, the student was unable to identify two coins or tell time to the nearest quarter hour (id.).

The psychologist noted a significant amount of variability in the student's language processing abilities and reported that the student performed better on comprehension tasks which included visual cues (Dist. Ex. 2 at p. 5). According to the psychologist, the student's performance on phonological processing was scattered; however, the student was generally able to isolate individual word sounds with picture cues (id. at pp. 5, 12). The student encountered some difficulty putting together and taking apart phonemes to make words (id. at p. 5). The psychologist reported that the student's performance on measures of verbal fluency were consistently weak (id. at pp. 5, 7).

As part of the October 2014 neuropsychological evaluation, the psychologist conducted several behavioral assessments which resulted in significant scores in the areas of attention, hyperactive and impulsive behavior, learning problems, and oppositional defiant type behaviors (Dist. Ex. 2 at p. 9). The evaluator noted that during testing the student required breaks, frequent reminders to check her work, follow-up questioning for clarification, and directions repeated and reworded (id. at p. 3). In addition, based on her observations during testing, the psychologist noted that the student had a variable attention span and a tendency to be distracted (id. at p. 6). She was not found to have significant problems with executive functioning (id.). The psychologist opined that the student's attention difficulties "may" be affecting her learning as she "may not be focused and missing out on class instruction" (id. at p. 9). The psychologist reported that the student was not rated as having peer problems at school as she was social and enjoyed interacting with classmates (id. at p. 8). The psychologist also reported that the student's sensorimotor and visual-motor skills were within expectations (id. at p. 6). According to the psychologist, the student's responses on projective measures conveyed a sense of rejection (id. at p. 8). The psychologist concluded that the student's difficulties warranted diagnoses of language disorder, attention deficit/hyperactivity disorder, combined type, mild, and specific learning disorder with impairment in reading (dyslexia), moderate (id. at p. 9).

Based on the student's performance during the October 2014 neuropsychological assessment, the psychologist concluded that the student needed an integrated classroom to better manage her dyslexia and ADHD, a smaller class size to minimize distractions, and multisensory techniques to address the student's learning difficulties, as well as more individualized instruction which could be provided in an integrated class by virtue of the lower student to teacher ratio (Dist. Ex. 2 at p. 9). The psychologist recommended that the student receive multisensory instruction, such as Orton-Gillingham or Wilson, five times per week to address her dyslexia (id.). In addition, the psychologist recommended that the student receive speech-language therapy and OT in accordance with her speech therapists' and OT evaluator's recommendations and continued support from a guidance counselor for peer-related issues (id. at pp. 9-10). Additionally, the psychologist opined that the student required extra time on tests, testing in a separate location, directions repeated, and breaks as needed (id.).

The hearing record also includes a December 14, 2014 district teacher report from the student's first grade teacher that indicated the student tended to lose focus in a large group, and either '"zone[d] out'" or became distracted by peers (Dist. Ex. 5 at p. 1). The teacher noted, however, that the student was '"pretty focused" during individual work, that she worked best in small groups and that she liked working in a quiet, private space (id. at pp. 1-2). According to the teacher, the student was friendly, rarely engaged in conflict, but sometimes imitated the poor behavior of others (id. at p. 2). The teacher reported that the student showed more motivation after

positive feedback (id.). The student's first grade teacher noted that the student's decoding was at a level "D" (benchmark = F), the student "sometimes" forgot the details from her reading, and the student's writing and oral expression were disorganized (id. at p. 3). Regarding the student's mathematics, the teacher indicated that the student's calculations were on grade level but that the student demonstrated difficulty selecting the appropriate operations when solving word problems (id.).

An undated speech and language report reflected in the student's January 2015 IEP identified a number of the student's language needs including phoneme blending, segmenting of multisyllabic words, expressing thoughts in an organized manner, and communicating in complete sentences (Dist. Ex. 14; see Dist. Ex. 1 at p. 2). The report also stated that the student had difficulty with correct pronoun usage, narrative retelling, answering questions, and retelling events while noting that the student benefited from repetition and visualization (id.).

2. Specially Designed Instruction

The hearing record indicates that Stephen Gaynor is an independent ungraded pre-kindergarten, elementary and middle school that serves approximately 350 students with language-based learning disabilities (Parent Ex. J at pp. 1-2). The lower school provides instruction to approximately 200 students ranging from ages 6 to 11 years old (id. at p. 2). According to the co-director of the lower school, Stephen Gaynor uses special education techniques including explicit, sequential, direct, and multisensory instruction (id.). Stephen Gaynor's language curriculum is also programmatic and infused throughout the program (id. at p. 3). Additionally, the faculty at Stephen Gaynor are trained in the Orton-Gillingham program, which is a structured, sequential, systematic approach to reading that focuses on multi-sensory instruction with a strong emphasis on phonics and morphology (id.). The lower school classes all have 11 students with one head teacher and one assistant teacher (id.at p. 2). For homeroom classes, the students are grouped based on academic needs and learning styles (id.). With respect to reading and mathematics the students are broken out into smaller groups of five to six based on ability so the students in each group are on similar levels (id.).

The hearing record further indicates that the student's schedule at Stephen Gaynor includes academic classes in reading, math, literacy, language, and science (Parent Ex. H). In addition, the co-director of the lower school at Stephen Gaynor testified that the student's homeroom consists of 11 students with one teacher and one teaching assistant (Parent Ex. J at p. 2). The co-director further indicated that for reading, the student is in a group of five students with one teacher and for math a group of four students with one teacher (id.).[10] Additionally, the student receives pull out speech-language therapy in a dyad once a week, push in speech-language therapy twice a week for language development, and the speech-language pathologist also co-teaches the student's literacy class (id. at p. 3). Individual OT is provided once a week to facilitate the student's handwriting, core strength, and endurance, and as part of the student's homeroom class, she receives "push in" OT twice a week to address fine motor skills and handwriting (id. at pp. 2-3).

[10] The student's teacher at Stephen Gaynor testified that the student's math group consisted of five students (Tr. p. 30).

To address the student's difficulty with decoding and phonemic awareness, the student's reading teacher at Stephen Gaynor testified that the student is in a reading group of five where the student receives explicit instruction for every combination of letters and words (Parent Ex. L at p. 1). The student's reading teacher also noted that sounds are broken down, teaching only a few sounds per week in order to move slowly enough for the student to make progress (id.). The reading teacher provides the student with scaffolding and repetition to support progress in reading (id. at pp. 2-3). To address the student's writing needs the teacher indicated that Stephen Gaynor uses a writing program with the student that is highly structured and breaks down information into small manageable chunks and uses repetition and consistent language (id. at p. 3). In addition, the teacher talks with the student about expanding sentences, uses visualization, wh-questions, modeling, and examples to further support the student's expressive writing skills (id. at p. 2). The teacher also breaks down questions and directions and provides the student with repetition due to the student's receptive language difficulties (id. at pp. 2-3). The hearing record reflects that the student received 55 minutes of reading instruction each day based on the Orton-Gillingham program (Tr. p. 30; Parent Ex. H). With respect to the student's difficulties in math, the school provided the student with a math program that is highly structured, highly repetitive, and uses manipulatives (Dist. Ex. L at p. 2).

To address the student's speech-language needs, the student's speech-language pathologist at Stephen Gaynor testified that she provides the student with repetition, visual support, and category practice (Parent Ex. K at p. 2). In addition, the speech-language pathologist further testified that she teaches the student categories to increase her vocabulary, provides sound cues and leading questions to address the student's word finding problems, and provides story builder charts to expand narrative skills (id.). The speech-language pathologist also indicated she provides the student with temporal cues to work on visually sequencing events as well as scaffolding and wh-questions to support story telling (id.). The speech-language pathologist testified that she pushes into the literacy class twice a week to address language needs during reading and writing activities for all the students in the class, sees the student once a week when she teaches a whole class language lesson in the classroom, and provides services to the student once a week in a dyad (Tr. pp. 43-48).

To manage the student's attending needs the student's teacher at Stephen Gaynor indicated that she provides the student with movement breaks, non-verbal cues, and encourages eye contact, opining that the student has benefitted from such strategies throughout the year (Parent Ex. L at p. 2). To support self-expression and organization of feelings, the teacher testified that she provides the student with scaffolding, sentence starters, and options (Tr. pp. 19-20).

Given the student's above described needs, and the description provided in the hearing record of the instructional supports and the methodologies employed at Stephen Gaynor, the hearing record supports finding that Stephen Gaynor provided the student with specially designed instruction to address her identified academic, social/emotional, and speech-language needs.

3. Progress

With respect to the student's progress at Stephen Gaynor during the 2015-16 school year, 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]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed App'x 80, 82 [2d Cir. Dec. 26, 2012]; Frank G., 459 F.3d at 364). 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]).

The student's teacher at Stephen Gaynor indicated that, as a result of breaking down information and the provision of explicit instruction, the student made progress in reading (Parent Ex. L at p. 2). Specifically, the teacher noted that at the beginning of the school year the student knew many sounds but could not read a consonant-vowel-consonant word, however, by January 2016, the student read all vowel sounds, and L and R blends (id.). Additionally, in mathematics, the student progressed from a mid-kindergarten level to an early first grade level, developed number sense up to ten and learned to do simple addition under ten (id.). With respect to writing, the student's teacher also indicated that, at the beginning of the year, the student could not generate a complete sentence and had particular difficulty identifying a subject (id.). However, by January 2016, the student generated complete sentences that included a subject with minimal support (id.).

With respect to the student's attention to task, the teacher indicated that at the beginning of the school year the student needed a break every period; however, in January 2016 the student was able to remain focused for half a day before needing a break (Parent Ex. L at p. 2). In addition, the teacher reported that the student's focus had improved (id.). The teacher also noted that the student made progress in her receptive language, particularly with following directions (id. at p. 3). Regarding social/emotional development, the teacher reported that in September 2015 when the student was frustrated, tired, or not feeling well, she would remove herself from the group, and not participate or speak (id.). The teacher noted that she worked with the student to help her express herself when she needed assistance or became "frustrated" (id.). As a result, the teacher reported that the student demonstrated progress by asking for help when she needed clarification or when something was "bothering" her, rather than removing herself from the group or not speaking at all (id.).

The student's speech-language pathologist described the student's demonstrated speech-language progress (Parent Ex. K at p. 1). Specifically, the speech-language pathologist indicated the student followed multistep directions with fewer repetitions (id.). Further, the speech-language pathologist indicated the student showed improved listening by "more accurately" following directions involving increased steps relative to her performance at the beginning of the school year (id.). The student's speech-language pathologist also noted that the student was speaking "a lot", responded to questions without prompting, increased her vocabulary, and made more effort towards developing language (id. at p. 2).

Based on the foregoing, the hearing record demonstrates that the student made progress at Stephen Gaynor during, which is considered as a factor indicating that Stephen Gaynor is an appropriate placement for the student for the 2015-16 school year.

4. Least Restrictive Environment

The restrictiveness of the parents' unilateral placement is a factor that may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty,

315 F.3d at 26-27; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at *19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]). However, parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 837 [2d. Cir. 2014] ["while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; M.S., 231 F.3d at 105; D.D-S., 506 Fed. App'x at 82).

As discussed above, Stephen Gaynor is an independent school that serves approximately 350 students with language-based learning disabilities (Parent Ex. J at pp. 1-2). Although the student would not receive any opportunity for interaction with typically developing peers at Stephen Gaynor, the fact that it is more restrictive than the district public school does not on its own render it inappropriate (C.L., 744 F.3d at 837 [noting that "private schools [for students with disabilities] are necessarily restrictive as they do not educate disabled and nondisabled children together, and may be more restrictive than the public school from which the child was removed"]. In the instant case, the student attended the district public school subsequent to the January 2015 CSE meeting until the end of the 2014-15 school year in a general education setting (see Parent Ex. E). By letters to the district dated July and August 2015, the parents requested that the CSE reconvene in order to consider the parents' two privately-obtained evaluations and expressed their concerns that the district's recommended program was not able to meet the student's needs (Parent Exs. D; E). However, the district failed to respond to the parents' request to reconvene the CSE and thus ignored their concerns regarding the placement of the student in a general education setting. Considering the parents' limited options regarding the student's program for the 2015-16 school year, the parents' decision to place the student at Stephen Gaynor in a special education classroom was not unreasonable (C.L., 744 F.3d at 837 [noting that "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in *Burlington.*"]).

Even though Stephen Gaynor was a more restrictive placement than the recommended public school placement, in consideration of the totality of the circumstances, including that Stephen Gaynor provided the student with specially designed instruction to address her identified academic, social/emotional, and speech-language needs, that the student was demonstrating progress at Stephen Gaynor, and that the district failed to reconvene the CSE to consider the parents' concerns regarding the student's lack of progress in the recommended public school placement, LRE considerations do not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at Stephen Gaynor for the 2015-16 school year was appropriate (C.L., 744 F.3d at 837; Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

E. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2015-16 school year and that Stephen Gaynor constituted an appropriate unilateral 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; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary

equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, and any fraud or collusion on the part of the parent or private school]; see Frank G., 459 F.3d at 363-64; Voluntown, 226 F.3d at 69 n.9).

In the instant case, the parents participated and cooperated in the January 2015 CSE meeting (Dist. Ex. 1 at pp. 14, 16). In addition, after the student attended the district program for the remainder of the 2014-15 school year, the parents sent timely and sufficient notice of their intent to unilaterally place the student at Stephen Gaynor (Dist. Ex. E). Furthermore, on more than one occasion, the parents communicated their concerns regarding the IEP and the assigned public school site, and, further, requested that the CSE reconvene to discuss their private evaluations, to which the district did not respond (Parent Exs. D; E). To the extent that the IHO found that the student's mother's testimony regarding the January 2015 CSE may have been in conflict with statements she made when interviewed as part of a social history update (IHO Decision at p. 11), I do not find this a sufficient factor to reduce tuition reimbursement based on equitable considerations. Based on the foregoing, equitable considerations support the parents' request for tuition reimbursement.

VII. Conclusion

Based on the hearing record the district denied the student a FAPE for the 2015-16 school year, Stephen Gaynor was an appropriate unilateral placement for the student, and equitable considerations weigh in favor of the parents' request for relief.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated January 29, 2016, is modified by reversing that portion which determined that the Stephen Gaynor was not an appropriate unilateral placement for the student; and,

IT IS FURTHER ORDERED that, upon proof of payment, the district shall reimburse the parents for the costs of the student's tuition at Stephen Gaynor for the 2015-16 school year.

Dated: **Albany, New York**
May 20, 2016

STEVEN KROLAK
STATE REVIEW OFFICER