The University of the State of New York

The State Education Department
State Review Officer
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No. 12-234

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, Gail M. Eckstein, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Sonia Mendez-Castro, 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 a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered relief to compel her attendance at the School for Language and Communication Disorders (SLCD) for the 2012-13 school year. The parents cross-appeal the IHO's decision to the extent that it did not reach certain issues raised in parents' due process complaint notice, including their request for tuition reimbursement. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO 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

With respect to the student's educational history, the hearing record indicates that the student attended a 12:1+1 special class with a 1:1 paraprofessional at a district public community

school from the 2007-08 school year (kindergarten) through the 2011-2012 school year (third grade) (Tr. pp. 164-69 Parent Ex. D at p. 8; see Tr. p. 40).[1]

On January 19, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 2 at p. 21).[2] Finding the student eligible for special education as a student with autism, the January 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school (id. at pp. 1, 17-18, 21-22).[3] In addition, the January 2012 CSE recommended related services of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group (3:1), two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of OT in a group (2:1), and one 30-minute session per week of counseling in a group (3:1) (id. at pp. 17-18). In addition, the CSE recommended support for management needs, 23 annual goals, adapted physical education, testing accommodations, and modified promotion criteria (id. at pp. 5-17, 19, 23).

In a letter dated February 2, 2012, the parents informed the district that they discussed the outcome of the January 2012 CSE meeting with a private psychologist who previously completed a private neuropsychological evaluation of the student (Parent Ex. F). The parents reported the opinion of the psychologist that the student did not meet the criteria for a diagnosis of autism, but rather demonstrated characteristics of a severe expressive/receptive communication and language disorder and, due to her communication challenges, features of pervasive developmental disorder (PDD) (id.). In addition, the parents indicated they had visited several 6:1+1 special class programs in district specialized schools and "believed they [we]re wholly inappropriate for [the student]," noting that other students in the observed classrooms exhibited "behavioral disorders and [we]re lower functioning" (id.). Therefore, the parents requested another CSE review, as well as deferral of the student's placement to the Central Based Support Team (CBST) for the purpose of recommending a State-approved nonpublic school (id.). The letter reflected that the student was accepted to attend the SLCD for July 1, 2012 (id.).[4]

By letter dated March 19, 2012, the parents informed the district that they visited the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. C; see Tr. pp. 184-88). The parents rejected the assigned public school site as not appropriate for the student because, based on their observation of two classrooms: the

[1] The hearing record indicates that the student attended kindergarten for a second time during the 2008-09 school year (Tr. p. 166; see Parent Ex. D at p. 8).

[2] The hearing record contains two different versions of a January 2012 IEP, which vary in some respects, as discussed in more detail below, including as to the date on which the CSE meeting was held (compare Dist. Ex. 2 at pp. 17, 21, 22, with Parent Ex. G at pp. 13, 17, 18). However, the hearing record indicates that the CSE meeting took place on January 19, 2012, not on January 17, 2012 (see Tr. pp. 66, 172). As the parties' do not dispute that the district's version was the operative IEP for the student's 2012-13 school year, the district's exhibit will be cited.

[3] The student's eligibility for special education programs and related services as a student with autism is in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[4] SLCD has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

classes were composed of "low functioning," "mainly . . . nonverbal students"; one of the two was a TEACCH classroom"; and both "follow[ed] picture schedules and [we]re very restricted environments" (Parent Ex. C).

On May 28, 2012, the parent executed an enrollment contract with SLCD for the student's attendance during the summer portion of the 2012-13 school year (Parent Ex. M at pp. 1-2).[5]

By letter to the district dated June 15, 2012, the parents rejected the January 2012 IEP and the assigned public school site and notified the district of their intentions to unilaterally place the student at SLCD for the 2012-13 school year and to seek public funding for the costs of the student's tuition, as well as the provision of transportation services (see Parent Ex. B at pp. 1-4). Specifically, the parents outlined their concerns regarding, among other things, the timing of the January 2012 CSE meeting, the composition of the CSE, the classification of the student, the appropriateness of the annual goals, the ambiguity in the IEP regarding the student's need for a BIP, the lack of mention in the IEP of a particular teaching methodology, the CSE's failure to recommend parent counseling and training, and the district's failure to respond to the parent's request that CSE reconvene (id. at pp. 2-3). In addition, the parents reiterated many of their concerns regarding functional grouping and teaching methodologies at the assigned public school site, as set forth in their March 2012 letter to the district (id. at pp. 2-3; see Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year on both procedural and substantive grounds (see Parent Ex. A at pp. 1-2). With respect to the January 2012 CSE, the parents asserted that: (1) the CSE convened too early in the school year; (2) because the parents received a copy of the January 2012 IEP that did not include an attendance page, the parents were unable to decipher whether or not the CSE was properly composed; (3) the CSE denied the parents a meaningful opportunity to participate in the development of the student's IEP; and (4) the CSE failed to adequately evaluate the student and, as a result, considered insufficient evaluative information to develop the student's IEP (id. at pp. 3-4, 7).

With respect to the January 2012 IEP, the parents asserted that the CSE's determination of the student's eligibility for special education as a student with autism failed to "encompass[] [the student's] needs," including her "unique strengths" (Parent Ex. A at pp. 2-3). In addition, the parents alleged that the annual goals included in the January 2012 IEP were inherently flawed given that the student's present levels of performance failed to adequately reflect the evaluative material and, further, that the annual goals were vague, not adapted to the student's significantly modified promotion criteria, and otherwise did not correlate to grade level baselines or targets (id. at p. 5). The parents also asserted that, although the student was mandated to receive adaptive physical education, no annual goal was included in the IEP relative to this service (id. at pp. 5-6). Next, the parents argued that the recommended 6:1+1 special class placement in a specialized school was not appropriate for the student, as the particular class ratio was intended for lower functioning students (id. at p. 3). The parents assert that the January 2012 IEP was inconsistent

[5] The evidence in the hearing record shows that parents signed an enrollment contract for the remainder of the 2012-13 school year on September 10, 2012 (see Parent Ex. I at pp. 1-2).

and ambiguous in that it stated that the student did not require a BIP, yet indicated that the student had a BIP (id. at p. 5). This inconsistency, argued the parent, would "impede[] the ability of teachers and related services specialists to appropriate structure the learning environment for this student (id.). The parents also alleged that the January 2012 IEP should have included a recommendation for parent counseling and training (id. at p. 6).

The parents also asserted that, on numerous occasions, the district failed to communicate with the parents or respond appropriately to parental requests (Parent Ex. A at pp. 4, 6, 7). Specifically, the parents asserted that, despite their attempt "to open a dialogue" with the district to re-evaluate the student, the district did not respond to any of the parents' concerns (id. at p. 4). In addition, the parents allege that the district did not reconvene a CSE meeting after their written request therefor (id. at p. 6). Moreover, the parents assert that the district failed to offer the student an alternative placement after the parents rejected the January 2012 IEP and the assigned public school site and failed to provide the parents with a finalized copy of the student's IEP prior to the start of the school year (id. at pp. 6, 7).

In addition, the parents alleged that the student's unilateral placement at SLCD was appropriate and that equitable considerations weighed in favor of their request for relief (Parent Ex. A at p. 8). As relief, the parents requested the issuance of a Nickerson letter to fund the student's tuition at SLCD for the 2012-13 school year or, in the alternative, an order requiring the district to reimburse the parents for the tuition costs (id. at p. 8).

B. Impartial Hearing Officer Decision

On September 13, 2012, an impartial hearing convened and concluded on October 4, 2012, after two days of proceedings (Tr. pp. 1-217). In a decision dated November 19, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year (IHO Decision at p. 5). Specifically, the IHO found that the student was improperly classified as a student with autism, and instead should have been classified as a student with a speech or language impairment, given that the student's "primary difficulties [we]re in the areas of expressive and receptive language" (id. at p. 3). Consequently, the IHO ordered the CSE to change the student's disability classification (id. at pp. 3, 5).

In addition, the IHO found that the district's failure to timely reconvene the CSE at the parents' request entitled the parents to a "Nickerson letter" (id. at p. 4). Finally, the IHO found that the hearing record did not support a finding that the January 2012 IEP or the assigned public school site were appropriate for the student, noting "minimal information" about the manner in which the assigned public school site would have met the student's needs (id. at p. 5).

Because the parents requested tuition reimbursement as an alternative form of relief and because the IHO determined that a Nickerson letter was warranted, the IHO did not address the issues of whether SLCD constituted an appropriate unilateral placement for the student for the 2012-13 school year or whether equitable considerations weighed in favor of the parents' request for relief (see IHO Decision at p. 5).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year. With respect to the student's classification, the district alleges that the IHO erred in her determination that the student did not meet the regulatory requirements for an autism classification. The district argues that the parents requested the change in classification and that such change was reasonable given the student's academic, social, and neurological needs. Further, the district asserts that the student's classification did not result in a denial of a FAPE because a student is not entitled to a particular classification under the IDEA, so long as the IEP addresses the student's needs.

The district also asserts that the IHO erred in determining that the district ignored the parents' request for a new CSE meeting, arguing that State regulations did not require the CSE to reconvene the CSE and, in any event, no new information or change in circumstances existed between the January 2012 CSE meeting and the parents' request that the CSE reconvene that would necessitate an amended IEP. The district also asserts that it was not required to perform any new evaluations of the student because the parents did not request that the district do so. Further, the district asserts that it did not respond to the parent's request that the CSE reconvene because it was understood by the district school psychologist that the request was "put on hold" until after the parents visited the assigned public school site.

The district asserts that the parents were not otherwise entitled to relief because the January 2012 CSE developed an appropriate IEP for the student, including the 6:1+1 special class placement recommendation, based on careful review and consideration of evaluative information and teacher and related service provider input. The district additionally asserts that the parents' claims relating to the assigned public school site and proposed classroom were speculative in nature since the student never attended the assigned school.

Finally, the district asserts that the IHO erred in awarding a Nickerson letter, arguing that the relief did not apply to the present case, where the IHO did not find that the district failed to evaluate or offer the student a placement in a timely manner, and, in any event, the IHO had no legal authority to make such an order.

In an answer, the parents respond to the district's petition by admitting or denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year. The parents also assert that the SRO should draw an inference that the student was denied a FAPE based on the district's failure to place an FNR into evidence and that, as the CSE ultimately changed the student's classification on her subsequent IEP for the 2013-14 school year in compliance with the IHO's order, the district should be precluded from arguing that the classification set forth on the January 2012 IEP was proper. In addition, the parents argue that the IHO ordered an equitable version of a Nickerson letter, which was within the IHO's authority and discretion.

The parents also interpose a cross-appeal, asserting that other claims, raised in their due process complain notice but unaddressed by the IHO, also support a finding that the district failed to offer the student a FAPE. Specifically, the parents argue that the IHO should also have determined that January 2012 CSE met too early to develop a program for the student for the 2012-13 school year and the district denied the parents a meaningful opportunity to participate in the

development of the student's IEP, in that: the CSE ignored the parents' concerns during the meeting; failed to provide the parents with a final, complete copy of the IEP; and failed to respond to the parents' subsequent correspondence. The parents also argues that the January 2012 IEP: failed to accurately state the student's functional levels; included vague, insufficient, and inappropriate annual goals; and set forth in an ambiguous manner the student's need for a BIP. In addition, the parents argue that the district failed to establish the ability of a public school site to implement the student's January 2012 IEP, noting that the district failure to offer an FNR into evidence or otherwise rebut the parents' testimony that the assigned public school site would not meet the student's needs. The parents also assert that, although the IHO did not find it necessary to reach these issues, the evidence in the hearing record demonstrates that SLCD constituted an appropriate unilateral placement for the student and equitable considerations weigh in favor of an award of tuition reimbursement.

In an answer to the parents' cross-appeal, the district generally denies the parents' allegations and sets forth factual and legal assertions in opposition to the parent's cross-appeal. In addition, the district objects to the parents' submission of additional evidence with their answer and cross-appeal, in the form of the student's November 2012 IEP, developed by the CSE after the impartial hearing, arguing that the document is not necessary to enable the SRO to make a decision.[6]

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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school

[6] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, I decline to accept the additional documentary evidence, as it is not necessary in order to render a decision in this case.

districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the

"results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. January 2012 CSE

1. Timing of the CSE Annual Review Meeting

Turning first to the parents' claim that it was not appropriate to conduct the CSE meeting in January 2012 because the date was too remote in time to the next school year, the IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Additionally, at the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194) and there is no indication that the timing in the instant case resulted in a loss of educational opportunity for the student.

In any event, in the instant case, the evidence in the hearing record shows that the implementation date for the January 2012 IEP was March 2012 and, as such, the IEP would be implemented soon after the CSE meeting and would remain in effect at the commencement of the

2012-13 school year (Dist. Ex. 1 at pp. 1, 17-18; Parent Ex. G at pp. 13-14). In addition, the hearing record does not reflect that, at the time of the January 2012 CSE meeting, the parents objected to the timing of the meeting. As such, there is no evidence that the timing of the January 2012 CSE meeting significantly impeded the parent's ability to participate in the decision-making process regarding the student's placement or otherwise denied the student a FAPE.

2. Parent Participation and Transmittal of the January 2012 IEP

The parents assert that the district denied them a meaningful opportunity to participate in the development of the student's IEP, in that the CSE ignored their concerns during the meeting and failed to provide them with a final, complete copy of the January 2012 IEP.[7] 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]).

The parents acknowledged in testimony at the impartial hearing that the CSE discussed the private psychological evaluation, the parents' concern that the student required a strong language-based program, the parents' concerns that the student did not meet her annual goals during the year prior to the CSE meeting, and the possibility of parent counseling and training (Tr. pp. 173-74, 176, 180-81).[8] In addition, the district school psychologist testified that the parents participated in the January 2012 CSE meeting "talking about different areas that [the student] was receiving support . . . in terms of . . . her class or academics" but ultimately disagreed with the recommended placement and expressed their preference for a State-approved nonpublic school (Tr. pp. 31-32). The crux of the parents' contention appears to be that the CSE did not recommend a placement satisfactory to their desire, even after discussions to the contrary (see Answer ¶ 37, citing Tr. pp. 81, 82, 187-88). 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]). Therefore, I find that the hearing record does not support a finding that the district denied the parents a meaningful opportunity to participate in the development of the student's January 2012 IEP on the ground that the CSE ignored the parents' concerns and/or input.

The parents also assert that the district did not send them a finalized copy of the student's January 2012 IEP. The district asserts that the parents had a copy of the draft IEP and, as

[7] In this context, the parents also allege that the district failed to respond to their correspondences; however, this aspect is discussed below relative to the parents' request that the CSE reconvene and also in regard to the examination of equitable considerations.

[8] The district school psychologist could not recall whether or not the January 2012 CSE discussed parent counseling and training and believed that the service was "programmatic" (Tr. pp. 85-86).

everything discussed at the January 2012 CSE meeting appeared on the final IEP, the parents should not have been surprised by the copy they received, and that, regardless, the lack of a finalized IEP at the start of the new school year is not a denial of FAPE where, as here, the parents participated in the CSE process and subsequently notified the district of their belief that the IEP was insufficient to meet the student's needs. As noted above, 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., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

The hearing record is not entirely clear but it appears that the parents received a draft IEP during the January 2012 CSE meeting (see Tr. pp. 27-28, 64-65, 92-93; see generally Parent Ex. G).[9] The district school psychologist testified that a copy of the final IEP was sent home with the student in her "book bag in a sealed envelope" (Tr. p. 95; see generally Dist. Ex. 2). However, the parents testified that they never received a copy of the final IEP (Tr. p. 172). While the hearing record is not entirely clear as to the facts underlying this claim, in any event, the hearing record does show that, even if a procedural violation occurred, it did not, in this instance, rise to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The hearing record shows that the parents' were aware of the recommendations included in the January 2012 IEP, by virtue of their attendance at the January 2012 CSE meeting and as evidenced by their correspondence to the district (see Parent Ex. B). To the extent that the parents' understanding of the recommendations was based on receipt of the draft copy of the January 2012 IEP, the differences between the draft and the final versions are minimal and do not significantly relate to content at issue in this proceeding, expect to the extent discussed below (compare Dist. Ex. 2 at pp. 17, 21, 22, with Parent Ex. G at pp. 13, 17, 18; see Tr. p. 177).

B. January 2012 IEP

1. Present Levels of Performance

The IHO did not rule upon and the parents do not challenge on appeal the student's present levels of performance included in the January 2012 IEP.[10] While the adequacy or accuracy of the

[9] Neither the parents nor the district school psychologist were entirely clear as to whether the parents received the draft IEP (see Tr. pp. 27-28, 64-65, 92-93). However, the parents' June 15, 2012 correspondence to the district and the due process complaint notice referred to the incorrect date of the CSE meeting (January 17, 2012), consistent with the incorrect date on the draft IEP included in the parent's exhibits, and refers to other aspects unique to the draft version, thereby indicating that the parents did receive the draft IEP (Parent Exs. A at pp. 2-3, 5-7; B at pp. 2-3; G at p. 17).

[10] In their answer and cross-appeal, the parents do reference the accuracy of the student's functional levels given the timing of the January 2012 CSE meeting, discussed above, but do not further articulate a claim challenging the evaluative information considered by the CSE or the student's present levels of performance (see Answer at ¶ 40).

present levels of performance is not in contest, a review thereof facilitates the remaining issues to be discussed.

In preparation for the CSE meeting, the district school psychologist testified that the October 2011 private neuropsychological evaluation was provided by the parent and reviewed with her before the meeting (Tr. pp. 25-26, 50-51; see generally Parent Ex. D). In addition, the district school psychologist indicated that the CSE considered the input from the parent and the student's special education teacher and providers and the progress reports from the teacher and therapist were mentioned at the CSE meeting (Tr. pp. 25-26, 29-31, 43).[11]

Relying on the October 2011 private neuropsychological evaluation of the student, the January 2012 IEP incorporated the results of the Wechsler Intelligence Scale for Children–Fourth Edition (WISC-IV) that revealed a full scale IQ of 73, which indicated the student's cognitive abilities fell within low average to borderline range of functioning, and the following standard scores: verbal comprehension 77; perceptual reasoning 69; working memory 83; and processing speed 88 (compare Dist. Ex. 2 at p. 1 with Parent Ex. D at p. 1). According to the evaluating psychologist, the scores revealed progress when compared to the previous WISC-IV performed in April-June 2010 when the student obtained scores in the extremely low range (Parent Ex. D at p. 11). In contrast, the January 2012 IEP reflected an administration of the Comprehensive Test of Nonverbal Intelligence (CTONI), which yielded a nonverbal IQ of 102 (compare Dist. Ex. 2 at p. 1. with Parent Ex. D at p. 1). The evaluating psychologist reported that the student's scores on the CTONI varied from low average to high average range with most scores measured in the average to high average range (Parent Ex. D at p. 10).

The January 2012 IEP reflected the results of an administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) which showed the student's decoding and reading comprehension skills extended to an early first grade level (compare Dist. Ex. 2 at p. 2 at p. 2 with Parent Ex. D at pp. 4, 19). The evaluating psychologist reported that the marked phonological processing, organizational, language processing, and retrieval challenges underlain the student's reading and writing difficulties (Parent Ex. D at p. 11).

The present levels of academic performance and learning characteristics section of the January 2012 IEP indicated the student had challenges retaining and retrieving phonics rules, correctly perceiving the orientation of letters, and blending a string of sounds and that the student relied on both her sight word vocabulary and emerging phonics skills when reading (Dist. Ex. 2 at p. 2). As part of the neuropsychological evaluation, a parent interview reflected that the student made significant gains "over the past year" in the area of reading, as she had become more fluent and started to understand more of what she had read, as well as developed increasingly more effective decoding and encoding skills" (Parent Ex. D at pp. 7-8). Similarly, in the classroom environment, the IEP reflected that the student recognized a growing amount of words, although, in contrast, the student was described as having comprehension skills at the kindergarten level (Dist. Ex. 2 at p. 3). In writing, the neuropsychological evaluation reported that the student functioned at an early first grade level (Parent Ex. D at p. 11). Consistent with the neuropsychological evaluation, the January 2012 IEP showed the student could write simple

[11] The hearing record includes a December 2011 OT progress report and a December 2011 counseling progress report, (see generally Dist. Exs. 4; 5).

sentences, but struggled to write more complex thoughts (compare Dist. Ex. 2 at p. 3 with Parent Ex. D at pp. 12, 20). In addition, the January 2012 IEP indicated that spelling was a strength for the student (Dist. Ex. 2 at pp. 2-3). Taken verbatim from the neuropsychological evaluation, the IEP indicated the student's mathematics skills were between a late first and early second grade level and that the student developed appreciation of one-to-one correspondence, could read time with minor reminders, as well as recall coin equivalents, measure with a ruler, and add and subtract single digit numbers with concrete support (compare Dist. Ex. 2 at p. 2 with Parent Ex. D at p. 20). In the classroom environment, the IEP indicated the student exhibited weaknesses in addition and subtraction with regrouping and working with a number grid (Dist. Ex. 2 at p. 3). Furthermore, both the January 2012 IEP and neuropsychological evaluation indicated that the student struggled with understanding the basic principles of reading a graph, recognizing patterns in numbers, and understanding the language of mathematical word problems (compare Dist. Ex. 2 at p. 2 with Parent Ex. D at p. 20).

With regard to speech-language therapy, the January 2012 IEP indicated that the student transitioned well to the therapy room, her self-talk ceased, and she was becoming more independent, but she had difficulty remaining on task, engaging in critical thinking, responding to "wh" interrogatives, as well as well as retelling information in correct sequential order (Dist. Ex. 2 at p. 3). With regard to social/emotional performance, the January 2012 IEP indicated that, in the classroom environment, the student was very friendly and social with her peers, was kind, loving, and respectful towards adults, and demonstrated good motivation (Dist. Ex. 2 at p. 4). The January 2012 IEP reflected that the student made progress in the socialization areas, including that she was a very pleasant child who had a strong desire to engage, that her eye contact was only intermittently inconsistent, and that she would initiate conversations and interpret social cues (id. at pp. 3-4). However, the January 2012 IEP also indicated that the student demonstrated attentional difficulties and struggled to effectively generate and apply appropriate communication techniques when initiating and maintaining interactions with her peers, although it also noted that "it [wa]s important to remember [the student's] many social and emotional strengths" and that the student was motivated to develop and maintain relationships, as well as please her peers and teachers (id. at p. 4). Furthermore, the January 2012 IEP reflected information from the December 2011 counseling progress report, noting, in part, that, although the student could get frustrated when presented with challenging tasks, she sought out the approval of adults, wanted to do well, and responded to verbal praise and rewards (compare Dist. Ex. 2 at p. 4; with Dist. Ex. 5 at p. 1). The IEP reflected information from the parents that the student needed to increase her ability to focus, improve her self-confidence, and ability to focus on task (Dist. Ex. 2 at p. 4).

With regard to the student's present health status and physical development, the January 2012 IEP reflected information verbatim from the December 2011 OT progress report (compare Dist. Ex. 2 at pp. 4-5 with Dist. Ex. 4 at pp. 1-2). The January 2012 IEP described the student as a very friendly, cooperative, sweet girl who attended well, and was eager to please and sought out praise and affection from others (Dist. Ex. 2 at p. 4). The IEP indicated the student "[sought] out social communication, despite her diagnosis of PDD" and that the student "maintain[ed] good eye contact and [could] attend fairly well to tasks" (id.). In addition, the IEP reflected that occasionally, when in a group, the student withdrew, became insecure, and was fearful of losing affection from staff when challenged on an activity that she perceived as difficult (id.). Although the IEP indicated that the student exhibited age appropriate gross motor skills, her scissor skills required improvement (id. at pp. 4-5). The January 2012 IEP noted the student demonstrated

difficulty with perceptual motor tasks, as well as identifying animals and some common objects, but the student had shown improvement "recently" (id. at p. 4). The January 2012 IEP reflected that the student needed assistance with computer skills, but she demonstrated improvement in completing moderate level inset puzzles (id.). The January 2012 IEP reflected that, although the student enjoyed speaking and socially communicating, the content was unclear due to her limited vocabulary and her struggles with descriptive language (id.).

2. Classification

The district argues that the IHO erred in her determination that the January 2012 CSE improperly found the student eligible for special education as a student with autism, rather than as a student with a speech or language impairment. Initially, it is unclear the extent to which the IHO's decision contributed to her conclusion that the district failed to offer the student a FAPE, rather than just forming the basis for the IHO's order that the district change the student's classification (IHO Decision at pp. 3, 5). In any event, as the district does not appeal the IHO's order in this regard, the issue is reviewed to determine its impact on the FAPE analysis.

With respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR § 300.304[b][1]; see 8 NYCRR 200.4[b][1]). The IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111[d]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]) and, moreover, once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (M.R. v. South Orangetown Central Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y., Dec. 16, 2011] [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). Thus, the student's classification as a student with autism, by itself, absent some evidence that the classification, rather than the student's needs, inappropriately drove the resulting recommended program, does not contribute to a finding that the district failed to offer the student a FAPE (see M.R., 2011 WL 6307563, at *9).

However, that a review of the evidence in the hearing record supports the IHO's finding and reveals that a classification of speech or language impairment would have been more appropriate than autism, as the student exhibited significant deficits in expressive and receptive language that adversely affected her educational performance (34 CFR 300.8[c][11]; 8 NYCRR

200.1[zz][11]). Testimony by the district school psychologist indicated she agreed the student presented with social and emotional strengths not typical of a child with autism (Tr. pp. 90-91). While the student exhibited some characteristics consistent with PDD due to her severe communication and processing challenges, overall, the student's academic and behavioral profiles were not consistent with the regulatory definition of autism (see Parent Ex. D at pp. 22, 24; see also 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). Furthermore, while the hearing record shows the student had complex presentation and challenges with anxiety/sensory/attention and regulation—features consistent with a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD)—these features appeared to be also associated with the student's severe communication challenges and with her anxiety in response to her processing speed, language, and executive function challenges (Parent Ex. D. at p. 22).

3. Annual Goals

Turning to the parents' challenge to the January 2012 IEP annual goals, an IEP must include a 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]).

The hearing record shows that the January 2012 IEP contained 23 annual goals to address the student's individual needs in the areas identified and reflected in the present levels of performance (Dist. Ex. 2 at pp. 6-17).[12] Of these, approximately 11 annual goals targeted the student's needs in mathematics and reading (id. at p. 10). For example, three of the mathematics annual goals targeted addition, subtraction, and problem-solving skills, which were identified as areas of need in the present levels of performance section of the January 2012 IEP (id. at pp. 3, 10, 11). The January 2012 IEP included reading annual goals that were consistent with needs indicated in the present levels of performance section of the IEP and that were designed to address the student's decoding and reading comprehension skills (id. at pp. 3, 11, 12). The IEP also included three speech-language annual goals that targeted the student's challenges with receptive, expressive, and pragmatic language skills (id. at pp. 6-8). For example, one annual goal indicated, "[the student] will improve pragmatic skills, including her ability to appropriately initiate, maintain and terminate conversations with both adults and peers" with the use of fading models (id. at p. 6). Additionally, the IEP included multiple annual goals to address the student's needs related to OT, which focused on helping the student with her scissor skills, spatial awareness, two-three step classroom tasks, and computer skills (id. at pp. 13-16). The January 2012 IEP also included counseling goals to help the student establish greater confidence and social skills (id. at pp. 9-10). In addition, with regard to adaptive physical education, an annual goal was included to help the

[12] While not determinative, the evidence in the hearing record shows that most of the annual goals on the January 2012 IEP are similar to the goals reflected on the August 2012 SLCD progress report (compare Dist. Ex. 2 at pp. 2-17, with Parent Ex. L at pp. 1-10).

student develop coordination and social skills through cooperative games (id. at p. 17). Furthermore, and contrary to the parents' assertions, a review of all the annual goals shows that they included criteria for determining achievement of that goal, a method for measuring progress, and a schedule for progress measurement (see id. at pp. 6-17).

4. 6:1+1 Special Class Placement

Although the IHO did not elaborate on her finding, the district alleges that she erred in determining that the January 2012 IEP was not appropriate for the student, asserting, in particular, that the CSE determined that the 6:1+1 special class placement recommendation was appropriate for the student.

State regulations provide that a 6:1+1 special class placement is designed for the instruction of students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]).

The January 2012 IEP identified various supports to address the student's management needs, including a highly supportive program that was predictable and allowed for frequent clarification, multisensory presentation of information, and very small group support when the student completed academic tasks and when she engaged in social interactions (Dist. Ex. 2 at p. 5). In addition, the IEP indicated that the student benefited from: the presentation of oral information in short, syntactically simplified, multisensory manner with an emphasis on visual cues; emphasis and repetition of main ideas; visual presentation of material, when possible, with a focus on "hands on" activities (id.). The IEP further reported that the student required concepts broken down into very small conceptual units, expressed in simple, step-by-step, rule based ways, and presented in a multisensory context or with a "hands on" component (id.). The IEP also identified the strategies of redirection, multi-modality cues, positive reinforcement, repetition, and visual reminders (id.). Based solely on this unchallenged description of the student's needs, the hearing record supports the conclusion that the student's academic management needs were such that she required the level of support available in a 6:1+1 special class (see 8 NYCRR 200.6[h][4][ii][a]). However, the hearing record bears out additional information regarding the appropriateness of the CSE's recommendation.

The district school psychologist testified that the CSE recommended the 6:1+1 special class because the smaller setting would help the student focus more on her language and social needs, along with academics (Tr. p. 30). The evidence in the hearing record indicates that the January 2012 CSE also considered a special class in a community school but determined that the student's "academic, communication and interaction delays" warranted additional support (Dist. Ex. 2 at p. 23). In particular, the district school psychologist testified that the CSE considered a 12:1+1 special class in a community school, similar to the program the student attended during the 2011-12 school year, except that the hearing record indicates that the student was also assigned a 1:1 paraprofessional during the 2011-12 school year (Tr. p. 30; see Tr. pp. 164-65, 168-69). The January 2012 CSE also considered a special class in a nonpublic school but concluded that the

CSE "d[id] not have documentation to support" that the student could not receive appropriate instruction in a district public school (Dist. Ex. 2 at p. 23; see Tr. p. 32).[13]

The evidence in the hearing record reveals that the student was making progress during the previous school year in a 12:1+1 special class in a community school with a 1:1 paraprofessional (see Dist. Exs. 2 at pp. 3-5; 4 at pp. 1-2; 5 at p. 2; Parent Ex. D at pp. 6-8) and, in light of this, it is questionable why the January 2012 CSE declined to continue such recommendation and, instead, settled on the 6:1+1 special class in a specialized school. While the parents did not raise a claim relating to predetermination in their due process complaint notice, on appeal, they do emphasize evidence in the hearing record that the January 2012 CSE settled on the recommended 6:1+1 special class placement based largely on the recommendation for a 12-month school year program, in that it was "impossible" for a 12:1+1 special class to have a 12-month program in this district (Tr. p. 88; see Tr. pp. 28, 30, 42-43). Placement decisions must be based on a student's unique needs as reflected in the IEP, rather than based on the existing availability of services in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

Also not raised in the due process complaint notice but briefly addressed in the parents' answer and cross-appeal is a question regarding whether the placement was the student's least restrictive environment. As the January 2012 IEP recommended a special class in a specialized school, rather than a community school as in years prior, the student would not have access to nondisabled peers (see Dist. Ex. 2 at pp. 17, 21). The nature of the student's most significant deficit—her speech and language and related socialization deficits, described above—place this CSE's decision to recommend a specialized school into question. The hearing record provides no basis for a finding that the student could not have been educated in a community school environment, affording her access to her nondisabled peers (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v.

[13] When determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013]; [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]).

Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]).

Thus as set forth above, the evidence in the hearing record, overall, appears to support a finding that the 6:1+1 special class was appropriate for the student, yet there is some other evidence in the hearing record, albeit of marginal relevance to the educational placement issue in dispute by the parents, nevertheless causes serious concern. Accordingly, the extent to which this evidence related to undisputed issues may form the basis of a finding of a denial of a FAPE is questionable (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]). However, as discussed below, the evidence in the hearing record shows that the district failed to offer the student a FAPE for the 2012-13 school year for other independent reasons and, therefore it is unnecessary to definitely resolve this question in this instance.

5. Behavioral Intervention Plan

The parents assert that the January 2012 was ambiguous regarding the student's need for a BIP and, further, that, if a BIP was in fact required, the district failed to conduct an FBA. The basis for the parents' assertion is that, in the section of the parents' copy of the draft January 2012 IEP, devoted to identifying the student's needs relating to special factors, it indicates that the student did not required a BIP; whereas, in the IEP summary of recommendations, the box was checked indicating that the student had a BIP (Parent Ex. G at pp. 6, 18) The district's final version of the IEP does not include this discrepancy (Dist. Ex. 2 at pp. 5, 22). Initially, to the extent that the discrepancy in the copy of the draft IEP in the parents' possession included a typographical error, which was corrected in the final IEP, this does not rise to the level of a denial of a FAPE. To find otherwise, would be to "exalt form over substance" (M.H. v. New York Dep't of Educ., 2011 WL 609880, at * 11 [S.D.N.Y. Feb. 16, 2011]).

Moreover, the parents never affirmatively assert that the student required a BIP and the evidence in the hearing record does not support a finding that the student's behaviors interfered with her learning or that of others (see 20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i];). The district school psychologist testified that the January 2012 CSE did not recommend a BIP for the student because, based on input from the CSE members who worked with the student, "it didn't sound like . . . the [student's] behaviors were so significant that they would need a specific plan" (Tr. p. 88). The January 2012 IEP reflected that in the student's classroom environment, the student was friendly, social, kind, loving, and respectful toward adults and demonstrated good motivation (Dist. Ex. 2 at p. 4). However, the January 2012 IEP and the OT progress report both indicated that the student became insecure and fearful of losing affection from staff when challenged on an activity she perceived as difficult, even further, during those stress provoking times, the student would self-talk self-deprecating remarks such as "I can't do it" (compare Dist. Ex. 2 at p. 4 with Dist. Ex. 4 at p. 1). The January 2012 IEP indicated that the student responded to cues to "talk to me, rather than yourself" and the self-talk diminished (Dist. Ex. 2 at p. 4). The neuropsychological evaluation revealed that during formal assessment, the student was "cooperative" but her attention needed active maintenance, and she approached challenging tasks with a calm and even temperament, but if the student felt she did not know the answer to a question, tears would well up in her eyes (Parent Ex. D at p. 9). The January 2012 IEP noted that the student's responses to oral language can be inappropriate as she reacted to frustration

and failure by becoming very emotional (Dist. Ex. 2 at p. 3). The hearing record included the December 2011 counseling progress report that indicated the student wanted to do well and that she responded positively to verbal praise (Dist. Ex. 5 at pp. 1-2). The December 2011 counseling progress report reflected that the student progressed slowly as she started to demonstrate appropriate emotions to daily situations and initiated some conversation with peers (id. at p. 2).

Moreover, the January 2012 IEP included supports and annual goals to address the student's limited behaviors. The January 2012 IEP included goals to improve expressive, receptive and pragmatic language skills, as well as increase the student's self-confidence, social interactions, and self-confidence (Dist. Ex. 2 at pp. 6-10, 16-17). Among other supports, the IEP included positive reinforcement, redirection, and oral information presented in a short, syntactically simplified, multi-sensory manner with emphasis of visual cues (id. at p. 5; Parent Ex. D at pp. 24-26). In summary, a review of the hearing record reflects that a BIP was not warranted as the student did not have severe interfering behaviors.

C. Request to Reconvene the CSE

Next, for the reasons that follow, the hearing record supports the parents' contention that the district impeded their right to participate in the development of the student's program by failing to reconvene the CSE in response to the parents' request.

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 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]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In this case, by letter to the district on February 2, 2012, the parents unambiguously requested that the CSE reconvene in order to reconsider the classification of the student in light of the parents' conversation with the psychologist who completed the November 2011 private neuropsychological evaluation report, as well as to again review the parents' request that the CSE recommend a State-approved nonpublic school placement for the student (see Parent Ex. F). The district school psychologist testified that the parents agreed to visit the assigned public school site and that, in the meantime, the request for the CSE to reconvene "was put on hold" (Tr. p. 84). However, the CSE did not subsequently reconvene and no written notice from the district indicating its refusal to reconvene the CSE was offered into evidence at the impartial hearing. Accordingly, the district violated the IDEA by failing to either reconvene the CSE in response to

the parents' request or responding with written notice stating the reasons why the district did not believe a reconvening of the CSE to be necessary (see Application of the Dep't of Educ., Appeal No. 12-128; Application of a Student with a Disability, Appeal No. 13-172; cf. Application of a Student with a Disability, Appeal No. 12-071 [finding no violation where the parents stated only that they were "willing to meet" with the CSE to discuss their concerns]). By failing to even acknowledge the parents' concerns the district undermined the "cooperative process" between parents and districts that the Supreme Court has held constitutes the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5] [stating Congress' finding that the education of students with disabilities can be improved by "strengthening the role and responsibility of parents and ensuring that families of such children at school and at home"]). The district's failure to respond to the parent's request to convene significantly impeded the parent's ability to participate in the decision-making process regarding the student's placement and thereby denied the student a FAPE (20 U.S.C. § 1415[f][3][E][ii][II]; 34 CFR 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]).

D. Assigned Public School Site

With respect to the assigned public school site, the parents asserted that the school would not have met the student's needs and that the student would not have been functionally grouped with the other students in the proposed classroom. The district asserts that assertions regarding the assigned public school site are speculative.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure

to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[14] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the January 2012 IEP because a retrospective analysis of how the district would have implemented the student's January 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the January 2012 IEP (see Parent Ex. C). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow a parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or

[14] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on claims that the assigned public school site would not have properly implemented the June 2013 IEP.[15]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).[16]

E. Nickerson Letter

The IHO ordered the district to issue a "Nickerson letter" as relief for its failure to offer the student a FAPE. The IHO erred by not applying the Burlington/Carter test when deciding the parents' claim for the costs of the student's tuition at SLCD. 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.., 694 F.3d at 192 n.5). The "Nickerson letter" remedy authorizes a parent to immediately place the student in an appropriate special education program

[15] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see E.E. v. New York City Dep't of Educ., 13-cv-06709 [S.D.N.Y. Aug. 21, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D., 2013 WL 1155570, at *13; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

[16] In addition, the parents' assertion that a negative inference should apply because the district failed to offer a copy of the FNR into evidence must fail, particularly given that the hearing record indicates that the parents' received the FNR and were able to visit the assigned public school site, which they subsequently rejected (see Parent Ex. B).

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 (Jose P., 553 IDELR 298; see 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. Aug. 25, 2010]). 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, 933 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]], aff'd, R.E., 694 F.3d 167), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y.], aff'd, 553 Fed. App'x 2; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]). Therefore, neither the IHO nor SRO have 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, *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd, R.E., 694 F.3d 167; 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, the IHO's order directing the district to provide a Nickerson letter is reversed and the questions of whether the unilateral placement selected by the parents was appropriate and whether equitable considerations support the parents' request for tuition reimbursement are addressed below.

F. Unilateral Placement

Turning to the issue of whether SLCD was an appropriate unilateral placement for the student, the parents argue that the district should be foreclosed from arguing the appropriateness of SLCD since it did not raise any such arguments at the impartial hearing. The parents are correct that the district did not raise any specific arguments at the impartial hearing (see Tr. pp. 15, 213-14), but this does not foreclose the district from arguing that the parents failed to meet their burden of proof on any element relating to the unilateral placement. However, review of the district's submissions on appeal reveals that the district again did not offer any argument in this regard. In any event, the evidence in the hearing record shows that SLCD constituted an appropriate unilateral placement 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 must provide an educational program which meets 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 (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited

exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; 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 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; 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, quoting Frank G., 459 F.3d at 364-65).

The hearing record demonstrates that SLCD provided appropriate academic instruction and social/emotional support to the student for the 2012-13 school year. The student's six week, third grade SLCD summer school class consisted of 11 students and two teachers, one assistant teacher, and one teacher assistant (Tr. pp. 134-37). Similar to the student in the instant case, all of the students were in third grade, and functioning within a range from the beginning of first grade to the beginning of the third grade level, depending on the subject area (Tr. p. 138).

The SLCD assistant coordinator testified the student switched for reading groups, so she not only received interaction in her own classroom, but with other students in other classes on her level (Tr. pp. 117-118). The special education teacher at SLCD testified that the student's class

had reading for an hour, which incorporated two reading programs, one for comprehension, and one for decoding (Tr. pp. 139, 147-48, 150). The special education teacher testified that the student's class was grouped according to their ability level in comprehension and decoding (Tr. p. 139). The special education teacher stated that, at the beginning of the summer, the student took a reading placement test and the results determined her level of functioning and placement in an ability group (Tr. p. 148). The special education teacher concluded that the student's decoding level was approximately the beginning of second grade level, while her comprehension was at the end of the kindergarten level (Tr. p. 139).[17] Furthermore, the special education teacher testified that the student's comprehension issues carried over into her reading comprehension skills, as the student demonstrated difficulty answering questions about a story, retelling the story, or the sequence of events, and she needed verbal prompting and visual cues to assist her (Tr. p. 144). In addition to the reading groups, the special education teacher testified that the students engaged in shared or guided reading for 30 minutes with children's books where they also focused on decoding and comprehension skills (Tr. pp. 150-51). During English Language Arts (ELA), the students learned different parts of grammar and worked on listening comprehension skills, such as listening to stories and responding to questions through multiple choices or written responses (Tr. p. 152). In writing, the special education teacher testified that the third grade class used the Handwriting without Tears program twice per week and the students learned how to write cursive (id.).

With regard to mathematics, the special education teacher testified that she used informal observation and depending on the topic, the class was instructed in a whole or small group if needed (Tr. p. 139). She testified that she believed the student was at the end of the first grade level to the beginning of the second grade level in mathematics (Tr. p. 140). The special education teacher further testified that the student's comprehension delays impacted the student's mathematics problem solving skills when she had to pull out information and figure out what to do with it (Tr. p. 144). She testified that there were times in the summer that the students were reviewing multiplication and division facts, which the student had not started yet, and for those times, the student received some one-to-one instruction (Tr. pp. 148-49). In addition to the review of multiplication and division facts, the special education teacher testified that there were other units or skills that the class worked on, such as measurement and time (Tr. p. 151).

With regard to supports to assist the student's attentional difficulties, the special education teacher testified that, in order to help sustain the student's attention during lessons, she needed verbal re-prompting and redirection (Tr. p. 145). The special education teacher indicated that, consistent with the student's needs, SLCD used a multi-modal approach when teaching, using auditorally presented information, visuals throughout the lessons, picture cues, hands-on activities, modeling, review and repetition for practice of the skills, and tasks broken down into steps (id.; see Dist. Ex. 2 at p. 5). The special education teacher stated that they tried to provide sensory breaks throughout the day, since many kids exhibited attentional issues (Tr. p. 153). In addition, the special education teacher testified that they provided hands-on materials, such as counting cubes, rulers, scales, and clocks at their desks during mathematics lessons and the student availed herself of those things (id.). The special education teacher's testimony indicated that the teacher assistants in the classroom walked around to provide assistance or redirection, reviewed concepts in smaller groups, and facilitated appropriate language (Tr. p. 136). The special education teacher testified that SLCD was a good fit for the student since she needed a language-based, structured

[17] Her testimony indicated that the student's group included at least five students (Tr. p. 148).

program (Tr. p. 155). She indicated that a low student-to-teacher-ratio helped, so she could break into small groups or individual instruction if needed, and student's functioning level was similar to the other students (Tr. pp. 155-56). Finally, the hearing record also shows that the student received instruction in science, social studies, and specials such as music, gym, art, computer, and library (Tr. pp. 150-152).

With regard to related services, the hearing record reveals that there were related service providers at SLCD who worked with the student and that the other students in the classroom received similar services (Tr. pp. 141-42; see Tr. p. 109). The special education teacher's testimony indicated that, over the summer, the student received speech-language therapy, OT, and counseling (Tr. p. 142). The special education teacher testified that she communicated with the therapists because they came in and out of the room and she sent home weekly plans to the parents, as well as the therapists, so that everyone was aware of the skills worked on in the classroom (Tr. pp. 142-43).

With regard to the student's speech-language skills, the special education teacher testified that the student's major issue was her receptive, expressive, and pragmatic language deficits (Tr. p. 143). The special education teacher stated that the student had difficulty processing what people said to her, responding appropriately if asked questions, formulating grammatically correct sentences, and with word retrieval (Tr. pp. 143-44). With regard to pragmatics, the special education teacher testified that the student enjoyed initiating conversations, but needed modeled facilitation and verbal prompting to maintain the conversation (Tr. p. 145). The special education teacher testified that, over the summer, she would start the day with socialization lessons (Tr. p. 149). Specifically, the special education teacher testified that the students worked on skills that students needed to improve, and since the student was new, they worked on social skills such as making introductions and approaching children playing, and related conversational skills, such as maintaining eye contact (Tr. p. 150). In counseling, the special education teacher testified that the student focused on maintaining and elaborating on conversations and eye contact, as well as confidence, since that had been an issue from her past school experience, and that the student made progress with that over the summer (Tr. p. 160).

In addition to the appropriate academic and related service components at SLCD, the evidence in the hearing record also shows that the student made progress at SLCD (Tr. pp. 154-55; Parent Ex. L at pp. 1-8). Accordingly, for the reasons discussed above, the hearing record supports the conclusion that the parents met their burden to show that SLCD was an appropriate unilateral placement for the student for the 2012-13 school year. In reaching this conclusion, I have considered the "totality of the circumstances" (see Frank G., 459 F.3d at 364) and have determined that the evidence shows that the parents' unilateral placement provided educational instruction specially designed to meet the student's unique needs, supported by such services as were necessary to permit the student to benefit from instruction (id. at 364-65).

G. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year and that SLCD constituted an appropriate unilateral placement for the student, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226

F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The hearing record shows that the parents attended the January 2012 CSE meeting, visited the assigned public school site, and, soon thereafter on more than one occasion, wrote the district and communicated their concerns regarding the IEP and the assigned public school site, and, further, requested that the CSE reconvene, to which the district did not respond (see Parent Exs. B; C; F). Based on the foregoing, I find that equitable considerations favor the parents' request for tuition reimbursement.

VII. Conclusion

Based on the above, I find that the district failed to offer the student a FAPE for the 2012-13 school year, SLCD was an appropriate unilateral placement for the student, and equitable considerations favor the parents' claim for tuition reimbursement.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision, dated November 19, 2012, is modified by reversing that portion that ordered the district to issue a Nickerson letter to the parents for the 2012-13 school year; and,

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the student's tuition at SCLD for the 2012-13 school year upon the submission of proof of payment to the district.

Dated: **Albany, New York**
September 19, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER