The University of the State of New York

The State Education Department
State Review Officer
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No. 12-215

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Goldman & Maurer, LLP, attorneys for respondent, Brian S. Goldman, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to issue Nickerson letters to the parent for the 2010-11 and 2011-12 school years. The parent cross-appeals from the IHO's determination to the extent that it did not grant her request for direct payment of the student's tuition costs at the Child School for the 2011-12 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student attended a public charter school from the middle of the 2004-05 school year (kindergarten year) through the 2010-11 school year (fifth grade) (see Parent Ex. G at p. 3).[1] On April 30, 2009, the CSE convened to develop the student's IEP for the 2009-10 school year (Parent Ex. C). The April 2009 CSE determined that the student was eligible for special education

[1] The hearing record shows that the student repeated the first grade (Tr. p. 1605; Parent Ex. G at pp. 1, 3).

programs and services as a student with a speech or language impairment and recommended that the student attend a general education classroom and receive special education teacher support services (SETSS), and speech-language therapy in a small group (Parent Ex. C at pp. 1, 10).[2] On March 9, 2010, the CSE convened to develop the student's IEP for the 2010-11 school year and continued the classification and program recommendations from the previous year (Dist. Ex. 19 at pp. 1, 13).[3] In June 2010, the student underwent private neuropsychological and phonological evaluations (Parent Exs. G; H).[4] The parent provided copies of the evaluations to a social worker at the charter school in October 2010 (Tr. p. 246).

Subsequently, on March 10, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Parent Ex. J). The March 10, 2011 CSE was not in possession of the private evaluations that the parent had previously provided to the charter school social worker (Tr. p. 246; see Parent Ex. K at p. 1).[5] Therefore, the social worker advised the parent that she should request another CSE meeting, which she did (Tr. p. 1664; Parent Ex. K at p. 1). By letter, mailed on March 19, 2011, the parent notified the CSE that she wished to cancel her request for another CSE meeting because the CSE should have considered the private evaluations at the March 10, 2011 CSE meeting (Parent Ex. K at p. 1).[6]

By letter dated March 24, 2011, the Child School notified the parent that the student had been accepted to the private school for the 2011-12 school year (Parent Ex. L; see also Parent Ex. MM).

On March 25, 2011, a notice was sent to the parent informing her that a CSE meeting was scheduled for March 29, 2011 (Parent Ex. M). On March 29, 2011, the parent attended the CSE meeting with her advocate and delivered correspondence to the CSE detailing her objections, including that the CSE failed: to timely convene to review the private evaluations, as per the parent's request; to consider the private evaluations at the March 10, 2011 CSE meeting; to "arrange for effective supports;" and to develop an appropriate IEP for the student (Parent Ex. N at p. 1; see Tr. pp. 1656-57). The letter further informed the district that the parent intended to enroll the student at the Child School at public expense (Parent Ex. N at p. 1). The March 29, 2011 CSE adjourned for the purpose of completing additional evaluations of the student (Tr. p. 1656;

[2] The April 2009 IEP was also included as a district exhibit; however, the district's copy reflected that standard criteria would be applied to the student's promotion; whereas, the parent's copy indicated that the student was eligible for modified promotion criteria and also included an annual goals progress report (compare Dist. Ex. 16 at p. 10 with Parent Ex. C at pp. 10-12).

[3] Four pages of the March 2010 IEP are included in the hearing record as Parent Exhibit F. For the purposes of this decision, I will cite to the district's exhibit.

[4] Although the exhibit list indicates that Parent's Exhibit G was dated June 21, 2011, the report itself indicates that the evaluation took place on several dates in June 2010 (Parent Ex. G at p. 1).

[5] The hearing record shows that the charter school social worker participated in the April 2009 and March 2010 CSE meetings (Dist Ex. 19 at p. 2; Parent Ex. C at p. 2).

[6] The parent's letter was also included as a district exhibit, except that the district's version included a date stamp of March 21, 2011 and the parent's version included an image of a certified mail receipt (compare Dist. Ex. 24 with Parent Ex. K).

see Parent Ex. P at p. 1). By letter to the CSE dated May 26, 2011, the parent emphasized that, to date, the new evaluations had not been completed and the CSE meeting had not been rescheduled (Parent Ex. P at p. 1). She further informed the district that she would delay her decision to enroll the student in a private school until after the CSE presented recommendations for the student for the 2011-12 school year (id. at pp. 1-2). The district conducted an occupational therapy (OT) evaluation of the student in April 2011 and an assistive technology evaluation in May 2011 (see Parent Exs. O; Q).

On July 6, 2011, the CSE convened and determined that the student was eligible for special education programs and services as a student with a learning disability (Parent Ex. X at p. 1).[7] The July 2011 CSE recommended a special education program, consisting of, among other things, a 12:1 special class in a community school, along with related services of speech-language therapy in a small group and individual OT (id. at p. 7).

By final notice of recommendation (FNR) dated July 26, 2011, the district summarized the recommendations made by the July 2011 CSE and notified the parent of the particular public school site to which it had assigned the student (Parent Ex. T). The parent visited the assigned public school site in the beginning of August 2011 and the principal thereof informed her that there was no room for the student to enroll in the school (Tr. pp. 1585-87). The district sent the parent a second FNR, dated August 3, 2011, setting forth recommendations purportedly made by the July 2011 CSE and notifying the parent of another public school site to which it had assigned the student (Parent Ex. U).[8]

In early September 2011, the parent signed a tuition payment plan with the Child School relative to the student's attendance for the 2011-12 school year (Tr. pp. 1530, 1683; Parent Ex. KK at p. 1).

The parent visited the public school site identified in the second FNR on September 9, 2011 (Parent Ex. V at p. 1). By letter to the district dated September 15, 2011, the parent rejected the assigned public school as not appropriate for the student and stated the reasons for her objections (id. at pp. 1-2). She also notified the district of her intention to "seek public funding for private school tuition" for the student for the 2011-12 school year (id. at p. 2).

A. Due Process Complaint Notice

The parent filed an amended due process complaint notice dated October 28, 2011, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10, 2010-11, and 2011-12 school years on both substantive and procedural grounds (Parent Ex.

[7] The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[8] The July 2011 CSE recommended a 12:1 special class placement for the student; however, the August 2, 2011 FNR set forth a recommendation for a 12:1+1 special class placement (compare Parent Ex. U at p. 1 with Parent Ex. X at p. 7).

HH).[9] Relative to all three school years, the parent alleged that the CSE deprived the parent of the opportunity to meaningfully participate in the development of the student's IEPs by failing to provide the parent—whose native language is other than English—with an interpreter at the CSE meetings (id. at p. 9). With respect to the 2009-10 school year, the parent alleged that (1) the April 2009 CSE was improperly constituted; (2) the annual goals listed in the April 2009 IEP were not sufficient to meet the student's needs; (3) the CSE's recommended placement was not appropriate for the student; and (4) the district failed to implement that portion of the student's April 2009 IEP that required the district to provide SETSS to the student (id. at pp. 2, 7).[10] With respect to the March 2010 IEP, the parent alleged that the copy of the IEP provided to the parent was incomplete (id. at pp. 3, 7-8). The parent asserted that the CSE then failed to timely reconvene in response to her request that they do so for the purpose of reviewing private evaluations (id. at p. 4). The parent also asserted various allegations relating to the March 2011 CSE, including its failure to review the private evaluations (id. at p. 5). Finally, with respect to the July 2011 IEP, the parent alleged that: (1) despite making repeated requests for the student's IEP, she did not receive a copy until October 2011; (2) the annual goals listed in the July 2011 IEP were not sufficient to meet the student's needs; and (3) the CSE's recommended placement was not appropriate for the student (id. at pp. 6, 8-9). The parent also alleged that two assigned public school sites offered by the district were inappropriate for the student (id. at pp. 6, 8).

In addition, the parent alleged that the Child School was an appropriate school for the student (Parent Ex. HH at p. 10). As relief for the 2011-12 school year, the parent requested that an IHO award her, among other things, the costs of the student's tuition at the Child School (id. at p. 10). The parent also sought an award of additional services in the form of 300 hours of tutoring with EBL Coaching, along with transportation of the student to and from the tutoring site (id. at pp. 10-11).[11] The parent additionally requested reimbursement for other expenses, including the cost of evaluations (id. at p. 11).[12]

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 19, 2012 and concluded on August 30, 2012, after 10 days of proceedings (Tr. pp. 1-1745). In response to a motion by the district, the IHO ruled that the parent's claims relating to the period of time more than two years prior to the October 2011 due process complaint notice were barred by the statute of limitations (IHO Decision at pp. 5-6; Tr. pp. 29-37; Dist. Ex. 12). In a decision dated October 10, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years and ordered

[9] The original due process complaint notice is dated October 19, 2011 (Parent Ex. GG). For purposes of this decision, I refer to the parent's amended complaint as the due process complaint notice.

[10] Relative to the 2009-10 school year, the parent limited the allegations in the due process complaint notice to the time period of November 2009 to June 2010 (Parent Ex. HH at p. 7).

[11] The parent's requests for additional services were later withdrawn at the impartial hearing (Tr. p. 85).

[12] The parent's request for reimbursement for the cost of evaluations was later withdrawn at the impartial hearing (Tr. pp. 895-96).

the district to issue "Nickerson letters" to the parent for both school years (IHO Decision at p. 18).[13]

Initially, without specifying the CSE meeting to which the findings applied, the IHO determined that: (1) the district failed to ensure attendance of an additional parent member at "successive" CSE meetings; (2) the district failed to provide an interpreter for the parent but that such failure was de minimus, given testimony that the parent was able to communicate effectively in English; and (3) the district inappropriately assessed the student's delays as a result of the failure to take into account the fact that the student was one year older than his classmates (IHO Decision at pp. 12, 14, 17, 18). Addressing the March 2010 IEP, the IHO reiterated that there was no additional parent member at the CSE meeting and that the student had been inappropriately assessed and held that: (1) the district failed to deliver to the parent a complete copy of the IEP; (2) the district failed to develop short-term objectives for annual goals; and (3) the district failed to develop annual OT goals targeted to specific "identifiable conditions manifested by the student" (id. at pp. 14, 18). As to the March 2011 CSE meeting, the IHO held that the district "avoided" the private evaluations provided by the parent (id. at p. 17). Turning to the July 2011 IEP, the IHO held that: (1) the district again failed to deliver a complete copy of the IEP to the parent; (2) the district confused the student with his twin brother in the management needs section of the IEP; and (3) the district failed to develop appropriate annual goals or short-term objectives for the student (id. at p. 18). With respect to the private evaluations, the IHO determined that the delay between the parent's provision of the evaluations to the charter school and a CSE's actual consideration of the evaluations constituted a violation of the consent order issued in Jose P. (id. at p. 18).

Having determined that the district failed to offer the student a FAPE for both the 2010-11 and 2011-12 school years, the IHO directed the district to issue the parent Nickerson letters for both school years (IHO Decision at p. 18).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years. Specifically, the district asserts that: (1) the absence of an additional parent member at the March 2010 and March 2011 CSE meetings did not deprive the student of a FAPE and that, in any event, the March 2011 IEP was superseded as a result of the July 2011 CSE meeting, at which an additional parent member was in attendance; (2) to the extent that the IHO determined that the parent was deprived of

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

meaningful participation as a result of the lack of an interpreter, the district alleges that parent was able to speak and understand English, regularly communicated with the student's school, her advocate, and private evaluators in English, and did not request an interpreter at any meeting; and (3) the IHO exceeded his jurisdiction in determining that the district inaccurately assessed the student because the parent did not make such an allegation in the due process complaint notice and, in any event, the student's levels were appropriately stated.

As to the March 2010 CSE, the district asserts that the parent received a copy of the IEP and that the CSE developed appropriate goals and was not required to develop short-term objectives. Addressing the IHO's finding that the March 2011 CSE failed to consider the private evaluations, the district asserts that the evaluations were considered in the development of the student's July 2011 IEP, which superseded the March 2011 IEP. As to the July 2011 CSE meeting, the district alleges: (1) that the parent received a complete copy of the IEP and that a presumption of mailing should apply to support this conclusion; (2) that the inadvertent mention of the student's twin brother in the management needs did not render the entire IEP inappropriate; and (3) that the CSE developed appropriate goals and was not required to develop short-term objectives. Although the IHO did not address in his decision the appropriateness of the public school sites to which the student was assigned for the 2011-12 school year, the district notes testimony that an appropriate seat was available for the student.

In addition, the district asserts that the IHO erred in directing the district to issue Nickerson letters to the parent for the 2010-11 and 2011-12 school years because, among other reasons: the student was timely evaluated and placed and, therefore, a Nickerson letter was not an appropriate remedy; the IHO did not have jurisdiction to issue a Nickerson letter; the parent did not request a Nickerson letter for the 2010-11 school year in her due process complaint notice; and the student was enrolled at the charter school during the 2010-11 school year and a Nickerson letter could not be issued or successfully effectuated for a prior school year that had already concluded. The district also alleges that the Child School was not an appropriate placement for the student for the 2011-12 school year because it was too restrictive and did not provide the student with mandated OT services. Next, the district alleges that equitable considerations do not favor the the parent's request because she provided inadequate notice to the district of her intent to unilaterally place the student.

The parent answers the district's petition, countering, among other things, that the IHO was correct to find that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years. The parent also interposes a cross-appeal and alleges that the IHO erred in finding that the student was not entitled to direct funding of the costs of the student's tuition at the Child School for the 2011-12 school year. In support thereof, the parent emphasizes: that the public school site to which the district assigned the student was not appropriate; that the Child School was an appropriate placement for the student for the 2011-12 school year; and that equitable considerations favor the parent's request for relief. As to the assigned public school site, the parent asserts that the public school site did not have a seat available in a 12:1 special class, presented an unsafe environment, and that the student would not have been appropriately functionally grouped in the assigned classroom.

The district answers the parent's cross-appeal, alleging that the parent failed to raise the issue of the unavailability of a seat in a 12:1 class at the assigned public school site in her due

process complaint notice and that, therefore, it is not properly asserted on appeal. In any event, the district asserts that the issue of the assigned public school is speculative because the parent rejected the school and unilaterally placed the student at the Child School before the commencement of the 2011-12 school year. Finally, the district asserts that the parent has not established that she is entitled to direct funding of the student's tuition costs at the Child School for the 2011-12 school year.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869 [2d Cir. June 24, 2013]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]); see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Impartial Hearing and Review; Available Remedy

Before reaching the merits in this case, I must determine which claims are properly heard on appeal. First, the district alleges that the parent did not assert in her due process complaint that the assigned public school site did not have a seat available for the student in a 12:1 class and that the issue is raised for the first time on appeal. Next, the district alleges that the IHO exceeded the scope of his jurisdiction by sua sponte raising, addressing, and relying upon issues that were not raised in the parent's due process complaint notice. Specifically, the district asserts that the IHO erred in determining that district inaccurately assessed the student by not taking into account that he was one year older than his classmates; and in ordering the district to provide the parent a Nickerson letter as relief for the district's alleged failure to offer the student a FAPE for the 2010-11 school year.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist, 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *11-*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the

administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In the present case, the parent did not seek the district's agreement to expand the scope of the impartial hearing or seek to include any additional issues in the amended due process complaint notice. Upon review I find that the parent's due process complaint notice cannot be reasonably read to include any issue relating to the improper evaluation, assessment, or description of the student on the basis of his age (see Parent Ex. HH). [14, 15] Nor can it be said that the district opened the door to such a claim by raising evidence as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 249-50; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *10-*11 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]). Therefore, I find that it was not appropriate for the IHO to render a determination on this issue (S.M. v. Taconic Hills Cent. School Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]).

However, with respect to the assigned public school site, I find that the parent properly identified the issue in her due process complaint notice by alleging that the proposed public school site was inappropriate (Parent Ex. HH at p. 8). Although the parent subsequently offered more detail as to why the assigned school was allegedly inappropriate, without stating that the school did not offer a 12:1 class, the parents due process complaint may reasonably be read as raising the issue, and the district's argument to the contrary is rejected (see id.).

With respect to the relief requested by the parent in the due process complaint notice, the parent sought an order requiring the district to fund the student's tuition at the Child School for the 2011-12 school year (Parent Ex. HH at p. 10). Although the parent initially also requested additional services, this request was withdrawn on the first day of the impartial hearing (Tr. p. 85; Parent Ex. HH at p. 10). In any event, a Nickerson letter authorizing placement in an approved nonpublic school for the 2010-11 school year was not, in a practical sense, an available option under the circumstances, despite the parent making this request for relief. The hearing record reveals that: the student had already attended the charter school for the duration of the 2010-11 school year; the 2010-11 school year was already concluded by the time the parent filed the due process complaint notice; and the parent was not financially responsible for the cost of the student's education at the charter school—the charter school having been recommended as a result of the March 2010 CSE meeting (see Dist. Ex. 22; Parent Exs. G at p. 3; HH at p. 1). Thus, even if the district failed to offer the student a FAPE for the 2009-10 or 2010-11 school years, the parent did not in any practical sense pursue any kind of remedy pertaining to these years (see M.R., 2011 WL 6307563, at *13 [precluding the parents from belatedly asserting a claim for compensatory

[14] To the extent the parent's due process complaint notice could otherwise be read to raise any such allegations, no procedural or substantive violations of the IDEA relative to the 2011-12 school year can be based on the March 2011 CSE meeting because the resultant IEP was superseded by the July 2011 IEP, as acknowledged by the parent in her due process complaint notice (Parent Ex. HH at p. 8).

[15] A review of the parent's due process complaint notice also reveals that the parent did not raise the issue, addressed by the IHO, relating to the reference to the student's twin brother in the management needs in student's the July 2011 IEP (IHO Decision at p. 18; see Parent Ex. HH). Even if the parent had raised this issue, however, I agree with the district that such a typographical error did not render the IEP inappropriate.

education when it should have been requested in their due process complaint notice]).[16] Based on the foregoing, I find that the IHO inappropriately directing the district to issue a Nickerson letter for the 2010-11 school year.[17]

Based on the foregoing, I find that the IHO exceeded his jurisdiction in holding that the district inappropriately assessed the student's delays and in fashioning a remedy to address the district's alleged failure to offer the student a FAPE for the 2010-11 school year. Based upon my determination that no equitable relief relating to school years preceding the 2011-12 school year that should be awarded under the circumstances of this case, I will address the remaining issues in this matter as they relate to the 2011-12 school year only.[18]

B. Parental Participation

I turn now to the IHO's findings that the district failed: (1) to arrange for an interpreter for the parent at the July 2011 CSE meeting; and (2) to provide the parent with a copy of the July 2011 IEP (IHO Decision at pp. 13-14).

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

Here, the parent attended the July 2011 CSE meeting in person (Parent Ex. X at p. 11). Additional attendees included a district special education teacher, a district general education teacher, a school psychologist, who also participated as the district representative, a social worker, and an additional parent member (id.). The hearing record reflects that the July 2011 CSE received and considered the June 2010 private neuropsychological and phonological evaluations, as well as the April 2011 OT and May 2011 assistive technology evaluations (Tr. pp. 1055-56; Parent Exs.

[16] Even after the parent withdrew her request for additional services, and the IHO acknowledged that no remedy remained available for the 2009-10 and 2010-11 school years per the requests set forth in the parent's due process complaint, the IHO nonetheless indicated his intent to "be flexible" in crafting a remedy (Tr. pp. 85, 116-17).

[17] As set forth below, I also agree with district's additional argument on appeal that a Nickerson letter was not an appropriate form of relief in this case.

[18] As to those findings made by the IHO for which he did not specify a particular CSE meeting or IEP, I will examine the issues as they apply to the July 2011 CSE meeting and IEP.

G; H; O; Q; Y at p. 2). However, the parent testified that she was not provided with any documents at the CSE meeting and that no documents were available to which she could refer (Tr. p. 1570).

The district special education teacher testified that the parent participated at the meeting and presented herself as a passionate, concerned parent (Tr. pp. 1058-59, 1208). He indicated that the parent asked questions, offered rationales, and imparted her experiences with services previously received by the student (Tr. p. 1208). Although the parent testified that she sometimes hesitated to ask questions at CSE meetings because she did not want to interrupt conversations between other members, the special education teacher indicated that "[s]he knew exactly what was going on" (Tr. p. 861, 1209). The parent testified that she offered information at the CSE meeting regarding the student's difficulties with homework (Tr. pp. 1571-72). The district special education teacher recorded meeting minutes and under the heading "parent concerns" included information about the student's history; however, the parent testified that she did not provide that information at the July 2011 CSE meeting (Tr. pp. 1574-75; Parent Ex. Y at p. 2). The parent indicated that no discussion took place about the student's performance in school (Tr. p. 1573). She testified that the other CSE members spoke about the annual goals to each other but not with the parent, but later testified that the CSE had no discussion about annual goals (Tr. pp. 1197, 1570). The parent, as well as the special education teacher, indicated that the parent agreed with the CSE's recommendations (Tr. p. 1079, 1576).

1. Provision of an Interpreter at the June 2011 CSE Meeting

With respect to the district's failure to provide an interpreter for the parent at the July 2011 CSE meeting, I note that the district appeals this portion of the IHO's decision only to the extent that it contributed to the IHO's ultimate holding that the district failed to offer the student a FAPE. The parent acknowledges the IHO's finding that the district's failure to provide an interpreter was a de minimus violation (IHO Decision at p. 13) but maintains that, when combined with his holding that the district made several other errors, it contributed to the IHO's determination that the district failed to offer the student a FAPE.

The district "must take whatever action is necessary to ensure that the parent understanding the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[j][3][vi]; see also Application of a Child with a Disability, Appeal No. 05-119). The parent testified that her native language is other than English (Tr. p. 832).[19]

The hearing record shows that the parent attended multiple CSE meetings over the years for her two sons and that during those meetings, including the July 2011 CSE meeting, no CSE member ever inquired whether the parent required an interpreter, and the parent never requested an interpreter's presence (Tr. pp. 165, 234, 359, 669, 675, 856, 858-60, 935, 1059-60, 1569, 1658).[20] However, the parent spoke in English during the meetings, as well as in her interaction with the student's social worker at the charter school, and never gave meeting participants the

[19] An interpreter was available for the parent during the entirety of the impartial hearing.

[20] According to the district special education teacher, at a 2006 CSE meeting for the student, which he also attended, the district offered the parent the services of a translator but the parent refused (Tr. pp. 1102-03).

impression that she could not understand English or that she required a foreign language interpreter (Tr. pp. 165, 234, 357, 359, 572, 675, 661-62, 669, 1060). Nonetheless, the district special education teacher, who attended the July 2011 CSE meeting, and the social worker from the charter school testified that they knew that English was not the parent's first language (Tr. pp. 573, 653, 1100). While the conversations that take place in a CSE meeting may utilize terms of art and language that may not be as easily understood by a parent whose first language is not English, the hearing record shows that the parent was diligent about requesting elaboration and explanation when she did not understand something and had learned much of the terminology "that had to do with the school" (Tr. pp. 654, 657, 850, 853, 860, 1009, 1101, 1725).[21] Moreover, the special education teacher indicated that the district could have provided an interpreter "at any point during the meeting" if the parent "had any concerns about not understanding anything" (Tr. p. 1102).[22]

It is noteworthy that, at the time of the July 2011 CSE meeting, the parent was represented by an advocate; however, due to a scheduling conflict, the advocate was not able to attend the meeting (Tr. p. 1705). The advocate testified that, although he did not speak the parent's native language, he intended to "function as a spokesperson" for the parent, thereby doing away with the need for an interpreter (Tr. p. 1711). However, when the advocate was unable to attend the CSE meeting, he indicated that it was too late to request an interpreter for the parent and no one requested that the CSE reschedule the meeting (Tr. pp. 1711-12).

Notwithstanding the parent's grasp of the English language, the district did not establish that the parent did, in fact, understand the substance of the conversations that took place at the July 2011 CSE meeting, and therefore that it took the necessary action in this instance. While this procedural violation in isolation may not have resulted in a denial of a FAPE, as discussed in further detail below, the failure to provide an interpreter, when coupled with other procedural violations, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the student.

2. Transmittal of the June 2011 IEP

I now turn to the parent's allegation that the district's failure to timely furnish her with a copy of the July 2011 IEP denied her a meaningful opportunity to participate in the CSE process. The district asserts that it mailed a copy of the July 2011 IEP to the parent in the normal course of business and, therefore, is entitled to a presumption of mailing and receipt, notwithstanding the parent's testimony of non-receipt.

The IDEA requires that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR

[21] For example, the parent testified that, at the July 2011 CSE meeting, she asked what the CSE meant by a 12:1 (Tr. p. 1725).

[22] Furthermore, the hearing record reveals that the district utilized a form known as a home language survey which, upon a student's entry into kindergarten, requested that the student's parent indicate in what language he or she preferred to communicate (Tr. pp. 361, 365-66, 659-61). The social worker from the charter school testified that the parent identified English as her preferred language on that form (Tr. p. 661). However, neither party offered into evidence a copy of a survey actually completed for this student and a blank copy of a home language survey was included in the hearing record (see Parent Ex. II).

200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]). There is no legal authority requiring districts to produce an IEP at the time that the parents demand; districts must only ensure that a student's IEP is in effect at the beginning of each school year and that the parents are provided with a copy (34 CFR 300.322[f], 300.323[a]; 8 NYCRR 200.4[e][1][ii]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *7 [S.D.N.Y. Aug. 13, 2013]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]). The parent alleges that she did not receive a copy of the student's IEP until October 2011, after the beginning of the 2011-12 school year (Tr. pp. 1578, 1631, 1633).

Initially, the special education teacher's testimony that it was the district's procedure to mail a parent an IEP once the document was finalized, is not sufficient to give rise to the presumption of mailing (Tr. p. 1113).[23] Other than this conclusory description, there is no evidence as to the district's office practices and procedures with respect to addressing or mailing the IEPs (see Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978] [finding a presumption of mailing was warranted given proof that the subject notices had been "duly addressed and mailed"]; see also Mu Yan Lin v. Burlington Ins. Co., 2012 WL 967633, at *5 n.5 [S.D.N.Y. Mar. 21, 2012] [noting that New York law requires proof of actual mailing or evidence of a regular course of business showing that the subject notice was duly addressed and mailed]). Particularly important in this case, the parent described her unsuccessful efforts to request a copy of the IEP, including phone calls, in which she was informed that the document was not available (Tr. pp. 1577-78). The hearing record otherwise shows only that the parent did not receive a copy of the July 2011 IEP until her advocate obtained the document in October 2011, after the beginning of the 2011-12 school year (Tr. pp. 1578, 1631, 1633; see Parent Ex. W).[24]

While a district's failure to provide a parent a copy of an IEP will not always rise to the level of a denial of FAPE (see N.K., 2013 WL 4436528, at *7; Application of the Dep't of Educ., Appeal No. 13-032), this failure in this instance to do so when the parent requested it, combined with the district's failure to provide the parent with an interpreter at the July 2011 CSE meeting, significantly impeded the parent's participation in the CSE process (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2).

The district's failure to provide an interpreter at the July 2011 CSE meeting was aggravated by its failure to timely provide the parent a copy of the IEP. In particular, her inability to request translation or explanation of the contents of the IEP subsequent to the CSE meeting if necessary deprived the parent of the opportunity to review the CSE's recommendations for the student. These procedural failures are further compounded by the inadequacy of the goals contained in the July 2011 IEP, as discussed below, as well as the discrepancy between the CSE's recommendations set forth in the July 2011 IEP and the summary of the recommendations provided to the parent

[23] The special education teacher did not have personal knowledge as to whether or not the IEP was in fact mailed (Tr. p. 1113).

[24] The special education teacher from the Child School testified that the Child School initially received a copy of the March 2011 IEP and that it received a faxed copy of the July 2011 IEP from the advocate in November 2011 (Tr. p. 1385, 1425-26, 1432).

(compare Parent Ex. X at p. 7, with Parent Ex. U). Because the parent did not have a copy of the IEP at that point, such inadequacies and errors exacerbated her misunderstanding.

C. July 2011 IEP: Annual Goals and Short-Term Objectives

I now turn to the IHO's decision that the July 2011 CSE failed to draft appropriate annual goals or short-term objectives for the student. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Determinations about the individual needs of a student shall provide the basis for the written annual goals. (8 NYCRR 200.1[ww][3][i]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

Turning to the annual goals recommended by the July 2011 CSE, review of the IEP reveals that, while the annual goals were broadly related to the identified needs of the student, most contain insufficient specificity by which to guide instruction and interventions, evaluate the student's progress, and gauge the need for continuation or revision (Parent Ex. X at pp. 1-4).

To address the student's needs, as set forth in the present levels of performance in the July 2011 IEP and in evaluative materials considered by the CSE, the July 2011 IEP contained annual goals in the areas of classroom organization skills;[25] reading fluency; writing; mathematical processes; visual-perceptual, visual-motor, and visual-spatial skills; and phonological processing/auditory discrimination and auditory processing (Parent Ex. X at pp. 1-4). The special education teacher assigned to the July 2011 CSE acknowledged during testimony that the lack of specificity and measurability contained in the student's IEP goals and indicated that the parent would likely be unable to decipher the student's progress towards meeting the goals (Tr. pp. 1128-29, 1131-32, 1136, 1182-83).

Significantly, the reading fluency goal included in the July 2011 IEP does not specify the skills or level of progress the student was required to display "with 80 percent accuracy" in order to achieve the goal (Parent Ex. X at pp. 3-4). The reading fluency goal is non-specific in that it required the student to demonstrate an undefined "reduction of errors" and an "increase in reading rate" observed by his teacher (id.). As written, it is uncertain that a teacher would be able to determine what skills the student needed to work on in order to achieve the reading fluency goal (Parent Ex. X at pp. 3-4). The writing goal similarly does not specify the writing skills the student was expected to display in five out of ten trials to achieve that goal (id. at p. 4). The math goal also does not specify the mathematical processes in which the student needed to improve in order to achieve the goal (id.). Similar lack of specificity is noted for "improvements" the student would have been expected to display in the areas of visual-perceptual/visual-motor/visual-spatial skills,

[25] The annual goal addressing classroom organization is specific and measurable (Parent Ex. X at p. 3).

and phonological processing/auditory discrimination and auditory processing (Parent Ex. X at p. 4). As written, the goals are insufficient to guide instruction and interventions, evaluate the student's progress, and gauge the need for continuation or revision because the goals did not define the skills to be displayed and measured, and/or the amount of progress expected from the student.

Testimony by the special education teacher assigned to the July 2011 CSE indicates that the CSE did not have an updated speech-language report to review at the time of the meeting (Tr. pp. 1075-76, 1115). Instead, the special education teacher believed that the CSE carried over the speech-language goal from the previous (March 2011) IEP to the July 2011 IEP (Tr. pp. 1075-76, 1085-86, 1115, 1154-55; but compare Parent Exs. J at p. 7, with X at p. 4).[26] Review of the March 2011 IEP reveals that the March 2011 CSE included speech-language goals that targeted the student's needs specific to reading comprehension (retelling, drawing inferences, drawing conclusions), written narrative skills (organization, use of transition words, proper tense markers, punctuation, capitalization), vocabulary (antonyms/synonyms and multiple word meanings), and auditory processing (functional meaning of idioms and analogies) (Parent Ex. J at p. 7). A review of the annual speech-language goals in the March 2011 IEP reveals that they contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision, and they also contained adequate evaluative criteria (id.). In comparison, the single speech-language goal in the July 2011 IEP contained insufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision, and it contained inadequate evaluative criteria (Parent Ex. X at p. 4).

Regarding the lack of short-term objectives on the July 2011 IEP, I find that the IHO erred in determining such absence to constitute a violation of the IDEA (see IHO Decision at p. 18). The July 2011 IEP recommended that the student participate in the same State and district-wide assessments of student achievement that are administered to regular education students (Parent Ex. X at p. 9). Therefore, State regulations did not require the district to include short-term objectives on the July 2011 IEP (8 NYCRR 200.4[d][2][iv]). Had the defects in the annual goals been viewed in isolation in this case, once again it may not have resulted in a denial of a FAPE. The inclusion of short term objectives may have cured the lack of clarity in the annual goals (see E.F., 2013 WL 4495676, at *18-*19 [finding that, although the goals were vague, they were modified by more specific objectives that could be implemented]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]; C.D., 2011 WL 4914722, at *8). However, the vagueness of the annual goals was once again exacerbated the district's actions above significantly impeding the parent's participation in the development of and access to the student's July 2011 IEP. In consideration of the deficiencies, viewed together, I find that the district failed to offer the student a FAPE for the 2011-12 school year.

[26] The special education teacher testified that he thought the CSE reviewed a previous IEP in formulating the student's speech-language goal for the July 2011 IEP, but later acknowledged that he did not remember reviewing the March 2011 IEP and did not know how the speech-language goal was developed (Tr. pp. 1075, 1165, 1181).

D. Nickerson Letter

The IHO erred by not applying the Burlington/Carter test when deciding the parent's claim for tuition reimbursement at the Child School. Instead, the IHO directed the district to issue a Nickerson letter to the parents (IHO Decision at p. 18). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925 [8th Cir. 2004]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d 167), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012]; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F.Supp.2d 90, 101 n.3 [E.D.N.Y. 2011], aff'd 2013 WL 2158587 [2d Cir. May 21, 2013]). Therefore, I—and the IHO—lack the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17, n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *3-*4 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167 [2d Cir. 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90, n. 15 [S.D.N.Y. 2010]; see F.L., 2012 WL 4891748, at *11-*12; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]).

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

E. Appropriateness of the Child School

I will next consider whether the parent met her burden of proving that the Child School was an appropriate placement for the student during the 2011-12 school year. The district asserts that the Child School was too restrictive and did not provide related services mandated for the student.

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 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Student with a Disability, Appeal No. 12-036; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden

of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]; see also Educ. Law § 4404[1][c]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207. Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see M.B., 2013 WL 1277308, at *2; D. D-S v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; Gagliardo, 489 F.3d at 115; 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; M.B., 2013 WL 1277308, at *2; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

After careful review of the evidence contained in the hearing record I find that, for the reasons discussed below, the hearing record shows that the parents satisfied their burden of proving that the Child School was an appropriate placement for the student for the 2011-12 school year. The Child School is a New York State approved school for children with disabilities (Tr. p. 1380). The hearing record reflects that the student's Child School sixth grade special class placement consisted of eight students, one teacher, and one assistant teacher (8:1+1) (Tr. pp. 1382, 1404).

Although the hearing record is sparse with regard to information about the other students in the 8:1+1 class at the Child School, it does reflect that the class consisted of two female and six male students who were eligible for special education programs and services as students with an other health-impairment, a speech or language impairment, a learning disability, autism, or an emotional disturbance (Tr. pp. 1418-19, 1421). None of the students was physically aggressive (Tr. p. 1420). At the Child School, the student received speech-language therapy and, beginning in March 2012, OT (Tr. pp. 1430-31, 1438; Parent Exs. BB at p. 2; JJ at pp. 2, 17).

The hearing record demonstrates that the Child School provided academic instruction and academic support to the student for the 2011-12 school year. The student's teacher at the Child School testified that she taught the 8:1+1 self-contained class English, math, social studies, and science (Tr. p. 1382).[27] When the student began attending the Child School in September 2011, the teacher performed academic assessments of the student to determine his reading (decoding, comprehension, independent reading), spelling, and math levels for instructional grouping purposes (Tr. pp. 1385-89). For each academic subject taught within the self-contained classroom, students were divided into small groups (Tr. p. 1391). The student was taught a sixth grade curriculum that the teacher modified according to the student's needs (Tr. pp. 1391, 1398-99).

In reading, the teacher explained that she divided the class into small groups of up to three students so that everyone in a particular group was at approximately the same reading level (Tr. p. 1391). In order to meet the learning standards for reading (read and collect data, facts, or main ideas), the teacher taught the student how to ask clarifying questions when he did not understand something, how to highlight important data, facts, or ideas in passages, and how to distinguish facts from opinion by looking for proof in the reading passage (Tr. p. 1392). In order to address the learning standards for writing, the teacher taught the student note-taking skills by providing him with typed notes and a colored index card to help him keep his place (id.). The teacher also provided the student with graphic organizers to help him write a coherent passage (id.). In order to meet the learning standards for listening and in consideration of the student's language processing deficits, the teacher provided the student with repetition, rephrasing, checking for understanding, and assistance in asking questions to clarify instructions or tasks (Tr. p. 1393). In order to address the learning standards for speaking, the teacher taught the student how to ask wh-questions and the speech-language pathologist instructed the student in the use of a graphic organizer to organize his thoughts prior to speaking (Tr. p. 1395).

In math, the teacher assessed the student's computational skills prior to assigning him to a small work group that addressed his math needs and built on his mathematical skills (Tr. p. 1389; Parent Ex. BB at p. 6). The October 2011 first progress report from the Child School provided a math curriculum overview (Parent Ex. BB at p. 6). The first report indicated that a main goal of the school's math program at the time was for students to become more independent in their math computation and problem solving skills (id.). Students explored math topics through visual examples and hands-on manipulatives (id.). Subsequently, these math concepts were put into mathematical notation (id.). Students were exposed to mathematical symbols, operational signs, formulas, and equations (id.). Once a student mastered a targeted concept, the newly learned

[27] The hearing record reflects the student also received instruction at Child School in art, music, physical education, and technology (Parent Exs. BB at pp. 13-15; JJ at pp. 14-16, 18).

concept was applied to the real world (id.). Word problems were incorporated throughout topic areas to develop students' problem solving skills (id.).

In the instant case, the teacher indicated she modified the sixth grade curriculum for the student and his specific instructional levels by slowing the pace of the material presented (Tr. p. 1399). In addition, she simplified the content presented to make it easier for the student to process the information and to help him remember the material he needed to learn (id.). The teacher also modified her expectations as to how much the student needed to accomplish by picking books for him that were on his reading level (fourth grade), while addressing sixth grade learning standards and maintaining sixth grade content and analyses (Tr. pp. 1399-1401). The teacher checked the student's reading comprehension of presented material through observation of his ability to answer questions aligned to his reading material, and through small group discussion and assignments (Tr. pp. 1400-01). The October 2011 progress report from the Child School indicates mathematical games and frequent assessments were used to monitor students' strengths and needs for additional support in math (Parent Ex. BB at p. 6).

In science and social studies, the teacher indicated that she modified the curriculum for the student (Tr. p. 1415). In social studies, the student worked in a small group, and the teacher provided him with highlighters, graphic organizers, and notes with index cards (id.). In science, the teacher used visuals, hands-on materials, and computer based technology to help the student understand concepts addressed (Tr. p. 1416). The teacher explained that the student's class went on a class trip in their local community to provide the students with an opportunity to practice math and reading skills, as well as practical use of their map reading and compass skills (Tr. p. 1415; see Parent Ex. BB at p. 8).

The hearing record also demonstrates that the student made progress during the 2011-12 school year at the Child School. A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B., 2013 WL 1277308, at *2; D. D-S, 2012 WL 6684585, at *1; L.K., 2013 WL 1149065, at *15; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at *5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).[28] However, a finding of progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; L.K., 2013 WL 1149065, at *15.

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

In this case, the student's teacher testified that in September 2011, the student read at an independent grade level of 4.5 while by February 2012, he was reading independently at the 5.0 grade level (Tr. pp. 1410-11). Also by February 2012 the student's instructional reading level improved from "level S" to "level U" (grade equivalent 5.4) (Parent Ex. JJ at p. 3). In math, the student's instructional grade level improved from 3.5 to 4.5 (Tr. pp.1412; see Parent Ex. JJ at p. 7). The October 2011 and February 2012 progress reports from the Child School reflected the student's performance and progress from fall to mid-year in all academic areas when provided the classroom strategies, lessons, and supports described in the reports (see generally Parent Exs. BB; JJ). In addition, the mid-year progress report reflected the student's progress in speech-language therapy specifically related to vocabulary and semantics (understanding and using concepts; word meaning), receptive language (following directions, sequencing, answering wh-questions), and expressive language (syntax, grammar/morphology) (Parent Ex. JJ at p. 17). The speech-language mid-year progress report indicates the student made "good strides" by using the visualization/verbalization techniques emphasized in his therapy sessions (id.). According to the student's teacher, by February 2012, the student was more emotionally comfortable with the other students in his class and started asking questions when he had doubts (Tr. pp. 1412, 1417-18).

The district argues that the Child School was an inappropriate placement for the student for the 2011-12 school year because it did not constitute the student's LRE. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at *19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; Application of a Student with a Disability, Appeal No. 12-027; Application of the Dep't of Educ., Appeal No. 10-049; Application of the Dep't of Educ., Appeal No. 10-042; Application of a Child with a Disability, Appeal No. 99-083). The evidence in this case, described above, supports the conclusion that the student should be placed in a special class setting, a setting that is offered by the Child School.

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

F. Equitable Considerations

Having determined that the Child School was an appropriate placement for the student for the 2011-12 school year, I will now consider whether equitable considerations support the parents' reimbursement claim for tuition costs. The district argues that equitable considerations militate against an award of tuition reimbursement because the parent's notice to the district that she intended to unilaterally place the student was based upon her observation of the recommended class and not due to any allegations about the appropriateness of the July 2011 IEP, which she did not raise until she requested an impartial hearing (see Parent Ex. V). Thus, the district asserts that

it was deprived of an opportunity to reconvene to address the parent's concerns regarding the substance of the IEP.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see J.P. v. New York City Dep't of Educ., 2012 WL 359977, at *13-*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at *10; S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 363 [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 M.C., 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of a Student with a Disability, Appeal No. 12-036; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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

Initially, it is relevant that, prior to the 2011-12 school year, the student attended the public charter school for kindergarten through fifth grade (see Tr. p. 567, 917; Parent Ex. G at p. 3). The social worker from the charter school indicated that the parent was "a great advocate" for the student and worked with the charter school to secure services for the student (Tr. p. 567).

The hearing record indicates that in October 2010 the parent provided copies of private neuropsychological and phonological evaluations to the charter school social worker, with the intent that the CSE would convene and review the evaluations in drafting the student's special education program and services for the remainder of the 2010-11 school year (Tr. pp. 246, 611, 917-19; see Parent Exs. G; H). The social worker did not provide the evaluations to the CSE or request that the CSE reconvene (Tr. p. 723). The CSE did not convene again until March 10, 2011 and it was only then that the social worker brought the private evaluations to the attention of the district (Tr. pp. 941-44).[29] Before the CSE reconvened with a psychologist, so that the evaluations could be reviewed, the parent notified the CSE that, because the CSE failed to consider the private evaluations at the March 10, 2011 CSE meeting, she would "seek correction of these regulatory failures through other means" (Parent Ex. K). Nonetheless, the parent attended the March 29, 2011 CSE meeting with her advocate and delivered further correspondence to the CSE detailing the parent's objections to the CSE's process leading up to that meeting (Parent Ex. N at p. 1; see Tr. p. 1657). The March 29, 2011 CSE meeting was rescheduled for the purpose of completing further evaluations of the student (Tr. p. 1656; see Parent Ex. P at p. 1). Almost two months later, by letter dated May 26, 2011, the parent indicated that the new evaluations had not been completed and that the CSE meeting had not been rescheduled (Parent Ex. P at p. 1). She further informed the district that she would delay her decision to enroll the student in a private school until after the CSE presented recommendations for the student for the 2011-12 school year (id. at pp. 1-2).

Finally, the hearing record indicates that the parent attended the July 2011 CSE meeting and fully cooperated with the CSE during the review process. In early September 2011, the parent signed a tuition payment plan with the Child School for the 2011-12 school year (Tr. pp. 1530, 1683; Parent Ex. KK at p. 1). After visiting two assigned public school sites, the first of which the parent was informed did not have a seat for the student and the second of which offered a 12:1+1 special class rather than the 12:1 special class recommended by the CSE, the parent notified the district of her intention to unilaterally place the student (Tr. pp. 1266-67, 1585-87; Parent Exs. T; U; V at pp. 1-2; see Parent Ex. X at p. 7).

Addressing the district's argument about the parent's notice of unilateral placement, the hearing record reveals that, in her letter at the onset of the 2011-12 school year, the parent stated that she was enrolling the student at the Child School for that school year and seeking reimbursement from the district, but raised issues pertaining solely to the assigned public school site and assigned class rather than to the student's July 2011 IEP (Parent Ex. V at pp. 1-2). It is

[29] In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a recent guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). Although no remedy was pursued by the parent for the 2010-11 school year and the parent's allegation relating to the district's failure to timely reconvene after the parent provided the private evaluations to the social worker is thus not at issue, I nonetheless find it relevant to my evaluation of equitable considerations.

true that, by her September 15, 2011 letter, the parent did not "put FAPE at issue" for 2011-12 so that the district had the opportunity to reconvene the CSE and address any concerns raised by the parent to devise an appropriate plan and determine whether a FAPE could be provided in a public school (see Carmel Cent. Sch. Dist.., 373 F. Supp. 2d at 414-15; Greenland, 358 F.3d at 160; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *7 [N.D.N.Y. Sept. 29, 2010] [noting that each year a FAPE is at issue, the parents must comply with the notice requirements and inform the district of their dissatisfaction prior to enrolling the student in a private school and seeking reimbursement]; S.W., 646 F. Supp. 2d at 362-63; Application of a Student with a Disability, Appeal No. 11-103; Application of the Dep't of Educ., Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-099). However, although the hearing record shows that the parent became frustrated with the CSE process as a result of the delays described above, she nonetheless cooperated with the district and gave the CSE opportunities to address her concerns and devise an appropriate program for the student (Tr. p. 1664; Parent Exs. K at p. 1; N at p. 1; P at pp. 1-2). After attending three CSE meetings held to develop the student's IEP for the 2011-12 school year, I decline to find that the parent hindered the district's ability to offer the student a FAPE.

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

G. Relief

With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has

artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[30] Since the parent has selected the Child School as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of the Child School and whether she is legally obligated for the student's tuition payments (Application of the Dep't of Educ., 12-132; Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, the district argues that the parent has not sufficiently established the direct funding element of her requested relief regarding whether, due to a lack of financial resources, she was unable to front the costs of the tuition at the Child School for the 2011-12 school year. Upon careful review of the evidence, I agree.

In this case, the parent signed a tuition payment plan with the Child School relative to the student's attendance for the 2011-12 school year (Tr. pp. 1530, 1679-80, 1683; Parent Ex. KK at p. 1). The payment plan indicated that the total cost of tuition for the 2011-12 school year was $29,455.00 (Parent Ex. KK). The parent testified that she did not have the financial resources to pay the student's tuition at the Child School particularly because, at the time, she was also simultaneously obligated to pay for the tuition of the student's twin brother (Tr. p. 1629-30, 1676).[31] The hearing record reveals that the parent never made a payment to the Child School for the student's tuition or for an enrollment fee (Tr. p. 1527, 1623-24, 1687). The admission coordinator at the Child School testified that, based on the parent's representations as to her financial inability to pay, as well as the perceived likelihood that the district would become obligated to pay the student's tuition, the Child School agreed to wait for the result of the impartial hearing prior to requiring the parent to make tuition payments (Tr. pp. 1536, 1538, 1546; see Tr. p. 1684). However, the admission coordinator and the parent both acknowledged that if the parent was unsuccessful at the impartial hearing she would be obligated to pay the full amount of the tuition costs (Tr. pp. 1527, 1622, 1633).

The parent testified that she earns approximately $27,000 per year (Tr. p. 1628; see also Parent Ex. LL at p. 21). In addition to the testimonial evidence submitted regarding the financial circumstances of the parent's household, the parent also submitted her and her husband's 2010 income tax return that reflected income of approximately $107,000 (see Parent Ex. LL at p. 1). The hearing record shows that the parent and her husband also own real estate, for which they receive income totaling, for the 2010 tax year, approximately $28,000 after applicable expenses and deductions (Tr. pp. 1628-29). While the combined income of the parents is not insignificant, the hearing record contains little other evidence of the parent's assets, liabilities, or expenses during the relevant time period, nor is there evidence of the parents' investments, savings, or other resources that make up their "financial resources." Based on the parent's 2010 income, the lack of

[30] The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 557 U.S. at 244 n.11; see 20 U.S.C. § 1415[i][2][C][iii]).

[31] The admissions coordinator at the Child School testified that the impartial hearing for the student's twin brother resulted in an order that the district fund the brother's tuition at the Child School (Tr. pp. 1534-36).

additional information in the hearing record, and the amount of tuition owed for the 2011-12 school year, I decline to order the district to directly fund the student's tuition. However, upon proof of payment, I will direct the district to reimburse the parents for the student's tuition at the Child School for the 2011-12 school year.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. As to the 2011-12 school year, I find that the district impeded the parent's opportunity to participate in the development of the student's IEP, that the goals set forth in the July 2011 IEP were not reasonably calculated to enable the student to receive educational benefits, accordingly, the district failed to offer the student a FAPE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). I also find that the parent's unilateral placement at the Child School was reasonably calculated to meet the student's educational needs, and that equitable considerations favored an award of reimbursement to the parent of the student's tuition at the Child School for the 2011-12 school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 10, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to issue a Nickerson letter to the parent for that school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated October 10, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year on grounds not raised in the parent's due process complaint notice, as specified in the body of this decision, and ordered the district to issue a Nickerson letter to the parent for that school year; and

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

Dated: **Albany, New York**
September 20, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER