The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-111

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, G. Christopher Harriss, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to issue a Nickerson letter to the parents. 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 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 was initially referred to the Committee on Preschool Special Education (CPSE) for an evaluation due to her reluctance to speak in nursery school (Dist. Ex. 6 at p. 1).[1] She was subsequently found eligible for a special education program and received speech-language therapy, which continued when she entered kindergarten (Tr. p. 217; Parent Ex. G at p. 2; Dist. Ex. 6 at p. 1). The student attended the district public school for grades kindergarten through third (Tr. p. 217; Dist. Ex. 6 at p. 1). The student attended general education classes for kindergarten

[1] The hearing record contains duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both district and parent exhibits were identical. I remind the IHO that it is his responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

and first grade; however, during first grade she received "pull-out" services to assist her with reading and math (Parent Ex. G at p. 2). For second and third grades, the student attended an integrated co-teaching (ICT) class and received speech-language therapy (Parent Ex. G at p. 2; Dist. Ex. 6 at p. 1).[2] During elementary school, the student also received private tutoring and attended a summer reading camp, which were services arranged for by her parents (Parent Ex. G at p. 2; Dist. Ex. 6 at p. 2). The student has received diagnoses of mixed receptive-expressive language disorder, language based reading disorder-"dyslexia," math disorder, and disorder of written expression (Parent Ex. G at p. 11).

In September 2010, the parents sought an independent psychoeducational/neuropsychological (psychoeducational) evaluation to gather information regarding the student's cognitive, attending, and academic skills and for recommendations for academic programs and services that would address the student's needs (Parent Ex. G).[3] In addition, in November 2010, the parents sought a comprehensive assessment of the student's speech and language skills to determine the student's level of functioning in order to aid in educational planning for September 2011 (Dist. Ex. 6 at p. 1). The evaluating speech-language pathologist reported that the parents were concerned about "mounting evidence" that suggested a need for more restrictive educational options and noted that the parents did not believe that the student had made significant progress over the past year (id.).

During the student's third grade, the parents sent multiple correspondences to the district expressing their concerns with the student's educational program, summarizing their understanding of recommendations made for the student by the district's school based support team (SBST), and requesting a CSE meeting (Parent Ex. D at pp. 1-3). In a January 5, 2011 correspondence to the school principal, the parents indicated that the October 2010 psychoeducational evaluation and November 2010 speech and language evaluation were attached to their letter (id. at p. 1).

On March 11, 2011, an occupational therapist for the district conducted a "School Function Evaluation" and declined to recommend the student for occupational therapy (OT), noting that her needs could be met by her current education program and/or support services (Dist. Ex. 4).

The CSE convened on April 7, 2011 to conduct the student's annual review and to develop her IEP for the 2011-12 school year (Parent Ex. C at pp. 1, 11; see Tr. pp. 28-29, 219). The CSE recommended that the student continue to receive special education and related services as a

[2] Although the term ICT was used in the hearing record (Tr. pp. 36, 58, 59, 63, 67, 81-83, 93, 117, 119, 120, 165, 218-220, 222, 224, 232, 235, 236, 239, 245, 248, 250), "collaborative team teaching" (CTT) was occasionally also used (Tr. pp. 7-9, 12, 81, 82). However, for consistency with State regulations, in this decision, I refer to this type of class as an integrated co-teaching or ICT placement (see Tr. p. 82). ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an ICT class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

[3] Although testing for the psychoeducational evaluation took place in September 2010, the exhibit list cites the date of the reporting conference, October 4, 2010, as the date of the exhibit, and for the sake of consistency I will do the same (Parent Ex. G at p. 1).

student with a speech or language impairment and that she be placed in a ten-month ICT class and receive related services of speech-language therapy and counseling (Parent Ex. C at pp. 8, 11).[4] The IEP noted April 8, 2011 as the projected date for commencement of the related services and May 2, 2011 as the projected date for commencement of the special education program (id. at p. 8).

On or about April 28, 2011, the parents signed a payment schedule for the Child School for the 2011-12 school year (Parent Ex. E). On May 11, 2011, the parents made a $2,000 payment to the Child School (Parent Ex. F at p. 1).

In a letter to the school psychologist dated May 12, 2011, the parents informed the CSE that they planned to sign an enrollment contract with the Child School and provide the necessary deposit to reserve a seat for the student for the 2011-12 school year (Dist. Ex. 2). The parents stated that after serious consideration of the April 7, 2011 CSE recommendations that they had concerns that an ICT class would not offer the student the special education supports that she required in order to make educational progress (id.). The parents noted that they believed that the student required a small structured supportive class setting where she could receive individualized attention (id.). In addition, the parents indicated that they were willing to consider any other program or placement recommendations that the CSE offered, but that their letter served to notify the CSE that if an appropriate program/placement was not recommended in a timely matter that they would have no choice but to unilaterally place the student at the Child School and seek tuition reimbursement for the placement at public expense (id.).

In a subsequent letter dated June 20, 2011, the parents advised the district that they had not yet received a final notice of recommendation (FNR) relative to the April 2011 CSE meeting that notified them of the particular public school site to which the student was assigned (Parent Ex. D at p. 4). The parents indicated that they would like to visit the assigned public school site prior to the close of the school year so that they could observe the "actual program/placement" while it was still in session (id.). In addition, the parents informed the district that if it did not offer the student an appropriate program/placement in a timely manner that they would have no alternative but to unilaterally place the student at the Child School and seek tuition reimbursement (id.).[5]

By letter dated August 2011 from the principal of the assigned public school, the parents were purportedly informed of the public school class number and the names of the teachers that were assigned to the student's classroom for the 2011-12 school year (Dist. Ex. 7). The student's mother denied receiving this correspondence (Tr. p. 221).

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[4] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). In its petition, the district notes that, although the parents disputed the student's classification in their due process complaint notice, it did not appear that the student's classification was "currently" in dispute (Pet. ¶ 7; see Parent Ex. A at p. 2). The district asserts that, in his closing statement, the parents' former counsel noted "without objection or argument" that the student was classified as having a speech or language impairment (id.). In their answer, the parents "admit" to this assertion (Ans. ¶ 7) and do not otherwise raise the issue for my review.

[5] According to the parents, the June 20, 2011 letter was returned to them, unclaimed (Parent Ex. D at p. 6). On July 12, 2011, the parents resent the letter to the district and noted that they had still not received an FNR (id.). It appears that on August 9, 2011 this letter may also have been returned to the parents, unclaimed (see Parent Ex. D at p. 8).

In a letter to the district dated August 22, 2011, the parents stated that they had not received a response to their July 12, 2011 letter and advised the district that given the late date and lack of notification from the district they had no choice but to unilaterally place the student at the Child School and seek full tuition reimbursement at public expense (Parent Ex. D at p. 9).

A. Due Process Complaint Notice

By due process complaint notice dated September 9, 2011, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year on both procedural and substantive grounds (Parent Ex. A). The parents alleged, among other things, that: (1) the district engaged in impermissible "predetermination" and denied the parents meaningful participation in developing the student's IEP; (2) the district failed to adequately assess and evaluate the student and failed to consider the independent evaluations provided by the parents; (3) the goals and objectives listed in the April 2011 IEP were not sufficient to meet the student's needs; (4) the program recommendations made by the April 2011 CSE were inappropriate for the student; (5) the CSE did not properly consider the programs available within the continuum of placement options as evidenced by the CSE's failure to consider a nonpublic school placement; and (6) the district failed to issue an FNR for the 2011-12 school year (Parent Ex. A at pp. 2-4). As a result, the parents asserted that the district failed to have a "valid IEP and appropriate placement" in place prior to the start of the school year, resulting in a failure to offer the student a FAPE (id. at p. 3). In addition, the parents alleged that the student's placement at the Child School was appropriate and that equities favored the parents (id. at pp. 4-5). As relief, the parents requested that an IHO award them, among other things, the costs of the student's tuition at the Child School for the 2011-12 school year, the costs of the independent evaluations, and direct the district to provide the student with transportation to and from the Child School (id. at p. 5).

B. Impartial Hearing Officer Decision

On November 28, 2011, the parties proceeded to an impartial hearing, which after three days of proceedings, concluded on March 6, 2012 (Tr. pp. 1-255). On February 3, 2012, the IHO issued an Interim Order to address the parents' motion for a summary finding that the district failed to make "a timely offer of placement" to the student for the 2011-12 school year (IHO Interim Order at p. 2).[6] The IHO considered legal memoranda submitted by the attorneys for both parties (IHO Exs. I; II). The IHO found that, although both parties agreed that the district did not send the parents an FNR, a question of fact remained as to whether or not the district communicated a "placement offer" to the parents, and, if so, whether the district's failure to provide an FNR was a procedural violation that rose to such a level that the student was denied a FAPE (IHO Interim Order at pp. 2-3).

On April 23, 2012, the IHO issued a final decision, determining that "the [district] failed to present evidence that a placement offer was made for the student for the year in question" and, therefore, that the student was denied a FAPE (IHO Decision at p. 4). The IHO noted that a district witness who served as the district representative of the April 2011 CSE testified that she could not

[6] The February 3, 2012 Interim Order is mislabeled as an Interim Order on Pendency.

recall whether or not the CSE discussed the anticipated public school site for the student (id.).[7] The IHO found the class assignment letter from the principal of the assigned public school insufficient to constitute an offer of an assigned class, stating that the letter "does not constitute an offer of placement that would meet the demands of the statute, nor put the parents on notice of their child's placement . . . ." (id. at p. 5; see Dist. Ex. 7). Having determined that the district failed to offer the student a FAPE, the IHO directed the district to issue the parents a Nickerson letter,[8] finding no need to address the appropriateness of the parents' unilateral private school placement (IHO Decision at p. 5).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year. Specifically, the district asserts that it sustained its burden to establish that it offered the student a FAPE and that it made a timely offer of a school placement. With respect to the assigned public school, while the district concedes that it did not send an FNR to the parents, it contends that both the district and the parents understood that, for the 2011-12 school year, the student was expected to re-enroll in the school that she had attended the previous years and that the student's IEP was to be implemented at such school. The district also asserts that the August 2011 letter from the principal of the assigned public school notified the parents of the specific ICT class that the student would be attending for the 2011-12 school year. According to the district, the August 2011 letter was sent in the normal course of business and, therefore, entitled to a presumption of mailing and receipt, notwithstanding the student's mother's testimony of nonreceipt.

In its petition, the district also asserts allegations regarding issues raised in the parents' due process complaint notice that were not decided by the IHO, including that: the ICT class was not predetermined for the student, noting evidence in the hearing record that the CSE considered two other program options; the parents participated in the CSE meeting; the April 2011 CSE considered sufficient, current evaluative information; and the April 2011 IEP contained an appropriate program recommendation in the least restrictive environment (LRE).

In addition, the district asserts that the IHO erred in finding the student eligible to receive a Nickerson letter. The district avers that the IHO exceeded his jurisdiction by issuing a Nickerson letter and, moreover, that an ICT class is not a "special class" pursuant to the State continuum of

[7] The individual who served as the district representative at the April 7, 2011 CSE meeting testified that she was employed by the district as an IEP teacher, a reading recovery teacher, and a SETSS teacher (Tr. pp. 26, 31). In his decision, the IHO refers to the district representative as the IEP teacher (IHO Decision at p. 4).

[8] A "Nickerson letter" is a remedy for a systemic denial of FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

placement options that would make the student eligible for a Nickerson letter. Finally, the district asserts that the IHO erred by not determining whether the Child School was appropriate for the student before finding her entitled to a Nickerson letter. The district also alleges that the Child School is an inappropriate placement for the student because it is too restrictive. Turning to the equities, the district alleges that the parents did not seriously intend to enroll the student at the public school. The district seeks an order reversing the IHO's decision in its entirety.

In their answer, the parents respond to the district's allegations and assert additional arguments in support of their request to uphold the IHO's decision. Specifically, the parents assert that the IHO correctly found that the district had not provided notice of the assigned public school for the 2011-12 school year. According to the parents, the hearing record does not support any of the district's various "theories" about how it allegedly notified the parents of the assigned public school. With regard to the public school principal's August 2011 letter, the parents allege that the district failed to describe practices and procedures that would warrant application of a presumption of mailing and receipt.

In response to the district's argument that the IHO lacked jurisdiction to award a Nickerson letter, the parents allege that the IHO was not technically ordering the district to provide a Nickerson letter, but rather, was issuing a declaration that the district had failed to provide such a letter, as required by the consent order reached in a class action suit. The parents also argue that the IHO was correct in awarding the Nickerson letter without requiring a demonstration of the appropriateness of the Child School. If it is found that a Nickerson letter was an improper remedy, the parents alternatively argue that an award of tuition reimbursement is appropriate because the district failed to offer the student a FAPE, the Child School was an appropriate placement, and equities favored the parents. In their answer, the parents also elaborate on various allegations made in the due process complaint notice, which were not discussed in the IHO's decision.

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., 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; H.C. ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869 [2d Cir. June 24, 2013]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; 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., 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], aff'd, 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, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

It is first necessary to determine the scope of the issues before me. In this case, the IHO found a denial of a FAPE solely on the ground that no notice of the assigned school was offered and declined to address the other contentions that the parents had raised in their due process complaint notice (IHO Decision; see Parent Ex. A). In the event the IHO's narrow decision is overturned, as explained more fully below, both parties assert alternative arguments in their respective pleadings and seek additional findings regarding the parents' request to be reimbursed for the costs of the student's tuition at the Child School for the 2011-12 school year.

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). An

IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In its petition, the district states that: it offered the student a FAPE for the 2011-12 school year (Pet. ¶¶ 6, 37-38, 57); the April 2011 IEP contained an appropriate program recommendation in the LRE (Pet. ¶ 37); the April 2011 CSE considered sufficient, current evaluative information (Pet. ¶ 37); and the parents participated in the CSE meeting (Pet. ¶ 17). The petition also states that the parents failed to demonstrate that the unilateral placement at the Child School was appropriate (Pet. ¶¶ 6, 58-59) and that the equities disfavored the parents (Pet. ¶¶ 6, 60, 62). In the "wherefore" clause of the petition, the district requests a finding that it offered the Student a FAPE for the 2011-12 school year, or, in the alternative, a finding that the parents failed to demonstrate the appropriateness of the Child School or that equitable considerations favor them (Pet. at p. 20).

Thus, a review of the petition reveals that the district has preemptively addressed many of the parents' alternative claims that were unaddressed by the IHO (see F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *14 [S.D.N.Y. Feb. 14, 2013]; D.N. v. New York City Dep't of Educ., 2012 WL 6101918, at *5, n.6 [S.D.N.Y. Dec. 10, 2012] [noting that the district had requested in the petition that the SRO dismiss on the merits any claims that the IHO had not addressed]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 361 [S.D.N.Y. 2009] [holding that the SRO properly considered the issue of the parent's notice to the district of unilateral placement where the district placed equitable considerations before the SRO and notice is a component of such an analysis]).

Although a review of the parents' verified answer indicates that they did not cross-appeal from the IHO's decision,[9] I find that many of the assertions in the answer are responsive to allegations that were asserted in the district's petition.[10] For example, the parents counter the district's contention that it offered the student a FAPE, arguing that the program recommendation set forth in the April 2011 IEP, and specifically the ICT class, was inappropriate; the goals in the April 2011 IEP did not appropriately address the student's needs; and that the district failed to ensure procedural requirements, guaranteeing parental participation and due process, were followed. In addition, the parents allege in the answer that the Child School was an appropriate unilateral placement and that equitable considerations favor an award of tuition reimbursement, arguing that the fact that they executed a contract with the Child School does not preclude their

[9] I note that the affidavit of service of the answer filed with the Office of State Review states that "the Revised Verified Answer and Cross Appeal" were served upon the district. The Office of State Review only received one verified answer from the parents and there was no indication on that pleading that it was a revision of a prior version or that it was asserting a cross-appeal against the district.

[10] While this case concerns whether a respondent must cross-appeal when the petitioner asserts certain issues before the SRO, recent district court decisions have reviewed the scope of a respondent's right to cross-appeal issues that were not addressed by the IHO (J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9-*10 [S.D.N.Y. Nov. 27, 2012] [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *14 [S.D.N.Y. Feb. 14, 2013] [acknowledging the lack of uniformity within the district courts as whether a respondent must cross-appeal but remanding issues not addressed by the IHO]; D.N. v. New York City Dep't of Educ., 2012 WL 6101918 [S.D.N.Y. Dec. 10, 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]).

requested relief. The parents' answer also states that they "did not waive any issues at hearing and do not waive any issues on appeal" (Answer ¶ I).

I further note that there is an adequate record to decide the parents' tuition reimbursement claim beyond the narrow determination of the IHO. Based on the foregoing, I will consider those issues set forth in the district's petition and addressed in the parents' answer as alternative bases for granting the parents' requested relief.

B. Predetermination / Parent Participation

I will next address the parents' contention that the April 2011 CSE impermissibly predetermined the student's placement and program recommendations and denied the parents an opportunity to meaningfully participate in the development of the IEP.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D. D-S, 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

With respect to predetermination, consistent with the parents' assertion, the hearing record suggests that at least some of the recommended IEP goals were not drafted at the CSE meeting.

The district representative testified that the guidance counselor, who was not present at the April 2011 CSE meeting, wrote the counseling goals on the student's IEP (Tr. p. 66). She did not know when those goals were drafted (id.). In addition, the district representative testified that the classroom teacher wrote the math goals found on the student's IEP and that she did not know why the particular math goals on the IEP were chosen for the student (Tr. pp. 66, 68, 70). The district representative reported, however, that the parents had the opportunity to participate in the development of IEP goals, in that every goal was reviewed at the CSE meeting and the district asked if there was anything the parents wanted to add or if they had any questions (Tr. p. 50). During the impartial hearing, the student's mother was not questioned as to whether or not the IEP goals were reviewed with her during the April 2011 CSE meeting.

In any event, I decline to find, under the circumstances of this case, that the development of some of the goals prior to the April 2011 CSE meeting constituted a procedural violation that led to a loss of educational opportunity to the student or seriously infringed on the parents' opportunity to participate in the CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847 [S.D.N.Y. Nov. 9, 2011]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010] [explaining that parental presence is not required during actual goal drafting]; E.G., 606 F. Supp. 2d at 388-89; 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]).

With respect to parental participation, the hearing record reflects that the student's mother and father attended the April 2011 CSE meeting (Parent Ex. C at p. 14; see Tr. pp. 32, 219). Additional attendees were the district representative, the special education teacher, the regular education teacher, the school psychologist, the social worker, the speech and language therapy provider, and the educational advocate (Parent Ex. C at p. 14; see Tr. pp. 32). The district representative testified that all of the parties, including the parents, were asked for and allowed to offer input into the development of the student's IEP (id.). The district representative testified that every section of the IEP was discussed at the CSE meeting and, to her knowledge, when asked, there were no questions regarding the section describing the student's evaluation results (Tr. pp. 38-39). She reported that the parents were afforded the opportunity to provide input into the development of the academic achievement, functional performance, and learning characteristics section of the IEP, but she could not recall if they did (Tr. pp. 39-40). The district representative stated that after every section of the IEP there was an opportunity to include consideration of the student's needs that were of concern to the parents (Tr. p. 42). She assumed that, because there was no input following the social development section of the IEP, there were no concerns expressed by the parents at the time (id.). According to the district representative, the physical development section of the IEP was based on input from the student's parents (Tr. pp. 42-43). She also reported that the related services recommendations were developed based on the services the student already had, her classification, outside reports, and parental input (Tr. p. 51). The district representative testified that every meeting is conducted the same way in that every element of the IEP is reviewed (Tr. p. 71).

The student's mother testified that she did not discuss her feelings regarding the appropriateness of an ICT class for the student at the April 2011 CSE meeting (Tr. pp. 219-20, 222). She explained that "at that meeting what I understood is we were sitting as a team to discuss

ways we can help my daughter" (Tr. p. 220). She further stated "where she was at now was what they were offering, so I didn't know if there was anything else" (id.; see Tr. p. 222). The student's mother testified that the parents did not have the opportunity to voice their concerns at the April 2011 CSE meeting, but clarified her statement by adding that she thought the CSE already had the parents' concerns on paper, "so they were addressing what our concerns were" (Tr. pp. 222-23). Additionally, there is no evidence in the hearing record to suggest that anyone on the April 2011 CSE precluded the parents from participating fully in the meeting (see M.W., 869 F. Supp. 2d at 333-34).

As discussed further below, the hearing record reflects that the private evaluations obtained by the parents were utilized in the development of the April 2011 IEP (see Parent Ex. C). Furthermore, the district representative testified and the April 2011 IEP reflects that the CSE considered other placement options for the student, including placement in either a general education class with special education teacher support services (SETSS) or a special class in a community school, which were rejected, respectively, as insufficiently supportive or too restrictive for the student because of the student's academic and language needs (Tr. pp. 54: Parent Ex. C at p. 12).

Based upon my review of the hearing record, I find that the district did not predetermine the student's program for the 2011-12 school year and the parents were afforded an opportunity to meaningfully participate in the IEP development process (T.P., 554 F.3d at 253; see M.W., 869 F. Supp. 2d at 333-34; R.R., 615 F. Supp. 2d at 294).

C. April 2011 IEP

1. Sufficiency of Evaluative Information

The parents assert that the April 2011 CSE did not consider sufficient evaluative information in the development of the student's IEP for the 2011-12 school year and that the CSE failed to consider independent evaluations provided by the parents.

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 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see E.A.M., 2012 WL 4571794, at *9-*10; S.F., 2011 WL 5419847, at *12; 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 developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments, as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

Additionally, a CSE must consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993] citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

As noted above, the parents obtained a private psychoeducational evaluation and a private speech-language evaluation, which they forwarded to the district in January 2011 (see Parent Ex. D at p. 1). It is not clear from the hearing record the extent to which the April 2011 CSE discussed, at the CSE meeting, the independent evaluations submitted by the parents for review (Tr. p. 34; see Tr. pp. 57-58, 72-73).[11] However, the April 2011 IEP reflects information found in the independent evaluations submitted by the parents (see Parent Ex. C).[12]

The district representative testified that prior to the CSE meeting she reviewed the district's occupational therapy "School Function Evaluation," as well as the October 2010 psychoeducational report and November 2010 speech-language evaluation (Tr. pp. 32-34, 72; see Parent Ex. G; Dist. Exs. 4, 6). In addition, she testified that she had the opportunity to discuss the

[11] The district representative testified that no minutes were taken at the April 2011 CSE meeting (Tr. p. 62).

[12] I note that a CSE is not required to use its own evaluations in the recommendation of an appropriate program for a student and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *10 [S.D.N.Y. Mar. 21, 2013]; M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Bd. of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 12-159; Application of the Dep't of Educ., Appeal No. 12-092; Application of a Student with a Disability, Appeal No. 11-100; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student with a Disability, Appeal No. 10-004).

documents with the other CSE members and she indicated that the CSE considered the recommendations from the October 2010 psychoeducational evaluation (Tr. pp. 34; 57-58).

The October 2010 private psychoeducational evaluation provided information regarding the student's functional visual skills, behavior, intellectual functioning, language processing skills, fine motor and graphomotor skills, memory, executive processing, academic achievement, and psychological status (Parent Ex. G). The evaluation was conducted by a school/clinical psychologist over four days in September 2010 (id. at pp. 1, 14).[13] The examiner described the student as consistently alert and cooperative throughout testing (id. at p. 3). He noted that the student was animated and happy, readily engaged the examiner in conversation, and exhibited a normal range of affect (id.). According to the examiner, the student's speech was generally clear and easy to understand (id.). Although the student was generally able to understand test instructions, she frequently asked the examiner to repeat questions (id.).

Administration of the Wechsler Intelligence Scale for Children–Fourth Edition (WISC-IV) yielded indices scores in the low average range, along with a full scale IQ of 81, also in the low average range (Parent Ex. G at p. 3). The examiner opined that the scores appeared to be a valid measure of the student's cognitive and processing skills (id.).

With respect to the student's language processing skills, the examiner reported that the student's performance on measures of receptive vocabulary and comprehension indicated that the student had relatively weak receptive vocabulary and weak listening comprehension skills (Parent Ex. G at p. 4). The examiner further reported that the student's performance on expressive language tests was inconsistent (id.). The examiner noted that the student's expressive vocabulary, as measured by her ability to name common objects, was in the average range but that the student frequently had difficulty organizing and articulating her thoughts in a clear and coherent manner (id.). He further noted that the student had difficulty on language tests related to reading readiness, which indicated that the student's phonemic processing skills were not well developed (id. at p. 5).

With respect to the student's fine motor and graphomotor skills, the examiner reported that the student's head and body posture were usually appropriate as she worked on graphomotor tasks, but that at times she laid her head on the table as she worked on writing and drawing tasks (Parent Ex. G at p. 5). He noted that the student frequently changed her pencil grip (id.). According to the examiner, despite having difficulty on some fine motor coordination tasks, the student's letters were well formed and her handwriting was neat and legible (id.). Based on the student's performance on a drawing test, the examiner reported that the student had an age appropriate ability to integrate information from the visual and motor modalities (id.).

The examiner concluded that, based on the student's performance on memory tasks, the student had an ability to memorize and recall auditory and verbal information, but demonstrated relatively weak visual short-term memory skills (Parent Ex. G at p. 5). However, he also reported that the student had difficulty memorizing and recalling simple auditory stimuli, indicating that her rote memory skills were weak (id.). The examiner commented that in a 1:1 testing situation the student had difficulty attending for longer periods of time and that her attention often needed to be redirected (id. at p. 6). He further noted that the student's attending problems increased as she became more comfortable with the examiner and testing setting (id.). The student's

[13] The report indicates that the psychologist was also a doctor of optometry (Parent Ex. G at pp. 1, 14).

performance on formal testing of executive processing ability also reflected her difficulties with attention (id.). According to the examiner, the student's mother and teacher provided inconsistent responses with regard to questions about the student's attention and psychological functioning at home and in school (id.). Although the parent reported that the student had difficulty with attending at home, her responses indicated that she did not think the student's attending problems were significant (id.). In contrast, the teacher's responses indicated that the student was exhibiting significant levels of hyperactive-impulsive and inattention behavior in the classroom (id.).

The examiner's formal and informal assessment of the student's academic skills revealed that the student had weak reading skills (Parent Ex. G at p. 5). While the student was able to identify all of the letters of the alphabet, produce the sounds of most of the individual letters and some simple blends, the student had difficulty with phonemic processing (id. at p. 7). Specifically, the examiner reported that the student's phonetic decoding skills were not well developed; that she had difficulty quickly producing over-learned words, a skill that many children with learning disabilities in reading had difficulty with; and that her spelling skills and lexicon of sight words were also weak (id.). According to the examiner, the student was able to read simple first grade level phrases and sentences, but struggled to read simple paragraphs (id.). He noted that the student frequently had difficulty reading words in the text, as well as difficulty understanding what she had read (id.). The examiner reported that due to the student's weak reading, spelling, and language processing skills, the student struggled with writing tasks (id.). He noted that the student's spelling, sentence structure and punctuation were weak and that she had difficulty composing single sentences (id.). He also noted that the student often required long periods of time to think of something to write about (id.). The examiner noted that although the student's math skills appeared to be the strongest of her academic skills, she still had difficulty solving many math problems (id. at p. 8). He reported that the student was able to solve single digit addition and subtraction problems by counting on her fingers, but when working with double and triple digit numbers on paper she added/subtracted the number columns in an incorrect left to right direction (id.). The student was able to identify shapes, but did not know the value of individual coins and could not solve any money problems (id.).

The examiner used observations made during testing and formal projective instruments to evaluate the student's psychological status (Parent Ex. G at p. 8). The examiner described the student as being a "happy child" during testing (id.). He noted that the student smiled when she perceived that she was doing well and usually exuded confidence in her abilities (id.). He further reported that although the student was concerned about her performance, she was able to persevere when tests became difficult for her and she did not exert any overt signs of frustration (id.). He reported that the student's response to projective stimuli suggested that she viewed the world in a '"normal"' way, had a healthy need for love and nurturance from others, and was interested in people and relationships (id.). However, he also reported that the student's responses suggested that she may be frustrated and struggling with anxiety about her struggles in school and possibly about her capabilities (id. at p. 9).

The examiner concluded that the student had many strong personality and processing skills that would serve her in her current and future academic pursuits (Parent Ex. G at p. 9). Among other things, he noted that the student liked to be around people and was a hard worker (id.). He also noted that the student had average verbal and visual reasoning skills and cognitive skills in the low average range, which were important with respect to her ability to understand concepts, logically solve problems, and learn efficiently (id. at p. 10). In addition, the examiner noted that

the student had well developed verbal memory skills, which could enable her to remember instructions and verbal information presented in the classroom, as well as memorize and master new academic tasks (id.). He stated that the student's handwriting was neat and legible (id.). However, the examiner also reported that the student demonstrated weak receptive and expressive language processing skills and had difficulty understanding formal language and could easily become overwhelmed by large amounts of verbal information, such as multiple direction sets (id.). According to the examiner, the student had difficulty organizing and expressing her thoughts and ideas (id.). He reported that the student's weak language skills were important factors in the origin of her weak academic skills (id.). The examiner further noted that the student demonstrated relatively weak visual memory skills and may have difficulty remembering visual information, such as information that she is copying from the board to her paper (id.). According to the examiner, testing of the student's functional visual skills revealed that the student had reduced binocular, accommodative, and oculomotor skills (id. at p. 2).

The examiner reported that due to the student's weak language processing and academic skills, and her anxiety about her school performance, a diagnosis of Attention Deficit Hyperactivity Disorder could not be made at that time (Parent Ex. G at p. 10). He noted, however, that the student's attention was inconsistent during testing, that her teacher was very concerned about the student's difficulty to attend in school, and recommended that the student's ability to attend be watched closely over the next 12 months (id.). The examiner offered the following diagnoses: mixed receptive-expressive language disorder, language-based reading disorder- dyslexia, math disorder, and disorder of written expression (id. at p. 11).

The examiner further noted that the student was functioning at approximately a first grade level for reading, writing, and math (Parent Ex. G at p. 10). He commented that the student had received extensive special education services through the district, as well as tutoring and remediation services outside of school, yet she continued to struggle to learn how to read (id. at p. 11). According to the examiner, this indicated that, in order for the student to improve her academic performance, she would require a more intense academic program that could provide her with additional academic supports as well as 1:1 tutoring in reading, writing, and mathematics (id. at p. 12). He further stated that the student required an academic program that could provide her with a small sized classroom and that offered her daily multisensory educational instruction with learning disabilities specialists who have experience working with children who have dyslexia and language processing delays (id.). He concluded by making additional recommendations for an academic program that provided information in a multisensory mode throughout the day, testing accommodations, an OT evaluation, an assistive technology evaluation, speech and language therapy, classroom accommodations to address the student's attending difficulties, participation in non-academic activities outside of school to bolster the student's self-esteem, and a formal program of vision rehabilitative therapy to address her weak visual coordination skills (id. at pp. 12-13).

In addition to the October 2010 psychoeducational evaluation, the parents sought a private evaluation of the student's speech-language needs in November 2010 (see Dist. Ex. 6). The evaluator described the student as pleasant, friendly, and chatty, and noted that she was cooperative and seemed eager to please (id. at p. 2). She noted that the student responded eagerly to verbal praise and other forms of positive reinforcement (id.). The evaluator characterized the student's attending behaviors during testing as "fair" (id.). She reported that the student "chatted incessantly during the session" and opined that it was likely that the student's "propensity for banter" interfered

with her academic performance (id.). According to the evaluator, the student responded well to verbal and physical cues to keep her on task and to complete assigned tasks (id. at pp. 2-3). She noted that, on formal testing, the consistency of the student's responses was fair (id. at p. 3). According to the evaluator, the student worked slowly on several tasks and "clearly" required time to formulate her responses; other times it was necessary to remind the student to take her time and consider possible answers (id.). The student made some attempt to self-correct her answers when errors were brought to her attention, but, as the session progressed, she began to lose interest in doing so (id.). The evaluator reported that the student's tolerance for frustration was limited (id.). She noted that the student's approach to test taking, coupled with limited attending behaviors, resulted in scattering in her performance within subtests (id.). However, the evaluator opined that the student's tests scores were considered to be a fair representation of her strengths and weaknesses in the areas assessed (id.).

According to the evaluator, the student's performance on formal testing, along with clinical observations, suggested that the student had mild receptive language delays, along with mild to moderate expressive language delays (Dist. Ex. 6 at p. 5). She reported relative strengths in the student's auditory comprehension skills; however, noted that closer analysis suggested that the student relied on familiarity with utterances, as well as word knowledge (id.). The evaluator noted weaknesses in the student's vocabulary skills and higher level language tasks, along with expressive language skills (id.). According to the evaluator, the student did not adequately use semantic information to aid comprehension (id.). In addition, the evaluator indicated that higher level comprehension skills, such as making inferences, drawing conclusions, and predicting outcomes, were all considered weak (id.). The evaluator noted that these skills required the ability to attend to and make use of language information (id. at p. 6). She reported that the student's retention and recall of verbally presented information were weak, but that in some cases repetition enhanced recall (id. at p. 5).

The evaluator noted that the student spoke in phrases and sentences to convey intention (Dist. Ex. 6 at p. 3). She stated that the student used a fair range of different syntactic forms, which marginally reflected skills expected for her chronological age (id.). The evaluator stated that because the student was "chatty" she presented as being more advanced that she really was (id.). She noted that with closer analysis "one notes" the student's difficulty in presenting information in a logical and coherent matter (id. at p. 5). According to the evaluator, some of the student's utterances impressed as empty and lacking in content, in part due to her difficulty staying on topic (id. at p. 3). The evaluator reported that the student freely used fillers and non-specific referring terms in place of content words (id.). The evaluator characterized the student's verbal reasoning skills as quite limited, including her ability to define words or complete analogous sentences (id. at p. 5). With respect to word knowledge and word finding abilities, the evaluator reported that the student's responses suggested limited understanding as to how words might be related to each other (id. at pp. 3-4). The evaluator reported that the student recognized a listener's needs by offering relevant utterances (id. at p. 4). According to the evaluator, the student's intelligibility in conversational speech was adequate (id.).

The evaluator concluded that the student presented with significant language and speech concerns that had a direct impact on her academic performance (Dist. Ex. 6 at p. 5). She stated that the student could be expected to have difficulty following lectures in class (id.). According to the evaluator, since participation in classroom exchanges requires the ability to "abstract" information and integrate it with an existing body, the student would likely be confused and

frustrated by her inability to perform on tasks that require such information (id.). Based on her assessment of the student, the evaluator recommended that the student be considered for an educational setting that could address her language learning difficulties, so as to support her academic attempts (id.). She recommended the continuation of speech-language therapy services with a focus on increasing the student's auditory retention and recall of verbally presented information, ability to execute multi-level commands, abstract reasoning skills, on-topic contributions in small group discussion, ability to re-tell a familiar story, and meta-linguistic abilities (id. at p. 6).

The April 2011 IEP reflects information found in the parents' independent evaluations (Parent Ex. C). Specifically, the present levels of performance include the results (scores) of cognitive and achievement testing conducted as part of the fall 2010 psychoeducational evaluation obtained by the parents, as well as a description of the student's academic abilities consistent with the description found in the evaluation (compare Parent Ex. G at pp. 6-8, 11, with Parent Ex. C at pp. 1, 2). In addition, the present levels of performance contain a brief description of the student's language needs and therapy recommendations from the fall 2010 speech-therapy evaluation obtained by the parents (Parent Ex. C at p. 1). The hearing record further reflects that the October 2010 psychoeducational evaluation was relied on, in part, to describe the student's social development (compare Parent Ex. G at pp. 8-9, with Parent Ex. C at p. 2).[14]

The district representative testified that the source of the information found in the "evaluation results" section of the student's IEP was district and outside assessments (Tr. p. 38). She further testified that the social development section of the IEP was based on the September 2010 psychoeducational evaluation (Tr. p. 40). According to the district representative, the CSE considered the recommendations found in the fall 2010 psychoeducational report, including the recommendation for reading instruction using Wilson, but could not recall any discussion regarding whether the evaluation or testing was valid or invalid (Tr. pp. 57-58, 60-61; Parent Ex. G at p. 12). I also note that, at the onset of the impartial hearing, the attorney for the parents indicated that they were seeking reimbursement for the psychoeducational and speech-language therapy evaluations that they had obtained and that they were "utilized by the CSE at the meeting" (Tr. p. 19; Parent Ex. A at p. 2).[15]

Although the parents would have preferred that the CSE adopt wholesale the recommendations made by the private evaluators, the IDEA does not mandate that the district follow the private evaluator's recommendation over the opinions of its staff (Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a private recommendation alone does not invalidate the substantive adequacy of a program recommended by the CSE], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005]; see Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d

[14] The present levels of performance include information about the student's abilities and needs that goes beyond the information found in the parents' independent evaluations (see Parent Ex. C at pp. 1-2).

[15] I note that the hearing record indicates that the parents requested that the student be reevaluated (Parent Ex. D at p. 3). That request, however, was made contemporaneously with the parents providing to the district the privately obtained psychoeducational evaluation (id.). Furthermore, there is nothing in the hearing record to indicate that the parents disagreed with any district evaluation (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). In any event, the IHO did not address the parents' request for reimbursement for the independent educational evaluations in his decision and the parents have not raised the issue of reimbursement for private evaluations as part of this appeal.

632, 641 [7th Cir. 2010]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *10 [S.D.N.Y. Jan. 13, 2013]; M.H., 2011 WL 609880, at *12; Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]).

Based on the evidence above, I find that the April 2011 CSE considered the parents' independent evaluations when developing the April 2011 IEP and had before them sufficient information relative to the student's present levels of academic achievement and functional performance, which the CSE utilized in the development of the student's April 2011 IEP; and that, as viewed as a whole, the student's functional abilities were accurately documented on the IEP (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see DiRocco v Bd. of Educ., 2013 WL 25959, at *20 [S.D.N.Y. Jan. 2, 2013]; E.A.M., 2012 WL 4571794, at *9-*10; D.B., 2011 WL 4916435, at *8; see also Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dept't of Educ., Appeal No. 08-045).

Moreover, assuming for the sake of argument that the evaluative information available to the CSE was insufficient, the procedural deficiency of failing to consider evaluative data during a CSE meeting does not constitute a per se denial of a FAPE, but instead it must be established that the deficiency also impeded the parent's participation in the IEP's development or denied the student educational benefits (see Luo v. Baldwin Union Free Sch. Dist., 2012 WL 728173, at *4-*5 [E.D.N.Y. Mar. 5, 2012]; Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2 [2d Cir. June 3, 2011]). Here, given the evidence discussed above that the parents had the opportunity to meaningfully participate in the development of the student's IEP, and because the adequacy of the student's present levels of performance as described in the April 2011 IEP are not at issue in this appeal, I decline to find that any procedural deficiencies regarding the extent to which the CSE considered the evaluative information impeded the student's right to a FAPE, impeded the parents' ability to participate in the decision making process, or deprived the student of educational benefits.

2. Adequacy of Goals and Short-Term Objectives

Next, I will review the parents' assertion that the IEP developed at the April 2011 CSE meeting was inappropriate because the goals and objectives were not sufficient to meet the student's educational, social and emotional needs. 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]). Determinations about the individual needs of a student shall provide the basis for

the written annual goals (8 NYCRR 200.1[ww][3][i]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).[16]

Upon review of the hearing record, I agree with the parents that many of the recommended academic goals do not appear to be specific to the student's identified needs.[17] In response to questioning, the district representative identified the areas addressed by the recommended IEP goals and offered an explanation as to why she believed the goals to be appropriate (Tr. pp. 45-50). She testified, for example, that a goal related to improving receptive language skills would be addressed by the "speech provider" and that it was appropriate because it was "going to improve [the student's] receptive language, which she has a deficit in" (Tr. p. 45). With respect to the majority of the recommended academic goals, the district representative testified that they were grade appropriate or reflected an element needed for success, or that had to be met in third grade (Tr. pp. 47-49).

While the present levels of performance on the April 2011 IEP indicate that the student has difficulty solving word problems, solving multi-digit math problems, and identifying the value of coins, the recommended IEP goals do not target these skills; rather, they target the student's ability to skip count, estimate numbers to 500, and translate from a picture/diagram to a numeric expression (Parent Ex. C at pp. 2, 4-7).[18] The district representative initially testified that two of the math goals on the student's IEP were specific to the student because the IEP was an "individual education plan," but then clarified that she did not write the goals and therefore could not address how they were specific to the student (Tr. p. 67). She confirmed that the math goals reflected skills that any third or fourth grader would need to know (Tr. pp. 67-68). She did not know why the particular math goals on the student's IEP were chosen (Tr. p. 68). The district representative testified that the math goals were written by the classroom teacher, but did not recall any discussion with respect to the goals (Tr. p. 70).

With respect to reading, the IEP noted that the student was performing at a beginning second grade level and needed to slow down and use her decoding skills to identify the directions and vocabulary (Parent Ex. C at p. 1). It further noted that the student's reading mechanics, including decoding, word segmentation, and phonemic processing skills, were not well developed and she frequently encountered words that she could not read and had difficulty "comprehen[d]ing" what she read (id. at p. 2). The April 2011 IEP included English language arts (ELA) goals related to reading a variety of literature of different genres, recognizing features that

[16] I note that the April 2011 IEP recommended that the student participate in the same State and district-wide assessments of student achievement that are administered to general education students.

[17] The student's IEP indicates that on the Wechsler Individual Achievement Test–Second Edition (WIAT-II), administered in September 2010, the student attained the following percentile and grade equivalent (GE) scores: reading comprehension 27th percentile (1.7 GE), word reading 13th percentile (1.6 GE), pseudoword decoding 13th percentile (K. GE), numerical operations 27th percentile (2.2 GE), mathematics reasoning 25th percentile (1.9 GE), spelling 14th percentile (1.6 GE) (Parent Ex. C at p. 1). The April 2011 IEP also included the results of district assessments (Tr. p. 38; Parent Ex. C at p. 1).

[18] I acknowledge testimony from the student's Child School teacher that some of the math goals specified in the April 2011 IEP were implemented in her class, such as counting and estimating (Tr. pp. 212, 214). Because it is unclear that this testimony supports a conclusion that the goals were appropriate for this student at the time the April 2011 IEP was created, and since the Child School teacher did not participate in the April 2011 CSE meeting, her after-the-fact position regarding the appropriateness of the goals does not alter the outcome in this case.

distinguish the genres and using those features to aid comprehension, and exchanging friendly notes and letters to keep in touch (id. at pp. 5, 6). Despite the student's identified difficulties with decoding, word segmentation, and phonemic processing, the IEP included only one decoding goal related to recognizing words using particular vowel streams, using a multisensory reading program (id. at p. 5).

Under the IDEA and State and federal regulations discussed above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a preferred or optimal classroom setting or student-teacher ratio, but rather whether said goals and objectives are consistent with and relate to the needs and abilities of the student (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]). Based on the above, I find that the academic goals recommended by the April 2011 CSE more closely reflect the district's third grade curriculum than the student's identified academic needs.

3. Appropriateness of Program Recommendations

The parents assert that the district's recommendation of an ICT class with related services was inappropriate for the student. The parents also assert that the IEP does not reflect a recommendation for pull-out reading instruction. The parents assert that the student requires a small, structured class setting, which offers individualized instruction.

State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]).

According to the October 2010 private psychoeducational evaluation, which was considered by the April 2011 CSE, the student was functioning at approximately a first grade level for reading, writing, and math (Parent Ex. G at p. 11). The student exhibited weak receptive and expressive language processing skills and weak visual memory skills (id. at p. 10). The report emphasized that, although the student "has been provided with extensive special education services," she "is still struggling to learn how to read" (id. at p. 11).

The October 2010 private psychoeducational evaluation, based on the data collected therein, recommended a "small sized classroom in a small school" (Parent Ex. G at p. 2). Although as noted above the CSE was not required to adopt the recommendations of the private evaluator, the district failed to contribute to the hearing record any evidence that tended to justify the CSE's recommendation of an ICT class beyond the conclusory testimony of the district representative that she agreed with the recommendations in the April 2011 IEP "[b]ecause we could meet [the student's] needs based on the recommendations of reports" and because, with the recommended services, she thought "we would find success, we would see her learning and progressing" (Tr. p. 36).

The student's mother did not agree with the recommendations in the April 2011 IEP (Tr. pp. 218, 224). She testified that the student had not made progress in the ICT class prior to the

April 2011 IEP meeting and that the student's teachers at the time told the parents that the student was "struggling, she can't meet the levels, . . . she's falling behind" (Tr. p. 219). The hearing record shows that as early as January 2011, the parents wrote a letter to the school principal stating that the student's then-current program, which was an ICT class, was not meeting the student's needs (Parent Ex. D at p. 1).[19] A subsequent letter from the parents to the district, dated February 8, 2011, suggested that the district's SBST had met and recommended that the student undergo an occupational therapy screening, that her speech-language therapy be provided in a 1:1 setting, and that she receive SETSS services, including pull-out sessions for reading, writing, and math (id. at p. 2).[20]

With respect to reading and math, the April 2011 IEP indicated the student's delays in these areas (Parent Ex. C at pp. 1-2). The student's mother testified that prior to the April 2011 CSE meeting, the student had been receiving reading "resources" and math services that were not subsequently included on the April 2011 IEP (Tr. pp. 221-22; see Tr. p. 218).[21] Testimony by the student's mother indicates that following the SBST meeting in February 2011, and consistent with the recommendations thereof, the student began receiving resource room/reading instruction in addition to her placement in an ICT class (see Tr. pp. 28, 36, 221). However, the district representative reported that she began providing the three times per week reading service to the student approximately one week after the CSE meeting in April 2011 (Tr. p. 71).

The April 2011 CSE did not recommend additional reading instruction or a resource room program for the student, as reportedly recommended by the SBST (Parent Exs. C at p. 8; D at p. 2). While the parent denies the conversation, the district representative testified that the CSE discussed reading services for the student, which the district representative was expected to implement, and indicated that these services were reflected on the IEP in the annual goal related to recognizing words using particular vowel streams and using a multisensory reading program (Tr. pp. 36-37, 222).[22] According to the district representative, with respect to this goal, the CSE discussed that she would implement the reading program, that she was certified to do so, and that she would do so three days per week (Tr. p. 37; see Tr. p. 61). The district representative acknowledged that the IEP did not indicate that the reading goal would be addressed during pull-out sessions as opposed to in the classroom (Tr. p. 57). In addition, she confirmed that, other than the one reading goal, the IEP did not reflect the student's need for multisensory instruction (Tr. pp. 61-62). The district representative testified that she knew it was the plan to pull-out the student

[19] According to the speech-language pathologist who evaluated the student in November 2010, the parents stated that the student's teachers continued to raise concerns related to the student's rate and manner of learning and were anxious to locate a more appropriate program for the student (Dist. Ex. 6 at p. 2).

[20] Referred to in the hearing record at times as "SETTS" services, it appears that the additional reading and/or math services at issue function as a resource room program, as defined in State regulations (see 8 NYCRR 200.6[f] [defining resource room programs as being "for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs"]).

[21] The student's previous IEP was not included in the hearing record.

[22] The district representative testified that she was going to continue to pull-out the student three days per week to support her reading and writing (Tr. p. 36). Notably, she also testified that she agreed with the April 2011 CSE's recommendation and thought that providing support services including two teachers, speech-language therapy, and three days per week of reading services would result in the student learning and progressing (Tr. p. 36; see Tr. pp. 55-56).

three days per week for Wilson instruction because that is what was discussed at the CSE meeting, along with the belief that Wilson could appropriately address the student's deficits (Tr. p. 69). She stated that the pull-out sessions would continue for the duration of the IEP, which was one year (Tr. p. 70).

While the hearing record shows, and the district acknowledges, that the student requires reading instruction in addition to placement in an ICT class, the student's April 2011 IEP does not reflect a recommendation for three times per week multisensory reading instruction, as was reportedly discussed at the April 2011 CSE meeting. In the absence of a recommendation on the student's IEP, the only evidence that such a discussion took place is the testimony of the district representative, which conflicts with that of the parent.[23]

I note testimony of the district representative that she actually implemented "the Wilson Orton-Gillingham program" with the student three days per week after the April 2011 CSE meeting (Tr. pp. 28, 71). She testified that she used the Wilson program with the student because she had recall problems while reading and also visual confusion (Tr. p. 30). According to the district representative, the student did "great" using the Wilson program and "made progress every week" (Tr. pp. 30-31). She stated that she believed the student was approaching level three of the program, having started at level one, and that they were systematically working through the program (Tr. p. 29). It is unclear from the hearing record when the district representative began providing the student with the additional reading instruction. As stated above, whereas the parent testified that the student began receiving additional reading instruction in February 2011, following the SBST meeting (see Tr. pp. 28, 36, 221), the district representative reported that she began providing the reading service approximately one week after the CSE meeting in April 2011 (Tr. p. 71). Further testimony by the district representative, however, indicated that it was discussed at the April 2011 meeting that she would "continue" to provide the reading instruction, implying that it was taking place prior to the meeting (Tr. pp. 36-37). To the extent the testimony refers to events occurring after the April 2011 CSE meeting, however, the determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis and includes the consideration of only the information known at the time the IEP was developed (R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, *17-*18 [S.D.N.Y. March 21, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 n.19 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]. However, the Second Circuit rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 185-89). Applying the prospective analysis articulated in R.E., I do not find that the district representative's testimony regarding the implementation of the Wilson program with the student after the meeting cures the deficiencies in the April 2011 IEP. Nonetheless, even if the testimony described the student's

[23] I note that one of the reading goals contained in April 2011 IEP references multisensory reading instruction and the teacher of the assigned class reported that this goal would have been addressed during her Wilson lessons in small groups (Tr. pp. 112-13).

participation in extra reading sessions before the meeting, for the reasons addressed above, and due to the ambiguity in the timeline, it is insufficient to overcome the deficiency in the April 2011 IEP.

Based on the information in the hearing record, I cannot conclude that the district has met its burden to establish that the recommendations of the April 2011 CSE were reasonably calculated to enable the student to receive educational benefits, and thus, I find that the district failed to offer the student a FAPE for the relevant portions of the 2010-11 and 2011-12 school years. While I acknowledge that the CSE considered sufficient evaluative information and adequately set forth the student's present levels of performance, I find that the April 2011 CSE failed to develop appropriate annual goals and tailor a program to address those identified needs (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 111).

D. Notice of Assigned School

Although I have determined that the district failed to offer the student a FAPE for the relevant portions of the 2010-11 and 2011-12 school years, I will now address the IHO's grounds for such a finding; to wit, that notice of the assigned school was not offered to the parents in a timely fashion.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. Jan. 6, 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"]). The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320).

When determining how to implement a student's IEP, however, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 12-159; Application of the Dep't of Educ., Appeal No. 11-147; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063). The Second Circuit has established that "'educational placement' refers to the general educational program—such as the

classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. 2011]; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 CFR 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504); see also K.L., 2012 WL 4017822, at *16; C.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *8-9 [S.D.N.Y. October 28, 2011]; A.S. v. New York City Dep't of Educ., No. 10–cv–00009, slip op. at 18–19 [E.D.N.Y. May 25, 2011]); S.H. v. New York City Dep't of Educ., 2011 WL 666098, at *5 [S.D.N.Y. Feb. 15, 2011].

In any event, the district's failure to send the parents an FNR was inconsequential under the circumstances of this case because the weight of the evidence indicates that the parents knew that the district intended the student to attend the same public school for the 2011-12 school year as she had attended the previous school year.[24] At the impartial hearing, the student's mother testified that this was her understanding (Tr. pp. 222, 224-25). Moreover, the evidence indicates that April 2011 IEP was intended to apply to the end of the 2010-11 school year, as well as the 2011-12 school year, and that the district began implementing the student's April 2011 IEP in April and May of 2011, while the student attended the public school (Tr. pp. 28, 30, 36, 54, 70-71; see Parent Ex. C at p. 8). In addition, the district representative, who believed she was implementing aspects of the student's April 2011 IEP shortly after the CSE meeting, provided testimony about the student's progress in her reading and writing program (see Tr. pp. 31).

Furthermore, the hearing record establishes that the lack of notice of the assigned school had no bearing on the parents' decision to reject the April 2011 IEP for the 2011-12 school year, since the parents notified the district by letter, dated May 12, 2011, noting their concerns with the April 2011 IEP and informing the district that the parents planned to sign an enrollment contract for the student for the 2011-12 school year with the Child School (Dist. Ex. 2).[25] In fact, the

[24] I acknowledge that the parents allege in their answer that the district has asserted various "theories" about how it allegedly notified the parents of the assigned public school, to wit: that the parents were provided notice verbally at the April 2011 CSE meeting, that the parents were provided notice by virtue of a mailing sent by the principal of the school to all anticipated students, or that circumstantial evidence of the parents' actual knowledge established that they had received notice. However, the hearing record reveals that, since the commencement of the impartial hearing, the district has pursued the defense that, one way or another, the parents knew the school to which the student was assigned (see Tr. pp. 9, 11). The parents cite no authority to support a finding that the district should be deemed to have waived the ability to cite any set of facts that exist in the hearing record to support its consistently alleged defense.

[25] I also note the parents' correspondence, dated June 20, 2011, advising the district that they had not received an FNR and that they wished to visit the assigned public school prior to the close of the 2010-11 school year (Parent Ex. D at p. 4). While nothing in this decision is intended to discourage districts from offering parents the opportunity to view school or classroom placements, neither the IDEA nor State regulations confer upon parents the right to visit a recommended school and classroom. The U.S. Department of Education's Office of Special Education (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 12-015; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097).

parents did sign the enrollment contract on or about April 28, 2011 and paid a deposit on the student's tuition on May 11, 2011 (Parent Exs. E; F at p. 1). Ultimately, the parents officially notified the district of their intent to unilaterally place the student at the Child School by letter dated August 22, 2011 (Parent Ex. D at p. 9), prior to the time that the district became obligated to implement the April 2011 IEP during the 2011-12 school year (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]).

Thus, even if the district did not issue an FNR or a notice of placement, the student had been provided with a public school to attend and the hearing record does not indicate that the district deviated from substantial or significant provisions of the student's IEP in a material way, thereby precluding the student from the opportunity to receive educational benefits.

E. Nickerson Letter

The IHO also erred by not applying the Burlington/Carter test when deciding the parents' claim for tuition reimbursement at the Child School.

Instead, the IHO directed the district to issue a Nickerson letter to the parents (IHO Decision at p. 5). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d 167), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L., 2012 WL 4891748, at *11; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F.Supp.2d 90, 101 n.3 [E.D.N.Y. 2011]). Therefore, I lack the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17, n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *3-*4 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90, n. 15 [S.D.N.Y. 2010]; see F.L., 2012 WL 4891748, at *11-*12; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]).

Accordingly, I will reverse the IHO's order directing the district to provide a Nickerson letter and I will consider whether the unilateral placement selected by the parents was appropriate, and whether equitable considerations support the parents' request for tuition reimbursement.

F. Appropriateness of the Child School

I will next consider whether the parents met their burden of proving that the Child School was an appropriate placement for the student during the 2011-12 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 a Student with a Disability, Appeal No. 12-036; 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. 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.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49 (2005); L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 (S.D.N.Y. March 19, 2013); see also Educ. Law § 4404[1][c]). "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 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]; see L.K., 2013 WL 1149065, at *15). 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 M.B., 2013 WL 1277308, at *2; D. D-S v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; 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"]; L.K., 2013 WL 1149065, at *15). 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; M.B., 2013 WL 1277308, at *2; 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; L.K., 2013 WL 1149065, at *15; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

> designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see M.B., 2013 WL 1277308, at *2; Frank G., 459 F.3d at 364-65).

After careful review of the evidence contained in the hearing record, I find that, for the reasons discussed below, the hearing record shows that the parents satisfied their burden of proving that the Child School was an appropriate placement for the student for the 2011-12 school year.

The Child School is a New York State approved school for children with disabilities (Tr. pp. 168-69). The hearing record reflects that the student's Child School class consisted of 8 students, one teacher, and one assistant teacher, as well as 1:1 paraprofessionals assigned to specific individual students in the class (Tr. pp. 169, 174, 184). Similar to the student in the instant case, who was 9 years old during most of the 2011-12 school year and classified as a student with a speech or language impairment, the students in her Child School class were from 8 to 10 years old and the majority were classified as having a speech or language impairment or an other-health impairment, with one student in the class classified as having autism (Tr. pp. 176, 205). Testimony by the student's 2011-12 teacher at the Child School indicated that the student was also similar to her classmates with regard to social/emotional and academic functioning (Tr. pp. 206-07, 213). At the Child School, the student also received speech-language therapy and counseling (Tr. pp. 171-72, 176-77; Parent Ex. H at p. 2).

The hearing record demonstrates that the Child School provided academic instruction and academic support to the student for the 2011-12 school year. The student's teacher at the Child School testified that the she used verbal and gestural prompts or hands-on activities to redirect the student when she was off task and provided the student 1:1 attention and reading support as needed (Tr. pp. 187-88, 198). To address the student's undeveloped reading comprehension skills, the teacher testified that she adapted class materials to the student's level so that she was able to decode the words, and the teacher encouraged the use of context clues and making predictions (Tr. pp. 189-90). To address the student's difficulties with abstract thinking, the teacher testified that the she used creative writing, role playing, modeled reading comprehension strategies, and "synch"-aloud (Tr. p. 193). The hearing record reflects that the student's teacher used the prequel to the Wilson reading program, known as the Fundations program, to break down the rules of spelling and reading for the student (Tr. p. 186; see Parent Ex. I at p. 8).

In reading, the teacher explained that she utilized multisensory learning and that the student was working on reading Fundations, including welds and bonus letters (Tr. pp. 196-97). According to the October 2011 Child School progress report, the class was studying the elements of a story and participating in guided reading groups, as well as pursuing independent reading (Parent Ex. H at p. 3). The report notes that the student benefited from: "taking short breaks to discuss important details and clarify her reading comprehension;" the use of graphic organizers and brainstorming; and additional prompts and questions, so she could organize and elaborate on her writing (Parent Ex. H at p. 4). The mid-year Child School progress report noted that the student continued to struggle with word decoding and spelling, but that she was showing progress as a result of the utilization of strategies, such as "tapping out" (Parent Ex. I at p. 11).

With respect to math, the teacher testified that, at the time of the impartial hearing, the student was learning telling time and elapsed time and that she had learned rounding and estimating

and reviewed multi-digit addition and subtraction (Tr. pp. 194-95). According to the October 2011 progress report, the class was reviewing basic mathematical operations and the student benefited from the breaking down of steps to solve a program, but she was often challenged by word problems due to her delays in word decoding (Parent Ex. H at pp. 5-6). However, the mid-year progress report noted the student's progress with decoding and explained that the student was, at that time, working on one and two step word problems (Parent Ex. I at p. 14).

In science, the teacher testified that the student was learning about seeds, which was a part of the relevant grade curriculum, but that the lessons were modified to compensate for the student's attention and processing difficulties (Tr. pp. 199-200; see also Parent Exs. H at p. 7; I at pp. 5-6). According to the teacher, the student was learning about communities in social studies, with a focus, at the time of the impartial hearing, on map skills, again, utilizing the modifications and strategies suited to the student's delays (Tr. pp. 200-02; see also Parent Exs. H at pp. 8-9; I at pp. 1-2).

A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B., 2013 WL 1277308, at *2; D. D-S, 2012 WL 6684585, at *1; L.K., 2013 WL 1149065, at *15; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at *5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).[26] 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)]; L.K., 2013 WL 1149065, at *15).

In this case, I find the hearing record demonstrates that the student made progress during the 2011-12 school year at the Child School. The head teacher testified about the student's progress in attention, listening comprehension, decoding, reading comprehension, abstract thinking, math skills, as well as her reading, writing, spelling, and decoding, as a result of the classroom strategies and lessons, described above (Tr. pp. 188, 190-92, 194-99). The October 2011 and mid-year progress reports from the Child School reflected the student's performance and progress from fall to mid-year in all academic areas, given the supports described in the report (see generally Parent Exs. H; I).

The district argues that the Child School was an inappropriate placement for the student for the 2011-12 school year because it did not constitute the student's LRE. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of

[26] I note, however, that the Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

the parental placement 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., 454 F. Supp. 2d at 138; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; Application of a Student with a Disability, Appeal No. 12-027; 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 Child School.

Here, the hearing record does not indicate the extent to which the student has the opportunity to interact with nondisabled peers, if any, in her Child School placement. However, while the Child School may not have maximized the student's interaction with nondisabled peers, in this instance, it does not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at the Child School for the 2011-12 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

G. Equitable Considerations

Having determined that the Child School was an appropriate placement for the student for the 2011-12 school year, I will now consider whether equitable considerations support the parents' reimbursement claim for tuition costs.

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"]). 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 J.P. v. New York City Dep't of Educ., 2012 WL 359977, at *13-*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at *10; S.W., 2009 WL 857549, at *13-14; 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 M.C., 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of a Student with a Disability, Appeal No. 12-036; 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., 459 F.3d at 376; 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 argues that equitable considerations militated against an award of tuition reimbursement to the parents because the parents never intended to accept the recommended placement. In support of its argument, the district points to the fact that the parents tendered a deposit to enroll the student at the Child School.

The hearing record indicates that the parents attended and actively participated in the April 2011 CSE meeting and the parents fully cooperated with the CSE during the review process, including by obtaining their own private evaluations (see Tr. p. 219; Parent Ex. C at p. 14; see Parent Exs. G; Dist. Ex. 6). I note that the student attended the district public school for grades kindergarten through third (see Tr. p. 217). During the student's third grade, the parents sent multiple correspondences to the principal of the public school, the district, and the school psychologist, expressing their concerns with the student's educational program (Parent Ex. D).

By letter dated January 5, 2011, the parents informed the principal that the program recommendations of the May 2010 IEP were not meeting the student's needs and provided copies of the 2010 psychoeducational evaluation and November 2010 speech and language evaluation (Parent Ex. D at p. 1). The hearing record shows that the parents communicated with the SBST to craft an appropriate educational program for the student (see id. at p. 2). In a letter to the district, dated January 5, 2011, the parents noted that although they were happy that the SBST was trying to generate ideas to help the student, they were disappointed that they were not included in the process and requested a CSE meeting in order to afford them meaningful participation in the development of the student's IEP (id.). By letter to the school psychologist, dated March 7, 2011, the parents again repeated their request for a CSE meeting and expressed concerns about the student's then current educational program (id. at p. 3). The student's mother explained that she did not vocalize her concerns about the recommended ICT class at the April 7, 2011 CSE meeting because she felt that the members of the CSE knew her position as a result of her written communications, which were the impetus for the meeting (Tr. pp. 219-20, 223).

On or about April 8, 2011, the parents signed a payment schedule for the Child School for the 2011-12 school year and, on May 11, 2011, made a $2000 payment to the Child School (Parent Exs. E; F at p. 1). In a letter to the school psychologist, dated May 12, 2011, the parents notified the CSE that they planned to sign an enrollment contract with the Child School and provide the necessary deposit to reserve a seat for the student for the 2011-12 school year (Dist. Ex. 2). The parents stated that they had concerns that the ICT class recommended by the April 2011 CSE

would not offer the student the special education supports that she required in order to make educational progress (Dist. Ex. 2). In that letter, the parents indicated that they were willing to consider any other program or placement recommendations that the CSE offered, but that their letter served to notify the CSE that if an appropriate program/placement was not recommended in a timely manner that they would have no choice but to unilaterally place the student at the Child School and seek tuition reimbursement for the placement at public expense (id.).

As discussed above, the parents expected an FNR from the district during the summer after the 2010-11 school year, even though the April 2011 IEP was meant to be implemented for a portion of the 2010-11 school year, as well as the 2011-12 school year. Therefore, by letter dated June 20, 2011, the parents advised the district that they had not yet received an FNR relative to the April 2011 CSE meeting and expressed their desire to visit the school before the close of the school year (Parent Ex. D at p. 4). In addition, the parents reiterated to the district that if it did not offer the student an appropriate program/placement in a timely manner that they would have no alternative but to unilaterally place the student at the Child School and seek tuition reimbursement (id.). The parents received no response from the district, although it appears that their letter may have been returned to them unclaimed (id. at pp. 6, 8). Therefore, in a letter to the district, dated August 22, 2011, the parents stated that that they had not received a response to their July 12, 2011 letter and advised the district that, given the late date and lack of notification from the district, they had no choice but to unilaterally place the student at the Child School and seek full tuition reimbursement at public expense (id. at p. 9).

Based upon the evidence contained in the hearing record, I find that the parents acted reasonably under the circumstances of this case and cooperated with the district in good faith to secure an appropriate placement for the student. Therefore, I find that equitable considerations favor the parents and justify an award of tuition reimbursement under the circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *8-*9 [S.D.N.Y. Jan. 3, 2013]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *8-*9 [S.D.N.Y. Dec. 26, 2012]; R.K., 2011 WL 1131522, at *4).

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the relevant portions of the 2010-11 and 2011-12 school years, based on the conclusion that the district failed to provide notice of the assigned school, must be reversed as it is not supported by the hearing record. However, I find that the goals set forth in the April 2011 IEP and the April 2011 CSE's recommendation in the IEP of an ICT class with related services, but without provision for additional reading services for the student, were not reasonably calculated to enable the student to receive educational benefits, and thus, the district failed to offer the student a FAPE in the LRE for relevant portions of the 2010-11 and 2011-12 school years (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). I also find that the parents' unilateral placement at the Child School was appropriate, and that equitable considerations favor an award of reimbursement to the parents of the student's tuition at the Child School for the 2011-12 school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated April 23, 2012, is modified, by reversing those portions which determined that the district failed to provide notice of the assigned school and ordered the district to issue a Nickerson letter to the parents; and

IT IS FURTHER ORDERED that the district shall, upon satisfactory proof of payment, reimburse the parents for the student's Child School tuition for the 2011-12 school year.

Dated: **Albany, New York**
June 28, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER