The University of the State of New York

The State Education Department
State Review Officer
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No. 12-027

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Lauren A. Baum, P.C., attorneys for petitioner, Lauren A. Baum, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) reimburse her for the costs of her daughter's tuition at the Aaron School for the 2009-10 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student initially received special education and related services through the Committee on Preschool Special Education (CPSE) due to her difficulties with language and socialization (Tr. pp. 909-10; see Dist. Ex. 4 at pp. 2-3, 5, 7). She has received diagnoses of a mixed receptive-expressive language disorder; auditory processing disorder; mild attention deficit hyperactivity disorder (ADHD), inattentive type; and a mathematics disorder (Dist. Ex. 4 at p. 15). At the time of the impartial hearing, the student was attending the Aaron School, where she has continuously attended since kindergarten (Tr. p. 911; see Dist. Ex. 4 at pp. 3-5).

On January 20, 2009, the CSE met for the student's annual review and to develop an IEP for the 2009-10 school year (fifth grade) (Dist. Ex. 3 at pp. 1-2). The CSE recommended that the student continue to be eligible for special education and related services as a student with a speech

or language impairment (id. at p. 1; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). In addition, the CSE recommended that the student be placed in a 12:1+1 special class in a community school and receive related services of speech-language therapy (Dist. Ex. 3 at p. 13). The CSE determined that the student was not eligible for a 12-month school year, but recommended that she receive speech-language therapy for the months of July and August 2009 (id. at pp. 1, 12).

In a "Notice of Recommended Deferred Placement" dated January 21, 2009, the district informed the parent that although the student had "the right to immediate placement" in the recommended program, the CSE believed that "it may be in the best interest" of the student to defer changing the student's educational placement until August 15, 2009 (Dist. Ex. 7). The parent responded by handwritten note on the January 21, 2009 notice stating that she did not have "enough information about the recommended program to make a determination as to its appropriateness" at that time (Parent Ex. V).

In March 2009, the parent signed a contract enrolling the student in the Aaron School for the 2009-10 school year (Parent Ex. L).

In a letter dated July 22, 2009, the district summarized the student's recommended special education program and related services, and identified the particular school to which the district assigned the student to attend (Dist. Ex. 8). In a response dated July 30, 2009, the parent acknowledged receipt of the district's letter (Parent Ex. U). The parent indicated that she could not visit the public school site as it was closed for summer break, and requested that the district answer numerous questions about the assigned school so that she could determine if it would be an appropriate setting for the student (id.). The parent stated that if the district was unable to provide her the information necessary to make an informed decision, she would visit the program in early September and advise the district of her decision at that time (id. at p. 2). She further stated that in the interim, she would send the student to the Aaron School and seek reimbursement for that placement until such time that she could assess the particular public school site and determine whether it was appropriate (id.).

In a letter to the district dated August 21, 2009, the parent indicated that the district had not responded to her July 2009 request for information regarding the particular public school site (Parent Ex. T). She stated that she intended to visit the assigned school in September and would advise the district of her response to its offer at that time (id.). The parent again advised the district that in the interim, she would send the student to the Aaron School and seek reimbursement from the district (id.).

The student's mother visited the public school site in September 2009 (Tr. p. 919). Following her visit, she advised the district in a letter dated September 30, 2009 that she found the assigned school to be inappropriate for the student (Parent Ex. S). The parent rejected the offered public school site for the 2009-10 school year and notified the district that she would continue the student's enrollment in the Aaron School and her "attorney would seek reimbursement on [her] behalf" (id. at p. 3).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated November 1, 2010, relating to the 2009-10 school year in which she alleged that the district denied the student a free appropriate

public education (FAPE) based on procedural and substantive violations (Parent Ex. A).[1] The parent alleged that the January 2009 IEP was "invalid" and there was not an appropriate placement offer (id. at pp. 1, 2). The parent asserted that the student required multisensory instruction in a small class with minimal distractions and adequate levels of individual support and attention from "appropriately trained teachers and staff" in a small, structured educational environment in order to make measurable academic and social/emotional progress and avoid regression (id. at pp. 1-2). The parent also asserted that the student required interaction with similarly functioning and appropriate peers, and appropriate related services (id. at p. 2). Regarding the composition of the CSE, the parent alleged that no regular education teacher was present at the meeting (id.).

The parent made allegations regarding the IEP, including, among other things, that it did not fully and accurately reflect the student's present levels of educational performance and needs; that it inaccurately described the student's cognitive functioning and failed to indicate what testing was relied on and when it occurred; that it failed to mention the student's severely compromised working memory and processing speed, executive functioning difficulties, and difficulties with organization; that it failed to provide special education and related services tailored to meet the student's unique needs and was not reasonably calculated to provide meaningful educational benefits and avoid regression; that the management needs and related supports were not sufficient; that the student's speech-language therapy services should have been coordinated and balanced between push-in, pull-out, and after-school sessions; that there was an insufficient quantity of appropriate, measureable annual goals and short-term objectives; that there were no transition supports to facilitate the student's moving from her current school setting to the assigned school; and that there was no FM unit recommended on the IEP to address the student's auditory processing difficulties (Parent Ex. A at pp. 2-3). The parent also raised several allegations regarding the assigned school and assigned class (id. at pp. 3-4).

The parent stated that the student had been unilaterally placed at the Aaron School and requested that the district fund tuition at that placement, as well as reimbursement for related services including after school speech-language therapy from an Aaron School provider and transportation (Parent Ex. A at pp. 4-5).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 21, 2011 and concluded on November 3, 2011, after ten days of proceedings (Tr. pp. 1-1035). In a decision dated December 29, 2011, the IHO determined that the district had offered the student a FAPE for the 2009-10 school year (IHO Decision at pp. 10-11). Specifically, the IHO disagreed with the parent's assertion that the IEP was procedurally inadequate, finding that the CSE properly considered the results of the student's most recent evaluations and her educational needs (id. at p. 10). She also determined that the CSE carefully weighed all the information before it in making recommendations and developing the

[1] The parent previously sought a due process hearing related to the 2008-09 school year and on May 25, 2010, an IHO issued a decision finding that the district failed to offer the student a FAPE for the 2008-09 school year, and ordering it to reimburse the parent for the tuition costs of the Aaron School for that year (Parent Ex. B). The district appealed the IHO's decision and an SRO dismissed the appeal as untimely (Dist. Ex. C; see Application of the Dep't of Educ., Appeal No. 10-058).

IEP, and that all CSE meeting participants were given an opportunity to meaningfully contribute to the discussion regarding the student's needs (id.).

The IHO also disagreed with the parent's assertion that the IEP was substantively inadequate, finding that the IEP provided for individualized and differentiated instruction with sufficient support to permit the student to benefit from instruction (IHO Decision at p. 10). The IHO also determined that the IEP accurately described the student's current levels of performance and needs, and addressed them in the recommended services, and in the goals, all of which she determined to be measurable (id.).

Regarding the district's assigned school and assigned class, the IHO determined that it was appropriate and would have met the student's needs, including her related services mandated in the IEP (IHO Decision at pp. 10-11). Having determined that the district offered the student a FAPE for the 2009-10 school year, the IHO declined to address whether the Aaron School was an appropriate placement for the student and whether equitable considerations favored an award of tuition reimbursement (id. at p. 11).

IV. Appeal for State-Level Review

This appeal by the parent ensued. The parent alleges that that the IHO improperly found that the district provided the student with a FAPE, and that the IHO improperly failed to reach the issues of whether the Aaron School was appropriate for the student and whether the equities supported the parent's request for tuition reimbursement. Regarding the provision of a FAPE, the parent alleges, among other things, that the student's IEP was invalid, there was not an appropriate placement offer, and the January 2009 CSE failed to consider sufficient, appropriate evaluative and documentary material to justify its recommendations. In support of her position, the parent alleges many specific arguments previously delineated in her due process complaint notice. The parent also alleges that the Aaron School was appropriate for the student and that the equities favor her request for reimbursement.[2]

In an answer, the district responded to the parent's petition, denying many of the allegations made by the parent, and alleging that the student's IEP was appropriate, the assigned school was appropriate, and the CSE considered recent and relevant documentation in developing the student's IEP.[3] The district also alleges that the Aaron School was not appropriate for the student because it was not the student's least restrictive environment (LRE) and it did not provide the student with the necessary related services. The district alleges that the equities favor the district as the parent never intended to place the student in a public school and that the parent failed to give proper notice of her intent to enroll the student at the Aaron School.

[2] I required the parties to demonstrate whether or not the district had already provided the relief sought by the parent in this proceeding by virtue of providing the parent with reimbursement pursuant to the pendency (stay put) requirements.

[3] Although the parent raised an issue regarding CSE composition in her due process complaint notice, she did not raise this issue in her petition, nor did the IHO make a finding on this issue; therefore, I will not address this contention in this decision. Moreover, although the parent raised a claim for reimbursement for after school speech-language therapy in her due process complaint notice, she abandoned this claim during the impartial hearing (Tr. pp. 928, 939-41).

The parent submitted a reply and alleges that the district waived its argument that the parent did not provide proper notice of intent to place the student at the Aaron School because the district did not raise this defense in its response to the parent's due process complaint notice or at the impartial hearing. The parent further alleges that even if the district's argument regarding notice is considered on appeal, the equities still favor the parent.

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 v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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; 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. Dep't 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 enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][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]). 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; 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 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. Scope of Review

Regarding the parent's allegation that the CSE process for the development of the student's goals was improper, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party

agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see R.B. v. Dep't of Educ. of The City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8); Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the petition, I find that the parent raises several issues that were not raised in the due process complaint notice or addressed by the impartial hearing officer in her decision. Specifically, the parent did not raise the issues of whether the CSE copied the student's goals from the prior school year's IEP, the lack of discussion and review of the goals at the January 2009 CSE meeting, and the drafting of the goals after the CSE meeting.[4] As such issues are improperly raised for the first time on appeal, I will not address them in this decision.[5]

B. Appropriateness of January 2009 IEP

1. Sufficiency of Evaluative Information

Turning to parent's allegations regarding justification of the CSE's recommendations, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20

[4] Even if I were to address these allegations made by the parent on appeal, I would find that the CSE process in this case regarding the development of the goals was appropriate and was not a procedural violation that lead to a loss of educational opportunity to the student or seriously infringed on the parent's opportunity to participate in the CSE meeting (see Bougades v. Pine Plains Cent. Sch. Dist., 2009 WL 2603110, at *6 [S.D.N.Y. Aug. 25, 2009]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388-89 [S.D.N.Y. 2009]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010] [explaining parental presence is not required during actual goal drafting and that drafting goals as a result of a CSE meeting did not result in a denial of a FAPE]); see also Mahoney v. Carlsbad Unified Sch. Dist., 2011 WL 1594547, at *2 [9th Cir. Apr. 28, 2011] [declining to find a denial of a FAPE where the goals and objectives were pre-drafted, but not provided to the parents]).

[5] "By requiring parties to raise all issues at the lowest administrative level, the IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. v. Bedford Cent. Sch. Dist. 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the parent asserts that it was unclear what documents were reviewed at the January 2009 CSE meeting, or that the documents were available to the student's Aaron School teacher who participated in the CSE meeting by telephone.[6] The hearing record shows that the January 2009 CSE was composed of a district representative who was also a special education teacher, a district school psychologist, the student's mother, and an additional parent member (Tr. pp. 23-24; Dist. Ex. 3 at p. 2). The student's special education teacher from the Aaron School participated in the meeting by telephone (Dist. Ex. 3 at p. 2). The school psychologist testified that in developing the student's January 2009 IEP, the CSE considered a November 2007 neuropsychological assessment of the student, a November 2008 Aaron School "fall report," and a November 2008 classroom observation conducted by the district's school psychologist (Tr. pp. 27-32, 72; Dist. Exs. 4; 5; 6).

With respect to the information that was available to the CSE, the school psychologist testified that she reviewed the November 2007 neuropsychological assessment prior to the CSE meeting (Tr. pp. 28, 68). She testified that she believed that a copy of the neuropsychological assessment was provided to the additional parent member during the meeting; however, she could not say with certainty whether the student's Aaron School teacher had a copy of the neuropsychological assessment (Tr. pp. 71-72). The school psychologist noted that the parent had provided the district with the neuropsychological assessment and that she did not know whether the parent had provided it to the Aaron School teacher as well (id.). According to the school psychologist, the January 2009 CSE discussed the November 2007 neuropsychological assessment "generally, but not specifically;" and she noted that it was "not a brand new report" (Tr. p. 29). The school psychologist testified that the CSE did not discuss the specific testing or summary recommendations found in the neuropsychological assessment (Tr. p. 72). The student's mother denied that the November 2007 neuropsychological assessment was discussed by the CSE (Tr. p. 913).

[6] Although not at issue in this case, the IDEA procedures require that prior written notice be given to the parents, which includes a description of the actions proposed or refused by the district together with a description of each evaluation procedure, assessment, record, or report that was used as a basis for the proposed or refused action (see 34 CFR 300.503; 8 NYCRR 200.5[a]; see, e.g., http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html). Neither party included such prior written notice with the hearing record in this case. Assuming conformity with the regulations, prior written notice should have been sent within a reasonable time after the January 2009 CSE meeting and under the circumstances of this case, it would have been reasonable to send it at some time before the November 2010 due process complaint notice was filed.

Next, the district's school psychologist testified that the CSE did not discuss the November 2008 fall report from the Aaron School verbatim, but rather "broadly" discussed the student's functioning (Tr. p. 73). She noted that the teacher who wrote the report was present at the CSE meeting and discussed the student's classroom performance (id.). As for the classroom observation, the school psychologist testified that she believed a copy of the observation was provided to the additional parent member during the CSE meeting (Tr. p. 71). She did not know if the student's Aaron School teacher had a copy of the classroom observation, but noted that the teacher was present when the observation took place and the information contained in the observation was reviewed at the CSE meeting (Tr. pp. 71-72). The parent testified that she believed that the student's Aaron School teacher did not have documents other than her own report at the time of the CSE meeting (Tr. p. 914).[7]

The parent also alleges that contrary to the IHO's finding, the CSE failed to adequately consider sufficient, current evaluative and documentary material to support its recommendations in the IEP. Specifically, the parent asserts that the CSE failed to review a social history or medical documentation and that, other than the classroom observation of the student, no other assessments were conducted in preparation for the meeting nor did the team discuss the need to obtain additional testing or evaluative data.

A CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S., 10 F.3d at 89-90; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

In this case, in her November 2007 report, the private neuropsychologist who evaluated the student provided a detailed overview of the student's academic history and prior testing (Dist. Ex. 4 at pp. 2-7). Additionally, she conducted an assessment of the student's general intellectual functioning; academic achievement; language; visual/spatial, perceptual, and constructional skills; memory; executive functioning; attention and concentration; and sensory and motor functioning (id. at pp. 8-14). The neuropsychologist reported that the student attained the following standard scores (and percentile ranks) on the Wechsler Intellectual Scales for Children – Fourth Edition

[7] I note that State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]). Such regulation, effective December 2005, does not incorporate the requirements for telephonic participation that were set forth in a June 1992 State Education Department field memo entitled, "The Use of Teleconferencing to Ensure Participation in Meetings to Develop the Individualized Education Program (I.E.P.)" which provided, among other things, that individuals who participate by telephone at CSE meetings must have access to the same material as other participants (see Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of a Child with a Disability, Appeal No. 05-129). In determining whether there has been a denial of a FAPE due to a procedural violation, every member of a body such as a CSE need not read a document in order for the body to collectively consider the document (T.S. v. Board of Educ. of Town of Ridgefield, 10 F.3d 87, 89 [2d Cir. 1993]); however, I remind the district that it should ensure that all members of the CSE have access to the documents discussed at a CSE meeting.

(WISC-IV) indices: verbal comprehension 65 (1st percentile), perceptual reasoning 98 (45th percentile), working memory 71 (3rd percentile), processing speed 73 (4th percentile) (id. at p. 14). She noted that the indices scores yielded a full scale IQ score of 72 (3rd percentile) that fell in the borderline range (id.). According to the neuropsychologist, the student's reasoning abilities on verbal tasks were generally in the extremely low range, while her nonverbal reasoning abilities were significantly higher, in the average range (id.). The neuropsychologist reported that the student's WISC-IV scores were slightly lower than those obtained during previous testing; however, she opined that the student's then-current scores did not reflect her full intellectual potential as her performance was lowered due to her auditory processing disorder (id.). The neuropsychologist reported that the student's significant weaknesses in attention, concentration, mental control, and short-term auditory memory impeded her performance in a variety of academic areas (id.). She further reported that the student's weakness in the speed of processing routine information made the task of comprehending novel information more time consuming and difficult for the student (id.). The neuropsychologist characterized the student's perceptual reasoning, including visual-spatial reasoning and perceptual-organizational skills, as a strength (id.).

The neuropsychologist noted that the student exhibited a "long-standing" auditory processing disorder and a mixed receptive-expressive language disorder, both of which interfered with the student's ability to comprehend, particularly when concepts were advanced or a series of questions was asked (Dist. Ex. 4 at p. 15). She indicated that "material" needed to be stated slowly and clearly since the student frequently had difficulty understanding what was being said (id.). According to the neuropsychologist, the student exhibited difficulty with oromotor sequencing, speeded naming, and phonological processing skills due primarily to her difficulty with expressive language skills (id.). Additionally, the student demonstrated significant problems with writing fluency, punctuation, and capitalization (id.). The neuropsychologist reported that the student had significant difficulties with mathematics and met the criteria for a mathematics disorder (id.).

According to the neuropsychologist, the student had a history of ADHD, was intermittently fidgety during testing, had intermittent difficulty concentrating, and demonstrated problems with executive functioning (Dist. Ex. 4 at p. 15). The neuropsychologist concluded that the student met the criteria for mild ADHD, inattentive type (id.).

The November 2008 classroom observation considered by the January 2009 CSE included observations of the student during snack and science in her classroom at the Aaron School (Dist. Ex. 6 at p. 1). The observation indicated that the class consisted of 13 students with two teachers (id.). In general, the observation indicated that the student was able to comply with teacher directives given in a group setting, was at times off task in group activities and needed teacher prompting to refocus, and was able to work cooperatively with a peer (id. at pp. 1-2).

The CSE also considered the November 2008 Aaron School fall report that detailed the student's functioning with respect to homeroom, reading, math, writing, language arts, science, social studies, art, physical education, library, and computers (Dist. Ex. 5). The report included an October 2008 speech-language therapy plan (id. at p. 7). The report stated that the student tended to lose focus during academic times due to internal and external stimuli, and that she was easily distracted (id. at p. 1). The report indicated that the student's teachers provided her with frequent redirection using reminders, on the spot questioning, prompts, and visual cues, and that the student benefited from previewing material before it was discussed in the classroom (id.). According to the report, the student became easily frustrated and struggled to ask for help when

tasks became too challenging (id.). The student's classroom goals included asking for help when necessary, improving her ability to follow multi-step directions, attending to classroom activities during large and small instruction, participating more often during class discussions with less prompting, and developing her pragmatic language skills (id. at pp. 1-2). The report stated that the student's reading instruction would focus on literal and abstract comprehension, as well as the development of proper fluency and intonation when reading aloud, and building the student's vocabulary (id. at p. 2).

At the Aaron School the student's reading goals included expanding her reading comprehension skills by answering "WH" questions, enhancing understanding of abstract references in text, reading with expression and fluency, and applying strategies to self-monitor for comprehension (Dist. Ex. 5 at p. 2). With respect to math, the report indicated that the student's math group was working on improving their skills in place value, addition/subtraction, elapsed time, counting money, and word problems (id.). The report described the student as "very enthusiastic about learning new skills," but noted that computation and problem solving were "quite challenging" for the student and that she learned best through repetition, teacher modeling, visual aids, and guided practice enabling her to scaffold skills (id.). The student's math goals included improving her automaticity of addition and subtraction facts under 20, utilizing visual aids without teacher prompting, and increasing her ability to retain concepts learned through repetition of class and homework assignments (id.). The Aaron School report indicated that the student's class employed "Project Read," which was described as a "sequential program" that began with the grammatical foundations of a simple sentence and moved to more complex structures using expanders and describers (id.). The report included writing goals for the student related to using various sentence types in her writing; using correct punctuation; and writing a paragraph with a topic sentence, three supporting details, and a concluding sentence (id. at p. 3). Additionally, the report include language arts goals related to writing a story using a narrative chain and with a clear beginning, middle, and ending (id.).

The speech-language therapy plan included in the November 2008 Aaron School report indicated that the student received three 30-minute speech-language therapy sessions per week, one in the classroom and two with a peer (Dist. Ex. 5 at p. 7). The student also participated in a weekly social skills group within the classroom (id.). The speech-language therapy plan included goals related to improving the student's ability to execute spoken and written language instructions, as well as improving auditory processing skills, expressive language skills, and oral and written narrative skills (id. at p. 8). However, the speech-language therapy plan did not include a description of the student's speech-language abilities or identify her speech-language needs. The student's speech-language pathologist at the Aaron School testified that the school did not conduct any formalized testing, and that students went to "another facility" for formal or standardized testing (Tr. p. 436). However, she indicated that she was "'privy'" to the testing results (id.).[8]

The parent testified that the CSE did not discuss a speech-language evaluation conducted of the student at the January 2009 CSE meeting (Tr. p. 913). The school psychologist

[8] Based on her testimony, it appears that the Aaron School speech-language pathologist relied on the results of standardized testing obtained by a private evaluator in January 2007 when developing her October 2008 speech-language therapy plan for the student (see Tr. pp. 436-39). These are the same test results that the school psychologist referenced as being reviewed by the January 2009 CSE (Tr. pp. 65-66).

acknowledged that the CSE did not review a speech-language evaluation of the student, but noted that the November 2007 neuropsychological assessment included a review of previous assessments of the student's speech and language abilities (Tr. pp. 65-66; see Dist. Ex. 4 at p. 7). The school psychologist further testified that the reviewed assessment was approximately two years old at the time of the January 2009 CSE meeting, and that she did not believe that the CSE had access to the original speech-language evaluation report (Tr. pp. 65-67). Furthermore, the school psychologist indicated that the CSE did not have contact with the student's speech-language pathologist from the Aaron School and the IEP does not reflect that a speech-language pathologist participated in the January 2009 CSE meeting (Tr. p. 85; see Dist. Ex. 3 at p. 2).

It is undisputed by the parties that speech and language is a substantial area of deficit for the student and that she has significant needs in this area. Given that the most recent formal assessment of the student's speech-language skills was two years old at the time of the January 2009 CSE meeting, coupled with the lack of then-current information regarding the student's speech-language needs and lack of participation by a speech-language pathologist at the CSE meeting, I find that the CSE lacked sufficient evaluative information regarding the student's speech-language abilities and needs to develop an IEP for the student that accurately reflected her special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *5 [N.D.N.Y. Sept. 29, 2010]; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

Additionally, the parent alleges that the January 2009 IEP did not provide for an FM unit or similar system, which the student required to address her auditory processing needs. While the student's speech-language therapist and teacher from the Aaron School testified that use of an FM unit or Phonic Ear was necessary to address the student's auditory processing deficits, the student's need for an FM unit was not noted in the November 2008 Aaron School Fall report, including the speech-language therapy plan, nor was it recommended by the neuropsychologist who evaluated the student in November 2007 (see Dist. Exs. 4; 5).

The student's Aaron School speech-language pathologist reported that the student previously underwent an evaluation which determined she had auditory processing difficulties (Tr. p. 412). The speech-language pathologist testified that she did not know if a determination was ever made as to whether the student needed an FM system (Tr. p. 412). The speech-language pathologist testified that despite making excellent progress with respect to auditory processing, the student had difficulties with it (Tr. p. 380). She testified that it was necessary for the student's teacher to have a voice amplification system in the classroom, where the student received primarily language-based information, but not in specialty area classes (Tr. pp. 381-82, 413). She also testified that the student did not require that her teacher use a voice amplification system in specialty area classes because they were not "academic language-loaded type subjects" (Tr. pp. 459-62).

In her November 2007 assessment, the neuropsychologist who evaluated the student noted that the student had mild difficulty distinguishing between similar sounding words (Dist. Ex. 4 at p. 11). The neuropsychologist stated that tests for Auditory Double Simultaneous Stimulation were conducted on two occasions (id.). She reported that on the first occasion, the student did not respond to simulation in her left ear, but noted that this could have been attributed to the fact that

the student had a bad cold (id.). The neuropsychologist reported that when the test was re-administered, the student still showed some slight slowing in responses for the left ear, which prompted the neuropsychologist to recommend a consult with an audiologist for audiological testing (Tr. pp. 504-06, 509; Dist. Ex. 4 at pp. 11, 15). There is no evidence that the district completed audiological testing or if it was conducted, that the CSE considered the results of such testing. I find that the recommended audiological testing was necessary to determine the student's audiological needs given her known difficulty with auditory processing, and that such information would have aided the CSE in making an appropriate recommendation for the student to address that need.

In view of the foregoing evidence, I find that the January 2009 CSE did not consider adequate, current information with respect to the student's functioning and her significant areas of deficit and, as further described below, this was not without consequence insofar as the student's IEP did not thereafter accurately reflect the student's needs and was not reasonably calculated to enable the student to receive educational benefits.

2. Present Levels of Performance

The parent alleges that the January 2009 IEP failed to adequately describe the student's then-current levels of performance including her deficits in memory, speech and language, processing speed, executive functioning, and organization.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). While the present levels of performance on the student's January 2009 IEP reflect some of the information found in the documents considered by the CSE (compare Dist. Ex. 3 at pp. 3-4, with Dist. Ex. 4, and Dist. Ex. 5), I find that overall they do not adequately reflect the student's special education needs.

The IEP indicated that the student presented with strengths in perceptual reasoning, but also attending deficits and significant auditory processing challenges (Dist. Ex. 3 at p. 3). The IEP listed the student's instructional levels, based on teacher observation, as follows: decoding 3.2, reading comprehension 2.6, writing 3.6, computation 3.0, and problem solving 2.6 (id.). According to the IEP, the student was easily distracted during academic tasks due to internal and external stimuli and frustrated easily when tasks were too challenging (id. at p. 4). The IEP noted that the student enjoyed peer interactions and had developed relationships with her classmates (id. at p. 5). However, the IEP further noted that the student's expressive and receptive language delays may impact her social functioning (id. at p. 4).

Although the IEP included instructional levels for reading and math, some of which were almost two years below the student's grade level, the IEP did not describe any of the student's academic needs (Dist. Ex. 3 at pp. 3-4). Notably, the neuropsychologist who evaluated the student in November 2007 diagnosed the student with a mathematics disorder, citing scores on the math subtests of the Woodcock-Johnson III Tests of Achievement (W-J III ACH) that fell below the 4th percentile and in the "borderline" and "impaired" ranges (Tr. pp. 507, 520; Dist. Ex. 4 at pp. 10, 18). Additionally, the November 2008 Aaron School fall report indicated that math computation and problem solving were "quite challenging" for the student (Dist. Ex. 5 at p. 2). Yet, other than

reporting an instructional level, the present levels of performance are silent as to the student's math needs (see Dist. Ex. 3 at pp. 3-4).

Moreover, despite the student's history of speech-language difficulties, diagnoses of a mixed receptive-expressive language disorder and an auditory processing disorder, and classification as a student with a speech or language impairment, the present levels of performance in the IEP provide little insight into the student's speech-language needs (see Dist. Ex. 3 at pp. 3-4). Rather, the present levels include broad statements regarding the student's functioning in this area, indicating that the student has "significant auditory processing challenges" and verbal comprehension skills "within the borderline range," and noting that the student's "expressive and receptive language delays may impact her social functioning" (id.).

Based on the foregoing, I find that the present levels of performance contained on the student's January 2009 IEP did not adequately reflect her special education needs at the time the IEP was developed.

3. Annual Goals

The parent further alleges that the January 2009 IEP failed to include appropriate and measurable annual goals directly addressing the student's needs. The parent asserts that the annual goals failed to address all of the student's areas of need, most notably pragmatic language, and that they are not objectively measurable as written.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

A review of the January 2009 IEP shows that it included annual goals and short-term objectives targeting the student's deficits in decoding, reading comprehension, math computation and problem solving, writing, executing spoken and written language instructions, auditory processing, expressive language, and oral and written narrative language skills (Dist. Ex. 3 at pp. 6-10). Consistent with the parent's claim, the IEP does not include annual goals targeting the student's pragmatic language deficits (see Dist. Ex. 3). Although the school psychologist testified that the CSE reviewed the student's prior (March 2008) IEP when developing the annual goals and short-term objectives, she acknowledged that the committee did not discuss the pragmatic language goals contained in the March 2008 IEP within the context of the January 2009 annual review (Tr. pp. 86-87; see Parent Ex. P at p. 9). I note that the student's speech-language pathologist from the Aaron School testified that she required pragmatic language and social skills goals for the 2009-10 school year (Tr. p. 385; see Parent Ex. I at p. 2). I find that the January 2009 IEP failed to address the student's pragmatic language needs and should have included goals to address her deficits in this area.

Moreover, with respect to the parent's claim that the IEP goals are not objectively measurable as written, I note that some of the annual goals contained broad criteria for measuring progress; however, other goals contained none (see Dist. Ex. 3 at pp. 6-10). Although in some instances the corresponding short-term objectives contained information sufficient to allow a teacher or therapist to measure the student's progress (e.g. multiply a 2-digit number by a 1-digit number without regrouping with 80% accuracy), in other instances the short-term objectives themselves are broad or somewhat more difficult to measure (e.g. use and generate organizational strategies 80% of the time) (Dist. Ex. 3 at pp. 7, 9).

Given the totality of the circumstances presented in this case involving the formulation of an educational program for the student's 2009-10 school year and, specifically, the lack of sufficient evaluative information available to the CSE regarding the student's speech-language abilities and needs, the absence of audiological testing, the inadequate present levels of performance contained in the IEP, and the lack of annual goals necessary to address the student's pragmatic language and social skills needs, I find that the district failed to offer the student a FAPE for the 2009-10 school year.

C. Parent's Unilateral Placement

I will next consider whether the parent met her burden of proving that the Aaron School was an appropriate placement for the student during the 2009-10 school year. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though

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

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

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

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

In this case, the district asserts that the Aaron School was not appropriate for the student for the 2009-10 school year because it did not provide sufficient related services the student needed, specifically the student's mandated speech-language services. The district also asserts that the Aaron School was not appropriate as it did not constitute the LRE for the student. The hearing record reflects that the level of services actually provided by the Aaron School to address the student's speech-language deficits during the 2009-10 school year was similar, but not identical to the level of services described in the student's January 2009 IEP. The January 2009 CSE recommended that the student receive speech-language therapy four times per week—two individual 30-minute sessions per week and two 30-minute sessions per week in a dyad (Dist Ex. 3 at p. 13). The student's speech-language pathologist at the Aaron School testified that during the 2009-10 school year, she saw the student two days per week, one time per week in a dyad in her office and one day per week either in her office or in the classroom during writing time (Tr. pp. 369, 410; Parent Ex. J at p. 1). The speech-language pathologist reported that the sessions were 30 minutes long (Tr. p. 369).[9] In addition to receiving direct speech-language therapy services, the hearing record indicates that the student also participated in a weekly 45-minute counselor directed social skills group and a weekly 30-minute life skills group co-led by the classroom occupational and speech-language therapists (Parent Ex. J at p. 1). The speech-language pathologist's 2009-10 therapy notes indicated that she worked with the student on social thinking,

[9] The speech-language pathologist also reported that she saw the student after school once per week individually for 60 minutes per session (Tr. pp. 370, 410). She indicated that she did not provide the after school session as an Aaron School employee, rather as an independent contractor (Tr. pp. 415-17; see Tr. p. 865). She described the after school speech-language therapy session as "supplemental" and reported that it was requested by the parent (Tr. pp. 418-19).

vocabulary, ambiguous language, problem solving, listening/reading comprehension, receptive and expressive language, and visualizing (Parent Ex. OO).

One of the of the factors to consider in determining if a private school is appropriate when considering the totality of the circumstances is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient" (Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]). The essence of the district's challenge to the Aaron School is that the parent failed to obtain sufficient speech-language services to address the student's significant deficits in this area (Ans. ¶ 50). However, whether the speech-language services are as "crucial" as the district suggests takes the issue back to a fundamental problem with the hearing record in this case – the lack of evaluative information regarding the student's speech-language needs. During the CSE process, a parent can request that the district conduct an evaluation or that the CSE consider any privately obtained evaluative information (34 CFR 300.303[a][2], 300.502[c]; see 8 NYCRR 200.4[b][[4], 200.5[g][1]), but neither of these circumstances are present with regard to the student's speech-language deficits in this case. One Court in this jurisdiction has addressed whether a unilateral placement was appropriate under circumstances in which the student's needs remain unclear (A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 206 [S.D.N.Y. 2010]).[10] In A.D., the Court discussed how New York has placed the burden of production and persuasion on parents to establish that the unilateral placement was appropriate (id. at p. 206). However, if there is a lack of required evaluative information and the IEP is deficient as a result, the Court held that when analyzing whether the unilateral placement addresses the student's needs the district, rather than the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance (id. at p. 207; see Application of the Bd. of Educ., Appeal No. 08-056).

In this case, I am concerned with rendering any finding that the level of speech-language services at the Aaron School were appropriate to address the student's unique needs when neither party offered reliable evidence regarding the student's deficits in this area.[11] This is particularly so where there is significant similarity between the speech-language services offered by the public school and private school programs. With regard to the deficiency in evaluative information regarding the student's auditory processing, I note that a Phonic Ear FM system was employed in some of the student's classrooms at the Aaron School, which may be helpful to the student

[10] In New York, related services such as speech-language therapy are included in the definition of special education (Educ. Law § 4401[2][k]; 8 NYCRR 200.1[ww], [qq]).

[11] In my view, the appropriate way for an administrative hearing officer to render a determination based upon an adequate hearing record when there is insufficient information, would be to exercise the authority to order the district to evaluate the student's speech-language deficits in order to assist the IHO or SRO in reaching a determination (34 CFR 300.502[d]; see 8 NYCRR 200.5[g][2], [j][3][viii]) It is far better to decide whether a unilateral placement meets the unique needs of a student based upon some reliable evaluative information regarding a student's needs. However, with regard to this student, this particular issue has languished in litigation for several years and there is little value in ordering an evaluation at this juncture because it would not reliably inform an adjudicator of the student's needs as they once existed in the increasingly distant past.

depending on the extent of the student's deficits (Tr. pp. 380-82, 412, 459, 600, 648, 847, 926; Parent Ex. F at p. 1).

Notably, the A.D. Court also examined other factors including the student's progress in order to reach a determination of whether the unilateral placement was appropriate (A.D., 690 F. Supp. 2d at 208-14). While evidence of progress at a private school does not itself establish that the private placement is appropriate, it is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115 citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27). In this case, the hearing record shows that the student made some academic gains during the 2009-10 school year, while attending the Aaron School. A May 2010 "Spring Report" completed by the student's Aaron School teachers indicated that the student demonstrated progress in reading, including decoding multi-syllabic words and reading more fluently; math, including computation skills; and writing, including sentence and paragraph composition (Tr. p. 613; Parent Ex. H at pp. 1, 2, 9, 10). The student also demonstrated improved language skills (Tr. pp. 373-76). In a May 2010 progress report, the student's Aaron School speech-language pathologist detailed the student's progress with respect to oral and written language (Parent Ex. J). Notably the speech-language pathologist reported that the student had shown improvement in her use of comprehension strategies within therapy sessions including identifying key words, visualizing, finding context clues, verbal rehearsal, asking for repetition/clarification, and summarizing (Tr. pp. 373-74; Parent Ex. J at p. 2). According to the speech-language pathologist, the student had improved her independent use of word retrieval strategies (Tr. pp. 374-75; Parent Ex. J at p. 3). She noted that the student's improved use of vocabulary assisted her with language organization and expansion of ideas in both oral and written language (Tr. p. 375; Parent Ex. J at p. 3). The speech-language pathologist further reported improvement in the student's overall use of grammatical forms (Parent Ex. J at p. 3). With respect to ambiguous or abstract language, the speech-language pathologist reported that the student show improved awareness of when information was ambiguous or abstract and when prompted, was able to use strategies or ask for clarification in order to increase her understanding (id.). The speech-language pathologist reported that the student's language organization on written language tasks had improved, as had the student's use of salient details (id. at p. 4). She also noted improvement in the student's pragmatic language skills, specifically the overall quality of her peer interactions and her ability to actively listen to her conversational partner (Tr. pp. 375-76; Parent Ex. J at p. 4). The speech-language pathologist further reported gains in the student's problem solving abilities and understanding of others' perspectives (Parent Ex. J at p. 5). During the due process litigation for the 2008-09 school year, there was some evidence reviewed that suggested the student was able to progress with speech-language therapy services at Aaron School once per week individually and two time per week in a group of two (Parent Ex. B at p. 13), and if there was progress made with similar services in a prior school year, it lends some support that such progress would be likely to continue with similar services.[12]

With regard to the LRE for the student, the Aaron School educational supervisor testified that there were opportunities for mainstreaming at the Aaron School in that the fourth grade had an integrative program with a preparatory school, and beginning in fifth grade the students took an overnight trip where they participated in team building and leadership activities with students

[12] The underlying evidence, a May 2009 speech-language therapy progress report, which apparently "detailed the student's needs and how those needs were being met" was not included in the hearing record in this proceeding (Parent Ex. B at p. 13).

from other schools (Tr. p. 733). However, the student's language arts teacher for the 2009-10 school year testified that there were no mainstreaming opportunities for the student at the Aaron School as it was a "self-contained school" (Tr. pp. 631-32). The student's math teacher testified that to her knowledge, the student was not mainstreamed for anything during the 2009-10 school year (Tr. p. 779). She further testified that mainstreaming would not have been appropriate for the student because the student had difficulty with social interaction and furthermore, she did not believe that the student would have been able to navigate a mainstream setting without support from adults on a regular basis (Tr. pp. 779-81). The student's math teacher confirmed that she had never seen the student interact in a mainstream setting (Tr. pp. 782, 783). Testimony by the student's speech-language pathologist reflects that the student did not have any mainstreaming opportunities with regard to speech-language therapy (Tr. p. 834). The neuropsychologist who evaluated the student in November 2007 testified that the student was not appropriate for any mainstreaming (Tr. p. 550).

While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; 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]; Application of the Dep't of Educ., Appeal No. 10-049; Application of the Dep't of Educ., Appeal No. 10-042; Application of a Child with a Disability, Appeal No. 99-083). The evidence in this case described above supports the conclusion that the student should be placed in a special class setting, a setting that is offered by the Aaron school. I also note that similar to the placement recommendation made by the district, the student was placed in a special class at the Aaron School designated to contain no more than 12 students (Tr. p. 470; Dist. Ex. 3 at p. 1). Based on the foregoing, I find that LRE considerations, in this instance, do not weigh so heavily as to preclude the determination that the parent's unilateral placement of the student at the Aaron School for the 2009-10 school year was appropriate.

Under the circumstances presented above, I decline to hold that the evaluative information in the hearing record is sufficient to support the conclusion that the speech-language services at the Aaron School were designed to address the student's unique needs, but I will adhere to the Court's holding in A.D. that the responsibility for this deficiency lies with the district and not the parent. I am also troubled that the private school services ultimately selected by the parent closely resembled the rejected public school services set forth on the IEP by the district, but this has no relevance to whether the services selected by the parent were appropriate for the student. The evidence described above shows that the Aaron School offered specially designed educational instruction supported by services necessary for her to benefit from instruction for the 2009-10 school year and that as a result, she actually experienced some progress.[13] While the Aaron School may not have maximized the student's interaction with nondisabled peers, that factor does not

[13] It would be difficult to describe this as a circumstance in which a district is being required 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).

preclude the determination that the Aaron School is appropriate in this instance (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

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

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

The district alleges that the equities do not favor an award of reimbursement to the parent because the parent never intended to place the student in a public school. The district also alleges that the parent failed to give proper notice of her intent to enroll the student at the Aaron School. The parent alleges that the district waived this argument because it did not raise it in response to the parent's due process complaint notice or at the impartial hearing but that, even if considered, the equities still favor the parent. State regulation does not require the insertion of affirmative

defenses in the response to the due process complaint notice, nor does it suggest that unasserted defenses will be waived (R.B., 2011 WL 4375694, at *5). Accordingly, the district is not precluded from challenging the equities on the basis of notice.

In this case, the parent signed a contract with the Aaron School for the 2009-10 school year and paid a nonrefundable deposit of $8000 in March 2009 (Parent Exs. K; L at p. 1; N). The parent made three more payments to the Aaron School for the student's 2009-10 tuition in May 2009, August 2009, and January 2010, totaling $35,500, which payments satisfied the total tuition amount of $43,500 due for that school year (Parent Exs. K; L; N at pp. 2-4). At the impartial hearing, the parent testified that she would have accepted a public school placement she believed to be appropriate for the student despite having signed the contract with the Aaron School (Tr. pp. 931-32). I also note that the parent, after receiving notice of the assigned school in the summer while it was closed, sent a letter to the district requesting information about the assigned school and class, followed up when she did not receive a response from the district, and then visited the school in September (Parent Exs. S; T; U). Accordingly, I find that the hearing record does not support a conclusion that the parent never intended to enroll the student in a public school.

While I find that equitable considerations support the parent's request for reimbursement for the reasons stated above, I also note that in her three letters to the district prior to and at the onset of the 2009-10 school year, the parent stated that she would continue the student's enrollment at the Aaron School for that school year and seek reimbursement from the district, but that her requests for information and the issues she raised pertained solely to the assigned school and assigned class rather than to the student's January 2009 IEP (Parent Exs. S at p. 3; T at p. 1; U at p. 2). The parent in this matter did not "put FAPE at issue" for 2009-10 during that school year when the district would have had the opportunity to reconvene the CSE and address any concerns raised by the parent to devise an appropriate plan and determine whether a FAPE could be provided in a public school, but rather the parent waited until the subsequent school year to raise issues pertaining to the student's IEP (see Carmel, 373 F. Supp. 2d at 414-15; Greenland, 358 F.3d at 160; see also Wood, 2010 WL 3907829, at *7 [noting that each year a FAPE is at issue, the parents must comply with the notice requirements and inform the district of their dissatisfaction prior to enrolling the student in a private school and seeking reimbursement]; S.W., 646 F. Supp. 2d at 362-63; Application of a Student with a Disability, Appeal No. 11-103; Application of the Dep't of Educ., Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-099). In a prior decision on appeal rendered by this office regarding this student, Application of a Student with a Disability, Appeal No. 09-080, an SRO declined to dismiss the parent's tuition reimbursement claims on the basis that the Aaron School was a for profit institution. In taking judicial notice of the January 28, 2009 due process complaint notice underlying Application of a Student with a Disability, Appeal No. 09-080, I am troubled by the parent's claims therein that there was inadequate evaluation and inadequate speech-language services offered by the district because there is no evidence that the parent raised her concerns during the 2009-10 school year CSE meeting that was conducted one day later in this case (see Application of a Student with a Disability, Appeal No. 09-080). This is relevant to the parent's cooperativeness in the process; however, I also note that the district had the opportunity to try to address these concerns as well and did not. Having considered the evidence in this case and in my discretion, I find that the parent is entitled to reimbursement of fifty percent of the tuition for the student's enrollment at the Aaron School for the 2009-10 school year.

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE during the 2009-10 school year, that the parent's unilateral placement was reasonably calculated to meet the students educational needs, and that equitable considerations favor an award of reimbursement to the parent of 50 percent of the tuition.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 29, 2011 which found that the district offered the student a FAPE during the 2009-10 school year is reversed; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for 50 percent of the student's tuition costs for the 2009-10 school year at the Aaron School upon the submission of proof of payment to the district.

Dated: **Albany, New York**
April 23, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER