



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-140

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

Appearances:

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Summit School (Summit) for the 2008-09 school year. Respondent (the district) cross-appeals from those portions of the IHO's decision assigning the burden of proof to the district and finding the district was deliberately indifferent to the student's mistreatment because it failed to fully investigate and adequately remediate the student's mistreatment. The appeal must be dismissed. The cross-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 is required to issue a final decision in the review and mail a copy of the decision 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. Procedural History

Before turning to the merits of the appeal, a brief explanation regarding its procedural posture is warranted. The parents initially challenged the special education programs and related services recommended by the district for the student's 2008-09 school year (fourth grade) by due process complaint notice dated June 20, 2008 (Parent Ex. A at pp. 1-6). Proceeding through the administrative procedures described above, an IHO found—and an SRO similarly concluded in Application of a Student with a Disability, Appeal No. 09-097—that the district offered the student a free appropriate public education (FAPE) for the 2008-09 school year, and both the IHO and the

SRO denied the parents' request to be reimbursed for the costs of the student's tuition at Summit for the 2008-09 school year (see IHO Ex. III at pp. 1-39 [representing the IHO's decision in the initial action, dated July 21, 2009, in which the IHO further found that Summit was not appropriate to meet the student's special education needs and equitable considerations did not favor the parents' request for tuition reimbursement]; Application of a Student with a Disability, Appeal No. 09-097 [reviewing IHO's decision dated July 21, 2009]). The parents sought judicial review of the decision in Application of a Student with a Disability, Appeal No. 09-097 in the United States Federal Court for the Eastern District of New York, after which the Court ultimately remanded the matter to the IHO for further administrative proceedings to "review evidence of bullying and make a determination of whether harassment deprived [the student] of her educational benefit and any other relevant issues bearing on this issue" using a four-part test articulated by the Court (T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 293, 316-19 [E.D.N.Y. Apr. 25, 2011]; IHO Ex. I at p. 2).¹

A. The Test in T.K.

Addressing a case of first impression, the Court in T.K. created a strict legal test to determine whether—in an IDEA action—harassment or bullying deprives a student of a FAPE (T.K., 779 F. Supp. 2d at 293-317). In developing the test, the Court balanced longstanding administrative advice instructing districts in how to apply the IDEA with tests used to determine a district's liability for either student-on-student sexual harassment or student-on-student disability harassment under Title IX of the Civil Rights Act (T.K., 779 F. Supp. 2d at 314-17).²

Accordingly, the Court announced that "under IDEA the question to be asked [was] whether school personnel w[ere] deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities," and thus, rose to the level of a denial of a FAPE (T.K., 779 F. Supp. 2d at 297-316).³ The Court explained that while the alleged conduct "need not be outrageous to fit within

¹ Although the Court remanded the matter to determine whether the alleged harassment or bullying rose to the level of a denial of a FAPE, the Court did reach a conclusion on the merits regarding the parents' contention that the district impermissibly predetermined the student's 2008-09 IEP (T.K., 779 F. Supp. 2d at p. 319). The Court agreed with both the IHO's and SRO's conclusion that the parents had an opportunity to meaningfully participate in the development of the student's 2008-09 IEP, and thus, the Court granted the district's motion to dismiss the parents' predetermination claim (T.K., 779 F. Supp. 2d at 319).

² Under Title IX, a district's liability for cases involving student-on-student sexual harassment is analyzed under a test developed by the U.S. Supreme Court in Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 119 S. Ct. 1661 (1999). However, a modified Davis test has been applied to cases involving a district's liability for student-on-student disability harassment; as modified, the test requires an inquiry into whether

- 1) the plaintiff is an individual with a disability who was harassed because of that disability; 2) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive environment; 3) the defendant knew about the harassment; and 4) the defendant was deliberately indifferent to the harassment

(T.K., 779 F. Supp. 2d at 314-15 [citing Werth v. Bd. of Dirs. of Pub. Schs., 472 F. Supp. 2d 1113, 1127 (E.D.Wis. 2007); K.M. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 358-60 (S.D.N.Y. 2005)]).

³ Deliberate indifference "requires a finding that the state entity had actual knowledge of the harassment and failed

the category of harassment that rises to the level of deprivation of rights of a disabled student," the conduct "must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment" (T.K., 779 F. Supp. 2d at 317 [citation omitted]). The Court further explained that districts must take "prompt and appropriate action," and described the "rule to be applied" when responding to incidents of bullying involving students with disabilities that "may affect the opportunities" of students with disabilities to "obtain an appropriate education" (id.). Specifically, districts "must investigate" to determine if the alleged harassment occurred, and if alleged harassment did occur, then the district "must take appropriate steps to prevent it in the future" (Id.). In cases where "a student may have her academic success stunted as a result of harassment, but still achieve some success," the test is met for denial of FAPE: it is not necessary to show that all opportunity for an appropriate education was prevented (id. at 316). "[A]cademic growth is not an all or nothing proposition. There are levels of progress. A child may achieve substantial educational gains despite harassment, and yet she still may have been seriously injured" (id.).

B. Administrative Proceedings on Remand

Pursuant to the Court's directive, the parties returned to an impartial hearing that commenced on June 8, 2011, and concluded on May 21, 2012 after 10 nonconsecutive days of proceedings (IHO Ex. I at pp. 1-2; Tr. pp. 1821, 3487).^{4, 5} The parties convened the first day of the impartial hearing to address the question of which party bore the burdens of production and persuasion with regard to whether bullying or harassment deprived the student of a FAPE—the issue to be relitigated before the IHO under the T.K. test—and in particular, the interplay of the State's statute assigning the burden of proof to the district at an impartial hearing to demonstrate that it offered the student a FAPE (see Tr. pp. 1821, 1823-31, 1839-40).⁶ Ultimately, the district's attorney stipulated on the record that he agreed with the IHO's "order" assigning the parents with the burden of production on "elements one, two and four," and assigning the district with the burden of production on "element three;" similarly, the district's attorney stipulated on the record that the district bore the burden of persuasion on all four elements of the test (Tr. pp. 1896-1901, 1947-49). The parents' attorney explicitly agreed to the stipulation proposed by the district's attorney (Tr. pp. 1949-61).⁷

to respond adequately" (T.K., 779 F. Supp. 2d at 315 [citing Hayut v. State Univ. of N.Y., 352 F.3d 733, 750 (2d Cir. 2003)]). As applied in student-on-student sexual harassment cases, a school district's "failure to respond must be 'clearly unreasonable in light of known circumstances,'" and the school district's deliberate indifference "must cause students to be harassed or make them more vulnerable to such conduct" (T.K., 779 F. Supp. 2d at 325 [citing D.T. v. Somers Cent. Sch. Dist., 348 Fed.Appx. 697, 700 (2d Cir. 2009) (applying the Davis test)]).

⁴ Consistent with the Court's expressed preference, the same IHO presided over both the initial impartial hearing and the impartial hearing on remand (IHO Ex. I at p. 2; compare IHO Ex. III at pp. 1, 35, with IHO Decision at pp. 4-5, 42).

⁵ Attempting to avoid a remand of the case, the parents' attorney stated at a status conference that the matter required no more than a "brief evidentiary hearing" before the Court (approximately "45 minutes") in order to complete the administrative record and be ripe for adjudication by the Court (IHO Ex. II at pp. 2-4).

⁶ The Court previously denied the district's request to clarify which party bore the burden of proof at the impartial hearing on remand (Dist. Ex. 9 at p. 12).

⁷ In a letter dated June 10, 2011, the district's attorney clarified that the "'stipulation'" agreed to at the June 8, 2011

As an essential part of the discussion, the IHO and the parties identified four elements as making up the test in T.K.: (1) was the student a "victim of bullying;" (2) did the "school authorities know or should they reasonably have known about the bullying;" (3) did "school authorities take appropriate steps to fully investigate the bullying and take remedial action against those who were perpetrating the harassment or were they deliberately indifferent to the bullying;"⁸ and (4) did the "bullying reach a level where the student was 'substantially restricted' in her learning opportunities" (IHO Decision at pp. 32-33; see Tr. pp. 1821, 1823, 1833-38, 1842-43, 1896-1901; Dist. Ex. 9 at pp. 1-10; Parent Ex. LLLLL at pp. 1-5; see generally Tr. pp. 1821-1961).⁹

Guided by these principles, the parties proceeded with the impartial hearing on remand. In a decision dated June 6, 2012, the IHO issued the following findings specific to the four elements of the T.K. test: (1) the student was a victim of bullying; (2) school authorities knew or should have reasonably known about the bullying; (3) school authorities failed to fully investigate and adequately remediate the bullying, and thus, were deliberately indifferent to the bullying; and (4) despite the bullying, the student was not "substantially restricted" in her learning opportunities during the 2007-08 school year (IHO Decision at pp. 32-42). As a result, the IHO found that the student was not denied a FAPE due to bullying, and denied the parents' request to be reimbursed for the costs of the student's tuition at Summit for the "2007-2008" school year (id. at p. 42).¹⁰ Having so concluded, the IHO noted that it was not necessary to "revisit" the initial IHO decision, dated July 21, 2009, and the "outcome of that decision remain[ed] undisturbed" (id.).

C. Issues on Appeal Related to the T.K. Test

In this case, neither party has appealed or cross-appealed the IHO's findings regarding the first two elements of the T.K. test, namely, that (1) the student was a victim of bullying, and (2) school authorities knew or should have reasonably known about the bullying; therefore, the IHO's

conference regarding the burdens of production and persuasion "was intended only to stipulate" that the IHO had made such a ruling and that "in the interest of efficiency, the hearing could proceed consistent with that ruling" (Dist. Ex. 10 at p. 1). The district's attorney also noted that the stipulation did not constitute any intention by the district to waive any objections to the IHO's findings, and specifically preserved the district's right to appeal the issue of the burden of proof at a later date (id.). It is unclear whether, or to what extent, the IHO considered the June 10, 2011 letter in the decision-making process concerning the assignment of the burden of proof as written in the decision (IHO Decision at pp. 31-32).

⁸ The IHO interpreted the Court's decision in T.K. as requiring a party to demonstrate "either that the [district] was deliberately indifferent or failed to take reasonable steps" as the third element of the test (Tr. pp. 1834-36). Noting that the district characterized the third element of the T.K. test as a "deliberately indifferent" standard and that the parents characterized the third element of the T.K. test as a "failed to take reasonable steps" standard, the IHO stated that the Court "didn't give me any guidance as to which one should apply because [the Judge] mentioned both things" (Tr. p. 1835; compare Dist. Ex. 9 at pp. 3-4, with Parent Ex. LLLLL at p. 2).

⁹ The IHO noted that each party had "synthesized these four points in quite different ways" and that she did not agree with the statement by the parents' attorney that the Court had "map[ped] them out so clearly" (Tr. pp. 1842-43).

¹⁰ It appears that the IHO mistakenly referred to the 2007-08 school year in the ordering clause in the decision since the student first attended Summit during the 2008-09 school year, and the parents specifically requested reimbursement for the student's attendance at Summit for the 2008-09 school year (compare IHO Ex. III at pp. 4-5, 33-34, with IHO Decision at p. 42).

findings on these two elements are final and binding upon the parties and the facts related to these two elements will not be recited or addressed in detail (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see IHO Decision at pp. 32-37). The parties have, however, either appealed or cross-appealed the IHO's findings related to the third and fourth elements of the T.K. test. Accordingly, facts relevant to the third and fourth elements of the T.K. test will be discussed, as well as facts related to additional issues to be addressed in this decision.

In addition, the student's educational history has been described at length in previous decisions and will not be repeated here in detail (see Application of a Student with a Disability, Appeal No. 08-019; Application of a Child with a Disability, Appeal No. 06-004).¹¹ Notably, the student continuously attended the same district public school for kindergarten (2004-05), first grade (2005-06), second grade (2006-07), and third grade (2007-08) in a 12:1 collaborative team teaching (CTT) classroom with full-time, 1:1 special education itinerant teacher (SEIT) services (school-based SEIT); related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) as part of either a school-based and/or home-based program; and home-based SEIT services (see Application of a Student with a Disability, Appeal No. 08-019 at pp. 2-3; Application of a Child with a Disability, Appeal No. 06-004 at pp. 2-3).^{12, 13} The student's

¹¹ With the exception of the 2006-07 school year, the student's recommended special education and related services have been continuously challenged at the impartial hearing level and/or the State-review level since the 2003-04 school year when the student attended a private nursery school (see Application of a Student with a Disability, Appeal No. 09-097 [regarding the 2008-09 school year]; Application of a Student with a Disability, Appeal No. 08-019 at pp. 2-3 [reviewing parents' request to be reimbursed for the costs of the student's school-based and home-based services for the 2007-08 school year]; Application of a Child with a Disability, Appeal No. 06-004 at pp. 2-3 [reviewing parents' request to be reimbursed for the costs of the student's school-based and home-based services for the 2004-05 and 2005-06 school years and noting the parents' challenge related to the 2003-04 school year]). Therefore, the student may have continued to receive certain services—such as school-based SEIT services, home-based related services, and/or home-based SEIT services—throughout subsequent school years pursuant to her rights under the pendency (stay-put) provisions.

¹² For consistency, this decision will refer to the student's placement as a "CTT" classroom largely because of the long decisional history regarding this student (see T.K., 779 F. Supp. 2d at 294; Application of a Student with a Disability, Appeal No. 09-097; Application of a Student with a Disability, Appeal No. 08-019; Application of a Child with a Disability, Appeal No. 06-004). Prior to the amendment of State regulations incorporating integrated co-teaching (ICT) services as a placement option within the continuum of services, districts often referred to such placement as a "CTT" or "collaborative team teaching" classroom (see 8 NYCRR 200.6[g]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-091 at p. 3 & n.5; Application of a Student with a Disability, Appeal No. 09-095). As of the date of this writing, districts have been advised to use the term ICT. Currently, State regulations define ICT services 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]). State policy guidance issued in April 2008, entitled "Continuum of Special Education Services for School-Age Students with Disabilities," provides more information about these services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

¹³ The hearing record refers to the student's full-time, 1:1 school-age educational support services as "SEIT" support. However, the Education Law defines special education itinerant services (commonly referred to as "SEIT" services) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). Although mischaracterized in the hearing record, I will continue to refer to the school-age educational support service

eligibility to receive special education and related services as a student with autism for kindergarten through third grade was not in dispute (Application of a Student with a Disability, Appeal No. 08-019 at p. 2; Application of a Child with a Disability, Appeal No. 06-004 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

D. Facts: Third Grade, 2007-08 School Year

Correspondence from the parents to the district during the 2007-08 school year began in August 2007, shortly after the parents learned the identities of the student's regular education and special education teachers in the third-grade CTT classroom (Parent Ex. PPP; see Tr. pp. 3071-72).¹⁴ In this hand-delivered letter, the parents requested a meeting with both teachers in order to introduce themselves and to discuss a variety of topics, including the role of the student's school-based SEIT and the student's "status and progress, learning profile, style and needs, interdisciplinary collaboration, [Applied Behavior Analysis (ABA)] principles, strategies and techniques (i.e. prompting, positive reinforcement and shaping), and curriculum" (id.). In addition to both parents and both of the CTT classroom teachers, the school principal (principal) also attended the requested meeting (see Tr. pp. 3072-73; see also Tr. pp. 818-19). At the meeting, the parents questioned the principal about the results of her investigation into an incident that occurred in May 2007—near the end of second grade—in which the student reported that another student in her class had pinched her on the arm during recess (Tr. pp. 3073-74; see Parent Exs. CCC at p. 16; FFF at p. 1).¹⁵ In response, the principal told the parents that "it ha[d] been addressed," but did not elaborate with further details (Tr. pp. 3073-74).¹⁶

providers as "SEITs" to remain consistent with the hearing record and to avoid confusion in this decision.

¹⁴ The third-grade CTT classroom represented the first full-time teaching jobs held by both the regular education teacher and the special education teacher assigned to that classroom for the 2007-08 school year (see Tr. pp. 2004, 2804).

¹⁵ The parents reported this incident in a letter addressed to the student's second-grade CTT teachers, dated May 11, 2007, and provided copies of the letter to the principal and two assistant principals at the school (Parent Ex. FFF at pp. 1-2; see Tr. pp. 3027-29). According to the letter, the student did not report the incident to anyone at the school because she was "'afraid to tell an adult' and 'scared'" (Parent Ex. FFF at p. 1). The parents learned about the incident at the end of the school day when they arrived to pick up the student (id.). At that time, the parents took the student to the school nurse who examined, treated, and documented the injury (a bruise on the arm); the parents also spoke to an assistant principal about what happened before leaving school that day because the principal was unavailable (id.; see Parent Ex. EEE at pp. 1-2). The assistant principal advised that he would investigate by speaking with the students involved and with the adults who were present during recess (Parent Ex. FFF at p. 1). The hearing record contains an undated statement that appears to have been written by the perpetrator of the pinching incident, which would typically accompany an occurrence report form and an accident/incident form (compare Parent Ex. CCC at p. 16, with Parent Ex. CCC at pp. 3-7, 8-10). The hearing record does not otherwise contain an occurrence report or an accident/incident form about the pinching incident.

¹⁶ The parents testified that although they did not receive a written response to the May 11, 2007 letter, the principal had telephoned them on the evening of the incident, and indicated that she would investigate the incident and report back to the parents (see Tr. pp. 3027-28). The parents testified that they were unaware whether the principal investigated the incident, but were "sure" that the principal did not report back to them (see Tr. p. 3028). The principal testified that she interviewed the student who perpetrated the pinching, she contacted the student's parents, and the student was given a consequence as a result of this incident (see Tr. pp. 1078-81). In addition, the principal testified that in these situations she would "never" disclose to a parent what consequence had been

In third grade, the student began attending the CTT classroom with the same SEIT provider (SEIT 1) who provided school-based SEIT services to the student during second grade in the 2006-07 school year (Tr. pp. 3061-62). A SEIT note dated October 12, 2007, indicated that the SEIT had to prompt the student "throughout the day for picking her nails [and] making them bleed" (Dist. Ex. 8). It also noted that the student participated with other children playing kickball at recess (*id.*).

On November 1, 2007, the parents privately obtained a psychological consultation (November 2007 report) of the student to "update her current academic functioning in the context of appropriate future educational planning," to "investigate other educational options," and to "help make educational recommendations" in light of parental concerns about the student's needs and the increasing demands "on all levels" at her current public school (*see* Parent Ex. XX at p. 1).¹⁷ At that time, the clinical neuropsychologist described the student as a "social" and "engaging" third grader who—despite a history of developmental, language, and regulation difficulties—made "ongoing progress in all areas" since kindergarten while attending a "large mainstream public school environment" (*id.*). Similarly, the parents independently reported that the student was a "social girl" who was eager to meet and play with other children, and who had a "best friend at camp and school" (Parent Ex. XX at p. 1). According to the report, the student's pragmatic deficits persisted and she continued to present as uncomfortable and anxious in novel situations or when feeling challenged or frustrated; with difficulties more pronounced in her current school environment (Parent Ex. XX at p. 1). The clinical neuropsychologist reported that during the consultation the student presented as "guarded" and "anxious," and was concerned about being judged and evaluated by others (Parent Ex. XX at pp. 2-3).

The psychological consultation report provided results from an April 2007 psychological evaluation of the student, which indicated the student possessed "solid potential with variable difficulties in higher level learning skills" (Parent Ex. XX at p. 1). Consistent with the April 2007 findings, the November 2007 administration of an abbreviated intellectual battery yielded a full scale, nonverbal fluid reasoning, and verbal knowledge scores that fell "solidly" within the average range (Parent Ex. XX at pp. 1-2, 6). The clinical neuropsychologist also re-administered specific cognitive assessment subtests that in April 2007 had produced "spuriously low scores," but during the November 2007 assessment, yielded "significant improvement" (Parent Ex. XX at pp. 2, 6).

given to another student as a matter of "confidentiality" (Tr. pp. 1009-10).

¹⁷ It does not appear from the hearing record that the parents provided the district with a copy of the November 2007 report at any time prior to the impartial hearings in this case (*see* Tr. pp. 1-3526). The parents learned about Summit from the evaluator who conducted the November 2007 psychological consultation (*compare* Parent Ex. XX at pp. 1, 6, *with* Parent Ex. AAAAA at p. 2). According to information provided on the Summit admissions' application completed by the parents, the evaluator indicated that "Summit would be a good fit" for the student and would provide the student with an educational setting where she could "meet her full academic and social potential" (Parent Ex. AAAAA at p. 2). The parents testified that they had not "seriously considered" a nonpublic school placement until the "beginning of the second half of third grade" due to the "continuing problem of bullying," and "began researching options" in "February or March of [2008]" (Tr. pp. 1594, 1710-12). The Commissioner of Education has approved Summit as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7). A review of the State Education Department's State-approved nonpublic schools indicates that Summit serves students with the following disabilities: "LD" (learning disability), "ED" (emotional disturbance), and "MD" (multiple disabilities) (<http://www.p12.nysed.gov/specialed/privateschools/NYC.htm>; *see* 8 NYCRR 200.1[zz][4], [6], [8]).

The clinical neuropsychologist reported that some of the variability in the student's assessment performance was due to her pragmatic language difficulties and anxiety evident in testing situations, and that it "seem[ed] clear" that her cognitive potential was "at least in the average to high average range" (Parent Ex. XX at p. 2).

The November 2007 report contained the results of an April 2007 administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) (Parent Ex. XX at p. 7). In April 2007, the student achieved the following WIAT-II subtest standard scores: word reading, 102 ; reading comprehension, 107; numerical operations, 93, and math reasoning, 91 (Parent Ex. XX at p. 7).¹⁸ In November 2007, the student achieved the following on the Gray Oral Reading Tests-Fourth Edition subtests: reading rate, 84th percentile; accuracy, 50th percentile; fluency, 75th percentile; and comprehension, 63rd percentile (Parent Ex. XX at p. 7). The clinical neuropsychologist reported that the student's overall reading abilities were within normal limits, although she was "beginning to struggle" with more complex higher level comprehension tasks (Parent Ex. XX at p. 2). He further indicated that the student exhibited "variable difficulties" with math calculation and reasoning, and with executive functioning skills such as organization, planning, and self-monitoring (Parent Ex. XX at p. 2). Due to the student's executive functioning deficits, the clinical neuropsychologist reported that the student required "a good deal of scaffolding" to remain in her current educational setting, and indicated that "a more supportive academic environment needs to be pursued" (Parent Ex. XX at p. 2).

Emotionally, the clinical neuropsychologist reported that the assessment results consistently reflected the student as being "bright," and vulnerable to negative self-appraisals and affective states (Parent Ex. XX at pp. 2-3). The report indicated that the student's patterns of withdrawal and anxiety protected an underlying fear of being harshly judged, which she was more vulnerable to in educational and assessment settings (Parent Ex. XX at p. 3). Despite these difficulties, the clinical neuropsychologist reported that the student was "not a conduct difficulty or a behavior management problem in the classroom," and once comfortable, was an "active and engaged learner" (Parent Ex. XX at p. 3). The report further indicated that the student functioned "adequately" within familiar settings, in that she was able to keep up academically with peers at her current school, she had some close friends, and she was able to comfortably participate in group and class discussions provided the support she was receiving at school (Parent Ex. XX at p. 3). The clinical neuropsychologist cautioned that the student remained at "increased risk" as she advanced in grade, especially as she neared middle school, where academic and social demands would tax her greatest areas of difficulty (Parent Ex. XX at p. 3).

The clinical neuropsychologist concluded that the student would "benefit from a smaller educational setting" as she advanced in grade, as the work becomes more challenging and less structured (Parent Ex. XX at p. 3). He further indicated that "a CTT classroom will not be able to offer the level of individualized support and encouragement, as would a smaller but intellectually challenging special educational setting" (Parent Ex. XX at p. 3). Among other recommendations, the clinical neuropsychologist recommended that the student be placed in a "small, special education class and school for children with solid cognitive potential who need a supportive and

¹⁸ The clinical neuropsychologist re-administered the WIAT-II reading comprehension subtest to the student in November 2007, which yielded a standard score of 100 (Parent Ex. XX at p. 7).

specialized approach for learning" (Parent Ex. XX at pp. 3-4). He further indicated that the student would benefit from psychotherapy to teach her specific coping strategies targeting her frustration tolerance, anxiety, and difficulties with pragmatic skills (Parent Ex. XX at p. 5).

Meanwhile, certain issues arose with the student's 1:1 school-based SEIT and the parent testified that the school-based SEIT's agency made the decision to terminate her services with the student, which occurred just after Thanksgiving (Tr. pp. 3062-63). The parent testified that the SEIT had been leaving twenty minutes early at the end of the school day, which was a problem for the student due to her need for assistance with transitions (Tr. p. 3062). The SEIT then took two weeks off for vacation without notice and a replacement SEIT was therefore not able to be obtained for the student during that time (Tr. p. 3063; but see Application of a Student with a Disability, Appeal No. 08-019).¹⁹ In November 2007 and January 2008, however, the parents replaced this school-based SEIT provider with two part-time, school-based SEITs (Tr. pp. 1469, 1551-52, 3068-69). Although not employees of the district, the district continued to pay for the school-based SEITs' services pursuant to the student's pendency (stay-put) placement (see Application of a Student with a Disability, Appeal No. 08-019 at pp. 2-3 & n.3).

In a letter dated November 29, 2007, the parents wrote to the student's regular education and special education teachers and indicated that during the "lunch/recess period yesterday," another student in the classroom "intentionally stepped on [their daughter's] feet and toes repeatedly to hurt her" (Parent Ex. WW).²⁰ The parents requested that the incident be addressed and that the perpetrator be kept away from the student, but did not request a meeting to discuss bullying (id.).

On January 25, 2008, the parents authorized one of the student's school-based SEITs to complete an admissions questionnaire for Summit (see Parent Ex. BBBB).²¹ On February 11, 2008, the parents completed an application for admission to Summit for the 2008-09 school year (see Parent Ex. AAAAA at pp. 1, 7-8).²²

¹⁹ Interestingly, a similar situation occurred during spring 2007 without any apparent repercussions. At that time, the student's regular education and special education teachers in her CTT classroom "effectively provide[d] the student with additional support and prompts to stay on task" during the same school-based SEIT's seven-day absence in spring 2007 (Application of a Student with a Disability, Appeal No. 08-019 at p. 19). No substitute SEIT had been provided in the school-based SEIT's absence, and "everything went 'fairly well'" (id.).

²⁰ The parents copied the district's principal and two assistant principals on this letter (see Parent Ex. WW).

²¹ The parents identified the SEIT's title on the Summit questionnaire as "teacher;" the SEIT identified herself on the questionnaire as the student's "teacher" at the district's school; and the SEIT indicated that she had known the student for four months, although it appears from the hearing record that she only began working with the student for two days per week in the ICT classroom since late November 2007 (compare Parent Ex. BBBB, with Tr. pp. 1549-52; Parent Exs. DD at pp. 1-2; EE at pp. 1-2; NNN).

²² On the "Release Form" attached to the Summit application, the parents identified the student's "Classroom Teacher" as the SEIT who began working with the student two days per week in the ICT classroom in late November 2007 (compare Parent Ex. AAAAA at p. 8, with Tr. pp. 1549-52; Parent Exs. DD at pp. 1-2; EE at pp. 1-2; NNN; BBBB). The release form allowed Summit to contact the individuals listed on it for the purposes of obtaining "comments and/or release of transcript, teacher reports and any standardized testing" (Parent Ex. AAAAA at p. 8).

By letter dated March 11, 2008, the admissions team at Summit informed the parents of the student's acceptance for the 2008-09 school year (see Parent Ex. YYYY). By letter of the same date, Summit provided the parents with two forms in order for the student to complete a writing sample to assess her current level of skills (see Parent Ex. ZZZZ).

On March 19, 2008, in accord with an IHO's previous order dated February 21, 2008, the district completed a functional behavioral assessment (FBA) of the student (see Dist. Ex. 1 at pp. 3-11; Parent Ex. E at pp. 1, 5-6).

On March 21, 2008, the parents executed an enrollment contract for the student's attendance at Summit, and forwarded a nonrefundable, one-month tuition payment to reserve the student's seat for the 2008-09 school year beginning in September 2008 (see Parent Ex. UU at pp. 1-2).

On March 26, 2008, both parents met with a district social worker, two district school psychologists, the student's third-grade regular education and special education CTT teachers, both of the student's school-based SEITs, and the student's home-based OT provider to review the completed FBA and to develop a behavior intervention plan (BIP) for the student (see Tr. pp. 353, 376-83, 1512-14, 1525-27, 1549-52, 1566 1657-58, 1756-57 ; Dist. Ex. 1 at pp. 1-2; Parent Ex. D at p. 38). The BIP meeting—described as "contentious" by one of the school psychologists in attendance—lasted for approximately two to three hours because the group reviewed the BIP "line, by line, by line" and because the parents "pretty much dictated what words to use and what words not to use" (Tr. p. 381). At the conclusion of the meeting, however, the parents seemed "content" with the BIP (Tr. p. 383).²³

On April 18, 2008 a substitute SEIT's notes reflect that the student had no incidents noted during academics or specials during the school day, except during "Yard time/Lunch" where the student pushed a fellow classmate. The SEIT apparently "stepped in for conflict resolution" and noted that the student "learned that it is good to share friends" (see Dist. Ex. 7 at pp. 1-2). It was also indicated that the student participated actively in class and independently managed two "conflict" situations with classmates during the day (id.).

By letter dated May 16, 2008, the district invited the parents to a CSE meeting on June 4, 2008 (Parent Ex. T).

By letter dated May 27, 2008, the parents provided the district with copies of eleven separate evaluations, observations and progress reports, and indicated that additional documents would follow prior to the June 4, 2008 CSE meeting (Parent Ex. Q). The parents requested copies of all documents that the CSE intended to consider at the meeting (id.).

By letter dated May 28, 2008, the district indicated it was providing the parents with copies of the documents they had requested (Parent Ex. O). The parent testified that no documents were attached (Tr. p. 1722).

²³ The June 4, 2008 CSE included the BIP drafted at the March 26, 2008 meeting with the student's 2008-09 IEP (see Parent Ex. D at pp. 1, 38; see also Tr. p. 378).

By letter dated May 28, 2008, the parents provided the district with a copy of a progress report in preparation for the June 4, 2008 CSE meeting (see Parent Ex. N at p. 1).²⁴

By letter dated May 29, 2008, the parents provided the district with a copy of a privately obtained evaluation report in preparation for the June 4, 2008 CSE meeting (see Parent Ex. M).²⁵ The parents indicated that they "had not received documents requested" in their previous letter, dated May 27, 2008, and renewed their request for the documents (id.).

On June 4, 2008, the CSE convened to conduct the student's annual review and to develop her IEP for fourth grade during the 2008-09 school year (Parent Exs. D at pp. 1-3; J at pp. 1-81; see also Parent Exs. M-O; Q; T). At the conclusion of the CSE meeting, the parents voiced their disagreement with the recommendation to place the student in a CTT classroom "in general" (Tr. pp. 1771-79). The parent's testimony at the impartial hearing confirmed that no placement was offered at the IEP meeting (Tr. p. 1778). The only placement the parents were aware of was their home school zone, but placement in a particular school was not discussed at the IEP meeting (Tr. pp. 1771-79).

By letter dated June 6, 2008, the parents rejected the June 2008 IEP, and in particular, the student's recommended placement in a CTT classroom for fourth grade located in the same district public school that she had continuously attended since kindergarten (Parent Ex. I). The parents advised the district of their intentions to unilaterally place the student at Summit for the 2008-09 school year and to seek reimbursement for the costs of the student's tuition (see Parent Ex. I at pp. 1-4).

E. Impartial Hearing Officer Decision

By decision dated June 6, 2012, the IHO first addressed the question concerning the assignment of the burden of proof (see IHO Decision at pp. 31-32). After setting forth each party's position, the IHO concluded that the district bore the burden of production "as to the first, second and fourth elements" of the T.K. test, and that the parents bore the burden of production as to the fourth element of the T.K. test (id. at p. 32). However, the IHO noted that the district should have been assigned the burden of production on "all four elements of the test" pursuant to the State statute governing the burden of proof (id. [referring to Educ. Law § 4404[1][c]). The IHO then acknowledged that the "burden of production" was "irrelevant" because both parties "called witnesses in no particular order and both parties questioned each witness on the day of their appearance," and furthermore, the parents were not prejudiced by initially placing the burden of production upon the parents regarding the "third element of the test" (id.).

²⁴ The parents delivered the May 28, 2008 letter—addressed to the student's then-current regular education and special education teachers, a school psychologist, and a school social worker—via Federal Express (see Parent Ex. N).

²⁵ The parents delivered the May 29, 2008 letter—addressed to the same individuals identified in the May 28, 2008 letter—via hand delivery and Federal Express (compare Parent Ex. M, with Parent Ex. N at p. 1).

Turning to the merits, the IHO indicated that in order to determine whether the district offered the student a FAPE under the particular circumstances of this case, the "answer must be yes to all four" of the following under the applicable standard set forth in T.K.:

- 1) was the child a victim of bullying;
- 2) did the school authorities know or should they reasonably have known about the bullying;
- 3) did the school authorities take appropriate steps to fully investigate the bullying and take remedial action against those who were perpetrating the harassment or were they deliberately indifferent to the bullying;
- 4) did the bullying reach a level where the student was "substantially restricted" in her learning opportunities

(IHO Decision at p. 33). Applying the four elements, the IHO held that the student was a victim of bullying (*id.* at pp. 33-36), that school authorities were aware of some of the bullying incidents (*id.* at pp. 36-37), that the district was deliberately indifferent (*id.* at pp. 37-40), and that the student was not substantially restricted in her learning opportunities (*id.* at pp. 40-42).

IV. Appeal for State-Level Review

On appeal, the parents assert that the IHO properly concluded that hearing record established a pattern of "ongoing and repeated bullying" of the student at the district's public school during the 2007-08 school year and that the district was deliberately indifferent to the mistreatment.²⁶ In light of these findings, the parents allege that the 2008-09 IEP was reasonably calculated to "repeat that hostile environment," and therefore, the IHO erred in concluding that the district offered the student a FAPE. The parents also argue that the IHO ignored or misapplied the applicable legal standards, the burden of proof, and the evidence in the hearing record in reaching the conclusion that the district offered the student a FAPE. Next, the parents allege that the IHO failed to address whether the parents sustained their burden to establish the appropriateness of the unilateral placement of the student at Summit for the 2008-09 school year and whether equitable considerations weighed in favor of the parents' request for tuition reimbursement. The parents note that they do not appeal the IHO's findings on the first two elements of the strict legal test set forth in the District Court's decision. The parents request that the IHO's determination that there was no violation of FAPE be reversed.

The district answers and cross-appeals certain findings of the IHO. Specifically, the district cross-appeals the IHO's findings on the third element of the District Court's test, that the district did not fully investigate the bullying, failed to take remedial action to prevent further bullying and was deliberately indifferent. The district cross-appeals the IHO's decision to the extent it held that the district was required to bear the burden of proof on the third element of the District Court's test. The district requests that the petition be dismissed, the cross appeal be granted, and the IHO's

²⁶ The parents affirmatively assert in their petition that they do not appeal these particular conclusions in the IHO's decision (Pet. ¶¶ 3, 61).

determination be reversed to the extent that she held that the district failed to investigate mistreatment of the student or failed to take remedial action.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).²⁷ "[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];

²⁷ Although the IHO conceptualized the holding in T.K. to "expand[] the definition of FAPE," I do not read the Court's decision in T.K. to overrule, negatively affect, or otherwise modify the U.S. Supreme Court's holding in Rowley with respect to defining a FAPE (Tr. p. 1830). Moreover, given the parties' own misgivings on how to apply the test in T.K. to the case at hand—since the student did not attend the district's public school during the school year at issue, 2008-09—it may be more reasonable to and consistent with the development of a student's IEP to incorporate bullying issues—that is, how such instances affect the particular student, or how such instances manifest in the particular student, either academically, behaviorally, or social/emotionally—and address those specific needs within the IEP as would normally be the CSE's affirmative obligation as I have described below. The Court's test did not draw a bright line distinction in the test between alleged bullying that occurred during the 2007-08 school year as a denial of a FAPE from the parents claims of how the IEP was inappropriately designed for the 2008-09 school year.

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. Burden of Proof

The district cross-appeals the IHO's decision on the burden of proof to the extent that the IHO required the district to bear the burden of proof in any manner with respect to the third element of the legal test set forth by the District Court.

The IHO's decision held that the district was required to bear the burden of proof, which encompasses the burdens of persuasion and production, on all the elements of the District Court's legal test (IHO Decision at pp. 31-32). I concur with the IHO on this point. It is well established that the burden of proof is required to be on the district, except with respect to the appropriateness of a parent's unilateral placement when a parent seeks tuition reimbursement (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]). It is further undisputed that the legal test set forth by the District Court is a part of a determination as to whether a student was offered a FAPE in the first instance (T.K., 779 F. Supp. 2d at 316-17; IHO Decision at pp. 32-33). Therefore, the district was required to have the burden of proof with regard to the legal test set forth by the District Court and the district's cross appeal on this issue must be denied.

B. T.K. Legal Test

The parent appeals from the IHO's finding on the last element of the legal test set forth by the District Court, specifically the IHO's finding that the bullying of the student did not affect the opportunity of the student to receive an appropriate education. In particular, the parents allege that the IHO erred in focusing on the student's academic progress and "comfort" and ignored the "material negative impact" on the student. The district cross-appeals the IHO's findings on the third element of the legal test, specifically the IHO's finding that the district was deliberately indifferent to the bullying by failing to investigate and take remedial measures.

1. Third Element of T.K. Legal Test

The IHO considered the third element of the T.K. legal test set forth by the District Court, specifically whether the district took appropriate steps to investigate the bullying, whether

remedial actions were taken against the perpetrators of the harassment or whether the district was deliberately indifferent to the bullying, and held against the district. The IHO determined that concerning specific incidents, when the student was pinched, when her toes were stepped on, when prank calls were made to her house, and when other students refused to touch her pencil and laughed at her in class, the district failed to appropriately investigate and take remedial action and was therefore deliberately indifferent (IHO Decision at pp. 39-40).

The district argues that the IHO erred in finding that the district was deliberately indifferent because the district did in fact investigate incidents and had measures in place to prevent problems between the student and another student who had previously mistreated her. The district notes that the administration spoke with the perpetrators of the pinching and toe stepping incidents and their parents and did not provide detail of the investigation or consequences given due to confidentiality (Tr. pp. 888-89, 1009-11, 1079-82). The district's classroom teachers affirmed their standard practice of addressing situations and giving consequences to students who bother other students in the classroom (Tr. pp. 2158-59, 2169, 2180-82, 2186, 2917-19). In addition, the teachers did not seat the student and a prior perpetrator of harassment next to the student in order to preemptively avoid problems (Tr. pp. 2122, 3327). The district had a practice to address any continual bullying problems (Tr. pp. 2148-49).

As set forth herein, I find that the IHO's decision on this third element must be vacated. The evidence suggests that the district did in fact investigate the incidents that it was aware of and that, while the parents were upset that any investigation and consequences for the perpetrators was kept confidential, this does not negate the district's actions and testimony that investigations and consequences for perpetrators did occur. In addition, the absence of written incident reports is not dispositive as to a determination of this element of the District Court's test.

The testimony established that the student's special education teacher in fact discussed bullying with the class and also had a procedure with dealing with conflicts between students (Tr. pp. 2018, 2052, 2131). After discussing the conflict with the students, she would have students write letters of apology, take away yard time, do theme drawings and read stories to encourage friendship (Tr. p. 2131). She had monthly meetings with parents and she did not recall the student's parents ever raising the issue with her during the monthly meetings (Tr. pp. 2024, 2100, 2107). She testified that she raised the issue of the student's tardiness at the monthly meetings with the parents (Tr. p. 2218). She testified that the student initially had trouble drawing others to her due to habits and behaviors such as picking her nose, passing gas and biting her nails (Tr. pp. 2203-04). When the class laughed when the student passed gas, the teacher testified that she told them not to laugh and she spoke to the student away from the class so that she was not embarrassed (Tr. pp. 2203, 2133). She was not aware of the student being isolated or left out of groups, and the parents never told her that the student was afraid to come to school (Tr. p. 2044). She testified that she was not aware of a continual bullying problem involving the student and if she had been aware of such an issue, she would have addressed it (Tr. pp. 2149, 2159). She was aware of a letter that the student's mother sent regarding the student receiving prank phone calls at home from children in the class over one weekend and she testified that she would have addressed this in the classroom if it was a continuing occurrence (Parent Ex. HHH, Tr. pp. 2148-49).

The father testified that the principal was contacted by the parents after the student was pinched by another student during the 2006-07 school year and she apologized to the parents and

indicated to them that she would investigate (Tr. pp. 3027-29). The parents did not hear back from her on that issue (*id.*). When they asked her about it months later, she indicated that it had been addressed but did not give them any details (Tr. p. 3432). The same child stepped on the student's toes in the 2007-08 school year (Parent Exs. WW, CCC, Tr. p. 3034). The father indicated that he was not able to write an incident report regarding that incident (Tr. pp. 3036, 3418).

As acknowledged by the IHO, "many of the particular incidents of bullying of which the parents complain were not specifically disclosed" to district staff (IHO Decision at p. 37). The IHO concludes that the DOE should have known that "may have been an issue with regard to bullying" and this student based on incidents of physical and verbal harassment of which the district was aware (*id.*). However, the district's scope of knowledge being limited is relevant to the appropriateness of its investigation and remedial action regarding the incidents of which it was aware. The IHO focused on four incidents of harassment when concluding that the district was deliberately indifferent: a pinching incident in the 2006-07 school year; a toe stepping incident in the 2007-08 school year; prank calls over a weekend to the student's home in the 2007-08 school year and the fact that other students did not want to touch the student's pencil during the 2007-08 school year (IHO Decision at pp. 37-40). The IHO concluded that the district failed to take any steps or adequate steps regarding these four incidents and was therefore deliberately indifferent with regard to the student's bullying.

I find that the testimony at the hearing established that the district took appropriate steps to investigate and remediate the harassment of the student of which it was aware over the two school years when they occurred. Regarding the pinching incident, the parents were informed by the principal that the incident was investigated and that there were consequences for the perpetrator, but that the investigation was confidential (Tr. pp. 1008-10, 3073-74, 3105). Regarding when the student's toes were stepped on, the principal again investigated the incident and issued a consequence (Tr. p. 889). The student's teachers did not seat the student near that child in the future to avoid future problems, and also asked the SEIT to monitor the two of them outside the classroom at lunch (Tr. p. 3327). Regarding the prank phone calls, the special education teacher of the student testified that she would have addressed this in the classroom after it had occurred if it was a continual problem (Tr. p. 2149). In addition, the district was limited as to what it could do in that the event took place outside of school on a weekend (Parent Ex. HHH). The teacher also opined that this type of behavior was not out of the ordinary for the age of the students in the class. Regarding the pencil incident, the student's SEIT confirmed that the classroom teacher took action, in the form of labeling a pencil for the student, but the SEIT disagreed with the manner in which the classroom teacher handled the incident (Tr. pp. 1556-58). The testimony established that even if an incident report was not completed, investigations of any alleged bullying behavior were always completed (Tr. pp. 2700-01, 2905-06). Based upon the foregoing, I vacate the IHO's determination of this issue and sustain the district's cross-appeal on this issue.

2. Fourth Element of the T.K. Legal Test

The parents appeal the IHO's determination that the student was not substantially restricted in her learning environment and argue that the IHO failed to appreciate the hostile environment that the student had been subject to. The parents argue that the cumulative effects of the district's actions and inactions, including offering the student the same CTT classroom for the 2008-09 school year, denied the student a FAPE.

Based upon the evidence set forth at the hearing that established that the student was not substantially restricted in her learning opportunities, I concur with the IHO's determination on this issue as detailed below.

The student's special education teacher for the 2007-08 school year testified that the student became more self-confident during the second half of the school year, making social and emotional progress over the year (Tr. pp. 2040, 2167). The teacher noted that the student made less personal and emotional progress the first semester compared to the second semester of the school year, attributing this to some of her behaviors such as calling out. The teacher noticed that the student's hygiene improved over the year and there was a decrease in the student's nose and finger picking, hand movements and rolling on a carpet as the year went on as well (Tr. pp. 2040-42, 2167-68, 2204). While the student's absences and tardiness increased in the second half of the school year, the district was never informed that the student was afraid to come to school (Tr. pp. 2040, 2044, 2792). In fact the father confirmed that the student's absences were attributable to illness (Tr. pp. 3219-20), and that she was tardy because she was slow getting dressed and going to school in the morning, but that she was never allowed to stay home because she did not want to go to school (*id.*). On February 11, 2008, the parents completed an application for Summit and did not reference bullying, but did mention that the student participated in the school's social activities and was generally happy (Parent Ex. AAAAA, pp. 4, 8).

The student's special education teacher also confirmed the student's academic progress in reading, math and writing during the 2007-08 school year, with more progress during the second semester than the first (Tr. pp. 2043, 2166, Parent Exs. K, L). The student's progress over the course of the 2007-08 school year was so great that her classification was changed for the 2008-09 school year from autism to learning disability (Tr. pp. 66, 80, 362, Parent Ex. D at p. 1, J, KK, PP at p. 4). Her progress was noted to be "across the curriculum" (Parent Ex. D).

The student's two SEITs for the third grade year testified at the impartial hearing and they testified consistently that their overriding concern, in terms of the relationship between the student and others in the class, was that the other students often did not include the student (Tr. pp. 1472, 1555). One SEIT's May 2008 report noted that the student had negative social interactions with other students, surmising that this had affected the student's confidence and comfort in school (Parent Ex. S). The other SEIT's May 2008 report noted that the student had difficulty with positive peer relationships, but also that her ability to perform at or above grade level was limited only due to her language based disability (Parent Exs. EE). The latter SEIT's report summary concluded that the student is generally a "happy, loving, positive girl" (*id.*).

The evidence supports the IHO's findings that the student was not denied a FAPE under all the circumstances. The IHO determined that the student was not substantially restricted in her learning opportunities, and did not show signs of victimization (IHO Decision at pp. 40-42). The IHO noted that over the course of the 2007-08 school year, the student made gains in academics as well as emotionally and socially (*id.*). The IHO noted that the student had made additional gains and progressed even more in the second half of the 2007-08 school year (*id.*). The IHO noted the multiple professionals, evaluators and providers who affirmed the student's gains over the school year, in addition to the parents' own recognition of the student's progress (*id.*).

These findings by the IHO are supported by the evidence and in light of the fact that the student was not substantially restricted in her educational opportunities, the district was not required to offer the student a program other than the CTT program that she was making substantial progress in, contrary to the arguments of the parents. The school psychologist testified that the student was progressing in a number of different areas and she felt that the CTT program that she had observed the student in was the appropriate program and that a private school setting was not appropriate (Tr. pp. 392, 510). In addition, the evidence of the student's growth, including academic, social and emotional growth, support the finding that the student was not substantially restricted in her educational opportunities. I have reviewed the standard set forth by the District Court, and noted that despite progress, there can still be a finding that a student was substantially restricted. I do not find that to be the case here in light of the evidence in the record. The student's teachers, her private evaluators, and even her parents, have acknowledged her academic progress and her social involvement over the 2007-08 school year. As the IHO speculated, this may be because the bullying was not severe enough to have a substantial impact upon her (IHO Decision at p. 41). Whatever the reason, the evidence does not support a finding that the student's academic success was "stunted as a result of harassment" or that her educational opportunity was otherwise substantially interfered with in accordance with the final element of the District Court's legal test (T.K., 779 F. Supp. 2d at 316). The meaningful progress across the curriculum by the student during the 2007-08 school year, without evidence of how bullying or harassment hindered or stunted her gains and successes, compels the conclusion that the fourth element of the legal test is not met in this case, in accordance with the IHO's conclusion. The fact that the district offered the student a CTT class for the 2008-09 school year and did not specifically note a different placement for the student on the IEP, did not deny the student a FAPE under the circumstances. Based upon the foregoing, I concur with the IHO's determination and I must deny the parents' appeal on this issue.

Based upon my determination above that the district did not deny the student a FAPE, it is not necessary to reach the issues of the appropriateness of the parents' unilateral placement or the equitable considerations. However, I note that the SRO in the prior State-level appeal prior to remand did not find it necessary either. However, due to the length and number of proceedings involving the student's education and in the and in the interests of judicial economy I will offer the parties and any reviewing court, if any, such findings in the alternative. Accordingly, I would concur with the IHO's July 21, 2009 determinations, as set forth below. I also note that there was no basis for the IHO to address these issues a second time in her 2012 decision because the remand from the District Court was limited to the new legal test set forth by the court.

C. Remaining Considerations Related to Bullying and Educational Programming

As discussed above, the parties and the IHO addressed the question posed by the District Court regarding 1) whether the student was the victim of bullying 2) whether school personnel had notice of substantial bullying; 3) whether the district failed to take reasonable steps to address the harassment, such as providing documentation that it either investigated claims of bullying or took steps to remedy the conduct; and 4) whether the bullying reached a level where a student was substantially restricted in learning opportunities she has been deprived a FAPE (see T.K., 779 F.Supp.2d at 318). This appears to have addressed the points for which the District Court remanded to the IHO. The remaining concern I have, in light of R.E., is that thus far the analysis of the bullying aspects of the case focus largely on whether the student was denied a FAPE while

the student was receiving services under the 2007-08 IEP. The parent's due process complaint in this matter indicated

"The CSE unilaterally refused to address the ongoing bullying of and negative effects on [the student] academically and socially in the [assigned public school site] CTT classroom despite [the student]'s parent's efforts to discuss this at the IEP meeting and in prior meeting and written communications, clearly indicative of the CSEs deliberate indifference to this problem"

(Parent Ex. A at p. 4). There does not appear to be a claim that the student was so affected by the bullying that the district was unable to actually deliver to the student the services mandated in the June 2007 IEP. Therefore it cannot be said that there was a denial of a FAPE due failure to follow "material" or "substantial" portion(s) of the IEP (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [holding that "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled [student] and the services required by the [student's] IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Since the District Court issued its decision, the United State Department of Education (USDOE) has further clarified that

"[a] school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly."

(Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP 2013]). Federal regulations implementing the IDEA also provides that a CSE should reevaluate

"(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation."

(34 CFR 300.303[a]). There is no claim that the district failed to evaluate the student during the 2007-08 school year in relation to revising the June 2007 IEP. What is clear is that the CSE reconvened and to conduct its annual review in June 2008, and that according to the parents, the June 2009 CSE is alleged to have failed to address the student's needs in light of bullying (Parent

Ex. A). Accordingly, I will review the evidence in the hearing record relevant to the substance of the June 2008 IEP as it may be relevant to addressing the bullying.²⁸

1. Evaluative Reports Available to the June 2008 CSE

The privately obtained November 2007 psychological report by the clinical neuropsychologist is described in detail above (Parent Ex. XX), but, as noted above, there is no evidence of whether it was made available to the June 2008 CSE.

However, in letters dated May 27, 28 and 29, 2008, to the student's special education and regular education teachers, the school psychologist, and the school social worker, the parents provided the district with a number of the student's private reports and recommended IEP annual goals and objectives, including: the student's January 2008 ("winter") report card, a February 18, 2008 report and a May 15, 2008 classroom observation report from a neurodevelopmental pediatrician, an April 1, 2008 after-school art class report, an April 17, 2008 McCarton Center report, a May 15, 2008 speech-language pathology report, a May 22, 2008 Lovaas Institute consultant report, May 2008 home and school-based SEIT reports, and May 2008 progress reports from the student's home-based occupational, speech-language, and physical therapists (Parent Exs. M; N; Q; see Parent Exs. F; G; H; K; S; V; W; Y; AA; CC; EE; FF; KK; NN; OO; PP).²⁹

The student's January 2008 report card reflected that she was approaching grade standards in reading, word study (spelling, mechanics), writing, math, and homework, and was meeting grade standards in social studies (Parent Ex. K at p. 1). According to the report card, the student's work habits were far below grade standard, as were her organizational skills based upon standard-based measures (Parent Ex. K at p. 1). The teacher's reported that the student was a "creative and outgoing child," and that they encouraged her to use her artistic talents to sketch stories before writing tasks (Parent Ex. K at p. 3). The report indicated that although the student had the ability to perform at or above grade level, she hesitated to fully apply herself (Parent Ex. K at p. 3). Her teachers recognized how much potential the student had, and opined that a more positive attitude toward her school work would benefit her (Parent Ex. K at p. 3). Teacher comments included in the winter report card identifying areas the student could improve upon included increasing writing stamina, thinking about books read independently using a variety of strategies, seeking out and engaging with peers, and demonstrating more respect towards adults and classmates (Parent Ex. K at p. 3). The teachers reported that the student had made progress since the beginning of the school year and that they were "looking forward to her continued success" (Parent Ex. K at p. 3).

The February 2008 neurodevelopmental pediatrician's report reflected that the student was last evaluated in March 2007, and at that time exhibited language delays, auditory processing difficulties, learning disabilities, fine and gross motor delays, and had previously received a diagnosis of a PDD-NOS (Parent Ex. PP at p. 1). Background information reflected in the report

²⁸ As noted above, the District Court has already concluded that the parents were provided with the opportunity to participate in the development of the student's IEP and that it was not predetermined (T.K., 779 F.Supp.2d at 319), consequently, my review does not further rule upon the parents' claims as they may relate to a denial of a FAPE due to inhibiting their ability to raise concerns regarding the bullying at the June 2008 CSE meeting.

²⁹ One of the exhibit markings with respect to "P" and "PP" may have been transposed with respect to the exhibit list.

indicated that the SEITs' role in the student's CTT classroom was to prompt the student to stay focused and on task, to follow instructions, make transitions, and to facilitate social interactions (Parent Ex. PP at p. 1). According to the neurodevelopmental pediatrician, the student's SEITs had "pulled back" over the course of the year to allow the student to function more independently (Parent Ex. PP at p. 1). The student reported to the neurodevelopmental pediatrician that it was a "difficult year" for her, as she stated her "'teachers are mean and so are some of the kids'" (Parent Ex. PP at p. 1). The report indicated that children in the student's class had bullied her, the stress of which made the student "more anxious" than the previous year (Parent Ex. PP at p. 1). Despite these difficulties, the neurodevelopmental pediatrician indicated that the student had some friends at school and independently formed friendships with students in an after-school art program, enjoyed learning, and reported that her class work was "not hard" (Parent Ex. PP at pp. 1, 3; see Parent Ex. OO). Following achievement and neurodevelopmental assessments, the neurodevelopmental pediatrician concluded that the student had made progress in receptive, expressive, and pragmatic language skills, and "especially" her social skills, although she continued to exhibit deficits in those areas (Parent Ex. PP at p. 3). According to the neurodevelopmental pediatrician, the student's auditory processing skills were "problematic" in that she demonstrated difficulty accurately repeating simple sentences, and remembering all the steps of multistep or sequential directions (Parent Ex. PP at p. 3). The student did not exhibit impulsivity or distractibility during her meeting with the neurodevelopmental pediatrician, who reported she did not see evidence of "ADHD" (Parent Ex. PP at p. 3).³⁰ The neurodevelopmental pediatrician reported that the student exhibited an "undercurrent of anxiety that seem[ed] to be focused on difficulties at school" (Parent Ex. PP at p. 3). Recommendations included that the student's classification be changed from a student with autism to a student with a learning disability as she "more clearly meets the criteria" for that educational classification, and for the 2008-09 school year, that she be placed in a special education school that provides instruction for students with language based learning disabilities (Parent Ex. PP at p. 4).

Following the neurodevelopmental pediatrician's May 2008 one hour and fifteen minute classroom observation of the student in her CTT classroom, she reported that the student "seemed anxious, sad, and frustrated," and that her "posture and demeanor suggested a depressed mood" (Parent Ex. FF at pp. 2-3). Compared to the neurodevelopmental pediatrician's observation of the student during the previous school year, the student did not volunteer information, and the SEIT needed to provide the student with much more prompting to get her to start and complete even high-interest activities (Parent Ex. FF at pp. 2-3). The student was observed to have little interaction with her classmates, which according to the neurodevelopmental pediatrician, were mostly negative, whereby the student was rejected, excluded or ignored (Parent Ex. FF at pp. 2-3). The neurodevelopmental pediatrician reported that the student's classroom teachers did not address the negative interactions, intervene to facilitate and model appropriate behavior/social interactions, or deliver consequences to students, nor did they inquire how the student was feeling (Parent Ex. FF at p. 3). According to the neurodevelopmental pediatrician, the social and psychological difficulty the student was experiencing in the classroom and the stress of the negative interactions were affecting the student's academic performance (Parent Ex. FF at pp. 2-3). In her report the neurodevelopmental pediatrician expressed her concern that the student seemed to depend more on SEIT prompts to start and complete class work than she had the

³⁰ In the context of the developmental pediatrician's report, the term "ADHD" appears to refer to a diagnosis of an attention deficit hyperactivity disorder.

previous school year, and that she appeared to be losing her independence in the classroom (Parent Ex. FF at p. 3). The observation report repeated the neurodevelopmental pediatrician's February 2008 recommendation that the student be placed in a special education school for students with language based learning disabilities (Parent Ex. FF at p. 3).

In April 2008 the McCarton Center conducted a neurodevelopmental evaluation of the student, which included physical, neurological, and psychological assessments (Parent Ex. NN at pp. 1-2). The student had been previously evaluated by the McCarton Center in spring 2007, at which time she was diagnosed as having a PDD, expressive, receptive and pragmatic language disorders, an auditory processing disorder, and fine/graphomotor deficits (Parent Ex. NN at p. 1). Administration of the Wechsler Intelligence Scale for Children-4th Edition (WISC-IV) to the student yielded composite standard scores in the low average to average range of cognitive ability (Parent Ex. NN at p. 13). The student achieved subtest standard scores within the average to very superior range on assessments of her academic achievement (Parent Ex. NN at p. 14).³¹ The McCarton Center also conducted assessments of the student's language, visual/perceptual, adaptive and behavioral skills (Parent Ex. NN at pp. 2-4, 7-9). At the conclusion of the evaluation, the evaluators reported that the student's cognitive functioning was "quite variable" with some significant weaknesses (Parent Ex. NN at p. 9). They further reported that the student exhibited "significant" attentional and processing difficulties, weaknesses in executive functioning skills, and auditory processing difficulties (Parent Ex. NN at pp. 9-10). According to the evaluation report, the student exhibited expressive language weaknesses and she was an "inefficient learner of rote material" (Parent Ex. NN at p. 10). The student's visual skills had shown improvement, and the report indicated that the student's rote academic skills were stronger than her applied skills (Parent Ex. NN at p. 10).

The McCarton Center report reflected reports from the student and her mother that some of the student's classmates were "critiquing and ostracizing" her, and that there were "ongoing instances" of peers being mean to and bullying the student, including episodes of physical aggression toward her at school (Parent Ex. NN at p. 1). The evaluation report reflected reports from the student's mother that her daughter was becoming increasingly "sad, anxious and uncomfortable in school, and less available for learning" (Parent Ex. NN at p. 1). It appeared to the evaluators that as the social, communication, and academic demands increased at school, the student was having "increasing difficulty keeping up" (Parent Ex. NN at p. 10). Due to shifts in the student's development, and her difficulty understanding and using language, among the McCarton Center's recommendations were that the student's classification be changed to a student with a learning disability, and that she be placed in a special education school for "bright" learning disabled students (Parent Ex. NN at pp. 10-11).

On May 15, 2008 a speech-language pathologist completed his private language evaluation of the student (Parent Ex. KK at p. 1). According to the report, the student was last evaluated in February 2007, at which time she exhibited a moderate language disorder, including difficulty with higher level language functioning such as the formulation of longer and more complex ideas, and comprehension of nonliteral language and inferencing (Parent Ex. KK at p. 1). During the May

³¹ A standard score for the WIAT-II word fluency subtest was not reported, although the report described the student's score as "low to average" (Parent Ex. NN at p. 14).

2008 evaluation, the student presented as "related," and responded to/transitioned without difficulty between formal and informal tasks (Parent Ex. KK at p. 1). Following administration of assessments measuring the student's auditory processing, inference, nonliteral language and narrative language skills, the evaluator concluded that the student continued to present with "a moderate receptive and expressive language disorder," and that her higher level language deficits made her vulnerable to social and academic deficits (Parent Ex. KK at pp. 4-5). Among the evaluator's recommendations was that the student be enrolled in a "small, structured classroom setting with a low student to teacher ratio" that would support her language-based difficulties (Parent Ex. KK at p. 6).

A May 2008 Lovaas Institute report prepared by the student's program consultant indicated that the student received 40 hours of SEIT services per week divided between school, home, and the community, and that she currently received full time SEIT services in her third grade CTT classroom (Parent Ex. W at p. 1). The report described the areas of need the SEIT services targeted, including social skills, narrative language, conversation skills, auditory comprehension and processing, reading comprehension, math word/multi-step problems, written language skills, inference and reasoning skills, attention skills, and generalizing acquired skills across environments (Parent Ex. W at pp. 1-2). The consultant reported that the student continued to demonstrate gains in all areas of current programming in school, home, and community environments (Parent Ex. W at p. 1). Included among the recommendations was that the student attend a "small, low student to teacher ratio, and supportive classroom in a special education school" commencing in September 2008 (Parent Ex. W at p. 2).

In May 2008, the home-based SEIT, and both school-based SEITs prepared reports of the student's progress (Parent Exs. S; V; EE). The reports reflect that the SEITs worked with the student to improve her receptive, expressive, and pragmatic language, auditory comprehension and processing, inference and reasoning, academic, organization and attention, transition, working memory, fluency and processing speed skills (Parent Exs. S; V at p. 1; EE at pp. 1-2). Additionally, the SEIT reports indicated that the student wanted to please adults, sought help from adults when needed, and responded well to scaffolding, feedback, positive reinforcement, redirection, reassurance, praise, and encouragement (Parent Exs. V at p. 1; EE at p. 2). According to a school-based SEIT report, the student worked well individually and in small group settings, and was working on attending in larger group settings (Parent Ex. EE at p. 2). While in school, the SEITs provided the student with prompts to transition and attend to classroom routines, and during academic and social times throughout the day (Parent Ex. S at p. 1). The SEITs also provide positive verbal support and positive reinforcement, which one school-based SEIT indicated was necessary due to the "negative social interactions within this [third] grade CTT class," which had lowered the student's confidence, self-esteem, and comfort in school (Parent Ex. S at p. 1). The other school-based SEIT reported that the student had a strong desire to be liked and accepted by her peers, although negative social interactions within the classroom had made developing positive relationships difficult (Parent Ex. EE at p. 2). The home-based SEIT indicated that peers had made negative comments to the student during the school year, which she had internalized (Parent Ex. V at p. 3). According to the home-based SEIT, the student had continuously expressed her sadness, frustration, anxiety and discomfort from being bullied by various other students in her class at school (Parent Ex. V at p. 3). The home-based SEIT reported that the bullying had negatively affected the student's ability to initiate, concentrate, attend and stay on task with her homework and after-school activities, which has affected her academic performance and negatively affected

her confidence and self-image (Parent Ex. V at p. 3). According to the home-based SEIT, the student coped by discussing negative situations with her mother and the SEIT to develop strategies to address the situations at school (Parent Ex. V at p. 3).

The school-based SEITs reported that the student's academic abilities were "at or above grade level" with delays noted in higher level receptive and expressive language processing, pragmatic language, and social skills (Parent Ex. S at p. 1; EE at p. 2). Although she continued to present with deficits and delays, the home-based SEIT reported that the student had made progress in all areas, specifically, in initiating conversations and social interactions with peers (Parent Ex. V at pp. 1, 3). Both school-based SEITs and the home-based SEIT recommended placement of the student in a small, structured, supportive class setting with a low student to teacher ratio (Parent Ex. S at p. 1; V at p. 4; EE at p. 2).

In May 2008 the student's home-based physical therapist, occupational therapist and speech-language pathologist prepared reports of the student's progress (Parent Exs. Y; AA; CC).³² The physical therapist reported that the student presented with decreased coordination, balance, endurance, strength, and age appropriate gross motor skills, and recommended that she continue to receive one 60-minute session of home or outpatient PT services in addition to a twice weekly adapted gym class (Parent Ex. AA at p. 4). In the event the adapted gym classes were not available, the physical therapist recommended that the student receive two 60-minute sessions of PT per week provided at home or on an outpatient basis (Parent Ex. AA at p. 4). In her report, the occupational therapist indicated that the student had exhibited "steady progress" with her graphomotor, fine motor, visual perception and visual motor, and self care skills, such that she recommended a decrease in the student's home-based OT to three 60-minute sessions per week on a 12-month basis in addition to "any OT received in a supportive special education school next year" (Parent Ex. Y at p. 2). The speech-language pathologist reported that the student had made "steady progress" toward her receptive, expressive, and pragmatic language, and social skill goals despite remaining deficits and delays that "adversely affect [the student] academically and socially" (Parent Ex. CC at p. 2). Speech-language recommendations included that the student be placed in a "special education setting" that provided small classes, where she would receive small group speech-language therapy to improve language, pragmatic, social and play skills (Parent Ex. CC at p. 2). In addition to placement in a special education setting with in-school speech-language therapy, the clinician recommended three 60-minute sessions of individual home-based speech-language therapy on a 12-month basis (Parent Ex. CC at p. 2).

2. The June 2008 IEP

a. Present Levels of Performance

The June 2008 IEP indicated that the student was a motivated reader of both fiction and nonfiction, could retell, answer questions and provide details about a story, but was challenged by inference questions (Parent Ex. D at p. 4). Although not as motivated by writing as reading, the IEP indicated that the student was regularly able to independently generate topics of personal interest, and edit her own work for spelling, capitalization, and punctuation (Parent Ex. D at p. 4). The IEP noted that the student often hesitated to initiate work on a writing task and take it through

³² I note that none of the related service providers' reports reference bullying (see Parent Exs. Y; AA; CC).

the writing cycle (Parent Ex. D at p. 4). In math, the student demonstrated a strong number sense, but had difficulty showing her "thinking" verbally or in writing (Parent Ex. D at p. 4). The IEP indicated that the student was "performing at grade level in all academic areas," specifically noting the results of recent teacher assessments and performance assessment tasks showing that her reading comprehension, decoding, math computation and calculation skills were at an end of third grade instructional level, and her writing skills were at a beginning to mid third grade instructional level (Parent Ex. D at p. 4). According to the IEP, the student exhibited difficulty starting work without prompts, staying on task, and completing activities (Parent Ex. D at p. 4). The IEP reflected that the student benefitted from a "highly structured and consistent classroom setting," taking short breaks to read upon task completion or when in need of refocusing; and using visual aides, repeating directions, and providing small group work supported her learning (Parent Ex. D at p. 4). The IEP indicated that the student responded well to praise and extrinsic rewards such as ticket jars, stickers, and running errands (Parent Ex. D at p. 4).

According to the June 2008 IEP, the student was a "sensitive child" who cared for those close to her and sought out certain peers she felt comfortable with (Parent Ex. D at p. 5). Most of the time, the student was able to clearly verbalize her ideas and feelings, and she was working on using that strength to problem solve with her peers more appropriately (Parent Ex. D at p. 5). She also was able to express her personal thoughts and feelings both verbally and in writing (Parent Ex. D at p. 5). According to the IEP, the student did not regularly participate in classroom activities, and many times did not contribute when in partnership situations (Parent Ex. D at p. 5). The student was working on consistently raising her hand and not calling out in class (Parent Ex. D at p. 5). The IEP indicated that the student frequently required reminders to attend to tasks and often lost focus while drawing/reading before an activity was complete (Parent Ex. D at p. 5). The IEP reflected that the student's behavior seriously interfered with instruction, and that she required additional adult support and a BIP (Parent Ex. D at p. 5). According to the IEP, the student needed frequent redirection and praise from adults, and she responded well to visual supports and verbal cues to follow directions and make transitions (Parent Ex. D at p. 5). Additionally, providing breaks to read and write helped the student to "re-group" and complete the current task (Parent Ex. D at p. 5).³³

b. Annual Goals and Short-Term Objectives

The June 2008 IEP provided the student with approximately 40 annual goals and over 200 corresponding short-term objectives developed by her home-based related service providers and the Lovaas Institute consultant (Parent Exs. D at pp. 7-32; see Parent Exs. F; G; H; Q at p. 1; AA at pp. 6-8). Goals and objectives within the IEP addressed the student's academic, fine and gross motor, expressive and receptive language, social and pragmatic language, visual motor and visual perceptual, sensory processing, and activity of daily living skills (Parent Ex. D at pp. 7-32).³⁴

³³ Testing accommodations included in the IEP were separate location (maximum 12 students), double time, directions read and reread, mask and markers to help the student keep her place on the page, and answers recorded in any manner (Tr. p. 385; Parent Ex. D at p. 36).

³⁴ The student's father testified that he did not have any issues with the IEP annual goals (Tr. pp. 1765-68).

A number of the annual goals and short-term objectives in the June 2008 IEP were designed to improve the student's attention, pragmatic language, social, play, and gross motor skills, abilities that would in turn help her develop appropriate peer relationships (Parent Ex. D at pp. 7, 9-10, 12-14, 18-19, 21, 24-28). To improve the student's ability to appropriately participate in small group instruction, the IEP provided short-term objectives including transitioning in a timely manner, coming prepared for, contributing to, and staying on topic during group discussions, and using manners (Parent Ex. D at p. 7). To improve the student's communication skills with peers, the IEP included annual goals and short-term objectives addressing her ability to remain on topic, join a conversation already in progress, identify emotions, interpret and respond to social cues, react appropriately to others' emotional states, and understand and react appropriately to humor (Parent Ex. D at pp. 9-10, 21, 24). These goals, as they relate to interactions with her peers, are appropriate elements of the IEP in light of the bullying experienced by the student. Other pragmatic language and conversation skills annual goals and short-term objectives included responding to peers/adults, repairing communication breakdowns, effectively changing topics, appropriately requesting wants/needs or protesting, asking questions to gain information, maintaining appropriate space, sustaining eye contact, and initiating, maintaining, commenting and elaborating on a variety of topics (Parent Ex. D at pp. 19, 21, 24). Goals and short-term objectives in the IEP addressed the student's need to identify another person's perspective and explain why that person's perspective may differ from her own, to improve her ability to visually inference information by watching a person's social cues, and to attend to the conversation partner's needs by providing accurate and immediate information (Parent Ex. D at pp. 14, 21).

Play skill needs targeted in annual goals and short-term objectives included increasing the student's ability to follow peers' transitions and negotiate theme changes during play, engage in varied play schemes, initiate and sustain interest in play with peers, and engage in board games with peers (Parent Ex. D at pp. 18, 24-25). Gross motor annual goals and short-term objectives were designed to improve the student's ability to engage in sports games and age appropriate activities with peers (Parent Ex. D at pp. 25-28). Once again, goals that focus on peer interaction are appropriate for this student. The IEP also included goals and objectives targeting the student's ability to attend such as staying on task during reading tasks with a peer or in a small group, providing joint attention to an assignment and/or peer/teacher, and sustaining attention during various activities (Parent Ex. D at pp. 12-13, 21). The parents' claims that the goals and short term objectives were inappropriate are not supported by the evidence.

c. BIP and the Incident Reports

Attached to the June 2008 IEP was a BIP that had been developed during a 2-3 hour-long March 2008 meeting by a team including the school psychologist, the assistant principal, a district social worker, a second district school psychologist, a district occupational therapist, the student's CTT teachers, the student's SEIT providers, the Lovaas Institute consultant, and the parents (Tr. pp. 377-81, 750, 794-95, 799, 1433, 1704, 2673, 2682).³⁵ The school psychologist testified that the district developed a BIP for the student because, among other reasons, her behavior was interfering with her learning (Tr. pp. 378-79). The BIP identified the student's behaviors that

³⁵ In March 2008, district staff prepared the student's FBA (Tr. pp. 422-27; Dist. Ex. 1). According to the school psychologist, the results of the FBA were reflected in the BIP (Tr. pp. 508-09; compare Dist. Ex. 1, with Parent Ex. D at p. 38).

interfered with learning including her difficulty staying on task, consistently attending to and completing a task or activity, and following multi-step and novel instructions (Parent Ex. D at p. 38). Other behaviors identified in the BIP were that the student sometimes misinterpreted social cues, at times felt anxious and overwhelmed, and that she sometimes exhibited behaviors that disrupted learning, such as picking her nails (Parent Ex. D at p. 38). Expected behavior changes included in the BIP were that the student would improve her ability to stay on task and remain focused on an activity, that she would sustain her attention for longer periods of time, that she would be better able to cope when feeling anxious or overwhelmed, and that she would increase: her ability to read other's cues in social situations, positive social interactions, fluency and processing speed, and receptive/expressive language processing (Parent Ex. D at p. 38).³⁶ The BIP also identified a decreased in the student's touching behavior and calling out when on the classroom rug as expected behavior changes (Parent Ex. D at p. 38). Strategies identified to change the behavior included repeating new instructions, providing reassurance, praise, feedback, encouragement and gestures to reduce off-task behaviors, recognizing antecedents (physical, noticeable signs that precede off-task behavior or distress such as putting her head down, turning away from the teacher and instruction, and exhibiting non-contextual laughter), and at that point intervening by softly calling her name to redirect her (Parent Ex. D at p. 38). Other strategies included in the BIP were allowing more time for the student to express her thoughts in class while providing reassurance, praise and encouragement if necessary, providing small breaks, and repeating simple, easy to understand expectations (Parent Ex. D at p. 38). Supports identified to help the student change the behaviors were providing teacher/staff support, regular communication and collaboration between home and school staff, and small group counseling services (Parent Ex. D at p. 38).

According to the school psychologist, the draft BIP initially presented to the parents during the 2007-08 school year at the March 2008 meeting "did not suit them at all," and the BIP was rewritten "line by line," the result of which was attached to the June 2008 IEP (Tr. pp. 381, 2274). The hearing record reflected that during the lengthy meeting there was quite a lot of collaboration among the participants, the language the parents objected in the draft BIP was removed, and at the conclusion of the meeting the parents appeared "content" with the BIP (Tr. pp. 383, 421, 2275, 2363, 2676-77, 3058-59, 3107-10). The school psychologist stated that due to the amount of collaboration and discussion that occurred at the BIP meeting, having the actual incident reports would not have been helpful to the process because the BIP targeted a number of the student's behaviors reflected in the incident reports (Tr. pp. 2281-82, 2289, 2299-2301, 2311-12).³⁷

The assistant principal testified that she knew about the student's aggressive behaviors prior to the March 2008 BIP meeting (Tr. pp. 2673-74, 2680). Both the school psychologist and the school social worker testified that a student who felt anxious and overwhelmed can exhibit impulsive or "acting out" behaviors, which could manifest as hitting, pulling hair, throwing furniture or making inappropriate comments; behaviors identified in the student's incident reports

³⁶ Focusing on the student's strategies for addressing social situations may be one means to address a bullying situation involved (Doe v. Big Walnut Local Sch. Dist. Bd. of Educ., 837 F.Supp.2d 742, 747 [S.D.Ohio 2011]).

³⁷ When asked what he would have done differently had he been aware of the incident reports, the student's father testified that he would have provided them to the "consultants" who worked with the student outside of school to "develop strategies to address [the student's] issues" (Tr. p. 3056).

(compare Tr. pp. 2361-62, 2530-32, with Parent Ex. CCC at pp. 1-15, and Parent Ex. JJJ at p. 1). The school psychologist indicated that even if she had known about the events described in the incident reports the resultant BIP was an accurate description of the student and would be the same, because the BIP addressed the student's feelings of being anxious and overwhelmed and misinterpreting social cues, regardless of the behaviors those feelings manifested (Tr. pp. 2364-65, 2368-69, 2397-98, 2429-30). The assistant principal stated that the purpose of the BIP was to decrease unwanted behaviors, and that it was less important to list specific behaviors such as slapping, than identifying the "general umbrella" of behaviors such as lack of attending, feeling overwhelmed and anxious, and misinterpreting social cues (Tr. pp. 2680-81, 2754-56, 2760-63). The school psychologist testified that during the BIP meeting, the parents agreed that the student sometimes misinterpreted social cues, and felt anxious and overwhelmed; behaviors identified in the BIP (compare Tr. p. 2427, with Parent Ex. D at p. 38).³⁸ To the extent that the parents argue the BIP lacked an indication that the student engaged in aggressive behaviors, the school psychologist and the assistant principal stated that the BIP addressed recognizing the antecedents to impulsive behaviors, which could include aggression (Tr. pp. 2400-01, 2684-87). The student's BIP was designed with substantial input from both district personnel and the parents and added to the student's educational programming in light of her experiences during the 2007-08 school year and, as designed, I find that it was appropriate to assist the student in decreasing her interfering behaviors which, in turn, would help decrease her vulnerability to bullying by others.

d. CTT Services

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. [Dec. 2010], at pp. 18-21, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/>

IEPgideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; S.P. v Carlisle Area Sch. Dist., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Reviewing first the student's progress under the June 2007 IEP, the hearing record reflects that the student had received CTT services for many years, and during second and third grade

³⁸ Additionally, the school psychologist and the assistant principal testified that the parents objected to identifying some of the student's behaviors BIP, and to what they considered to be "derogatory language" (Tr. pp. 2395, 2398-99, 2403-04, 2683, 3058); however, after a lengthy conversation the wording of the BIP was resolved to "what the team felt best depicted the behaviors" (Tr. pp. 2676-77).

academically was either approaching or had met grade level standards (Tr. pp. 370-71, 449, 740-41, 2668-70; Parent Exs. K at p. 1; L at pp. 1, 3). A comparison of the student's January and June 2008 report cards shows improvement in the student's organization, homework, word study, and math skills according to standard-based measures, and improvement in the student's reading and writing skills using assessments based upon a modified program (Tr. pp. 2164-66; compare Parent Ex. K at p. 1, with Parent Ex. L at pp. 1, 3). During the 2007-08 school year, the student's performance on the New York State Mathematics Test and the New York State English Language Arts Test indicated that she was "[m]eeting the [l]earning [s]tandard" (Dist. Ex. 4; Parent Ex. CCC at pp. 37-38). Evidence of the student's progress during the 2007-08 school year comports with a January 25, 2008 Summit admission questionnaire prepared one of the student's in-class SEITs, who reported that the student's reading and math skills were at/above grade level and that she was a "highly motivated, energetic learner" (Parent Ex. BBBB).

The speech-language pathologist who conducted the private evaluation of the student in May 2008, and who had known the student for approximately seven years testified that there was "no doubt" that the student made progress in her language and communication skills during second and third grade (Tr. pp. 261-62, 273; see Parent Ex. KK). Although the student continued to have difficulty with higher language abilities, she exhibited progress in the "concrete" areas of language including vocabulary, sentence structure, ability to make more appropriate responses, and to provide antonyms and synonyms (Tr. pp. 273-75, 296-301). The neurodevelopmental pediatrician who assessed the student in February 2008 and conducted a classroom observation in May 2008 testified that she supported a change in the student's classification from a student with autism to a student with a learning disability due in part to the student's "very nice gains" in her social skills, and her observation that the student had the desire to make and had made friends, was aware of other peoples' feelings, and was empathetic (Tr. pp. 1364-66, 1388-91; see Parent Exs. FF; PP). According to the neurodevelopmental pediatrician the student continued to exhibit deficits in language processing; however, had made progress in that area and in pragmatic language skills (Tr. pp. 1392-93; Parent Ex. PP at pp. 3-4). The neurodevelopmental pediatrician also testified that the student "did well" on academic achievement testing completed in February 2008, in that her word reading skills were above grade level and her math skills were appropriate for her grade (Tr. pp. 1361-62). Although the neurodevelopmental pediatrician stated that she was concerned about the student's auditory processing skills and her "subdued" mood, she concluded that the student had continued to make academic progress and that her academic skills were "fairly on target" (Tr. pp. 1363-64).

According to the special education teacher of the student's third grade CTT classroom, at the beginning of the 2007-08 school year the student was "very, very quiet," and the teachers needed to encourage her to engage with peers; however, she worked well in groups that included "appropriate" students, and the special education teacher indicated that the student had a couple of close friends (Tr. p. 2125). The student exhibited behaviors such as not focusing on work, refusing to complete work, "mak[ing] it known that she wasn't happy," rolling on the carpet, and playing "puppet hands" (Tr. pp. 2125-27, 2168). The special education teacher also testified that the student exhibited hygiene habits that "didn't draw students toward her" (Tr. pp. 2126-27, 2129). Toward the middle to the end of the school year as the student was feeling very comfortable in the classroom and enjoyed participating in class, she began "calling out" and needed support to engage appropriately with teachers and peers (Tr. pp. 2040-42, 2048).

The special education teacher testified that the student demonstrated progress throughout the school year in that she was aware of the adults in the classroom encouraging her to raise her hand, her hygiene habits improved, she sought out peers more frequently, instances of rolling around on the carpet decreased, and she volunteered more frequently in class (Tr. pp. 2167-68, 2204). This testimony is consistent with the January 2008 Summit admission questionnaire prepared by one of the in-class SEITs, who indicated that the student worked well in group settings and was working on attending to everyone in a group, and also worked extremely well one on one, was actively engaged, and participated while in that setting (Parent Ex. BBBB). I note that the special education teacher stated that the student's expression of concerns regarding bullying "petered out" as the school year went on (Tr. p. 2022).

On February 11, 2008, the student's mother completed her daughter's application for admission to Summit (Parent Ex. AAAAA). According to the parent, at that time the student was "motivated to learn, socialize and make progress" (Parent Ex. AAAAA at p. 2). The student's language difficulties interfered with her learning in large mainstream environments, although the application indicated that the student was motivated to complete her school work on time, responded well to reminders to stay on task, and was able to complete all assignments (Parent Ex. AAAAA at pp. 2, 4-5). Regarding the student's study and work habits, the parent indicated that the student completed class work and homework independently, worked in dyads and small groups, and requested help from the teacher when needed (Parent Ex. AAAAA at p. 3). The parent reported that the student had made a "best friend" in each school and camp she had attended, and had made "additional close friends," including older and same-age peers, with whom she got along well with and engaged in reciprocal conversation and play (Parent Ex. AAAAA at p. 3). According to the application, the student loved to participate in social activities with friends at school, home, and during extracurricular activities (Parent Ex. AAAAA at p. 4). When asked on the application about the student's "mood stability," the parent responded that her daughter was "generally happy, engaging, [and] outgoing with a good sense of humor" (Parent Ex. AAAAA at p. 3).³⁹

Transcript from the June 2008 CSE meeting shows that the student's third grade special education and regular education teacher both presented information about the student's skills and needs (Parent Ex. J at pp. 4-8). Specifically, the teachers indicated that the student was reading on grade level, "progressing very nicely in math," and contributing to discussions during social studies lessons (Parent Ex. J at pp. 4-7). According to the teachers, the student needed to work on verbalizing and numerically showing how she achieved answers to math questions, selecting challenging reading materials, and improving inference skills and "endurance" when reading (Parent Ex. J at pp. 5, 7-8). Although the teachers noted that writing tended to be an area where the student was more challenged, writing was also the area that she had improved the most (Parent Ex. J at pp. 5, 7). At the meeting, the neurodevelopmental pediatrician reported that the student's language skills had improved, although she continued to exhibit pragmatic language difficulties (Parent Ex. J at p. 41). The speech-language pathologist who conducted the private evaluation in spring 2008 indicated at the CSE meeting that the student shared visual attention, consistently engaged with joint affect, showed a range of emotions, was inquisitive and asked personal questions, and shared information (Parent Ex. J at pp. 50-51). He further reported that the student's

³⁹ I note that a review of the Summit application did not reveal any indication that the student was experiencing educational difficulties related to bullying (see Parent Ex. AAAAA).

academic and social difficulties were at that point in time, "language-based" (Parent Ex. J at pp. 9-10, 50-51).

With respect to the June 2008 IEP, for the 2008-09 school year, the June 2008 CSE continued its recommendation for CTT services for the student consisting of a regular education teacher, a special education teacher, nondisabled students, and up to 12 students with IEPs (Tr. pp. 365-66; Parent Ex. D at p. 1).⁴⁰ The school psychologist testified that CTT services were "highly structured" and provided "a lot of support," that in conjunction with the amount of small group instruction available, was a setting in which the student did well (Tr. pp. 370-71). Additionally, the school psychologist indicated that the adult support, including the two teachers in the CTT classroom who provided breaks, and constant redirection and refocusing to students in the class, would have been sufficient for the student given the improvement she had demonstrated (Tr. pp. 416, 506). Adult support for the fourth grade CTT services included the two teachers, paraprofessionals, related service providers, and administration staff (Tr. pp. 678-79).

The school psychologist described the CTT services as being "very language enriched," providing language stimulation to students throughout the day (Tr. p. 365). Teachers in the CTT class were trained and skilled at breaking material down into simple terms and steps when presenting new or reviewing information, then building (scaffolding) upon it (Tr. p. 366). The district speech therapist stated that teachers in the CTT classrooms were "quite accustomed" to checking students' comprehension, repeating directions, breaking things down, and using many of the strategies that students who received speech-language therapy needed (Tr. pp. 527, 556). To address behavioral events that arise in the CTT classroom, the fourth grade CTT special education teacher indicated that staff role-played similar scenarios and subsequently discussed how the students felt, potential causes of the incident, and ways to respond in the future (Tr. pp. 588-89).

The special education teacher of the fourth grade CTT class testified that based upon the her review of the June 2008 IEP academic present levels of performance, the student was functioning "on grade level" and in the CTT classroom, would have been grouped with other students who also functioned on grade level (Tr. pp. 597-98). Following a review of the IEP social/emotional present levels of performance, the special education teacher noted that the student's behavior interfered with her learning, and opined that she would most likely benefit from small group instruction of no more than 3-5 students (Tr. pp. 601-02). The IEP also informed the special education teacher that the student required specific and explicit instruction on how to work with peers and complete activities, and that she would benefit from a behavior modification program (Tr. pp. 602-03). Regarding the IEP provision that the student receive prompting, the special education teacher testified that in the CTT class prompting could have been provided using a chart the student referred to, repeating directions to her, having a teacher or another student redirecting her, or offering praise (Tr. pp. 677-78). After reviewing the IEP annual goals the special education teacher expressed her opinion that they were appropriate for a fourth grade student in a CTT class, and that the IEP was "completely manageable" in the fourth grade CTT

⁴⁰ The special education teacher of the fourth grade CTT class testified that during the 2008-09 school year, the students receiving special education services were classified as students with learning disabilities, speech or language impairments, or emotional disturbances (Tr. p. 587). All but one of the students who received special education services in the CTT class were either approaching or meeting "the standards," and other students in the CTT class exhibited needs similar to the student's social/emotional and behavioral needs (Tr. pp. 587, 602-03).

class (Tr. pp. 610-12). In view of the fact that the student had been making appropriate progress with the CTT services in the prior year and as further described both above and below modifications were made to the student's program that would address the student's needs as they related to the bullying, I see no reason to conclude that CTT services were an inappropriate setting for the student.

3. LRE

According to the USDOE, "[w]hile it may be appropriate to consider whether to change the placement of the child who was the target of the bullying behavior, placement teams should be aware that certain changes to the education program of a student with a disability (e.g., placement in a more restrictive "protected" setting to avoid bullying behavior) may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE" (Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP 2013]).

During the June 2008 CSE meeting, the parents and the principal discussed the parents' request that the student be referred for placement in a special education school (Parent Ex. J at pp. 54-63, 68-69, 73-75, 79-80). Transcript of the meeting reflected that the principal and the school psychologist stated that a special education program consisting of placement in a CTT with related services was appropriate for the student, as she had exhibited progress in such a program (Parent Ex. J at pp. 68-69). District staff at the CSE meeting also expressed that placement of the student in a special education school would have been too restrictive for her (Parent Ex. J at pp. 58-63).

According to the school psychologist, the fourth grade CTT special education teacher, and the assistant principal, the nondisabled students selected for the CTT program were "hand picked" based on their ability to model appropriate behavior, and to be role models, flexible, kind, and caring (Tr. pp. 365-66, 582-83, 2627). The nondisabled students selected for placement in the CTT class exhibited academic skills at or approaching grade level, and "exceptional behavior and social skills," as their social/emotional profile was the most important attribute (Tr. pp. 582-83). The school psychologist provided an example of how peers modeling desired classroom behaviors and receiving reinforcement from the teachers may positively affect a student who had difficulty transitioning between activities (Tr. pp. 367-69). The speech therapist testified that students in the CTT class benefitted from seeing how typical peers interacted with one another, and from the range of student abilities, including students who were "one step ahead of [a student] or one step behind," to build up their weaknesses and also use their strengths to help other students around them (Tr. pp. 556-57; see Tr. p. 365).

When asked why a small private school was not recommended for the student, the school psychologist testified that the student had been in CTT classes for a number of years, and did well in highly structured settings that provided small group instruction such as CTT services. Additionally, the school psychologist indicated that the student had friends in the class, was familiar with the school, and was "on grade level" (Tr. pp. 391-92, 493). In view of the forgoing evidence I do not find that the student should have been removed from her nondisabled peers available to her in the CTT services setting education (S.A. v. Weast, 898 F.Supp.2d 869, 881-82 [D.Md. 2012])

4. Related Services

a. PT and OT Services

The transcript of the June 2008 CSE meeting reflected the CSE's discussion about the student's gross motor skills in the classroom, and information contained in the May 2008 PT progress report (Parent Ex. J at pp. 33-36; see Parent Ex. AA). At the meeting the district physical therapist recommended that the student receive one 30-minute session per week each of individual and group PT, to which the student's father expressed agreement (Parent Ex. J at pp. 35-36). At the meeting the CSE reviewed the May 2008 OT progress report and the district occupational therapist's brief observation of the student in her classroom (Parent Ex. J at pp. 21-30; see Parent Ex. Y). Following the discussion at the CSE meeting and in consideration of the parents' request that the OT recommendations be made based solely upon the progress report, the CSE recommended that the student receive three 30-minute individual sessions of in-school OT per week (Parent Exs. D at p. 36; J at pp. 25-26, 29-30).

During the impartial hearing the district physical therapist described the specific methods and activities she would use to implement the student's June 2008 IEP gross motor annual goals and short-term objectives, which she testified were similar to the types of goals she worked with at the school, and could be met within the 30-minute PT sessions the June 2008 CSE recommended (Tr. pp. 1103, 1118-26, 1130). To address the student's fine motor and graphomotor needs, the district occupational therapist testified that she would have used a specific handwriting program, workbooks, clay, a slant board, adaptive paper, and multisensory methods when working with the student (Tr. pp. 1165, 1167, 1172-75). To help the student with organizational skills, the occupational therapist stated that she would have supported the student during her packing and unpacking routine, and when lining up and transitioning between the classroom and OT sessions (Tr. p. 1177). The occupational therapist provided descriptions of how she would address the student's daily living goals and objectives (Tr. pp. 1177-79). She further testified that she would be able to meet the student's needs relating to OT within the CSE's recommendations (Tr. pp. 1179-80).

b. Speech-Language Therapy

Attendees at the June 2008 CSE meeting included the speech-language pathologist who prepared the May 15, 2008 private language evaluation report, and a district speech-language therapist (Parent Exs. D at p. 3; KK at p. 1). Transcript from the meeting shows that the speech-language pathologist reviewed the results of the evaluation with the CSE, indicating that the student exhibited difficulty with word memory, auditory reasoning, nonliteral language, tasks

involving inference, and generating and organizing narratives (Parent Ex. J at pp. 9-10). During the meeting the district speech therapist discussed the home-based speech-language pathologist's report that indicated the student exhibited difficulty with pragmatic language skills (Parent Ex. J at p. 11). The CSE discussed recommendations for the length and frequency of both individual and small group speech-language therapy sessions to be provided at school (Parent Ex. J at pp. 16-18).⁴¹ **The June 2008 IEP provided the student with three individual 30-minute sessions of speech-language therapy, and two 30-minute sessions of speech-language therapy in a group of two** (Parent Ex. D at p. 36).

After reviewing the results of the May 2008 private language evaluation, the district speech therapist who had participated in the June 2008 CSE meeting testified that the student's skills were comparable to other students at the public school and that many students exhibited similar difficulties, and with the exception of narrative language, the student's scores did "not indicate a moderate or extreme severity of difficulty" (Tr. pp. 540-43; Parent Ex. D at p. 3). She stated that the June 2008 CSE's recommendations for the type, frequency and duration of speech-language therapy were appropriate because the individual sessions provided opportunities to work on the student's academic and higher level language difficulties, and the group sessions gave the student an opportunity to work on pragmatic language skills with peers (Tr. pp. 548-49, 560-61).

c. Counseling

Following a discussion about counseling services during the meeting, the June 2008 CSE recommended that the student receive one session per week of group counseling services to be provided in a location outside of the general education classroom (Parent Exs. D at p. 36; J at pp. 30-31).⁴² During the CSE meeting, the CTT teachers indicated that staff had been working to improve the student's ability to stay on topic, come prepared for and contribute to small group work, transition in a timely way, and use manners on a consistent basis (Parent Ex. J at p. 30). Counseling services could have been provided by a guidance counselor, a school social worker, or a school psychologist (Tr. pp. 2752-53). According to the school psychologist, the CSE initiated a recommendation for in-school, small group counseling to help the student with any "issues" that she was having with friendships or bullying, and to help her emotionally and behaviorally (Tr. pp. 384, 2360). Counseling services would have also addressed the student's difficulty interpreting social cues, as according to the school psychologist, social skills was "one of the main things" that guidance counselors worked on with students (Tr. pp. 2369-70, 2410). The school psychologist stated that students were often placed in small groups from the same classroom and/or grade, who

⁴¹ During the June 2008 CSE meeting, the speech-language pathologist clarified that his recommendation for 60 minute sessions would have taken place outside of the school day (Parent Ex. J at p. 18; see Parent Ex. KK at p. 5).

⁴² The guidance counselor, the assistant principal, and the school psychologist stated that district staff had discussed with the parents providing the student with counseling services prior to the June 2008 CSE meeting, but that the parents had either refused the services or requested time to think about it and subsequently did not follow up with the district (Tr. pp. 125, 146-50, 2677-79, 2752-54; Parent Ex. J at p. 30). The student's father testified that counseling was first formally offered to the student at the June 2008 CSE meeting, but that the parents were concerned about the number of times the student would have been removed from the classroom to receive related services, and they had "no confidence" in the counseling process due to their view the school had "utterly failed" to address the bullying issue (Tr. pp. 3059-60).

exhibited similar difficulties and who may form friendships outside of the counseling sessions (Tr. p. 386). The counselor played games, read books, and drew with students during counseling sessions to provide opportunities for the students to discuss what was happening with themselves and with each other (Tr. pp. 2360-61). The assistant principal stated that counselors provided students with strategies to handle different situations and to be proactive when engaging in play with other students in the schoolyard, as well as specific language to use during play with other children (Tr. p. 2678). She further testified that the in-school counseling would have addressed the student's needs arising from her anxiety, difficulty with social peer and adult interactions, and impulsivity (Tr. p. 2687). The CSE's determination to add the counseling to the student's IEP was an appropriate response in view of the incidents of bullying during the 2007-08 school year.

5. Availability of Adult Support Outside of the Classroom

The hearing record shows that during the June 2008 CSE meeting the guidance counselor suggested providing the student's counseling during non-classroom periods such as schoolyard/recess time, and that the student's PT sessions could be provided in the schoolyard/playground (Parent Ex. J at pp. 31-32, 36; see Tr. p. 478), which is where some of the bullying incidents occurred previously. Additionally, the school psychologist and district occupational therapist testified that the student's related services could have been provided during lunchtime or in the schoolyard (Tr. pp. 478, 1167).

D. Absences

As explained by the USDOE, bullying may result in higher truancy rates (i.e. school absences), that could trigger the need to consider modifications to the student's IEP (see Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP 2013]). According to the student's report card, from September 2007 to January 2008 she was absent on seven occasions and late on eight occasions (Parent Ex. K at p. 1). From January 2008 to June 2008, the student was absent on 15 occasions and was late on 16 occasions (compare Parent Ex. K at p. 1, with Parent Ex. L at p. 1). The hearing record suggests that contributing to the increase in lateness and absences from January to June 2008, was the student's participation in private evaluations on four school days between April 4, 2008 and May 15, 2008, a visit to Summit for an interview, and visits to "several different schools" to determine their appropriateness, three of which accepted her (compare Parent Ex. HHHHH at p. 3, with Tr. p. 3131; Parent Exs. J at p. 60; NN at p. 1; KK at p. 1). Although the parent stated during direct examination that the student was "consistently late" because she did not want to go to school due to a fear of being ostracized and of "what was going on at school," when questioned by the IHO, he testified that the student was late to school because she was slow getting dressed and to school, and that she was absent due to illnesses such as strep (compare Tr. pp. 3065-66, with Tr. pp. 3219-20).⁴³ In this case, find there is insufficient evidence to support the conclusion that the IEP was inadequate due to the failure to consider school absences/truancy.

⁴³ The student's father testified that the student had gained 30 to 40 lbs. towards the end of second grade and during third grade, although I note that the neurodevelopmental pediatrician's report reflected that from March 2007 to February 2008, the student gained only 13.6 lbs., and her height increased by almost three inches (Tr. pp. 3045, 3219; Parent Ex. PP at p. 2).

Having considered the third and fourth elements of the T.K. test at issue in this appeal and having reviewed the evidence in the hearing record, particularly with regard to the substance of the IEP in question as it relates to the bullying issue remanded by the District Court, I concur with the IHO that the student was not denied a FAPE.

VII. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a

unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

In her July 21, 2009 decision, the IHO determined that the parents failed to meet their burden to show that Summit was an appropriate placement for the student during the 2008-09 school year (July 21, 2009 IHO Decision at pp. 32-33). The Summit clinic director testified that Summit is a State-approved nonpublic special education school that serves 120 students identified as having learning disabilities and emotional disturbances (Tr. pp. 1225-26, 1230).⁴⁴ The lower school provides instruction to students ages 7 to 14 years old, with educational profiles of average or better intellectual skills who are emotionally and/or behaviorally "fragile" (Tr. pp. 1226-27). Summit implements a school-wide behavior management system using a token economy with tangible rewards, which is individualized based upon a student's individual behavioral goals (Tr. pp. 1231-32, 1239-40). According to the clinic director, Summit has a "no tolerance for bullying" mandate, which is supported throughout the year by classroom discussions and the school's social skill curriculum (Tr. p. 1232). At Summit, a social worker pushes into the classrooms one time per week to implement the social skills curriculum on topics such as friendships, self-esteem, problem solving, and conflict resolution (Tr. p. 1238).

During the 2008-09 school year the student received instruction in language arts, reading, math, social studies, science, computers, physical education, and art (Parent Ex. YY at pp. 1-6, 8-10). The hearing record showed that the student made progress in academic and speech-language skills at Summit during the 2008-09 school year (Tr. pp. 1251; Parent Exs. PPPP; SSSS; TTTT).⁴⁵ According to the clinic director, during the 2008-09 school year the student exhibited progress "across the board" because she had a greater ability to focus on her school work, less distracted by internal and external distractions, and knew what strategies to apply to become a more independent learner (Tr. p. 1251).

Regarding the student's physical therapy needs, the home-based physical therapist reported in May 2008 that the student presented with decreased coordination, balance, endurance, strength, and age appropriate gross motor skills, and recommended that she continue to receive one 60-

⁴⁴ I note that an exhibit entered in the hearing record purportedly to provided information about Summit, appears to be from the website of a different school with a similar name located in Western New York (Parent Ex. TT).

⁴⁵ The home-based SEIT who worked with the student during the 2008-09 school year testified that the student's skills in some academic areas including comprehension, writing, and math had "fallen behind," and the hearing record shows that the student's performance on the March 2009 New York State Mathematics Test was a "2" ("Partially Meeting the Learning Standard") (Tr. pp. 159-98, 1602, 1609-12; Parent Ex. MMMM; see Dist. Ex. 4 at p. 1).

minute session of home or outpatient PT services in addition to a twice weekly adapted gym class (Parent Ex. AA at p. 4). In the event the adapted gym classes were not available, the home-based physical therapist recommended that the student receive two 60-minute sessions of PT per week provided at home or on an outpatient basis (Parent Ex. AA at p. 4). At the June 2008 CSE meeting the district physical therapist recommended that the student receive one 30-minute session per week each of individual and group PT, to which the student's father expressed agreement (Parent Ex. J at pp. 35-36). The clinic director testified that Summit did not provide PT services (Tr. p. 1264). The parent stated that the student continued to receive private PT services through summer 2008, but that he discontinued his daughter's private PT upon entry to Summit because Summit had an "adaptive gym" (Tr. pp. 1745-46, 1798). He testified to his understanding that the adaptive gym program at Summit addressed a number of the needs that were previously addressed by the home-based physical therapist, such that "it was not necessary to continue [the home-based physical therapist's] services going forward" (Tr. p. 1746). The 2008-09 Summit progress report indicated that the student participated in "physical education," but does not provide any information about "adaptive gym" services the student may have received during that school year, or how Summit's physical education program addressed the student's unique gross motor, coordination, balance, endurance and strengthening needs (Parent Exs. YY at p. 9; TTTT at p. 7; see Parent Ex. AA).

Regarding the student's OT needs, the clinic director testified that she did not know whether or not the student received OT services at Summit, nor is there any evidence in the hearing record regarding how Summit addressed the specific student's fine motor, graphomotor and sensory needs during the 2008-09 school year (Tr. p. 1263; see Parent Exs. YY; QQQQ at p. 2; TTTT). The home-based occupational therapist who provided two hours of OT per week to the student during the 2008-09 school year testified that she worked to improve the student's graphomotor, sensory, and visual perceptual skills; her ability to independently complete activities of daily living, and her body awareness/coordination skills (Tr. pp. 1657, 1660-61). According to the home-based occupational therapist, at Summit the student received two 30-minute OT sessions per week, to work on improving her handwriting and coordination skills (Tr. pp. 1663-64, 1672). The home-based occupational therapist testified that the student would benefit from more in-school OT services than she received at Summit (Tr. pp. 1676, 1678-79).

When asked how many sessions of speech-language therapy per week the student received at Summit, the clinic director replied "whatever is on [the student's] IEP" and at that time did not know the number of sessions (Tr. p. 1263). A review of the student's 2008-09 Summit progress reports did not reveal the number of speech-language therapy sessions the student received, nor did the hearing record otherwise provide information regarding how Summit addressed the student's unique receptive, expressive, pragmatic, and higher-level language needs (Parent Exs. YY at pp. 11-12; PPPP; see Parent Exs. QQQQ at p. 1; KK).⁴⁶ According to the student's home-based speech pathologist, the student received one individual and one group 30-minute session of speech-language therapy at Summit per week, which she opined did not fully address the student's

⁴⁶ I note the parent's testimony that Summit's philosophy is "geared toward speech and language reinforcement" and that the program was designed to address the student's receptive, expressive and pragmatic language deficits (Tr. pp. 1690, 1692-93, 1724). Although the student received twice weekly speech-language therapy while at Summit, information contained in the hearing record does not indicate that the focus of Summit's program is consistent with the parent's statements (see e.g. Tr. pp. 1223-78; Parent Exs. PPPPP; SSSS; TTTT; VVVV).

needs (Tr. pp. 1645, 1647-48). The home-based speech-language pathologist testified that the student exhibited "significant deficits," and therefore needed the three hours of home-based speech-language therapy in addition to the sessions she received at Summit, to improve her pragmatic and expressive language, attention, problem solving social situations, auditory processing, reading comprehension, and listening skills (Tr. pp. 1646-49).

Approximately half way through the school year, the hearing record suggests that one session per week of both individual and group counseling services were added to the student's program in January 2009 (Tr. pp. 1263-64; Parent Ex. SSSS). The clinic director testified that teacher concerns about the student's off-task, calling out and impulsive behaviors continued during the 2008-09 school year, and that those behaviors were addressed by using cues, prompts, modeling support, and marking the student's "point card" (Tr. pp. 1250-51, 1258; see Tr. pp. 1231-32). The hearing record showed that many of the student's behavioral concerns identified in September 2008 and documented on Summit's "Social-Emotional Profile" did not change during the course of the school year (compare Parent Ex. OOOO at p. 2, with Parent Ex. WWWW at p. 1) and it is unclear why counseling services were not provided at the outset. Additionally, during the course of the 2008-09 school year the student accumulated six incident reports of behaviors including defiance, screaming, disruption, loss of self-control, inappropriate language, impulsivity, noncompliance, and crying (Parent Ex. XXXX).

Based upon the foregoing, I concur with the IHO that the appropriate physical therapy, counseling, OT and speech therapy was not provided to the student at Summit. The level of missing related services and unaddressed needs in this case was considerably greater when compared to the circumstances recently described in C.L. v. Scarsdale Union Free Sch. Dist. (2014 WL 928906 [2d Cir. Mar. 11, 2014]), in which the discrepancy was smaller and the student was receiving the services missing at the unilateral placement. I concur with the IHO's conclusion that the parents did not meet their burden to establish that the unilateral placement at Summit was appropriate based upon on these circumstances (IHO Decision at pp. 32-33). Therefore, were I to reach this issue, I note that I would uphold the IHO's prior determination on this issue.

VIII. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL

2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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

I also concur with the IHO that equitable considerations did not flow in the parents' favor. She concluded that the parents appeared intent on sending the student to the private school prior to and at the CSE meeting for the 2008-09 school year (IHO Decision at pp. 33-34; Parent Ex. J-60, Tr. pp. 1084-85, 1772-73). The parents' comments indicated that they were not considering the program offered by the district, despite the student's progress in that setting, suggesting to the CSE that the student was "bullied all day long every day" (Parent Ex. J at p. 63). Additionally, the CTT program recommendation was rejected by the parents prior to identifying a particular site based upon the parents' apparent mistaken understanding that the same site was the only option, but without allowing investigation into that issue further (Tr. pp. 1084-85, 1772-73). The parents were told during the CSE meeting that the district was willing to offered them find a different site, which they rejected (Parent Ex. J at pp. 57, 63). Therefore, were I to reach this issue, I note that I would uphold the IHO's prior determination on this issue.

IX. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district established that it offered the student a FAPE for the 2008-09 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the parents' unilateral placement of the student at Summit was an appropriate placement or whether equitable considerations favored the parents (Burlington, 471 U.S. at 370). As noted above, were I to consider the appropriateness of the parents' unilateral placement and whether equitable considerations favor the parents, I would concur with the IHO's conclusions and find that the evidence did not establish that Summit was appropriate for the student or that the equitable considerations favored the parents.

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: **Albany, New York**
 March 14 , 2014

JUSTYN P. BATES
STATE REVIEW OFFICER